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COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

No. 2024-CA-0127

WAREHOUSE CAFE PROPERTIES, L.L.C.,
Plaintiff/Appellant,

versus

THE ERNEST N. MORIAL CONVENTION CENTER,
Defendant/Appellee.

On Appeal from the January 5, 2024, Judgment of the
Civil District Court, Parish of Orleans,
No. 2023-13248, Div. L, the Honorable Kern A. Reese, Presiding

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ORIGINAL BRIEF ON BEHALF OF DEFENDANT/APPELLEE ERNEST N. MORIAL NEW ORLEANS EXHIBITION HALL AUTHORITY AND INTERVENOR/APPELLEE RIVER DISTRICT NEIGHBORHOOD INVESTORS, LLC

CIVIL ACTION

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STATEMENT OF THE CASE[1]

This injunction action stems from Plaintiff/Appellant Warehouse Cafe Properties, L.L.C.'s ("Warehouse Cafe") attempt to halt Defendant/Appellee Ernest N. Morial New Orleans Exhibition Hall Authority's ("Authority") River District project.[2]

On December 11, 2023, Warehouse Cafe—a nonparty to the contracts at issue—filed an "Original Verified Petition for Temporary Restraining Order, Preliminary and Permanent Injunction" against the Authority. 1 R. 1–13. In its petition, Warehouse Cafe sought three forms of relief: (1) a temporary restraining order "suspending" a lease between the Authority and the River District master developer, Intervenor/Appellee River District Neighborhood Investors, LLC ("RDNI"); (2) a TRO "suspending" a lease between RDNI and Topgolf USA New Orleans, LLC ("Topgolf"); and (3) mandatory injunctions compelling the Authority and RDNI to enter into unidentified contracts.[3] 4 R. 973. Warehouse Cafe did not file a petition to nullify any contracts, nor did it request declaratory relief. *See* 4 R. 963–75.

On December 12, 2023, the trial court denied Warehouse Cafe's TRO request. 1 R. 12.

On December 13, 2023, RDNI intervened in the lawsuit. 2 R. 275–79.

On December 18, 2023, Warehouse Cafe filed an amended petition to expand the scope of its requested relief to include additional leases between the Authority

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[1] The record on appeal consists of 13 volumes. Citations to the record are indicated by the volume number, then the letter "R." followed by the page number. For example, "12 R. 2873" refers to page 2,873 of the record, which is contained in volume 12. Volume 13 contains the trial court transcript and is not consecutively numbered. For example, "13 R. 20" refers to page 20 of volume 13, not page 20 of the entire record.

[2] The Authority is incorrectly named as "Ernest N. Morial Convention Center" in the petition. 1 R. 1.

[3] When Warehouse Cafe filed its original petition, the petition was missing several pages, including the prayer for relief. *See* 1 R. 9–10. The full original petition is reproduced at 4 R. 963–75.

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and RDNI.[4] 2 R. 281–82. Again, Warehouse Cafe failed to seek nullification of any contracts or declaratory relief. *See* 2 R. 281–82.

On December 19, 2023, Topgolf intervened in the lawsuit. 2 R. 284–88.

On December 20, 2023, the Authority and RDNI filed exceptions of prescription. 2 R. 294–95; 7 R. 1624.

On December 21, 2023, the trial court heard RDNI's exception of prescription. 12 R. 2873; 13 R. 2–33. Although the Authority and RDNI offered evidence in support of the exception, 13 R. 3:29, 11:21, Warehouse Cafe did not offer any evidence in opposition at the hearing. *See* 13 R. 1–33. The trial court sustained the exception and found that an "inordinate amount of time" had passed between the time the contracts were executed and the time Warehouse Cafe sued for an injunction. 13 R. 32. The trial court also noted the "strong public policy consideration involved," stating:

> [I]t would be detrimental to the public policy consideration because of the potential public benefit to be derived to grant an interlocutory order to stop this project, and *I don't think it's been timely filed*. Had this been down when the award was made or while the negotiations were ongoing before the document was executed, that may well have been the case. *But now we are just a little bit too far down the line*, and I think that's detrimental to the best interest of the City of New Orleans and the citizens.

13 R. 32–33 (emphasis added).

On January 5, 2024, the trial court signed a judgment memorializing its ruling on RDNI's exception of prescription. 12 R. 2872–75. Warehouse Cafe then took a devolutive appeal from that judgment. 12 R. 2876–78, 2888–90.

ISSUE PRESENTED FOR REVIEW

An injunction action must be filed timely. When a plaintiff waits more than a year after a contract is executed to sue to enjoin the contract, is the plaintiff's claim for injunctive relief untimely?

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[4] The amended petition is incorrectly styled as an "Original Verified Petition." 2 R. 281.

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STATEMENT OF FACTS

I. The Authority seeks to spur economic growth by developing the River District.

The Authority is a political subdivision of the State of Louisiana and the owner of the New Orleans Ernest N. Morial Convention Center. La. R.S. 33:4710.11(A). The Authority's purpose is to acquire, construct, maintain, and operate convention, exhibition, and tourist facilities within the City of New Orleans "to promote the economic growth of the city and its neighboring parishes." La. R.S. 33:4710.11(C). The Authority owns approximately 39 acres of undeveloped property adjacent to the Convention Center. 2 R. 319. In 2019, the Authority began a process to develop this land into the "River District," a mixed-use development with at least 450 sorely needed affordable and workforce housing units, office space, and retail space. 2 R. 320.

II. The Authority selects RDNI as the master developer after a rigorous and unchallenged selection process.

The Authority engaged in a two-step process to select a master developer to design, build, operate, and maintain the River District. 2 R. 320.

