

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE  
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

2009 SEP 9 PM 3:00

STATE OF TENNESSEE, *ex rel.*, )  
ROBERT E. COOPER, JR., )  
Attorney General and Reporter, )

Plaintiff, )

v. )

No. 08-C-3494

MARCUS DONNELL JONES, individually )  
and d/b/a JONES MEMORIALS, d/b/a )  
www.jonesmemorials.com, a website owned )  
and operated by MARCUS DONNELL JONES, )  
and HALF OFF STONES, a sole proprietorship )  
owned and operated by MARCUS DONNELL )  
JONES, and d/b/a www.halfoffstones.com, )  
a website owned and operated by MARCUS )  
DONNELL JONES, )

Judge Barbara Haynes

Defendant Jones, )

and )

HENRY WAYNE MONK, individually and )  
d/b/a MONK MEMORIALS, a sole )  
proprietorship owned and operated by )  
HENRY WAYNE MONK, and d/b/a )  
www.monkmemorials.com, a website owned )  
and operated by HENRY WAYNE MONK, )

Defendant Monk. )

Defendants. )

**MEMORANDUM OF LAW IN SUPPORT OF STATE OF TENNESSEE'S MOTION  
FOR STATUTORY TEMPORARY INJUNCTION, ASSET FREEZE, AND OTHER  
RELIEF**

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## PRELIMINARY STATEMENT

The State of Tennessee seeks this Court's immediate intervention to stop Defendant Jones and Defendant Monk from continuing to cause consumer harm and to stop Defendants from making false statements to vulnerable consumers from across the country who seek to purchase tombstones to honor their deceased loved ones. The State's law enforcement action, consumer complaints and affidavits provide clear evidence that Defendants have engaged in an established pattern of taking a consumer's money and failing to deliver the tombstone in the time period promised. Basically, Defendants engage in persistent delay while pocketing the proceeds from the sale.

### **A. FACTUAL EVIDENCE SUPPORTING MOTION AND COMPLAINT**

Because of the Defendants' artfully designed false promotions, deceptive advertisements, and other misrepresentations targeting consumers desiring to honor their deceased loved ones, consumers from across the country have paid substantial amounts<sup>1</sup> of money to Marcus Jones and to Wayne Monk for headstones, grave markers and other cemetery products and services that they have never received.<sup>2</sup>

After pocketing the consumers' money, the Defendants delayed delivery while giving

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<sup>1</sup>See Exhibits B to Motion, Affidavit of Mary Clement, (DCA complaints); Exhibit C to Motion, Affidavit of Kathleen Calligan (BBB complaints) and Exhibits G-Q to Motion. Affidavits of consumers indicate that the amounts paid, known to the State at this time, range from \$126.00 to \$5,000.00, with most consumers paying between \$1,000.00 and \$3,000.00.

<sup>2</sup> See Exhibit D to Motion, Jim KempVaNee (capture of websites, Jones Memorials, www.jonesmemorials.com, bg.memorials.tripod.com, jonesmemorials.tripod.com, Half Off Stones, www.halfoffstones.com and Monk Memorials. www.monkmemorials.com. If the web site is "captured," the viewer can access the entire web site as it existed on that day, clicking on "Warranty" or any other button shown on screen); See also Exhibit E to Motion, Affidavit of Nathan Casey (Jones Memorials web site, www.jonesmemorials.com as it appeared on July, 24, 2009, a pdf. copy); identical copy of website is attached as Exhibit D to Complaint.

consumers false assurances of new delivery dates for the ordered products or services. The Defendants routinely failed to deliver anything to the grieving consumers. Yet, the Defendants have retained the consumers' payments. Defendants have wrongfully denied and continue to deny consumers' requests for refunds<sup>3</sup>. The consumer affidavits, attached to the State's Motion, evidence the factual scenarios described above. Various consumer affidavits, discussed specifically below, provide a snapshot of the reprehensible, unlawful conduct of Marcus Jones and Wayne Monk engaged in from in whole or in part the State of Tennessee.

**1. Consumer evidence of the Defendants' unfair and deceptive practices**

Mitchell Haynie placed his order for an infant headstone for his baby daughter on April, 30, 2008, with Defendant Marcus Jones, at the Jones Memorials retail location on Dickerson Road in Nashville, Tennessee.<sup>4</sup> Mr. Haynie paid Marcus Jones four hundred ninety-five dollars (\$495.00) up front for the headstone. Defendant Marcus Jones indicated that the infant's headstone would be delivered within eight to nine weeks. Affiant Haynie testifies that he ran into Marcus Jones in June and in July, 2009 at Auto Zone on Dickerson Road, Nashville, Tennessee. Both times, Marcus Jones represented that he was working on filling Mr. Haynie's order (an order placed more than a year earlier) and that he was working on cleaning up his former location. Affiant Haynie requested a refund four separate times. Defendant Jones still "promises" Mitchell Haynie future delivery of his son's headstone. Currently, Mr. Haynie has no headstone for his infant daughter's unmarked grave and has not received a refund - only more false promises by Marcus Jones.

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<sup>3</sup> Exhibits G-Q to Motion, (eleven consumer affidavits).

<sup>4</sup> See Exhibit G to Motion, Affidavit of Mitchell Haynie.

Contrary to Defendant Jones' warranties and guarantees, many consumers were left with no recourse when problems arose with their orders.<sup>5</sup> Each of the consumers states that he/she had difficulty reaching Defendant Jones and/or Defendant Monk when nothing arrived within the time-frame for delivery represented by Defendants.

