IN THE CIRCUIT COURT OF TENNESSEE
FOR THE NINETEENTH JUDICIAL DISTRICT AT MONTGOMERY COUNTY

STATE OF TENNESSEE, *ex rel.* ROBERT E. COOPER, JR., Attorney General,	)	
Plaintiff,	)	
v.	)	Case No. 50500795
BRITLEE, INC., d/b/a The MILITARY ZONE, MILITARYZONE.COM and LAPTOYZ COMPUTERS AND ELECTRONICS, STUART L. JORDAN, individually and d/b/a BRITLEE, INC., MILLENIUM FINANCE, INC. and MILLENIUM, and ROME FINANCE COMPANY, INC.,	)	Judge Ross Hicks
Defendants.	)	

PLAINTIFF, STATE OF TENNESSEE'S MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS AGAINST DEFENDANT ROME FINANCE COMPANY, INC. AND RONALD M. WILSON FOR FAILING TO PROVIDE COURT ORDERED DEPOSITION TESTIMONY

Plaintiff, State of Tennessee ("State"), respectfully moves this Court pursuant to Tenn. R. Civ. P. 37.02 for an Order assessing sanctions against defendant Rome Finance Company, Inc. ("Rome") and its owner, president and chief operating officer Ronald M. Wilson ("Wilson"), for their continuing refusal to provide deposition testimony as Ordered by this Court on February 15, 2008, June 17, 2008 and July 2, 2008.

Significant sanctions are warranted because the sanctions assessed against Rome by this Court to date have had little impact on Wilson and Rome. Wilson unlawfully aborted his May 28, 2008 deposition shortly after it began and Rome failed to attend its Rule 30.02(6) deposition altogether. Both Wilson and Rome remain in violation of this Court's February 15, 2008, June 17, 2008 and July 2, 2008 Orders requiring them to appear for deposition.

BACKGROUND OF THE STATE'S DISCOVERY EFFORTS

This civil law enforcement proceeding was filed by the State of Tennessee on September 23, 2005, alleging the defendants engaged in various unlawful and predatory sales and lending practices which mainly targeted the young men and women in the military. The discovery at issue pertains to allegations that Rome is in civil contempt of this Court's September 23, 2005 Temporary Restraining Order and later agreed injunctive Orders (hereafter collectively "Injunction Orders") because it engaged in unlawful collection activity and other conduct in direct violation of such Orders.

In October 2006, the State first received information that Rome was continuing to engage in collection activity in violation of this Court's Injunction Orders and promptly contacted Rome regarding the same. *See* September 21, 2006 email from Assistant Attorney General John Smith to Tom Greenholtz, Esquire, and Bill Hannah, Esquire, Exhibit A.[1] *See also* Transcript of September 4, 2007 Proceedings, pp. 10-11, Exhibit B. Rome represented that such collection activity was minimal and inadvertent and promised the State it would provide the State with documents related to its post-injunction collection activities. *Id.* In turn, the State agreed not to pursue contempt proceedings against Rome. *Id.* Later, Rome began erecting various obstacles and failed to produce the promised information to the State.

On July 24, 2007, during the parties' hearings on cross motions for partial summary judgment, this Court ordered Rome to produce certain contempt-related discovery to the State.

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[1] All exhibits are attached to the State's accompanying Motion to Compel and for Sanctions Against Defendant Rome Finance Company, Inc. and Ronald M. Wilson, filed concurrently herewith.

See Exhibit C, pp. 35-36. *See also* Orders of August 10, 2007 and August 23, 2007, Exhibits D and E. Rome, however, failed to abide by these Orders and refused to produce even a single document to the State.

On September 4, 2007, the hearing on the State's contempt allegations against Rome began absent the benefit of Rome's court-ordered discovery. Exhibit B. During these proceedings, this Court determined that the discovery previously sought by the State and Ordered by the Court was relevant and necessary to a resolution of the contempt issue and again Ordered Rome to produce this outstanding discovery to the State. *Id.* at 48, 93 - 96. Rome promised the Court it would produce the documents within thirty days. *Id.* *See also* September 28, 2007 Order, attached as Exhibit F, hereto.