First, on September 6, 2019, the Authority issued a request for qualifications ("RFQ"), seeking to identify interested developers with the ability to serve as the master developer. 2 R. 320. Then, on December 20, 2019, the Authority invited three of the five respondents it qualified, including RDNI, to submit proposals in response to a request for proposals ("RFP"). 2 R. 320. An evaluation team selected by the Authority and composed of subject matter experts conducted interviews with the three responding teams. 2 R. 321.

On March 24, 2021, and after a rigorous evaluation process, the Authority accepted the evaluation team's recommendation that RDNI be selected as the master developer. 2 R. 321. No one challenged the RFQ/RFP process or RDNI's selection,

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and Warehouse Cafe did not submit its qualifications in response to the RFQ or a proposal in response to the RFP. 2 R. 320, 322.

III. The Authority and RDNI enter into the Master Development Agreement and leases.

On October 26, 2022—after more than a year of negotiations—the Authority and RDNI entered into a Master Development Agreement and several leases. 2 R. 323. Under the agreements, the land is leased from the Authority to RDNI on a parcel-by-parcel basis, as summarized below:

Parcel	Description	Rent
1	Topgolf[5]	$33,817.20/month (initial) $811,613.00/year
2	Shell Gulf of Mexico operations headquarters	$22,028.25/month (initial) $528,678.00/year
3A	Retail and entertainment space	$17,441.42/month (initial) $418,594.00/year 5% of parking revenue
5	Retail, entertainment, and office space Affordable and workforce housing units	$2,972.96/month (initial) $71,352.00/year 5% of parking revenue
6	Affordable and workforce housing units	$3,029.58/month (initial) $72,710.00/year 5% of parking revenue
7	Affordable and workforce housing units	$1,925.35/month (initial) $46,208.44/year 5% of parking revenue
8	Office space	$13,873.88/month $332,973.00/year 5% of parking revenue

2 R. 324–30; 4 R. 938. Contrary to Warehouse Cafe's allegation that the Authority "donated" its property, the Authority receives substantial rent, in addition to other consideration, from RDNI under the agreements at issue. *See* 2 R. 324–31; 4 R. 938.

IV. Construction begins on the River District.

On November 29, 2023, construction began on the River District. 2 R. 331.

[5] RDNI subleased Parcel 1 to Topgolf, an entertainment venue with a high-tech driving range.

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STANDARD OF REVIEW

An appellate court's review of a ruling sustaining an exception of prescription varies based on whether evidence was introduced in the trial court at the hearing on the exception. *Fisher v. Blood Ctr.*, 20-0551, p. 4 (La. App. 4 Cir. 2/10/21), 313 So. 3d 1275, 1279 (citation omitted). When, as here, evidence is introduced at the hearing, the trial court's findings of fact on the issue of prescription are subject to the manifest error or clearly wrong standard of review. *Id.* (citation omitted).

"Applying the manifest error standard of review, in order to reverse a trial court's determinations of fact, the appellate court must review the entire record and conclude that (1) a reasonable factual basis does not exist for the trial court's finding, and (2) the record establishes that the finding is clearly wrong or manifestly erroneous." *Libertas Tax Fund I, LLC v. Taylor*, 21-0550, p. 3 (La. App. 4 Cir. 6/16/22), 342 So. 3d 1083, 1086, *writ denied*, 22-01093 (La. 10/19/22) (citation omitted). "If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Ramelli Grp., L.L.C. v. City of New Orleans*, 08-0354, p. 10 (La. App. 4 Cir. 10/22/08), 997 So. 2d 612, 619, *writ denied*, 08-2773 (La. 2/6/09), 999 So. 2d 779 (citation omitted).

Warehouse Cafe cites *Scott v. Zaheri*, 14-0726 (La. App. 4 Cir. 12/3/14), 157 So. 3d 779, for the proposition that the de novo standard of review applies. Warehouse Cafe is mistaken. In *Scott*, the defendant filed exceptions of prescription *and no cause of action*. In connection with the no cause of action exception, this Court explained that the standard of review is de novo. *Id.* at 785 (citation omitted). But, with respect to the prescription exception—which is what is on review here—the Court went on to say that the applicable standard is manifest error, not de novo. *Id.* (citation omitted).

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SUMMARY OF THE ARGUMENT

The judgment should be affirmed for three primary reasons.

First, Warehouse Cafe's action against the Authority is an injunction action—not a nullity action, as it now contends on appeal. In the trial court, Warehouse Cafe filed not one, but two petitions, both of which sought only injunctive relief. The petitions' captions, substance, and prayers all confirm that the nature of this case is an injunction action. Therefore, the trial court properly characterized Warehouse Cafe's claim as an injunction action to conclude that it was prescribed or time-barred.

Second, the trial court did not manifestly err in finding that Warehouse Cafe's injunction action was untimely. The uncontroverted evidence presented in the trial court demonstrated that the Authority's River District project and the contracts facilitating the project were public knowledge and executed more than a year before Warehouse Cafe sought injunctive relief. Yet, Warehouse Cafe waited more than a year to sue, and only after the parties invested significant time, effort, and resources in the project. Under equitable principles of laches and the Supreme Court's timeliness requirement in *Airline*, Warehouse Cafe's injunctive relief claim is now foreclosed.

Third, even assuming Warehouse Cafe brought a nullity action, the jurisprudence has held that a nullity action is still bound by the *Airline* timeliness requirement. Thus, regardless of how Warehouse Cafe's claim is characterized, it is still untimely.