Consumers often had difficulty contacting the Defendants when they failed to deliver the headstone promised. For example, Consumer Haynie was unable to reach Defendant Jones and heard nothing from him after Defendant Jones' May 7, 2008 email in which he represented that he was "waiting on the bronze to come in." Mr. Haynie even went to the business location of Jones Memorials on Dickerson Road to try to talk to Defendant Jones but found that Jones was no longer operating at that location. Not until his accidental contact with Defendant Jones at Auto Zone, described above, did Mr. Haynie have any further communication with Defendant Jones.<sup>6</sup>

Stephanie Branch ordered a grave marker from Half Off Stones through salesman Wayne Monk in December, 2007. Ms. Branch paid three hundred seven dollars (\$307.00) by two personal checks, for the grave marker. Marcus Jones cashed both of these checks. In an email to Ms. Branch, on January 11, 2008, Marcus Jones indicated that the grave marker would be shipped in two to three (2-3) weeks and that he would send her a layout for final proof before carving.

On January 29, 2008, Ms. Branch inquired by email about the status of her marker. The next day, Defendant Jones, by email, asked her to take a look at his proposed layouts and to let him know which one she liked. Defendant Jones apologized for the delay, stating "we have been

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<sup>5</sup> Exhibits G-Q (eleven consumer affidavits).

very busy on this end and then off with cold (*sic*) bad weather as well which slows down the process.” Ms. Branch immediately reviewed the proposed layouts, made her decision and notified Mr. Jones of her choice. Defendants did not communicate with her from January, 2008 until March 11, 2008.

On March 11, 2008, with no update from Half Off Stones, Ms. Branch attempted to contact Half Off Stones to check on the status of her order. When Ms. Branch called the company’s phone number she was transferred to a voice mailbox which indicated the mailbox was full and the telephone number disconnected. The company’s website was under construction until March 15, 2008. Ms. Branch was unable to reach anyone at the only phone number she had for the company. On March 11, 2008, Marcus Jones finally responded to her emails, stating that she would get a link to view her order status that day or the next and that he was working on that “as we speak.”<sup>7</sup> That was the last time Ms. Branch heard from Marcus Jones.

The only contact after the March 11, 2008 email from Defendant Jones came from Wayne Monk. Defendant Monk stated that Marcus Jones had no intention of honoring the contract with Ms. Branch. Wayne Monk went on to explain that he had started his own monument company, Monk Memorials, and that, for an additional three hundred dollars (\$300.00), he would willing to produce a marker for her. Ms. Branch declined Defendant Monk’s offer; she was not interested in paying in advance for a marker.

Nedla Howton, a mother whose son had been murdered in the spring, 2007, testifies that she ordered a headstone for her son’s grave from Half Off Stones after viewing

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<sup>6</sup> Exhibit G, Affidavit of Mitchell Haynie.

<sup>7</sup> Exhibit H to Motion, Affidavit of Stephanie Branch, page 2.

www.halfoffstones.com.<sup>8</sup> Ms. Howton paid Marcus Jones of Half Off Stones one thousand, one hundred twenty-five dollars (\$1,125.00) for her son's headstone in November, 2007. Following months of delay Ms. Howton received more false assurances of delivery from Marcus Jones by email.<sup>9</sup> At the time of purchase, Marcus Jones had represented that delivery of her son's headstone would be within six to eight weeks from the date of the order. Mr. Jones never delivered the headstone for Ms. Howton's son's grave nor did he refund her money. Mr. Jones ignored Ms. Howton's requests for a refund.

In June, 2008, seven months after her order was placed with Half Off Stones, Wayne Monk contacted Ms. Howton to discuss the order that Ms. Howton had placed with Mr. Jones. Defendant Monk self-promoted by stating he had spoken with another consumer that day, Audrey Roberts.<sup>10</sup> Defendant Monk offered to produce the headstone for her son's grave "at cost" for \$924.00. Ms. Howton sent that additional amount to Wayne Monk for her son's headstone. Wayne Monk, just like Marcus Jones, accepted her payment of money, gave false assurances that "he was working on it" but failed to deliver a headstone for her son's grave.<sup>11</sup>

Defendant Wayne Monk did, indeed, have contact with consumer, Audrey Roberts - to her detriment.<sup>12</sup> After viewing Half Off Stones' website in November, 2007, Ms. Roberts submitted a request for assistance. Sales manager, Wayne Monk, in November, 2007, called her and took her order for a headstone. He instructed her to send five hundred dollars (\$500.00), which she did. Her check was cashed immediately by Marcus Jones. In January, 2008, Marcus

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<sup>8</sup> Exhibit I to Motion, Affidavit of Nedla Howton; *see also* Exhibit D to Motion, Affidavit of Jim KempVaNee, (www.halfoffstones.com website captured).

<sup>9</sup> Exhibit I, Affidavit of Nedla Howton, page 2.

<sup>10</sup> Exhibit I to Motion, Affidavit of Nedla Howton, page 3); *See also* Exhibit L to Motion, Affidavit of Audrey Roberts.

<sup>11</sup> Exhibit I to Motion, Affidavit of Nedla Howton.

Jones, by email, informed Ms. Roberts that he had fired Wayne Monk and that any shipping delays were due to a burglary at his office. Defendant Jones indicated that for her order to proceed, she would have to pay him an additional seven hundred forty-four dollars (\$744.00) by credit card, which she paid on April, 4, 2008.

On May 12, 2008, five weeks after Defendant Jones pocketed the additional money from Ms. Roberts for a total of one thousand two hundred forty-four dollars (\$1,244.00), Defendant Jones claimed his continuing delay in delivery was due to Wayne Monk. Ms. Roberts attempted to communicate with Mr. Jones in June, 2008, but found the toll-free telephone was disconnected and that Half Off Stones was no longer online. Seven months after placing her order for a grave marker with Defendant Jones, she could not reach him and still had received nothing for the money that she paid. At Audrey Roberts' request, her credit card company credited her account in the amount of seven hundred forty-four (\$744.00), but unfortunately, she suffered more unfair and deceptive practices at the hands of Defendant Monk and Defendant Jones.

