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

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

PLAINTIFF, STATE OF TENNESSEE'S RESPONSE AND OPPOSITION TO DEFENDANT ROME'S MOTION TO SET ASIDE DEFAULTS

Plaintiff, State of Tennessee, ("State"), by and through its undersigned attorneys, hereby responds to and opposes defendant Rome Finance Company, Inc.'s ("Rome") Motion to Set Aside Defaults on the grounds that Rome has failed to carry its burden under Tenn. R. Civ. P. 55.02 showing there is "good cause" to set aside this Court's September 5, 2008 Order. Rome has further failed to set forth any reason which would justify such relief for the same under Tenn. R. Civ. P. 60.02 and has not accurately presented the history of discovery in this case. For all of these reasons, Rome's Motion to Set Aside Defaults should be denied.

Standard of Review

Rome brings its present motion under Tenn. R. Civ. P. 55.02 and under the fifth Tenn. R. Civ. P. 60.02 alternative. Tenn. R. Civ. P. 55.02 provides that "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02." Tenn. R. Civ. P.

60.02 provides for relief for a party from a final judgment upon motion if there is "(5) any other reason justifying relief from the operation of the judgment." As set forth below, Rome has failed to meet its burdens under Tenn. R. Civ. P. 55.02 and Tenn. R. Civ. P. 60.02.

Rome Has Failed to Demonstrate "Good Cause"for Relief

In its motion, Rome claims this Court's September 5, 2008 Order granting the sanction of a default judgment against Rome should be set aside, because Rome has allegedly "purged itself" of contempt by responding to all discovery. Rome is apparently offering up alleged after-the-fact purging as its "good cause" for setting aside the September 5, 2008 Order. *See generally* Rome's Memorandum in Support of its Motion to Set Aside Defaults, p. 2. As demonstrated below, Rome fails to carry its burden of demonstrating "good cause" for setting aside this Court's September 5, 2008 Order, because it seriously misstates the nature and status of its discovery responses and transgressions and again jumbles the separate standards of civil contempt law into the special law enforcement-only provision in Tenn. Code Ann. § 47-18-108(c).

Rome Has Inaccurately Portrayed Discovery

This Court's ruling at the August 11, 2008 hearing, as memorialized in this Court's Order of September 5, 2008 was issued because of Rome's extreme course of dilatory and bad faith litigation conduct, extensive discovery obstruction and persistent disregard of court orders. *See* Excerpts from Transcript, August 11, 2008 proceedings, Ex. A, and September 5, 2008 Order, Ex. B. The history of Rome's dishonorable conduct is extensively documented in the record and will not be recited at length here, other than to refer to a summary of the same as set forth in the State's July 28, 2008 Motion for Sanctions Against Defendant Rome Finance Company, Inc. and Ronald M. Wilson for failing to Provide Court Ordered

Deposition Testimony, and Memorandum thereto, Exs. C and D, as well as the Court's numerous discovery and sanctions rulings of record.

Rome's July 30, 2008 76 GB Production Was Mostly Irrelevant

Rome's huge July 30, 2008 production only confirms Rome has done little to rehabilitate its past discovery transgressions, let alone begin anew with a good faith approach to litigation.

On July 30, 2008, Rome produced an enormous amount of documents in the form of hundreds of thousands and perhaps millions of documents in electronic form. Although Rome previously acknowledged on the record that this production constituted well over one million documents, it has now decided to refer to this massive production as consisting of "hundreds of thousands" of documents. *Compare* Transcript, August 11, 2008 hearing, Ex. A *and* Rome's Memorandum in Support of its Motion to Set Aside Defaults, p. 5. Rome admits that most of these documents "have nothing to do with the sales of products in Tennessee or financing of such sales," but persists in its disingenuous claim that the State requested them. *Id.* at 4. This Court's numerous discovery and sanctions Orders clearly defined the scope of Rome's discovery obligations and Rome's continuation of its pretense of compliance now does little to bolster its credibility.

The State has now determined that of the 76 GB (giga bytes) of data in Rome's huge July 30, 2008 production, there were 726,000 separate electronic files which covered approximately 69,000 Rome customers. *See* Affidavit of Robert Moore, Esquire, ¶¶ 9 and 12, Ex. E. The Tennessee-related information the State has been able to extract to date from this data, while not yet complete due to its sheer volume and size, confirms that of the 69,000 customer files Rome deposited on the State on July 30, 2008, less than 5,000 consist of

customer records that have any sort of Tennessee connection. *Id.* ¶ 17. Expressed as a percentage, **less than eight percent (8 %) of the total 76 gigabytes of data Rome produced on July 30, 2008, has any remote relevance to this case**. Moreover, only 500 files have been located to date which pertain to Rome's Britlee Clarksville, Tennessee transactions at the Governors Square Mall at all, and more than 500 are believed to exist. *Id.* ¶ 19. Thus, while Rome undertakes the grand gesture of submitting $432,566.56 of unverified invoicing it allegedly "received," the shallow nature of this submission becomes readily apparent when one considers the fact that most of Rome's July 30, 2008 document production was and remains, completely irrelevant to any of the issues in this case and was designed to bury the State in an insurmountable amount of data three and one-half weeks before the August 26, 2008 hearing in this matter.