ARGUMENT

I. Warehouse Cafe brought an untimely injunction action—not a nullity action.

The majority of Warehouse Cafe's appeal brief is premised on the notion that it brought a nullity action against the Authority. It did not. While Warehouse Cafe's petition references La. Const. art. VII, § 14(A) ("Section 14(A)"), it did not file a

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petition to nullify the agreements. Nor did it file a petition for a declaratory judgment to have the agreements declared null. Nor did it request in its prayer for relief that the agreements be nullified. 4 R. 973.

Instead, Warehouse Cafe filed a "Petition for Temporary Restraining Order, Preliminary and Permanent *Injunction*." 1 R. 1 (emphasis added). And while the caption of a pleading is not always determinative of what the pleading actually is, *Sam v. La. State Racing Comm'n*, 23-0170, p. 4 (La. App. 4 Cir. 10/24/23), 376 So. 3d 953, 956 (citation omitted), the substance of Warehouse Cafe's petition confirms that this is an action for injunctive relief, not a nullity action. Indeed, in its prayer, which determines "[t]he character of an action," *Faber v. Gondrella*, 4 So. 2d 245, 246 (La. App. Orl. 1941), Warehouse Cafe sought only TROs (a type of injunction) and mandatory injunctions—not nullification of the contracts. 4 R. 973.

The characterization of Warehouse Cafe's claim is important because it determines the applicable prescriptive period. *Fishbein v. State ex rel. La. State Univ. Health Scis. Ctr.*, 04-2482, pp. 6–7 (La. 4/12/05), 898 So. 2d 1260, 1265 (applying three-year prescriptive period set forth in La. Civ. Code art. 3494 to an action seeking a declaratory judgment of the amount of unpaid wages) (citations omitted). *See also Born v. City of Slidell*, 15-0136, p. 9 (La. 10/14/15), 180 So. 3d 1227, 1232 ("[T]he prescriptive period applicable to an action is determined by the character of the action disclosed in the pleadings."). "The characterization which a plaintiff gives his suit determines the applicable prescriptive period." *Julien v. Wayne*, 415 So. 2d 540, 542 (La. App. 1 Cir. 1982) (citing *Fed. Ins. Co. v. Ins. Co. v. N. Am.*, 263 So. 2d 871 (La. 1972)) (citation omitted). Further, a plaintiff's prayer is particularly determinative of the character of the action. *See Faber v. Gondrella*, 4 So. 2d 245, 246 (La. App. Orl. 1941).

Thus, when analyzing a claim under Section 14(A)—or any other constitutional provision without an express prescriptive or peremptive period—courts will

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look to the nature of the plaintiff's claims. *See, e.g.*, *Denham Springs Econ. Dev. Dist. v. All Taxpayers, Prop. Owners & Citizens of Denham Springs Econ. Dev. Dist.*, 05-2274, p. 27 (La. 10/17/06), 945 So. 2d 665, 683 (applying the peremptive period set forth in La. R.S. 33:9038.4(L) in connection with analysis of revenue bond issues under La. Const. art. VII, § 35); *Bates v. City of Denham Springs*, 22-0853, pp. 4–6 (La. App. 1 Cir. 4/18/23), 367 So. 3d 102, 106 (applying La. Civ. Code art. 3494 to a claim for unpaid sick-leave benefits, notwithstanding plaintiff's argument relying in part on Section 14).

Here, Warehouse Cafe characterized its suit as an injunction action—not a nullity action. That characterization controls what prescriptive period applies. *Julien*, 415 So. 2d at 452 (citation omitted). Plus, Warehouse Cafe's prayer is replete with references to only one form of relief: injunctive relief. 4 R. 973. Any argument by Warehouse Cafe that a claim to enjoin an absolutely null contract and a claim to nullify such a contract are indistinguishable should be rejected. Courts have held that injunction and nullity actions are "separate and distinct cause[s] of action" and that a nullity claim is a "companion claim." *Slidell Building Supply, Inc. v. I. D. S. Mortgage Corp.*, 237 So. 2d 923, 925 (La. App. 1 Cir. 1970); *Executone Sys. Co. of La., Inc. v. Jefferson Par. Hosp. Serv. Dist. No. 2 for Par. of Jefferson*, 15-569, p. 15 (La. App. 5 Cir. 2/24/16), 186 So. 3d 1210, 1219, *writ denied*, 16-0569 (La. 5/13/16), 191 So. 3d 1059. Thus, the narrow issue is whether Warehouse Cafe's claim for injunctive relief is prescribed or time-barred. As explained below, the trial court correctly ruled that Warehouse Cafe's injunction claim was not timely asserted.

Warehouse Cafe may argue that its demand for injunctive relief is not determinative of the character of the action. The Supreme Court rejected a similar argument in *Starns v. Emmons*, 538 So. 2d 275 (La. 1989). In that case, the plaintiff sued the defendants for breach of contract but included a demand for rent arrearages in his petition. *Id.* at 278. At issue was whether the claim was characterized as a

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personal action, in which case a longer prescriptive period applied, or whether the claim was an action to recover rent, in which case a shorter prescriptive period applied. *Id.* The plaintiff argued that the mere "inclusion of a demand for rent arrearages in a petition alleging breach of contract does not give the suit the character of an action to recover rent." *Id.* Instead, he urged the Court to look to "the nature of the action as a whole" to determine the applicable prescriptive period. *Id.* The Court rejected the plaintiff's approach, concluded that his claim was an action to recover rent based on the demand contained within the petition, and sustained the defendants' exceptions of prescription. *Id.* at 278–79.