On September 21, 2007, the State noticed Rome's deposition pursuant to Tenn. R. Civ. P. 30.02(6), which is the first of the two depositions at issue now. This deposition was noticed to begin on November 1, 2007. *See* Notice of Deposition, Exhibit H.

The First Round of Sanctions Against Rome in this Case

On October 3, 2007, one day before Rome's court-ordered discovery deadline, Rome filed a Notice of Removal with the United States District Court for the Middle District of Tennessee. *See* Notice of Removal, Exhibit H. This filing caused an automatic stay of all pending state court proceedings in this case and transferred the entire case into the federal court system. Rome's removal also represented the second time this case was

removed to federal court from state court.[2] Absent explanation, Rome asserted the same jurisdictional grounds that had been previously been considered and rejected by the federal court in this case the year before in connection with co-defendant, Millenium, Inc.'s removal of this case.

During the next several weeks, Rome's November 1, 2007 Rule 30.02(6) deposition remained on schedule and Rome said nothing more to the State about this deposition.

On October 30, 2007, six weeks after Rome was first served with the State's Notice of Deposition and only four days before Rome's deposition was set to begin, Rome decided to advise the State that it would have to "wait" until after an October 31, 2007 federal court scheduling conference took place before Rome would even "agree" to a deposition date. *See* Oct. 29, 2007 letter from Hugh Moore, Esq. to Assistant Attorney General John S. Smith, III. Ex. J. While litigants may not be compelled to participate in depositions prior to the first federal court scheduling conference, nothing in either the State or Federal Rules of Civil Procedure prohibits litigants from agreeing to conduct a deposition in advance of the scheduling conference.

The federal court showed little tolerance for Rome's maneuver. The following day, on October 31, 2007, the federal court ruled that Rome had improperly removed this case to federal court and issued the first of what were to be multiple rounds of sanctions assessed

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[2] Defendant Millenium Finance Inc. ("Millenium") filed the first removal of this case to federal court on October 24, 2005. *See* Notice of Removal, Exhibit I. Rome fully supported Millenium's first removal and even filed a brief supporting Millenium's removal of this case to federal court.

against Rome in this case, all related to its obstruction of the pending contempt proceedings or the related discovery. *See State of Tennessee v. Britlee, et al.*, Civil Action 3:07cv0988, p. 5 (M.D. Tenn. Oct. 30, 2007) (Wiseman, J.) (ruling that Rome's removal was "devoid of merit" and brought "in bad faith and for an improper purpose."), Exhibit K. Significantly, the Honorable Thomas A. Wiseman, Jr. explicitly ruled that Rome filed the removal "for the apparent purpose of avoiding or delaying contempt proceedings pending against Rome Finance Company in state court." *Id.* at 5. (emphasis added). At the time of the above federal court ruling, Rome had still not produce a single document as ordered by Court on August 10, August 27 and September 28, 2007. *See* Exhibits D-F. Rome also failed to reschedule its deposition.

The Second Round of Sanctions Against Rome in this Case

Following remand, the State made several attempts to schedule Rome's 30.02(6) deposition without success. *See* Exhibit L. Rome had also failed to produce any discovery to the State as previously ordered at the July 4 and September 4, 2007 hearings, and as set forth in this Court's August 10, August 23 and September 28, 2007 Orders. Exhibits D-F.

On November 19, 2007, the State filed a Motion to Compel and for Sanctions, alleging Rome had failed to provide court-ordered discovery and was evading its Rule 30.02(6) deposition.

On December 20, 2007, this Court ruled that Rome was in violation of its earlier discovery orders and assessed additional sanctions against Rome, including the partial sanction of requiring Rome to appear for its Rule 30.02(6) deposition in Tennessee. *See*

Transcript of December 20, 2007 Hearing and February 15, 2008 Order, Exhibits M and N.