In July, 2008, Defendant Wayne Monk falsely represented to her that he was working with the Tennessee Attorney General's Office to finish some of the orders that Marcus Jones had failed to deliver – another blatant misrepresentation.<sup>13</sup> Defendant Monk represented to Ms. Roberts that he would complete her order but that completion would require an additional two thousand two hundred dollars (\$ 2,200.00). Defendant Monk accepted and cashed her check. Defendant Monk represented that he would complete her order with Kings Monuments, a third party vendor, and that the process would take 6 to 8 weeks.

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<sup>12</sup> Exhibit L to Motion, Affidavit of Audrey Roberts.

<sup>13</sup>Exhibit L to Motion, Affidavit of Audrey Roberts, page 2; *see also* Exhibit M to Motion, Affidavit of Theron Beck (Defendant Monk falsely represented he was working with the Attorney General's Office, consumer paid total of two thousand two hundred forty-five dollars

Ms. Roberts worked with King's Monuments to ensure that the layout for her monument was complete and accurate. But Defendant Monk never transferred any money to King's Monuments to place her order. From September, 2008 until late April, 2009, Wayne Monk failed to respond to any of Ms. Roberts' calls. When he finally did contact her, Monk admitted that he had spent her money. In May, 2009, Defendant Marcus Jones represented to Ms. Roberts that, for an additional seven hundred sixty-two dollars (\$762.00), cash only, he would complete her order. Ms. Roberts declined to send cash and told Defendant Jones that he would have to honor their previous agreement and that he would have to allow her to pay by credit card. She never heard from Defendant Jones again.

In May, 2009, Defendant Monk once again reassured her that he would produce her memorial or refund her two thousand two hundred dollars (\$2,200.00). Defendant Monk failed to deliver anything and never refunded her money.

After finding Jones Memorials on the Internet in November, 2006, Ms. Poole sent an email to jonesmemorials@yahoo.com, expressing her interest in purchasing a single stone for her mother's and nephew's grave.<sup>14</sup> Her email also inquired about the size of a single stone, design etchings; she asked other questions, *e.g.*, "For a baby that was still-born, can or would an (*sic*) conception date be put on the marker?" A person identified as "Amanda" notified Ms. Poole, by email that Mr. Jones would reply the next day with answers to her questions. Defendant Jones responded by email on November 10, 2006, to some of her questions; his email advertised, "New!! Be a member for 20% off today. Click here to learn more, Please (*sic*) refer our site at

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(\$2,245.00) to Defendants but received nothing - no refund and no monument).

<sup>14</sup>See Exhibit K to Motion, Affidavit of Robin Poole, Collective Ex. D (copy of email with information concerning becoming a member).

www.jonesmemorials.com.” Purportedly, if she signed up for membership, she would receive a 20% discount that day. On November 13, 2008, Robin Poole emailed Defendant Jones that she was interested in becoming a member but had not signed up yet. Ms. Poole asked if she should sign up before continuing with her order. Defendant Jones responded that same day by email, saying, “You would need to be a member to get more assistance (*sic*) and once you do that I will be more than happy to fully help you.” Ms. Poole then sent payment in the amount of twenty-nine and 99/100 dollars (\$29.99) to Defendant Jones for the membership he required to continue. After she placed her order with Jones Memorials on December 23, 2006, Ms. Poole paid an additional one thousand five hundred nine and 60/100 dollars (\$1,509.60) on December 24, 2006 for her loved ones' headstone.

Delay after delay occurred without any option to receive a refund mentioned by Defendant Jones. He routinely offered a different reason for each successive delay. On September 6, 2007, Ms. Poole received an email from Marcus Jones containing a picture of her finished headstone. Defendant Jones stated that her order would be shipped the next “pretty day.” He thanked her for her patience, admitted that that he knew her headstone was long overdue and stated, “I work mostly alone with a few people who come and go and have had to be off for various health reasons and the extreme heat. . . .”<sup>15</sup>

The headstone has never been delivered. She paid a total amount of one thousand five hundred thirty-nine and 59/100 dollars (\$1,539.59) but still has no grave marker.<sup>16</sup>

Defendant Jones has threatened at least one waiting consumer, Karen Doris. In an email

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<sup>15</sup> See Exhibit D to Motion, Affidavit of Jim KempVaNee, (captured websites); Exhibit E; Affidavit of Nathan Casey, Jones Memorials' website as of July 24, 2009 (Defendant Jones' websites imply he has a full staff working to provide quality service).

<sup>16</sup> Exhibit K, Affidavit of Robin Poole.

dated April, 2008, Defendant Jones stated, "So you do what you feel you got to do and remember payback is a motha."<sup>17</sup>

In her affidavit, Ms. Doris affirms the following facts: She ordered her headstone for her grandmother's grave from Wayne Monk, operating as the salesman for Jones Memorials, on June 4, 2007. Ms. Doris paid one thousand nine hundred thirty-six and 50/100 (\$1,936.50), as directed by Defendant Monk, by two personal checks to his home address on Delmas Avenue in Nashville, Tennessee. Mr. Monk informed Ms. Doris that her headstone should be ready in six to eight (6-8) weeks. When Ms. Doris did not receive the headstone in that time frame, she contacted Defendant Monk by email.