In addition, apart from being unverified, Rome's invoice submission is suspect on its face. Various entries on Rome's invoices identify specialized electronic coding work undoubtedly done for Rome's counsel, to make their manipulation of this data easier, but not provided to the State. *See, e.g.*, references to "Image Endorsing (Bates Numbers and/or Annotations," "Provide 3 Summation Deliverables" and "1 Summation and 2 TIFF Log File" in Rome's invoice exhibits. Thus, at best, Rome's invoices simply prove what the State has been alleging all along: Rome created a massive universe of electronic documents which bears little relevance to this case.[1]

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[1] It should also be noted that while Rome's counsel's affidavit says it "received" such invoices, there is no indication that such sums were actually "paid." *See* Affidavit of Hugh J. Moore, Esquire, p. 2 (attached to Rome's Memorandum).

The August 19, 2008 Deposition Confirms Rome's Continuing Evasions

Rome makes much of the fact that its president, Ronald M. Wilson, eventually presented himself for deposition on August 19, 2008. As the record reflects, the August 19, 2008 deposition finally came about only *after* the ultimate sanction of default judgment ordered by the Court at the August 11, 2008 hearing, and only *after* Rome had violated another Order of this Court through its regrettable decision to "walk out" of the May 27, 2008 deposition of its president, Ronald M. Wilson. *See* Transcript, August 11, 2008 proceedings, Ex. A and September 5, 2008 Order, Ex. B. This last transgression occurred just as the Court was preparing to hold a telephonic hearing to resolve a discovery dispute, and was done by Rome with full knowledge that a hearing was beginning. *Id. See also* Excerpts from Transcript of May 28, 2008 Deposition of Ronald M. Wilson, Ex. F.

Rome presents its present motion under the guise of unprecedented cooperation, coupled with criticisms that the State apparently did not depose Rome long enough for its liking. Rome states that its president, Ronald M. Wilson, appeared for continuation of his personal deposition, "and responded to each and every question put to him." *See* Rome Motion to Set Aside Defaults, p. 1, and that Wilson was also there to complete Rome's Rule 30.02(6) deposition. *Id.*

Rome's representation that Mr. Wilson "responded to each and every question put to him" is, simply stated, untrue. Mr. Wilson continued to evade candid responses during this deposition, especially when questions arose regarding the nature of Rome's business. For example, since Rome's misrepresentations first came to light regarding its failure to license as a California lender this past Spring, Rome has evaded questions which would require it to acknowledge it loans money. *See, e.g.,*Excerpt from April 14-15, 2008 30.02(6) Rome

Deposition, pp. 12-21, Ex. G. During Rome's April 14-15, 2008 deposition, when asked to identify the nature of its business, Rome responded as follows:

> Q. Can you please describe the nature of Rome Finance Company's, Inc. business?
>
> A. Rome Finance Company factors blocks of accounts receivable.

Id. pp. 12-21, Ex. G. At the August 19, 2008 deposition, notwithstanding all admonishments to date, when Mr. Wilson was asked about the nature of Rome's loan contracts, pages of transcript were wasted before an eventual, nonresponsive answer emerged:

> BY Ms. RYBAKOFF:
>
> Q. . . . . Would it be fair to say they were consumer loan contracts?
>
> MR. MOORE: Object to the form of the question.
>
> MS. RYBAKOFF: Who is defending Mr. Wilson today?
>
> MR. MOORE: I'm representing Rome. Mr. Campbell is representing Mr. Wilson.
>
> MS. RYBAKOFF: Mr. Moore, I would appreciate it if you didn't interrupt the deposition with objections. This is not your client.
>
> MR. MOORE: I'm objecting on behalf of the corporation.
>
> MS. RYBAKOFF: I've stated my position, Mr. Moore.
>
> MR. MOORE: I am here on behalf of the corporation which is a defendant in the case.
>
> BY MS. RYBAKOFF:
>
> Q. Can you answer the question, sir?
>
> A. I'd like to hear the question.
>
> MR. MOORE: Let me follow up. Is this the 30.02(6) deposition or the individual deposition?
>
> MS. RYBAKOFF: At the beginning of the deposition, Mr. Moore, I confirmed that we were continuing Mr. Wilson's deposition, the one that you aborted.
>
> MR. MOORE: So this is not the 30.02(6)?
>
> * * * *
>
> MS. RYBAKOFF: Do you need to have the question read back again, Mr. Wilson?