Following the Court's December 20, 2007 rulings and February 15, 2008 Order, the State made multiple attempts to schedule Rome's Rule 30.02(6) deposition, but Rome continued to evade deposition. During January and February of 2008, Rome proffered various excuses regarding counsel's availability. *See* Exhibits L. Rome succeeded in delaying its deposition until April 14, 2008, after claiming its 30.02(6) designee, Ronald M. Wilson, was not available due to a month-long cruise he was enjoying in Rio de Janeiro, Brazil, during the entire month of March 2008. *Id.*

On April 14, 2008, Rome finally appeared for a Rule 30.02(6) deposition, but engaged in a course of conduct which led to a prolonged, evasive and fruitless deposition. During its Rule 30.02(6) deposition, Rome's counsel interposed numerous, improper and unlawful objections, improperly instructed the witness not to answer questions and engaged in prolonged dialogue and oratory on the record. In particular, Rome's improper deposition conduct included the following:

- Out of 427 pages of transcript, Rome's counsel objects, speaks or otherwise interrupts the testimony on 333 pages or 79% of the transcript. *See* Exhibit O.[3]

- Although the deposition was defended by Rome attorney Hugh J. Moore, Rome's in-house counsel, Thomas Todd, Esquire, also repeatedly lodged objections and interrupted the record with questions, comments and speeches and shouting. Mr. Todd is not believed to be a licensed Tennessee attorney

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[3] A high number of obstreperous and excessive objections and interruptions are a form of discovery abuse. *Seltzer v. Morton*, 154 P.3d 561, 608 (Mont. 2007); *Mother, LLC v. L.L. Bean, Inc.*, 2007 WL 1073866 (W.D. Wash. 2007) (Sanctions warranted for counsel's excessive and unnecessary objections during deposition).

and refused to say whether or not he was licensed to practice law in Tennessee. *Id.*[4]

- Rome's attorneys gave repeated, improper instructions to the witness not to answer questions.[5]

- Rome's attorneys engaged in repeated, disrespectful conduct towards the State's attorney, including shouting, laughing, reading treatise text into the record to "educate" the State and in one case, boasting about defense counsel's 39 years of experience. *Id.*[6]

- Rome's attorneys made numerous improper objections which were suggestive of the answer and were adopted by the witness. *Id.*

- Rome's attorneys made numerous interruptions during the deposition to demand that the State justify its questions as within the scope of the Rule 30.02(6) Notice. *Id.*

While Rome's Rule 30.02(6) deposition proceeded, defense counsel also repeatedly represented to the State and to the Court that to the extent many of the State's questions could not be answered by Ronald M. Wilson as a 30(b)(6) designee, Mr. Wilson would be available to answer such questions in his "individual" capacity:

> *"[O]f course, they're entitled to take a deposition of Mr. Wilson;"*[7]
>
> *"I would also like to point out we obviously have no objection to them*

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[4] Corporate counsel that is not counsel of record for any of the parties has "no business making any objections at the deposition." *Flaherty v. Filardi*, No. 03 Civ. 2167 (LTS) (HBP), 2007 WL 2398762, *4, n. 3 (S.D.N.Y. Aug. 15, 2007).

[5] These interruptions formed the basis of this Court's July 2, 2008 Order, requiring Rome to return and complete its deposition. *See* Exhibit V.

[6] *See Seltzer*, 154 P.3d at 608 (Noting that prominent and experienced attorney had professional gate keeping duty to discourage litigation abuse).

[7] *See* Exhibit O, p. 15, lines 5-6, transcript of Rome's deposition.

taking Mr. Wilson's deposition. They have every right to do that;"[8]

"You're entitled to take [Ronald M. Wilson's] deposition..."[9]

On April 18, 2008, and only four days after Rome's counsel made these multiple representations to the Court and before the State had even noticed Ronald M. Wilson for deposition, Rome filed a motion for a protective order seeking to prevent the State from ever deposing Ronald M. Wilson.