On August 7, 2007, Defendant Monk responded to Ms. Doris' inquiry; he blamed the delay on the stone etcher and indicated that the stone etcher was still "a couple of weeks out on the completion."<sup>18</sup> Defendant Jones reaffirmed Defendant Monk's new time estimate (2-3 more weeks) for delivery of the stone. Again, no headstone was delivered. On October 2, 2007, Defendant Jones responded to her inquiry sent by email to Wayne Monk. Defendant Jones claimed that Ms. Doris' stone was cut but that "we have had delays with the etching and carving, due to the fact that some of our equipment was stolen."<sup>19</sup> Defendant Jones assured Ms. Doris that the stone would be delivered in an additional two to three (2-3) weeks. This was the third delay in delivery.

On October 10, 2007, Defendant Jones sent Ms. Doris his proposed information which he planned to be lettered on her order. The birth date information was incorrect. When she notified Defendant Jones of his error, he promised, on October 11, 2007, to correct the error to "make

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<sup>17</sup> Exhibit O, Affidavit of Karen Doris, page 5.

<sup>18</sup> Exhibit O, Affidavit of Karen Doris, page 2.

sure it would be perfect,” and to resend the proof “on Monday or tomorrow.”<sup>20</sup> After waiting and waiting for the promised delivery of the headstone she had purchased for her grandmother’s grave more than six months earlier, this weary consumer succeeded in contacting Marcus Jones by telephone on December 10, 2007. Ms. Doris asked Defendant Jones for a refund. While Defendant Jones promised to send her a refund by December 24, 2007, he again failed to keep a promise. Ms. Doris, not having received any refund or memorial for her grandmother’s grave, sent Defendant Jones and Defendant Monk an email on December 29, 2007, and requested, again, a refund for the uncompleted and undelivered order. In her email, Ms. Doris advised the two Defendants that she had purchased a memorial from another company.

On January 7, 2008, Defendant Jones informed Ms. Doris that he would send out half of her refund on that day and the rest of it “later in the week.”<sup>21</sup> Defendant Jones sent no refund. In April, 2008, Defendant Jones outlined his perspective on his repeated delays and failure to deliver any monument in an email.<sup>22</sup> Defendant Jones, in his own recitation of his “Facts,” stated, among other things: that all of her material was done and that he was aware of last year’s deadline, that the delay was due to his inability to get material on time from the quarry (a new reason for delay); that out of at least 500 stones done online since 1998, it had only been since ‘06, after a major accident in his life, that snowball delays had occurred.<sup>23</sup>

Defendant Jones’ recitation of “Facts” continued: that her monument . . . “can more than

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<sup>19</sup> Exhibit L to Motion, Affidavit of Audrey Roberts.

<sup>20</sup> Exhibit O to Motion, Affidavit of Karen Doris, page 3.

<sup>21</sup> Exhibit O to Motion, Affidavit of Karen Doris, page 4.

<sup>22</sup> Exhibit O to Motion, Affidavit of Karen Doris, page 4 at Paragraph 16.

<sup>23</sup> See Exhibit B to Motion, Affidavit of Mary Clement, (Peggy Turner’s consumer complaint to DCA arose in 2004, two years before 2006); See also, Exhibit D to Motion, Affidavit of Jim KempVaNee, (Jones contradicting own website at that time, [www.jonesmemorials.com](http://www.jonesmemorials.com), which claimed, “Over 1,000 online customers since 1998.”)

likely be ready by memorials day (*sic*) and then this will be a thing of the past”; that he had to start over due to a break in his back in April, 2007. Defendant Jones also averred in his last email to her that if Ms. Doris did not complete the order, to let him know and he would post the paid for material online and “resell it and pay her back.”<sup>24</sup> Ms. Doris never received a refund.<sup>25</sup>

Ms. Doris’ Affidavit, other testimonies of consumers<sup>26</sup> consumer complaints, and the false promotions of the Defendants at their websites<sup>27</sup> establish that the Defendants continued and continue to take new orders, accept payments from new consumers, when many, many backorders remain undone. Further, Defendants continue to feed consumers false promises and refunds.

The evidence offered, attached to this Motion and to the Complaint demonstrates numerous violations of the Tennessee Consumer Protection Act and other applicable law, set forth in the Complaint, and the need for the extraordinary relief requested in the State’s Motion.

**2. Defendants’ allege that their website advertisements reached hundreds of thousands of people.**

On the second page of Jones Memorials’ website dated July 24, 2009,<sup>28</sup> Defendant Jones claims that 587,077 visitors have visited his website since November 4, 1998. The number of visitors to any website is subject to manipulation. This representation, which may or may not be true, is located just above the “Satisfaction Guaranteed” logo and just to the left of Defendant Jones’ “100% Warranty” misrepresentation. The “22 Reasons to Buy Here” (from Jones Memorials) appears on the right side of the second page. Defendant’s representation that this

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<sup>24</sup> Exhibit O to Motion, Affidavit of Karen Doris, page 5.

<sup>25</sup> Exhibit O to Motion, Affidavit of Karen Doris, page 7.

<sup>26</sup> Exhibits G-Q to Motion.

<sup>27</sup> Exhibit D to Motion, Affidavit of Jim Kempvance (captured websites); Exhibit E to Motion and Exhibit D to Complaint, Affidavit of Nathan Casey (July 24, 2009 website copy).

website was, allegedly, viewed by so many consumers, tends to lend a false sense of legitimacy to Defendant Jones' monument operation, especially to vulnerable consumers in need of the advertised products and services. The national and international reach of Defendants' deceptive promotions is evidenced by the geographic scope of consumer complaints.<sup>29</sup> The consumer complaints received by the Division of Consumer Affairs (hereinafter, "DCA") and the Better Business Bureau (hereinafter, "BBB") come from consumers residing in Tennessee, and in the States of Alaska, Arkansas, Arizona, California, Colorado, Florida, Georgia, Kentucky, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, Wisconsin and the District of Columbia. One consumer complaint received by DCA and the BBB comes from a resident of Canada.