Here, Warehouse Cafe demanded only an injunction in its original and amended petitions. 4 R. 973; 2 R. 282. As "the master of its complaint," *S. Tool & Supply, Inc. v. Beerman Precision Inc.*, 01-1749, p. 12 (La. App. 4 Cir. 5/1/02), 818 So. 2d 256, 263, *writs denied*, 02-1509, 02-1515, 02-1531 (La. 9/20/02), 825 So. 2d 1177, 1177–79, Warehouse Cafe could have asserted a nullity claim or demanded declaratory relief. But it did not do so. Therefore, Warehouse Cafe's action is appropriately characterized as an injunction action, rather than a nullity action, in light of the narrow and specific relief demanded in its petition.

This Court should also decline Warehouse Cafe's invitation to examine new issues it failed to formally plead and brief in the trial court. As discussed, Warehouse Cafe did not file a petition to nullify the agreements nor did file a petition seeking declaratory relief to have the agreements declared null. Indeed, the word "nullity" does not appear in its petition or amended petition. Under, Rule 1-3 of the Uniform Rules of the Courts of Appeal, "issues not raised in the trial court will not be given consideration for the first time on appeal." *Scott v. Zaheri*, 14-0726, p. 14 (La. App. 4 Cir. 12/3/14), 157 So. 3d 779, 788.

In *Scott v. Zaheri*, the plaintiff, like here, raised new issues not pleaded before the trial court on appeal of the trial court's judgment sustaining an exception of

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prescription. This Court rejected the appellant's attempt to raise new issues, finding that appellant "failed to formally plead the doctrine [of *contra non valentem*] before the trial court. . . . Therefore, [this Court] will not consider as error the trial judge's refusal to deny [plaintiff's] exception of prescription on the grounds of *contra non valentem*." *Id.* at 788. There is no interest of justice that requires this Court to consider Warehouse Cafe's nullity arguments formally briefed for the first time on appeal.

II. Warehouse Cafe's injunction action is untimely.

Warehouse Cafe's injunction action is untimely on two independent grounds. *First*, the doctrine of laches precludes the action due to Warehouse Cafe's unreasonable delay in seeking an injunction. *Second*, the action is barred under the timeliness requirement established by the Louisiana Supreme Court in *Airline Construction Co. v. Ascension Parish School Board*, 568 So. 2d 1029 (La. 1990).

A. Warehouse Cafe's action is barred by laches.

Warehouse Cafe's injunction action is barred by the doctrine of laches. "Laches is an equitable doctrine" that "bars prosecution of stale and antiquated demands which would cause injustice if pursued." *Molero v. Bass*, 322 So. 2d 452, 454 (La. App. 4 Cir. 1975), *writ denied*, 325 So. 2d 609 (La. 1976) (citations omitted). In *Brockett v. City of Shreveport*, 160 So. 105 (La. 1925), the Supreme Court summarized the doctrine as follows:

> To entitle the plaintiff to an injunction, he must not be guilty of any improper delay in applying for relief. . . . If a party is guilty of laches, or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief—more especially where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character.

Id. at 711 (quoting HILLARD ON INJUNCTIONS, § 43). The Supreme Court has also held that "the general principles of equity," including laches, "control[] where the

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remedy of injunction [is] sought," and that the right to injunctive relief may "be lost by negligence and delay." *Id.* (citation omitted).

In *Brockett*, the plaintiff sued to enjoin a city from constructing a dam. *Id.* at 710. Before the plaintiff sued, construction began on the project. *Id.* at 710–11. The project was "public" and "well known to the people of the neighborhood." *Id.* Given the extensive publicity of the city's operations, the Court found that the plaintiff "must have been fully apprised of the existing conditions." *Id.* at 711. Yet, it was not until two years after significant funds and effort were expended that the plaintiff sought injunctive relief. *Id.* Given the plaintiff's delay, the Court in *Brockett* held that the plaintiff's injunctive relief claim was barred by laches. *Id.*

Like the plaintiff in *Brockett*, Warehouse Cafe delayed seeking injunctive relief, waiting more than a year to sue after the contracts were executed. The River District project has been extensively reported on by the local media and discussed in open meetings of the Authority's Board of Commissioners and news releases. *See* 2 R. 331–33. Yet, Warehouse Cafe sat on its rights after the parties undertook significant obligations before seeking an injunction.[6] Because of its delay, Warehouse Cafe's injunctive relief claim is barred by laches.

B. Warehouse Cafe's action is untimely under *Airline*.

In addition to laches, Warehouse Cafe's injunction action is barred by the timeliness requirement established by the Supreme Court in *Airline Construction Co. v. Ascension Parish School Board*, 568 So. 2d 1029 (La. 1990). The Authority and RDNI agree that this is not a Public Bid Law case. But that does not mean that jurisprudence interpreting and applying the Public Bid Law is irrelevant.

[6] To date, RDNI has expended millions of dollars to get this project underway. As of the date of Warehouse's initial filing, RDNI expended $5,641,888.00 in pre-development expenses and forecasts to spend another $2,351,163.00 in 2024. 4 R. 988.

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The Public Bid Law contains an express private right of action in La. R.S. 38:2220(B), which states that "*any interested party* may bring suit in the district court through summary proceeding to enjoin the award of a contract or to seek other appropriate injunctive relief to prevent the award of a contract . . . ." (Emphasis added). Notably, La. R.S. 38:2220 does not contain a prescriptive period. *See Ramelli Grp., L.L.C. v. City of New Orleans*, 08-0354, pp. 9–10 (La. App. 4 Cir. 10/22/08), 997 So. 2d 612, 618, *writ denied*, 08-2773 (La. 2/6/09), 999 So. 2d 779; *Gen. Elec. Co. v. W. Feliciana Par. Hosp. Serv. Dist. No. 1*, No. 16-449 (M.D. La. Nov. 29, 2016), 2016 WL 7007504, at *10–*11.