The Third Round of Sanctions Against Rome in this Case

On April 24, 2008, the State filed a Notice of Deposition to take the deposition of Ronald M. Wilson on May 27, 2008. *See* Exhibit P. The State also filed deposition notices seeking to depose other Rome employees, including Ramona Archer and Jay Kennedy. *See* Exhibits Q and R.

On April 31, 2008, Rome filed a so-called "Emergency" Motion for Protective Order, seeking to block the State from deposing any of its employees. The disingenuous nature of Rome's position became apparent two days later, when during a May 2, 2008 telephonic hearing, the Court learned that Rome was insisting that the State follow the formal out-of-state commissioning process for all employee depositions, while it continued to withhold discovery from the State identifying its employees' addresses, thereby making it impossible for the State to follow the commissioning process. *See* Transcript, May 2, 2008 Telephonic Hearing and June 17, 2008 Order, Exhibits S and T.

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[8] *See* Exhibit O, p. 18, lines 11-14, transcript of Rome's deposition.

[9] *See* Exhibit O, p. 49, lines 24-25, transcript of Rome's deposition.

Rome's "Emergency" Motion was denied and Rome was once again sanctioned for bad faith conduct and for obstructing discovery. On May 2, 2008, as memorialized in this Court's June 17, 2008 Order , this Court ruled that the State could proceed with the deposition of Ronald M. Wilson on May 27, 2008 as Ordered and was to produce all employees for deposition in Tennessee until such time date as it provided complete employee address information to the State. *See* Transcript, May 2, 2008 hearing, Exhibit S and June 2, 2008 Order, Exhibit T.

The Fourth Round of Sanctions Against Rome in this Case

On May 12, 2008, the State filed a motion to compel Rome to complete its Rule 30.02(6) deposition. During the May 27, 2008 hearing, as memorialized in this Court's July 2, 2008 Order, this Court ruled that Rome was to complete its Rule 30.02(6) deposition and answer all questions addressed in the State's motion. *See* Exhibits U and V.[10]

On May 19, 2008, the State once again filed a motion to compel and for sanctions, as a result of Rome's permanent destruction of contempt-related evidence. During earlier depositions, the State learned that Rome permanently over-wrote and destroyed internal electronic records which documented its contempt of court. *See* Transcript of May 27, 2008 hearing and July 2, 2008 Order, Exhibits U and V. Rome was also sanctioned for withholding other contempt-related discovery and was again ordered to produce both Rome and its principal, Ronald M. Wilson, for deposition. *Id.*

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[10] Upon Rome's request, Ronald M. Wilson's deposition began on May 28, 2008, and the parties agreed Rome's Rule 30.02(6) deposition would follow immediately thereafter.

On May 28, 2008, shortly after the parties reconvened after a lunch break, Ronald M. Wilson aborted his deposition in violation of this Court's June 2, 2008 Order and Rome failed to appear for its deposition altogether. *See* Exhibit W. The State continued to request deposition dates from Rome in order to complete these depositions, but Rome failed to provide any dates.

ARGUMENT

The discovery issue before the Court today is straightforward and simple. Defendant Rome and Ronald M. Wilson were both previously Ordered by this Court to appear for deposition and defendant Rome and Ronald M. Wilson continue to refuse to abide by such Orders. The State respectfully submits that Rome and its principal are continuing a dilatory, bad faith course of conduct that now spans a year and involves repeated violations and disregard of this Court's Orders.

Significant Sanctions Are Now Warranted Against Rome

Tenn. R. Civ. P. 37.02 sets forth the remedies and sanctions for a party's failure to respond to discovery or obey an order issued under Rule 37. Rule 37.02 provides as follows:

> **37.02. Failure to Comply with Order. -** If a deponent; party; an officer, director, or managing agent of a party; or, a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, or if a party fails to obey an order entered under Rule 26.06, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35.01 requiring the party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this rule, unless the party failing to comply shows that he or she is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Tenn. R. Civ. P. 37.02. *See also Lyle v. Exxon Corp.*, 746 S.W.2d 694, 698-99 (Tenn. 1988) ("Under the provision of the Tennessee rules of Civil Procedure, various sanctions against a party are provided when a party abuses the discovery process.") Moreover, the Court maintains inherent power to "take appropriate corrective action against a party for discovery abuse." *Lyle v. Exxon Corp.*, 746 S.W.2d at 699.