The consumer complaints attached to Exhibit B and C of the Motion mirror the experiences of the consumers testifying by affidavit.<sup>30</sup> Furthermore, the consumer complaints report additional, unconscionable and unlawful conduct by Defendant Jones. For example, consumer complainants, Mark and Susan Stephenson, reported to the BBB that they ordered a headstone for their nineteen (19) year old deceased daughter's grave in April, 2005, (two years before Defendant Jones' allegedly broke his back, and made full payment in the approximate amount of two thousand six hundred dollars (\$2,600.00). When the headstone finally did arrive at the cemetery, three and a half months after the promised date of delivery, the base of the

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<sup>28</sup> Exhibit D to Complaint and Exhibit E to Motion, Affidavit of Nathan Casey.

<sup>29</sup> See Exhibit B to Motion, Affidavit of Mary Clement, Director of Division of Consumer Affairs (31 consumer complaints received by the State of Tennessee Division of Consumer Affairs, to date) and Exhibit C to Motion, Affidavit of Kathleen Calligan, President of Better Business Bureau, Middle Tennessee (82 consumer complaints received by Better Business Bureau.)

<sup>30</sup> Exhibits G-Q to Motion, Consumer Affidavits.

headstone was the wrong size. Cemetery personnel sent the stone back to Marcus Jones with the trucking company that same day. The consumers immediately notified Defendant Jones and advised him the headstone was returning to him for correction. Their complaint reports that Defendant Jones stated the headstone would be corrected and returned back to California ASAP. Attempts to reach Marcus Jones failed. Not until December, 2005, did the Stephensons receive a message from Defendant Jones in which Marcus Jones stated that their order was at the dock pending shipment that week. These grieving parents had not received a corrected headstone for their daughter's grave when they saw their daughter's finished headstone, with her name on it, pictured on Jones' website for public viewing. After DCA and BBB contacts with Defendant Jones, the headstone was, according to Marcus Jones, shipped.

Just as the Defendants failed and continue to fail to respond directly to consumer complaints, the Defendants have failed to respond to correspondence from both the Division of Consumer Affairs (DCA) and the Better Business Bureau (BBB) more than seventy-five per cent (75%) of the time. If consumers are able to contact the Defendants, consumers generally receive another false assurance of a new, future delivery date or no response at all.<sup>31</sup> A review of the consumer complaints indicates that the consumers, who have paid for their orders, cannot locate Marcus Jones or Wayne Monk.

### **3. Defendants continue their unfair and deceptive practices.**

Consumers began filing complaints concerning Defendants' unfair and deceptive practices in the early years of this century and continue to file complaints.<sup>32</sup> In her complaint

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<sup>31</sup>Exhibits G-Q to Motion, Consumer Affidavits; Exhibit B to Motion, Affidavit of Mary Clement (DCA consumer complaints); Exhibit C to Motion, Affidavit of Kathleen Calligan (BBB consumer complaints).

<sup>32</sup>Exhibit B to Motion, Affidavit of Mary Clement, (DCA consumer complaints) and Exhibit C to

received by the BBB on July 15, 2009, Barbara Jean Smith reports that a friend referred her to Wayne Monk in her search for a grave stone to memorialize her brother's death. Ms. Smith placed an order for a grave stone with Defendant Wayne Monk in February of this year, 2009, confirmed an August delivery date and paid Defendant Monk five thousand dollars (\$5,000.00). Ms. Smith has not been successful in reaching Defendant Monk to inquire of her order's status. Her friend, who had, luckily, had a successful transaction with Defendant Monk, was able to reach him, calling him at his only contact phone number. After talking to Defendant Monk, Ms. Smith's friend related to her, that Defendant Monk was getting the grave stone from China, that Ms. Smith's grave stone should arrive that week and that he would contact Ms. Smith. Ms. Smith immediately called the same number her friend had just used to reach Defendant Monk but he did not answer her call. In subsequent efforts to reach Defendant Monk about her order, she found that same number was no longer in order. In fact, Defendant Monk never did contact Ms. Smith nor did he deliver the promised grave stone. He has pocketed her five thousand dollars (\$5,000.00).

**B. EXPEDITION OF A HEARING DATE FOR THIS MOTION IS WARRANTED**

Defendant Marcus Jones is advertising a "Going Out of Business" sale on his website, [www.jonesmemorials.com](http://www.jonesmemorials.com).<sup>33</sup> A portion of any money he might make from the sale of these items should be set aside, as requested in the Motion, to render monetary relief or restitution for consumer victims, if ordered by the Court, effectual. Money and other ill-gotten gains already derived from both Defendants' unlawful business practices must be frozen, preserved. In order to allow Defendant Jones to continue his sale of inventory, he will have to follow the rules

established by law and comply with the provisions submitted in the State's motion, if ordered by the Court. The practices outlined in the Motion and Complaint, evidenced by testimony and other evidentiary exhibits, must be stopped, by Court order. Too many consumers have lost money – and faith in the Tennessee marketplace due to the Defendants' conduct. The Defendants have been aware of the back orders, have known of the back orders when taking new orders, as evidenced by the consumer testimonies and complaints. Defendants' histories of unlawful acts and practices, related by consumers, affirm that their violations of the Tennessee Consumer Protection Act and other applicable law have been knowing and willful.

Defendants' unlawful conduct has caused substantial consumer injury in Tennessee, across the United States and Canada. Because of their unlawful enterprises, centered in Nashville, Tennessee, the reputation of the State of Tennessee's marketplace suffers. Defendant Jones and Defendant Monk must be stopped; this Court has that authority, as discussed below.