THE WITNESS: Yeah, I've been waiting.

(Whereupon, the court reporter read back the last question.)

THE WITNESS: I'm not a lawyer so I can't answer that. Rome buys contracts. Rome does not make loans.

Q. You don't know if the contracts that Rome purchases are loans to consumers?

A. I would same they're not. There is no money that goes to the consumer.

See Excerpt from Ronald M. Wilson August 19, 2008 Deposition, pp. 14-17, Ex. H (emphasis added). Later during this deposition, Wilson acknowledged that in Rome's income tax returns, Rome's business was identified as "finance" and its product or service was identified as "loans." *Id.* p. 26.

Numerous documents were requested by the State and promised by Rome, but still have not been produced. Rome promised to produce its bankruptcy Plan of Reorganization to the State, but has failed to do so. *Id.* p. 58.[2] Rome also promised to produce the identity of its Texas counsel, from a proceeding the Texas Attorney General brought against Rome which resulted an apparent settlement in 2002. *Id.* pp. 60-61. Thus, the bright picture of cooperation Rome paints for the Court dims significantly when compared with the actual facts. Numerous other instances of Rome's continuing discovery shortfalls remain unaddressed.

Rome also complains that the State did not depose Rome long enough for Rome's liking. The missing part of the facts which Rome omits from its argument, however, concerns the final context of this deposition. Once this Court ordered the sanction of default judgment

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[2] The bankruptcy testimony also yields information which clarifies Rome's implication that it was inconvenienced because the State did not depose it as long as it would have liked. During this testimony, Wilson confirmed he was not returning to California until September 2008, when he stated "I will not be back in California until September." *Id.*

against Rome on August 11, 2008, as memorialized in this Court's Order dated September 5, 2008, the scope of remaining issues before the Court narrowed significantly. The State was no longer required to solicit liability-establishing evidence from Rome, nor authenticate Rome's records, nor prove Rome committed contempt of court and violated this Court's September 23, 2005 TRO and later Agreed Orders of November 7, 2005 and February 26, 2006, because all these matters had been conclusively resolved in the State's favor, as a result of the August 11, 2008 rulings. See August 11, 2008 Transcript, Ex. A.

The issues which the Court designated for the August 26, 2008 hearing, which Rome has now postponed to the September 29, 2008 hearing, are limited to *monetary remedies* sought by the State, including statutory civil penalties under the TCPA, restitution to consumers, disgorgement of ill-gotten gains, costs, attorney fees and interest. Indeed, as seen in the State's Proposed Preliminary Findings of Fact and Conclusions of Law, provided to Rome this past Monday, September 22, 2008, the majority of the proposed findings and conclusions cite to the State's Second Amended Complaint as the source document. See Plaintiff, State of Tennessee's Proposed Preliminary Findings of Fact and Proposed Preliminary Conclusions of Law, Exs. I and J. Thus, Rome's implication that the State has somehow misrepresented the significance of these depositions is revealed for the half-truth that it is, as the comments Rome refers to were made *before* the sanction of default judgment had been ordered by the Court and *before* Rome was adjudicated in contempt and violation of this Court's injunctions. Of course, Rome omits reference to the fact that the hearing on the monetary portion of the State's case was scheduled to begin exactly one week later on August

26, 2008 and that the State therefore only had less than five working days left before the hearing.

Rome also inaccurately states that Ronald M. Wilson's deposition "had been suspended by Rome pursuant to the Tennessee Rules of Civil Procedure, Rule 30.04. Following a hearing and the ruling of this Court contemplated by the Rule 30.04 procedure, the deposition resumed, and all questions were answered." *See* Rome's Memorandum in Support of its Motion to Set Aside Defaults, p. 1. Indeed, several times in its filing, Rome incorrectly states that the sanction of default judgment was imposed against Rome "for Rome's alleged failure to provide discovery" which is incorrect. *See* Rome's Memorandum in Support of its Motion to Set Aside Defaults, p. 5. Rome was sanctioned for violations of Court Orders, not mere discovery rules as Rome implies. It is difficult to understand why a litigant in Rome's position would further undermine its legal position and credibility by submitting a filing which is nothing more than a transparent attempt to rewrite or ignore its history of bad faith litigation conduct, discovery transgressions and violations of Court Orders.