A Default Judgment Against Rome Is Now Warranted

To date, defendant Rome's litigation conduct has been reprehensible. Sanctions orders from two different courts have had little effect on this defendant's litigation conduct. *See* Exhibits K, N, T and V. In sum, Rome continues to disregard this Court's Orders with

impunity and continues to basically do "whatever it wants," rules and court orders notwithstanding. For this reason, the State respectfully submits that the time has come for this Court to impose the most serious sanctions available under Rule 37.02, namely, the sanction of default judgment.

Tenn. R. Civ. P. 37.02(C) authorizes entry of a default judgment if "a deponent; a party; an officer, director, or managing agent of a party; or, a person designated under Rule 30.02(6) .... fails to comply with an order to provide or permit discovery ...."

Rome's 30.02(6) deposition notice was served almost one year ago. Exhibit G. Since that time, the State has had to expend significant resources to overcome Rome's persistent course of obstruction and delay, which included Rome's bad faith removal of this case to federal court and Rome's repeated violations of multiple discovery orders issued by this Court. At some point, such conduct has to stop.

The two depositions at issue now, Rome's 30.02(6) deposition and Ronald M. Wilson's deposition, represent the two most important depositions the State requires for the pending civil contempt proceeding against Rome. Without these depositions, the State is not able to conclude its case-in-chief, nor verify fundamental information concerning Rome's limited document productions - a fact which undoubtedly is not lost upon Rome. Many of the limited documents Rome has produced to date remain unauthenticated, unidentified and unexplained.

In addition to a default judgment in its case-in-chief, the State respectfully requests that this Court further enter a ruling in connection with the civil contempt proceedings

pending against Rome, for Rome's violations of this Court's initial Temporary Restraining Order and subsequent temporary injunctions.

Rome's Documents Should Be Ruled as Admissible in Evidence

In addition to the sanction of judgment by default, the State further requests that this Court also impose additional sanctions against Rome under Tenn. R. Civ. P. 37.02(A), which permits the Court to make an order that certain matters or designated facts shall be taken to be established for the purposes of this action.

Following entry of default judgment, certain ancillary matters will require resolution, including restitution, disgorgement of profits and penalties. In this regard, the State would request that an minimum, the Court rule that all documents produced by Rome to date in this litigation be deemed admitted into evidence for any purpose at any hearing to be held in this case, including hearings on the issue of penalty assessments for Rome's contempt of court and for its violations of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq*. The State further requests that this Court rule that all court records obtained by the State from the Gwinnett County Court in Lawrenceville, Georgia, be similarly deemed admitted into evidence.

Rome Should Be Held In Contempt of Court for Its Discovery Transgressions

In addition to the sanctions discussed above, Rule 37.02(D) further authorizes the Court to enter "an order treating as a contempt of court the failure to obey any orders ...." This particular sanction has already been assessed against Rome once in this case, during the December 20, 2007 hearing, as set forth in this Court's February 15, 2008 Order. *See*

Exhibit N. A second finding of contempt of court under Tenn. R. Civ. P. 37.02(D) is appropriate here, especially because Rome remains undeterred by this Court's first contempt ruling against Rome.