The State of Tennessee must preserve the integrity of its marketplace. The public interest demands meaningful action by the State and this Court. Based upon the facts evidenced by the Complaint, Motion, supporting exhibits and upon applicable law, entry of a statutory temporary injunction order and asset freeze as described in the Motion are appropriate remedial actions to preserve the status quo and prevent additional harm to consumers and Tennessee's marketplace.

These Defendants have not acted in good faith in the past; it is unlikely they will act in good faith pending a trial on the merits. Moreover, Defendants have shown themselves to be systematic wrongdoers. Defendants' unfair and deceptive practices have definite earmarks. It is no accident that Defendants failed and fail to respond to worried, grieving consumers, that they disconnect their phone lines and seem to disappear from the consumers' view.

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<sup>33</sup> See Exhibit F to Motion, Affidavit of Wesley Campbell (website capture on August 4, 2009).

The remedies sought will attempt to prevent any additional harm to consumers and, hopefully, restore to them money lost by virtue of Defendants' unlawful business practices. Copies of unreported cases and cases from other jurisdictions are attached.

For these reasons, as set forth more fully below, the Court should grant the State's Motion.

### ARGUMENT

A. **THIS COURT HAS EXPRESS STATUTORY AUTHORITY TO ISSUE TEMPORARY INJUNCTIONS AND PERMANENT INJUNCTIONS AGAINST VIOLATIONS OF THE TENNESSEE CONSUMER PROTECTION ACT AND OTHER STATE LAWS**

Express statutory provisions authorize the State to seek a temporary injunction. Tenn.

Code Ann. § 47-18-108(a)(1) provides:

Whenever the consumer affairs division has reason to believe that any person has engaged in, is engaging in, or based upon information received from another law enforcement agency is about to engage in any act or practice declared unlawful by this part and that proceedings would be in the public interest, the attorney general and reporter, at the request of the consumer affairs division, may bring an action in the name of the state against such person to restrain by temporary restraining order, *temporary injunction* or permanent injunction the use of such act or practice.

(Emphasis added). Tenn. Code Ann. § 47-18-108(a)(4) specifically authorizes the court to issue a temporary injunction:

The courts are authorized to issue orders and injunctions to restrain and prevent violations of this part, and such orders and injunctions shall be issued without bond.

The authorization to the Tennessee Division of Consumer Affairs Division in Tenn. Code Ann. § 47-18-108(a)(1) to seek injunctive and other equitable relief constitutes the legislative determination that there is an irreparable injury in any violation of the Tennessee Consumer

Protection Act and that the balance of harm preponderates in favor of the State. Citing 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 461 (1973), the Indiana Court of Appeals recognized the well established rule that " 'when the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor' ." *Rees v. Panhandle Eastern Pipe Line Co.*, 377 N.E.2d 640, 649 (Ind. Ct. App. 1978); *see also, Hunt v. U.S. Securities & Exchange Comm'n*, 520 F. Supp. 580, 608-09 (N.D. Tex. 1981); *DeMayo v. State of Indiana*, 394 N.E.2d 258, 261 (Ind. Ct. App. 1979).

In cases of continuous violations of remedial statutes, such as the instant case, statutory injunctions may issue by a court, which is required to act primarily in the public interest. In regulatory enactments such as the Consumer Protection Act, there is a presumption that the public interest has been considered by the Legislature. *Id.* When this determination has been made by statute, no further showing of irreparable injury or imbalance of hardships is necessary. *Id.* While no further showing is necessary, the State's Complaint and supporting exhibits to the Complaint and to the Motion do evidence irreparable injury and an imbalance of hardships. The legislative authorization in Tenn. Code Ann. § 47-18-108(a)(1) and (a)(4) complement this Court's authority to issue a temporary injunction under Tenn. R. Civ. P. 65.

A statutory injunction may issue upon showing a *prima facie* case of illegality. In *Commodity Futures Trading Comm'n v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978), the Court stated as follows:

In actions for statutory injunction, the agency need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits. A *prima facie* case of illegality is sufficient.

Tennessee's own courts of record have recognized that the proper standard for a statutory temporary injunction is what the Legislature has stated in plain language. *See State v. Expyfi, LLC, et al.*, No. 07-3365, Cir. Ct. of Tenn., 20<sup>th</sup> Jud. Dist., Davidson County, Div. III (Nov. 21, 2007); *State v. Payton Abernathy, et al.*, No. 169384, Chan. Ct. of Tenn., 6th Jud. Dist., Knox County, Div. III (May 3, 2007); *State v. Froehlig, et al.*, No. 33293, Cir. Ct. of Tenn., 21st Jud. Dist., Williamson County, Div. II (Mar. 2, 2007); *State v. Olomoshua, et al.*, No. 06C2912, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. III (Nov. 16, 2006); *Tennessee Real Estate Comm'n v. Hamilton*, No. 01A01-9707-CH-00320, 1998 WL 272788, at \*4-6 (Tenn. Ct. App. May 22, 1998); *State v. Continental Distributing Co.*, No. 74892, Ch. Ct. of Tenn., 11th Jud. Dist., Hamilton County, Part I (Sept. 1, 1994); *see also FTC v. Nat'l Testing Servs., LLC*, No. 3:05-0613, 2005 WL 2000634 (M.D. Tenn. Aug. 18, 2005).<sup>34</sup> Pursuant to *Expyfi, Abernathy, Froehlig, Olomoshua, Tennessee Real Estate Commission, Continental Distributing Co., and National Testing Services*, the movant's burden for a statutory temporary injunction is met upon a demonstration of a substantial likelihood of success of demonstrating at trial that the non-movants are violating the statute. A showing of immediate and irreparable harm is assumed with the violation of the statute. Proof of immediate and irreparable harm or the inadequacy of other remedies is not required for a statutory temporary injunction.