Yet the Supreme Court held in *Airline* that a plaintiff "must seek injunctive relief at a time when the grounds for attacking the wrongful award of the contract were known or knowable to the [plaintiff] and when corrective action as a practical matter can be taken by the public body." 568 So. 2d at 1035 (citation omitted). Conceptually, the *Airline* timeliness requirement has been "likened to prescription or laches." *Hartman Enters., Inc. v. Ascension-St. James Airport & Transp. Auth.*, 582 So. 2d 198, 201 (La. App. 1 Cir. 1991), *writ denied*, 582 So. 2d 195 (La. 1991). The *Airline* timeliness requirement is rooted in practicability, as "[t]he need for quick action is apparent from the dynamics inherent in the process. Once the bid is awarded, the public body will enter into a contract with the successful bidder, work will commence, goods and services will be provided, and both time and money will be expended." *General Electric*, 2016 WL 7007504, at *11.

While it is true that the Authority is exempt from following the Public Bid Law for certain contracts, *see* La. R.S. 33:4710.13(4), the underlying rationale and policy considerations that gave rise to the *Airline* timeliness requirement for seeking injunctive relief against a public contract still apply. The timeliness requirement is not rooted solely in the Public Bid Law itself but rather in the practical realities and dynamics inherent in the government procurement and contracting processes. As

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courts have recognized, there is a clear need for quick action once a public entity selects a winning bidder or proposer following a procurement process, as the public entity will promptly enter into a contract with the winning contractor, work will commence, goods and services will be provided, and both time and money will be expended. *See Haughton Elevator Div. v. State, Through Div. of Admin*, 367 So. 2d 1161, 1166 (La. 1979); *General Electric*, 2016 WL 7007504, at *11.

Allowing any person—a losing bidder, proposer, or an entity entirely uninvolved in the procurement process, like Warehouse Cafe—to seek injunctive relief at any stage, even after a contract has been awarded and work has commenced, would undermine the principles of finality, certainty, and efficiency that are essential for the orderly administration of public contracts. Such a rule would engender a perpetual state of uncertainty and potentially disrupt ongoing projects, leading to a significant waste of public resources and taxpayer funds.

Because a prescriptive period can be "determined by reference to other statutes," *Adams v. Cajun Disposal, Inc.*, 96-1304, p. 5 (La. App. 1 Cir. 3/27/97), 691 So. 2d 296, 298, *writ denied*, 97-1106 (La. 6/20/97), 695 So. 2d 1365, the trial court correctly applied the *Airline* timeliness standard to conclude that Warehouse Cafe's claim was prescribed. In *Ramelli Group, L.L.C. v. City of New Orleans*, 08-0354 (La. App. 4 Cir. 10/22/08), 997 So. 2d 612, this Court held that an eight-month delay between the contract award and injunction suit constituted a "substantial delay" and that injunctive relief was an "inappropriate remedy" at that point. *Id.* at 619. Therefore, the plaintiff's claim was prescribed. *Id.* In *Annie Land & Associates v. Orleans Private Industry Council*, 98-0848 (La. App. 4 Cir. 2/3/99), 729 So. 2d 1067, *writ denied*, 99-0623 (La. 4/23/99), 742 So. 2d 887, this Court held that a 10-month delay between the contract award and injunction suit precluded the plaintiff's suit as untimely. *Id.* at 1069–70.

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Here, the Authority selected RDNI as the master developer on March 25, 2021, and the leases were executed on October 26, 2022.[7] Yet, Warehouse Cafe did not sue to enjoin the lease for Parcel 1 until December 11, 2023, and the leases for Parcels 2, 3A, 5, 6, 7, and 8 until December 18, 2023—a whopping 13.5 months after contract execution. These delays are significantly longer than those in *Ramelli Group* and *Annie Land*. Additionally, development of the River District has been public knowledge, discussed in open meetings of the Authority Board of Commissioners, and extensively reported on for several years. *See* 2 R. 331–33. Because of the substantial delay between the time the contracts were executed and the time Warehouse Cafe sued, the trial court correctly found that its injunction claim was untimely and prescribed.

Further, Warehouse Cafe's argument that, because the Authority's enabling legislation exempts certain contracts from the Public Bid Law, the Authority is subject to unlimited and imprescriptible claims is illogical and would lead to absurd results. The Authority's enabling legislation exempts "leases or subleases of the [A]uthority . . . for allied services such as hotels, restaurants, retail outlets, offices, and entertainment" from the Public Bid Law. La. R.S. 33:4710.13(4). By exempting the Authority from complying with the strict mandates of the Public Bid Law, the legislature clearly intended to make it easier—not harder—for the Authority to enter into leases for allied services. But, according to Warehouse Cafe, this exemption has the opposite effect.

Had the Authority opted to follow the Public Bid Law, then an action to enjoin an allegedly absolutely null contract was required to be brought timely. *See Airline Construction*, 568 So. 2d at 1033. Since the Authority is exempt from the Public Bid

[7] Even if the relevant time period started on May 1, 2023, when the leases for Parcels 1A and 1B were superseded (but otherwise remained the same) by a new lease, Warehouse Cafe still waited 7 months and 10 days before seeking injunctive relief. That delay is effectively similar to the delays in *Ramelli Group* and *Annie Land*.