Rome Remaining Arguments Are Also Based on Half-Truths

Rome's submissions regarding its employees, including Rome's Georgia Office Manager Guy Van Pool, prove equally disingenuous. Rome represents it scheduled the deposition of Guy Van Pool "as ordered by the Court, but the State did not take it." True to form, Rome also omitted significant information regarding the rest of this issue.

As a preliminary matter and to date, Rome has not provided a complete and verified response of record regarding its employees' address information.[3] While Rome identified an unverified submission from its counsel, it has not provided a verified interrogatory answer as required by the Tenn. R. Civ. P. 33 and by multiple Orders of this Court.

With respect to Mr. Van Pool, and without hesitation or qualification, Rome tells the Court that Mr. Van Pool's "deposition was canceled by the State." Rome makes this submission for the obvious purpose of making it appear that the State was not concerned with obtaining this important evidence. Rome fails to tell the Court, however, that only five days before Mr. Van Pool's deposition was scheduled to begin, Rome produced a medical report to the State which concluded that Mr. Van Pool was not "competent" to testify. *See* Late Filed Ex. K. Faced with this eleventh hour announcement, the State could not, in good faith, insist that Mr. Van Pool be deposed if indeed, he was not "competent" to testify and Rome knew this. But contrary to Rome's later actions, Rome's obligation did not end with that announcement.

During the August 26, 2008 hearing, the Court made it clear to Rome that Rome was to promptly address any issues with this deposition with the Court:

> THE COURT: Before you leave today, I want a deposition date of Mr. van Pool to be agreed upon. <u>And then if there are problems with Mr. Van Pool, that needs to be brought to The Court's attention for appropriate motions</u>."

See August 26, 2008 Transcript, p 52, Ex. L (emphasis added). In response to this directive, and as seen in the record, Rome did what it usually does when it prefers to avoid a Court

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[3] While it is possible that such information may be contained somewhere within the 76 GB of data Rome produced on July 30, 2008, such responses would nevertheless require production in the form of formal supplemental discovery responses.

Order. Rome filed a purported motion to clarify this issue with the Court, but without noticing its motion for a hearing, thereby ensuring it remained unaddressed. Rome served this motion on the State without accompanying memorandum or exhibits, then wrote self-serving letters to the State purporting to suggest two hearing dates, one of which was unreasonable and passed quickly.[4] Then, while Rome proceeded to file and notice the instant motion for hearing on Monday, September 29, 2008 without any concern for the State's convenience, Rome remained content to do nothing more about the Van Pool deposition, and let its motion languish when it could have, and should have, noticed it for hearing along with the present motion. *Id.*

The reason for Rome's misconduct is apparent now. Rome unlawfully extracted *over $1 million in violation of the TRO and later Agreed Orders* from the Britlee Governor's Square Mall consumers alone. *See* Affidavit of Robert Moore, Jr. and exhibits thereto, Ex. E. While Rome's conduct now hardly qualifies as conduct which has "purged" a contempt, a true "purging" of contempt would involve Rome's undoing some of the tremendous damage it has caused to the young men and women of the military who are the victims in this case. Rome could start by returning the $1 million in unlawful proceeds it extracted from these soldiers in direct violation of this Court's TRO and later Agreed Orders. *Id.* Moreover, Rome could also reimburse the State for the costs and fees the State expended in pursuing sanctions against Rome. The State's sanctions expenditures thus far total $345,719.99 in fees and $24,463.67 in costs. *See* State of Tennessee's Submission for Attorney Fees and Costs, Ex. L.

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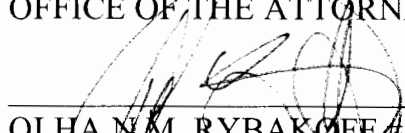
[4] Rome blamed its failure to serve its exhibits on a computer glitch. *Id.*

Conclusion

For all of the above reasons, Rome's Motion to Set Aside Defaults should be denied. Rome has failed to carry its burden under Tenn. R. Civ. P. 55.02 showing there is "good cause" to set aside this Court's September 5, 2008 Order and has failed to set forth any reason justifying such relief. Moreover, Rome continues to inaccurately portray the history of discovery in this case as well as the scope and nature of this Court's Order. For all of these reasons, Rome's Motion to Set Aside Defaults should be denied.

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 the foregoing PLAINTIFF, STATE OF TENNESSEE'S RESPONSE AND OPPOSITION TO DEFENDANT ROME'S MOTION TO SET ASIDE DEFAULTS, were served upon the below counsel on SEPTEMBER 24, 2008 by United States First Class Mail, postage prepaid, addressed as follows, and by electronic mail:

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