Other state courts that have addressed the "statutory injunction" issue have agreed with Tennessee's courts, concluding that when such statutory authority exists, one need not make a separate showing of irreparable harm or inadequacy of other remedies. The Ohio Supreme Court established that when a statute grants a specific injunctive remedy to an individual or to the state,

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<sup>34</sup> *See* Table of Authorities and attached copies of Tennessee unpublished opinions, orders, and cases from other jurisdictions.

the party requesting the injunction “need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law.” *Mid-America Tire, Inc., v. PTZ Trading*, 95 Ohio St.3d 367, 378, 768 N.E.2d 619, (Ohio 2002)(quoting *Stephan v. Daniels*, 27 Ohio St. 527, 536 (Ohio 1875)). In *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo. Ct. App. 1973), the defendants objected to the issuance of an injunction against them under the state's consumer protection statute, on the ground that there was no showing by the State of Missouri of lack of adequate legal remedy or that irreparable injury was threatened. In rejecting the defendant's objection, the Missouri Court of Appeals reasoned that the Missouri legislature, by enacting a statutory scheme creating a public right to protect consumers, created a new remedy - authorization of the issuance of an injunction when a violation is found. That legislative authorization constitutes sufficient authorization without more for the propriety of an injunction in a case under the statute. *Id.* at 370.

Similarly, in *Reed v. Allison and Perrone*, 376 So. 2d 1067 (La. Ct. App. 1979), the appeals court held that the State of Louisiana need not show irreparable harm to obtain injunctive relief under its consumer protection statute. At issue in that case was the Louisiana Unfair Trade Practices and Consumer Protection Law, which granted the Attorney General the right to seek injunctive relief upon a showing that a person was using, had used, or was about to use any method, act or practice declared unlawful by the statute. Construing that statute, the court noted that it “frees the attorney general from the burden of proving irreparable injury or that he has no adequate remedy at law.” *Id.* at 1069. In the instant case, the record establishes that violations of the Tennessee Consumer Protection Act have occurred, are occurring and will continue to occur. Freedom Marketing, Defendants' most recent name for their unlawful business, continues to

take consumers' money and will continue to perpetrate this scheme without Court jurisdiction.

Federal courts agree with the state court interpretations and applications of statutory authorizations of temporary injunctions. *See Commodity Futures Trading Comm'n v. British American Commodity Options Corp.*, 560 F. 2d 135, 141 (2d Cir. 1977); *Henderson v. Burd*, 133 F.2d 515, 517 (2d Cir. 1943); *Commodity Futures Trading Comm'n v. Carnegie Trading Group, LTD., et al.*, 450 F. Supp.2d 788 (N.D. Ohio 2006); *Commodity Futures Trading Comm'n v. J. S. Love & Associates Options Limited*, 422 F. Supp. 652, 661 (S.D.N.Y. 1976). The reasoning applied in these federal cases and other state cases cited is applicable in the present case. The Tennessee Consumer Protection Act explicitly gives the State the right to obtain an injunction to remedy violations of the Act, which have occurred, are occurring or are about to be engaged in by a person. Tenn. Code Ann. § 47-18-108 (a)(1) and (a)(4).

A temporary injunction is appropriate in this case given Defendants' continuing, blatant failure to adhere to the State's consumer protection laws.

**B. THIS CASE CONSTITUTES A PROPER CASE FOR AN ASSET FREEZE AND EXPEDITED HEARING DATE**

In addition to the injunctive relief authorized under Tenn. Code Ann. § 47-18-108(a), the Act authorizes courts to make orders that will restore money or property to those injured by unlawful acts or practices. Tenn. Code Ann. § 47-18-108(b)(1) provides that in civil actions in the name of the State:

The Court may make such orders or render judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use of employment of such unlawful method, act or practice, of any money or property, real, personal or mixed, or any other article, commodity or thing of value wherever situated, which may have been acquired by means of any act or practice declared to be unlawful by this chapter.

The Court's order of relief must be predicated on three requirements. First, there must have been an "ascertainable loss of money or property." Second, there must be a reasonable probability that the loss was caused by an act or practice prohibited by the Act. Third, the remedial order must be "necessary" to accomplish "restitution" of the money or property - that is, restitution to the consumers.

The Complaint, Motion and exhibits, establish the first requirement. The consumer purchasers have been injured by the Defendants' practices and have been deprived of their money by the Defendants. Their losses are "ascertainable losses"<sup>35</sup> - their payments, fees paid or taxes paid plus any other out of pocket expenses, e.g., money paid for Defendants to be members and receive 20% off and money paid in response to Defendant Jones' investment opportunities. (www.jonesmemorials website captured April 1998).

Tenn. Code Ann. § 47-18-108(b)(1) also requires that the consumers' losses be caused by "use or employment of such unlawful method, act, or practice" or losses "which may have been acquired by means of any act or practice declared to be unlawful by this chapter." The phrase "may have been acquired" indicates that the Court may order the requested relief when the State's probability of success on the merits, as here, is strong. This is a familiar consideration of a court of equity in ordering extraordinary relief generally. See William H. Inman, *Gibson's Suits in Chancery* § 358 (6th ed. 1982).

An asset freeze is necessary to restore ascertainable losses to consumers. The State seeks to ensure that Defendants' records will not be lost, destroyed or otherwise rendered unavailable

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<sup>35</sup> Tenn. Code Ann. § 47-18-2102(1) (ascertainable loss presumed to exist).

and that meaningful restitution to consumers in this case is not rendered impossible. *See* Tenn. Code Ann. §§ 29-1-105, 47-18-108 (b)(1). Accordingly, to obtain substantial justice under the facts presented in the Complaint, Motion and accompanying exhibits, the prohibitions and affirmative obligations outlined in the State's motion are necessary are to preserve the status quo and protect any assets.