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Law in this instance, Warehouse Cafe insists that claims to enjoin an allegedly absolutely null contract can be brought at any time—1 year, 10 years, or even 100 years after the grounds for attacking the allegedly null contract were known or knowable to the plaintiff. It is illogical to conclude that the legislature intended to subject the Authority to such sweeping liability merely by exempting it from the Public Bid Law.

C. Warehouse Cafe's counterarguments are meritless.

Warehouse Cafe raises three arguments to revive its untimely claim for injunctive relief. All three are meritless.

1. Injunction actions must be brought timely, regardless of whether the Public Bid Law applies.

First, Warehouse Cafe suggests that its claim is imprescriptible simply because this is not a Public Bid Law case. *See* Appellant Br., at pp. 23–29 (Apr. 1, 2024). That argument is incorrect, because the principle that a plaintiff must timely bring a claim for injunctive relief is not a Public Bid Law-specific principle. Rather, it is a general principle that applies to all injunctive relief claims. *See Brockett*, 106 So. at 711 (holding that plaintiff's right to injunctive relief can "be lost by negligence and delay"); *Mundy v. Phillips*, 102 So. 519, 521 (La. 1924) (holding that plaintiff's "right to an injunction" was waived "by his silence and inaction"); *Boogie Kings v. Guillory*, 188 So. 2d 445, 448 (La. App. 3 Cir. 1966), *writ denied*, 191 So. 2d 140 (La. 1966) (explaining that "equity will not grant injunctive relief . . . where laches have barred enforcement of complainant's right").

2. Actions to enjoin absolutely null contracts are prescriptible.

Second, Warehouse Cafe's insistence that an action to nullify an absolutely null contract is imprescriptible misses the mark, since Warehouse Cafe's claim is properly characterized as an injunctive relief claim and not a nullity claim. *See*

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discussion *supra* pp. 6–9. Such claims *are* prescriptible or capable of being barred by the passage of time.

Take, for example, a contract that violates the Public Bid Law. Although "[a] contract made in violation of the Public Bid Law is an absolute nullity," *Ryan Gootee Gen. Contractors LLC v. Plaquemines Par. Sch. Bd.*, 18-0276, p. 11 (La. App. 4 Cir. 11/7/18), 318 So. 3d 1022, 1030 (citation omitted), both the Supreme Court and this Court have repeatedly held that an action to enjoin such a contract is prescriptible—even though such a contract is absolutely null. *See Airline Contr. Co. v. Ascension Par. Sch. Bd.* 568 So. 2d 1029, 1035 (La. 1990); *Ramelli Grp., L.L.C. v. City of New Orleans*, 08-0354, pp. 9–11 (La. App. 4 Cir. 10/22/08), 997 So. 2d 612, 618–19, *writ denied*, 08-2773 (La. 2/6/09), 999 So. 2d 779.

The same principles apply here. Warehouse Cafe claims that the contracts are absolutely null because they allegedly violate Section 14(A). But a claim to enjoin the execution, performance, or enforcement of an absolutely null contract must be brought timely.

For example, in *Ramelli Group, L.L.C. v. City of New Orleans*, 08-0354 (La. App. 4 Cir. 10/22/08), 997 So. 2d 612, *writ denied*, 08-2773 (La. 2/6/09), 999 So. 2d 779, the plaintiff alleged that the City of New Orleans violated the Public Bid Law. *Id.* at 614. The plaintiff sought a declaratory judgment to declare the contract "null and void" and a mandatory injunction. *Id.* The intervenor filed an exception of prescription, which the trial court sustained, and the plaintiff appealed. *Id.*

On appeal, the plaintiff raised two arguments. First, the plaintiff argued that it was not seeking injunctive relief, but rather the nullification of the contract. *Id.* at 616. Second, the plaintiff maintained that its suit was imprescriptible because the legislature did not establish an explicit prescriptive period for actions brought under La. R.S. 38:2220 (the Public Bid Law). *Id.* This Court rejected both arguments. While the plaintiff disclaimed having sought injunctive relief on appeal, this Court

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found that the plaintiff did, in fact, assert an injunctive relief claim and concluded that such a claim was required to be "timely" brought. *Id.* at 617–18. Thus, this Court affirmed the judgment, even though the plaintiff had explicitly sought to invoke the nullity of an allegedly absolutely null contract in addition to its claim for injunctive relief. *Id.* at 619.

Warehouse Cafe is advancing the same rejected arguments that the plaintiff made in *Ramelli Group*. Warehouse Cafe is attempting to distance itself from the injunctive relief claims it made in the trial court by now "repackaging" its suit as a nullity action on appeal. The plaintiff tried that strategy in *Ramelli Group* and failed. The captions, substance, and prayers of Warehouse Cafe's petitions make it explicitly clear that this is an injunction action. And injunction actions—even those to enjoin allegedly absolutely null contracts—must be brought timely.

3. The absence of a prescriptive period in Section 14(A) does not mean that Warehouse Cafe's claim is imprescriptible.

Third, Warehouse Cafe claims that its action is imprescriptible simply because Section 14(A) does not contain a prescriptive period. *See* Appellant Br., at pp. 11–13 (Apr. 1, 2024). That is not the correct legal analysis. Merely because a law does not set forth a prescriptive period does not mean that a right of action brought under that law is imprescriptible. Nor is the absence of a prescriptive period unusual. "[M]any, if not most, of our statutes creating a right of action contain no prescriptive period." *Adams v. Cajun Disposal, Inc.*, 96-1304, p. 5 (La. App. 1 Cir. 3/27/97), 691 So. 2d 296, 298, *writ denied*, 97-1106 (La. 6/20/97), 695 So. 2d 1365.