As set forth above, this Court has formally and informally admonished Rome for its discovery misconduct and discovery abuses on numerous occasions, through written Orders and during hearings and argument. Rome's most discovery transgressions at its depositions confirms it remains undeterred and exemplifies the need for serious sanctions in this stage of the proceedings. Moreover, Rome's most recent deposition "walk-out," which occurred only one day after this Court again took the time on the record to admonish Rome about its discovery conduct only highlights the need for severe sanctions now. Indeed, this Court warned Rome about the imminence of such sanctions on May 27, 2008:

> THE COURT: You know, I welcome new counsel aboard to this case, but I'm telling you, you've come on at a point at which it's very clear to this court that your client has not complied with the court orders. Your client has not dealt in good faith. Your client has engaged in egregious conduct, and it's going to be sanctioned. And it's going to be sanctioned in this instance, too, with respect to what will appear to be appropriate relief. Once you get all of the information you can possibly get out of Rome, then I'm going to supply missing information by adverse findings. That will be the minimum that is going to happen with regard to sanctions. I'm seriously considering putting a halt to this litigation and finding that the State's claims are meritorious and it's getting on to the ultimate relief. Because, again, Rome's conduct throughout this Proceeding, and particularly in the last six months, is egregious.

See May 27, 2008 Tr. at pp. 55 - 56, Exhibit U.

One day after this last admonishment from the Court, Rome president and CEO, Ronald M. Wilson aborted his deposition and walked out, when questions which were not to his liking arose. This "walk-out" occurred when the State inquired into the identification of

certain investors and other financial information related to Rome. This Court previously ruled that Rome must produce its financial information to the State and Ordered Rome to do so, but notwithstanding this ruling, Rome did what it wanted to do. *See* Exhibit W.[11]

Because of their importance, depositions are conducted under conditions designed to resemble those in the courtroom. *See generally* Tenn. R. Civ. P. 30 and 32. *Dargi v. Terminex Int'l Co., L.P.*, 23 S.W.3d 342, 344 (Tenn. Ct. App. 2000). *Cf. Cameron Industries, Inc. v. Mothers Work, Inc.*, No. 06, Civ. 1999 (BSJ) (HBP), 2007 WL 1649856, *4 (S.D.N.Y. June 6, 2007) ("[T]he examination of a witness at a deposition is to be conducted in the same manner in which a witness is questioned at trial."); 8A C. Wright, A. Miller, R. Marcus, Federal Practice & Procedure, § 2113 (2008) ("Rule 30(c) further directs that the examination and cross-examination proceed as permitted at trial.") As is the case with trial, the attendance of deponents may be compelled by subpoena, the proceedings are under oath; examination and cross-examination are carried out under the Tennessee Rules of Evidence and witnesses are obligated to answer all questions put to them, except under very limited circumstances. *Dargi,* 23 S.W.3d at 344.

While deposition "walk-outs" in and of themselves constitute serious transgressions of the legal process, Rome and Wilson's abortion of this deposition was especially egregious because it occurred within the presence of the Court and once Rome clearly had notice that a court proceeding was imminent. Exhibit V. Rome, Wilson and defense counsel all hurried out of the deposition room with the full knowledge that the Court had already been contacted

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[11] The benefit of new counsel seemed to have no impact on Rome's decision to continue violating this Court Orders.

by the State and was about to begin a telephonic hearing. *Id.* Indeed, as defense counsel were hurrying out of the room, the Court began the proceeding while Rome counsel Thomas Todd was still present. As the Court began to address the parties, Mr. Todd ran out of the deposition room as well:

> BY MR. SMITH: Okay. What was the name of -- what is the name of the investor that Rome has had since the beginning?
>
> MR. MOORE: I make that objection. That will be part of our motion.
>
> MR. SMITH: Do you want to call the judge?
>
> MR. MOORE: John --
>
> MR. SMITH: We've got the right to call the judge. You all have the right to leave, but we have the right to call the judge.
>
> MR. MOORE: Then we'll terminate the deposition. He's prepared to be here, but we'll terminate the deposition under Rule --
>
> THE WITNESS: Did you mean to ask investor or contract broker? You asked contract broker the first time.
>
> MR. SMITH: The second time.
>
> MR. MOORE: Under Rule 30.04, we're terminating the deposition.
>
> MR. SMITH: As Mr. Wilson's attorney, is that your position also?
>
> MR. CAMPBELL: I guess so.
>
> (Whereupon, Ms. Baldwin placed a telephone call to Judge Hicks' office.)
>
> MS. BALDWIN: Sherry, this is Donna Baldwin with the Attorney General's office. Is Judge Hicks available for a phone call?
>
> SHERRY: No, he's in a jury trial.
>
> MR. SMITH: This is John Smith with the State of Tennessee. With me is Hugh Moore representing Rome. And they have refused to answer questions about the financial records of Rome, something that the judge covered yesterday. And they have