If the Court eventually renders a final judgment of restitution in this case, such a judgment will be meaningless unless the statutory temporary injunction and asset freeze, as described in the Motion are immediately upon an expedited hearing ordered by the Court. The Court's order can preserve records and assets, including but not limited to monetary assets. Defendants have consistently demonstrated their failure to conduct their operations in a lawful manner that is free of unfair or deceptive acts and practices and these practices are causing harm the public.

These Defendants have taken advantage of vulnerable consumers, through wrongful, unlawful means, and pocketed thousands of consumer dollars. Defendants cannot take advantage of their own wrongs. Otherwise, innocent consumers will suffer to the benefit and advantage of Defendants, who have violated and continue to violate the Act. The State prays that this Court will expedite the hearing on this Motion.

C. **THE EVIDENCE SUPPORTS THE COURT'S ISSUANCE OF A TEMPORARY INJUNCTION PENDING A HEARING ON THE MERITS**

The Tennessee Consumer Protection Act expressly provides for statutory temporary injunction orders.<sup>36</sup> The evidence adduced and the law cited herein provide clear support for the issuance of a statutory temporary injunction, an asset freeze, and, ultimately, a permanent

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<sup>36</sup> Tenn. Code Ann. § 47-18-108(a)(1) and (a)(4).

injunction, restitution, civil penalties, disgorgement of benefits derived from Defendants' unlawful schemes and permanent revocation of Defendants' ability to engage or participate in any monument/memorials operation in whole or in part in the State of Tennessee.<sup>37</sup> The evidence demonstrates Defendants' ongoing fraudulent conduct against consumers and numerous violations of the Tennessee Consumer Protection Act. Defendants' unlawful scheme, promoted across the country and conducted from Davidson County, Tennessee, must be stopped.

Assuming *arguendo* that no express provision for a statutory temporary injunction existed to relieve the Attorney General and Reporter from having to establish irreparable harm and lack of any legal remedy, a temporary injunction under Tenn. R. Civ. P. 65 would be appropriate under these circumstances. When considering requests for temporary injunctions made by private parties, pursuant to Tenn. R. Civ. P. 65, the courts usually consider four factors: (1) substantial probability of success on the merits; (2) a significant threat of irreparable injury or loss in the absence of relief; (3) the relative absence of harm caused to the Defendant by the proposed injunction; and (4) the service of the public interest. *Lillard v. Burson*, 933 F. Supp. 698 (W.D. Tenn. 1975). These “four considerations are factors to be balanced, not prerequisites that must be met.” *Memphis Planned Parenthood, Inc. v. Sundquist*, 184 F.3d 600 (6th Cir. 1999) (citing *Mascio v. Public Employees Retirement Sys.*, 160 F.3d 310, 312-13 (6th Cir. 1998)) (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). One factor is not determinative; the factors must be weighed equitably. *Advisory Info. and Mgt. Sys., Inc. v. Prime Computer, Inc.*, 598 F. Supp. 76 (M.D.Tenn. 1984).

In light of Defendant Jones' paucity of records finally produced under the Court's order

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<sup>37</sup> See Tenn. Code Ann. § 47-18-108 (b)(2) (if evidence has been presented to the court establishing knowing and persistent violations, the court may temporarily or permanently revoke

in the earlier investigative phase of this matter,<sup>38</sup> it is appropriate that this Court direct the Defendants not to destroy, remove, or alter any current records of Defendants' businesses such that it would make discovery difficult.<sup>39</sup> The State's Motion requests that this Court issue an order mandating that Defendants maintain their business records in accordance with the Motion's dictates. Concealment of documents, or destruction of documents - past, present and/or documents compiled during the pendency of this action, would not only mar the discovery process but could constitute spoliation of evidence.<sup>40</sup> The Complaint, Motion and supporting exhibits establish the presence of all four factors. The Attorney General and Reporter is charged, by statute, to enforce the Tennessee Consumer Protection Act and common law to protect the public interest.<sup>41</sup> The Attorney General and Reporter has established through exhibits to the Motion and the Complaint, that Defendants have engaged in, are engaging in, and are about to engage in violations of the Act. Defendants' violations harm the public. The public interest will be served if the State's motions are granted.

### CONCLUSION

For the foregoing reasons, the Attorney General and Reporter, respectfully requests that the Court immediately enter a temporary injunction order on an expedited basis to preserve the status quo, to freeze all assets of Defendants (allowing Jones' sale of inventory within the limitations set forth in the State's Motion and state law), pending further order of the Court.

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license to do business in this state).

<sup>38</sup> See Transcript of the Proceedings before the Honorable Barbara Haynes, February 27, 2009 (copy attached).

<sup>39</sup> See *State v. Payton Abernathy, et al.*, No. 169384, Chan. Ct. of Tenn., 6th Jud. Dist., Knox County, Div. III, (May 3, 2007).

<sup>40</sup> See *Bronson v. Umphries*, 138 S.W.3d 844 (Tenn. Ct. App. 2003).

Respectfully submitted,

STATE OF TENNESSEE

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<sup>41</sup>Tenn. Code Ann. § 47-18-114; *State v. Heath*, 806 S.W.2d 535 (Tenn. Ct. App. 1990).

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this document filing has been mailed, postage prepaid, to:

Marcus Donnell Jones  
3311 Hawkwood Lane  
Nashville, Tennessee 37202-2112

and

Henry Wayne Monk  
1005-B Delmas Avenue  
Nashville, Tennessee 37216

on this the 9<sup>th</sup> day of September, 2009.

  
MEREDITH DEVAULT  
Senior Counsel