"Instead, courts must look to the cause of action that forms the underlying basis of the request in determining which prescriptive period applies." *Brown v. Schreiner*, 10-1436, p. 5 (La. App. 4 Cir. 11/9/11), 81 So. 3d 705, 708 (citing *dela Vergne v. dela Vergne*, 99-0364, p. 8 (La. App. 4 Cir. 11/17/99), 745 So. 2d 1271,

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1275). Courts have also held that a prescriptive period can be "determined by reference to other statutes." *Adams*, 691 So. 2d at 298.

Warehouse Cafe claims that "there is no case more on point then [sic]" *Bunge North America, Inc. v. Board of Commerce & Industry*, 07-1747 (La. App. 1 Cir. 5/2/08), 991 So. 2d 511. Appellant Br., at p. 20 (Apr. 1, 2024). That claim might be more persuasive had Warehouse Cafe asserted a nullity claim. In *Bunge*, the plaintiff alleged that a contract violated the Louisiana Constitution. *Id.* at 524. The defendant filed an exception of prescription, arguing that the plaintiff's claim was a tort claim and, therefore, subject to a one-year prescriptive period. *Id.* The trial court disagreed, finding that the plaintiff asserted a nullity claim and not a tort claim. *Id.* The trial court gave particular attention to the plaintiff's prayer for relief "and concluded that the relief ultimately sought by [the plaintiff] was the nullification of the contract." *Id.* On appeal, the First Circuit affirmed, noting that the plaintiff "specifically requested . . . that the trial court issue and enter a declaratory judgment declaring the contract to be . . . void from inception." *Id.* at 525.

Unlike in *Bunge*, Warehouse Cafe did not assert a nullity claim. In its prayer, Warehouse Cafe sought only TROs and mandatory injunctions, not a declaration or invocation of nullity. 4 R. 973. It also did not request that the trial court issue and enter a declaratory judgment declaring the contracts to be null or void. 4 R. 973. The trial court correctly found that Warehouse Cafe asserted an injunction claim and not a nullity claim, and, as in *Bunge*, that factual finding is entitled to deference from this Court. In short, Warehouse Cafe's reliance on *Bunge* rests on the false proposition that it brought a nullity claim against the Authority. Therefore, *Bunge* is distinguishable.

In short: The absence of a prescriptive period in Section 14(A) is not dispositive of whether an injunction premised on an alleged violation of Section 14(A) is imprescriptible. Under that line of reasoning, it is questionable whether Section

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14(A) even confers a private right of action upon Warehouse Cafe. After all, there is no express language to that effect. *Cf. Bourgeois v. Boomtown, LLC of Del.*, 10-553, p. 8 (La. App. 5 Cir. 2/15/11), 62 So. 3d 166, 171 (holding that statute did "not confer a right of action to private citizens for violation thereof"); *Johnson v. Hardy*, 98-2282, p. 10 (La. App. 1 Cir. 11/5/99), 756 So. 2d 328, 334 (same). Instead, the proper analysis is to determine the plaintiff's cause of action. Here, the trial court correctly classified Warehouse Cafe's action as an injunction action and, on that basis, found that it was untimely.

III. Any nullity claim is still prescribed or time-barred.

Even assuming Warehouse Cafe's petition can be read to include a nullity claim, that claim is still prescribed or time-barred. An action to nullify an allegedly absolutely null public contract by a nonparty "is bound by the timeliness constraints of *Airline* . . . ." *Gen. Elec. Co. v. W. Feliciana Par. Hosp. Serv. Dist. No. 1*, No. 16-449, 2016 WL 7007504, at * (M.D. La. Nov. 29, 2016). *See also Percy J. Matherne Contractor, Inc. v. Grinnell Fire Prot. Sys. Co.*, 915 F. Supp. 818, 823 (M.D. La. Aug. 9, 1995), *aff'd*, 104 F.3d 550 (5th Cir. 1996). In other words, the claim must be brought timely.

In *Executone Systems Co. of Louisiana, Inc. v. Jefferson Parish Hospital Service District No. 2 for Parish of Jefferson*, 15-569 (La. App. 5 Cir. 2/24/16), 186 So. 3d 1210, *writ denied*, 16-0569 (La. 5/13/16), 191 So. 3d 1059, East Jefferson General Hospital, a political subdivision, issued an RFP to solicit proposals for a nurse communication system. *Id.* at 1212. The Hospital awarded the contract to Hill-Rom Company, Inc. *Id.* A year later, Executone Systems Company of Louisiana, Inc., a losing proposer, sued to enjoin and nullify the contract. *Id.* at 1213. The trial court, however, "found that Executone failed to act timely in seeking injunctive relief" and sustained Hill-Rom's exception of prescription. *Id.* at 1214.

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On appeal, Executone argued that the contract between the Hospital and Hill-Rom, an unlicensed contractor, was an absolute nullity because it violated the Louisiana Contracting Law, La. R.S. 37:2150, *et seq.*, and that an action to annul an absolutely null contract was imprescriptible under La. Civ. Code arts. 7 and 2030.[8] *Id.* at 1214, 1217–18. Although Executone cited several cases where contracts were nullified, even after they were completed, the Fifth Circuit explained that those cases were "distinguishable from the present case because they all involved actions for nullity brought by parties to the contract." *Id.* at 1219. Whereas, Executone was "not a party to the contract sought to be annulled." *Id.* The court then applied *Airline*'s timeliness requirement "to Executone's companion nullity claim," held that the trial court did not err in addressing the timeliness requirement, and affirmed the judgment sustaining the exception of prescription. *Id.* at 1219–20.