said they're discontinuing the deposition. We wanted to see if the judge could offer some advice on this.

SHERRY: They're refusing to answer questions regarding financial records of Rome?

MR. SMITH: Correct.

SHERRY: Can you hold on?

MR. SMITH: Yes.

MR. MOORE: Come on, Tom, let's go. What time are you starting Ms. Archer's deposition on the 30th?

MR. SMITH: Ten o'clock. You don't want to see if the judge is coming on?

MR. MOORE: We're suspending the deposition.

MR. TODD: Mr. Smith, I don't think this is appropriate. You've trampled on the defendant's rights.

MR. SMITH: Is this on the record?

THE COURT REPORTER: What I can hear. I'm trying.

MR. MOORE: The deposition is suspended. I've got the right under 30.04 to suspend it, so the record is closed.

MR. SMITH: Would you have it reflect that Mr. Todd says the State is trampling on the defendant's rights. And if you will stay on the record at least until we finish the conversation with the judge.

MR. CAMPBELL: John, we'll see you on Friday.

(Mr. Campbell, Mr. Moore and Mr. Wilson exited the deposition room.)

(Whereupon, Judge Hicks answered the telephone call.)

THE COURT: This is Judge Hicks.

MR. SMITH: Judge Hicks, this may be a moot point since everyone except Mr. Todd for Rome has left, but we asked questions dealing with Rome's financial matters such as how much gross per year did Rome make and how much net per year did

Rome make, and Rome refused to answer those questions.

(Mr. Todd exited the deposition room.)

MR. SMITH: And, actually, now all of Rome's representatives are gone. So I guess that I'm not sure what I'm asking you to rule on since they aren't here. But they have refused to answer any questions dealing with Rome's finances. And they knew I was calling you and knew that you were on the phone when they left.

THE COURT: Who terminated the deposition?

MR. SMITH: Hugh Moore representing Rome and Thomas Todd representing Rome. And Mr. Campbell from Chattanooga was representing Mr. Wilson, and when I asked him did he agree with Hugh Moore suspending the deposition, he said I agree with whatever he does.

THE COURT: All right. Well, I don't know what I can do at this point since they've gone. You can pursue whatever relief you think is appropriate by motion. And you don't have to wait until August to have that heard, obviously.

MR. SMITH: Okay. I'm sorry to have pulled you out of a jury trial. I thought when they heard us getting you on the phone, they would have stayed.

THE COURT: That's okay. I understand.

MR. SMITH: Thank you.

THE COURT: All right, thank you.

MR. SMITH: Then we will close the deposition.

(Whereupon, the deposition was closed.)

See Exhibit V. Thus, the record confirms Rome knew the Court had been contacted, but fled the deposition to avoid accounting for its conduct. Moreover, Rome successfully delayed proceedings once again.

Improper termination of a deposition is sanctionable conduct. *Mother, LLC v. L.L. Bean, Inc.*, 2007 WL 1073866 (W.D. Wash 2007). Termination of a deposition "is an extreme step and should be taken only in a clear case." 2 Bus. & Com. Litig. Fed. Cts., §

20:73 (2nd ed. 2007). "'Walking out' of a deposition represents a gross breakdown of the discovery process." *Id.*; *Jeffress v. Reddy*, 77 Fed.Appx. 627, 2003 WL 22293579 (4th Cir. Oct. 7, 2003).