Executone's rationale and holding—that a *nonparty* must timely bring an action to nullify an allegedly absolutely null contract—has been adopted by two other courts.

First, in *General Electric Co. v. West Feliciana Parish Hospital Service District No. 1*, No. 16-449, 2016 WL 7007504 (M.D. La. Nov. 29, 2016) (unpublished), the court relied on *Executone* to hold that a nonparty to an allegedly absolutely null contract may not seek to annul the contract at any time. *Id.* at *18. The plaintiff in *General Electric* argued that *Airline*'s timeliness requirement was "irreconcilable" with La. Civ. Code arts. 7 and 2032.[9] *Id.* But the court said that "the Louisiana Supreme Court was mindful of Civil Code articles at the time it rendered its ruling in

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[8] La. Civ. Code art. 7 states: "Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity."

La. Civ. Code art. 2030 states: "A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed. Absolute nullity may be invoked by any person or may be declared by the court on its own initiative."

[9] La. Civ. Code art. 2032 states, in relevant part: "Action for annulment of an absolutely null contract does not prescribe."

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Airline, and did not intent for its holding to conflict with existing legislation." *Id.* Thus, the court ruled that "[t]he rationale of *Executone* reconciles the holding of *Airline* with the mandate of Articles 7 and 2032." *Id.* Therefore, a nonparty's nullity claim is still "bound by the timeliness constraints of *Airline* . . . ." *Id.*

Second, in *Parkcrest Builders, LLC v. Housing Authority of New Orleans*, No. 15-1533, 2017 WL 3394033 (E.D. La. Aug. 8, 2017) (unpublished), the court adopted the rationale set forth in *Executone* and *General Electric* to reject the plaintiffs' arguments that their action to nullify an allegedly absolutely null contract was imprescriptible under La. Civ. Code art. 2032. *Id.* at *8.

Here, Warehouse Cafe is not a party to the contracts. Therefore, under *Executone*, *General Electric*, and *Parkcrest*, it was required to *timely* bring its nullity action. As detailed above, Warehouse Cafe's did not do so. *See* discussion *supra* pp. 6–9. *Executone* also flatly contradicts Warehouse Cafe's argument that its action is immune from any timeliness constraints merely because the Authority employed an RFP process rather than a bidding process. *See Executone Sys. Co. of La., Inc. v. Jefferson Par. Hosp. Serv. Dist. No. 2 for Par. of Jefferson*, 15-569 (La. App. 5 Cir. 2/24/16), 186 So. 3d 1210, 1212, 1219–20, *writ denied*, 16-0569 (La. 5/13/16), 191 So. 3d 1059 (plaintiff's action held prescribed even though public entity solicited proposals through RFP process).

IV. Warehouse Cafe's defective petition is incurable.

Finally, no amount of new factual allegations can change the fact that Warehouse Cafe failed to bring its injunctive relief claim timely. Therefore, Warehouse Cafe's defective petition is incurable, and the trial court did not abuse its vast discretion in denying Warehouse Cafe an opportunity to amend its petition yet another time.

La. Code Civ. Proc. art. 934 only permits a plaintiff to amend its petition of "the grounds of the objection pleaded by the peremptory exception may be removed

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by amendment . . . .” “The right to amend is not absolute. Amendment is not permitted when it would constitute a vain and useless act.” *Smith v. State Farm. Ins. Cos.*, 03-1580, p. 6 (La. App. 4 Cir. 3/3/04), 869 So. 2d 909, 913 (citation omitted). “[A]rticle 934 does not require that the plaintiff be provided the opportunity to speculate on unwarranted facts merely for the purpose of defeating the exception. . . . The decision to allow amendment of a pleading to cure the grounds for a peremptory exception is within the discretion of the trial court.” *Harrell-Bijou v. Guarino*, 23-0435, p. 9 (La. App. 1 Cir. 11/16/23), 379 So. 3d 698, 705 (citations omitted).

Warehouse Cafe is now on its second iteration of the petition. It should not be given a *third* opportunity, especially since it “did not request leave to amend” its petition, either in an opposition to RDNI’s exception (it did not file one) or at the hearing on the exception. *Guarino*, 379 So. 3d at 705.

If Warehouse Cafe is afforded leave, it is anticipated that it will attempt to add new claims, like nullity or declaratory relief claims, that it could have, but did not, assert in its original and amended petitions. This Court rejected such an approach in *Ballanco v. Morvant*, 23-0426 (La. App. 4 Cir. 1/17/24), ___ So. 3d ____, 2024 WL 177450. In *Ballanco*, this Court found that the plaintiff “desired to amend her suit to alter the substance of the petition and add . . . another cause of action . . . .” *Id.* at *5. Therefore, the plaintiff in *Ballanco* “was not entitled to leave to amend” her petition after her claims were dismissed as prescribed. *Id.* The same result should be reached in this case.

CONCLUSION

Warehouse Cafe sat on its right to seek injunctive relief at a time when, if appropriate, the Authority could have rectified any defect in the agreements. Warehouse Cafe inexplicably delayed over one year to take legal action and, as held by the trial court, is now precluded from seeking any relief, whether styled as an injunction action or a nullity action. The trial court properly sustained RDNI’s exception

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of prescription. This Court should affirm that ruling and assess all costs of this appeal against Warehouse Cafe.

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Dated: May 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2024, a legible copy of the foregoing Original Brief on Behalf of Defendant/Appellee Ernest N. Morial New Orleans Exhibition Hall Authority and Intervenor/Appellee River District Neighborhood Investors, LLC was served by U.S. Mail on the trial court and by email upon the following counsel of record and to each opposing party not represented by counsel, if any:

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