The State respectfully submits that Ronald M. Wilson's unilateral termination of his deposition and after the Court had been contacted by the State, is the equivalent of walking out of the courtroom, while on the stand. Moreover, by leaving the room and not returning for Rome's scheduled 30.02(6) deposition, Rome not only failed to appear for its deposition, but it also failed to abide by a standing Order requiring it to appear and conclude its deposition. "[T]he failure to appear at a deposition constitutes a violation of rule 37(d) regardless of whether a motion for protective order has been filed." *Alexander v. F.B.I.*, 186 F.R.D. 78, 86 (D.D.C. 1998).

Sanctions are warranted where, as here, one witness improperly aborted a deposition and another failed to appear for a deposition. *Alexander v. F.B.I.*, 186 F.R.D. at 88. To date, Rome continues to evade completion of its own deposition and the deposition of its owner and operator Ronald M. Wilson. In sum, Rome remains in violation of this Court's February 15, May 27 and June 2, 2008 Orders. *See* Exhibits N, S and T. The State submits that it has made good faith efforts to schedule completion of these depositions with new defense counsel, but to no avail.

Requested Sanctions and Other Relief

Given the protracted history of bad faith conduct and discovery evasion by Rome, including Rome's blanket defiance of multiple Orders of this Court, it is clear that the more

serious sanctions set forth in Tenn. R. Civ. P. 37.02(A) - (D) are appropriate here. The State therefore respectfully requests that this Court issue a sanctions order as follows and pursuant to:

(1) Tenn. R. Civ. P. 37.02(D), entering a default judgment against Rome under the State's Second Amended Complaint and under the State's pending civil contempt motion;

(2) Tenn. R. Civ. P. 37.02(A), ruling that all documents produced by Rome to date in this litigation be deemed admissible into evidence for any purpose at any hearing to be held in this case, including hearings on the issue of penalty assessments for Rome's contempt of court and for its violations of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq*. The State further requests that this Court rule that all court records obtained by the State from the Gwinnett County Court in Lawrenceville, Georgia, be similarly deemed admissible into evidence;

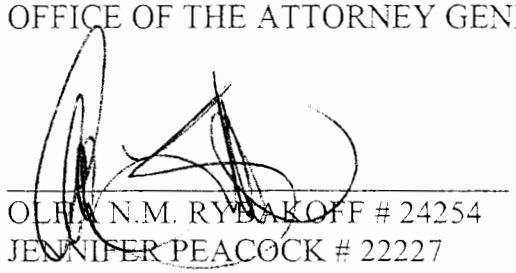
(3) Tenn. R. Civ. P. Rule 37.02(D), finding defendant Rome and its president and CEO, Ronald M. Wilson is each in contempt of court for the failure to obey this Court's aforesaid discovery orders;

(4) The State further requests that this Court assess all costs and attorney fees incurred by the State in attempting to depose Rome and Wilson to date, and in pursuing the instant motion for sanctions against Rome and Wilson. The State further requests that the Court Order Rome and Wilson to immediately appear for deposition at the State's Nashville, Tennessee offices to conclude the monetary portions of this proceeding, including, but not limited to, restitution, penalties and disgorgement of profits;

(5) The State further requests that the Court enter such other relief as may be just and appropriate.

Respectfully Submitted,

OFFICE OF THE ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, OLHA N.M. RYBAKOFF, ASSISTANT ATTORNEY GENERAL, hereby certify that a true and correct copy of PLAINTIFF, STATE OF TENNESSEE'S MOTION TO COMPEL AND FOR SANCTIONS AGAINST DEFENDANT ROME FINANCE COMPANY, INC. AND RONALD M. WILSON FOR FAILING TO PROVIDE ORDERED DEPOSITION TESTIMONY, MEMORANDUM and EXHIBITS thereto, were served upon the below counsel on JULY 28, 2008 by electronic mail and United States First Class Mail, postage prepaid, addressed as follows:

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And was served upon below counsel by United States First Class Mail, postage prepaid as follows:

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