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8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF PIMA**

10 STATE OF ARIZONA, *ex rel.*
11 TERRY GODDARD, Attorney
General,

12 Plaintiff,

13 vs.

14 Robert L. Gendler and Yorkys
15 Ramirez, individually and as a marital
community; and Top Stone, Inc.,

16 Defendants.
17

No. _____

**COMPLAINT FOR INJUNCTIVE AND
OTHER RELIEF**

Unclassified Civil

18 Plaintiff State of Arizona, by and through its attorneys, alleges the following:

19 **JURISDICTION AND VENUE**

20 1. The State of Arizona brings this action pursuant to the Arizona Consumer Fraud
21 Act, A.R.S. § 44-1521 *et seq.*, to obtain restitution, declaratory and injunctive relief, civil
22 penalties, attorneys' fees and costs, investigative expenses and other relief to prevent the
23 unlawful acts and practices alleged in this Complaint and to remedy the consequences of such
24 unlawful practices.
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26 2. Venue is proper in Pima County, Arizona.

27 3. The Superior Court has jurisdiction to enter appropriate orders, both prior to and
28 following a determination of liability, pursuant to A.R.S. § 44-1528.

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PARTIES

4. Plaintiff is the State of Arizona, *ex rel.* Terry Goddard, who is authorized to bring this action under the Arizona Consumer Fraud Act, A.R.S. § 44-1521 *et seq.*

5. Defendants Robert L. Gendler (hereinafter “Gendler”) and Yorkys Ramirez (hereinafter “Ramirez”), a marital community, are residents of Cochise County, Arizona and are the owners and sole officers of Top Stone, Inc.

6. Defendant Top Stone, Inc. is a foreign Sub Chapter “S” Corporation, incorporated in the State of Florida, that conducts an internet business in Cochise County, Arizona. At all times relevant to this action, Defendants were the owners of Top Stone, Inc.

7. Defendants act in their individual capacities in all acts alleged herein and also conduct, control, and participate in the day-to-day operations of Top Stone, Inc. as officers, principals, and employees. All acts of Top Stone, Inc. are in fact the acts of Defendants.

8. Whenever in this Complaint reference is made to any act of a Defendant, such reference shall be deemed to mean the acts of each Defendant.

NATURE OF DEFENDANTS’ BUSINESS

9. From approximately February, 2001 to early May, 2004, Defendants operated Top Stone, Inc. in Florida.

10. Since approximately May 11, 2004, Defendants have operated and continue to operate Top Stone, Inc. in Cochise County, Arizona.

11. Top Stone, Inc. is an internet business through which Defendants advertise and offer for sale both in-stock and custom-made marble and granite statutes, fireplaces, rolling spheres, and fountains (hereinafter “merchandise”) from suppliers in China and the United States.

12. Defendants take orders from consumers via the telephone and internet.

1 13. Defendants send a contract to consumers after the consumer places an order. *See*
2 Attached Exhibit A. The contract provides consumers with the following representations:

- 3 a. The final sales price, which includes all shipping costs;
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5 b. A time frame, usually somewhere between four to twelve weeks, in which
6 their merchandise will be shipped;
7
8 c. The date on which the contract is “accepted;” and
9
10 d. “Payment terms” that require consumers to pay Defendants a deposit for
11 the merchandise they have ordered. The contract is silent as to whether the
12 deposits are refundable if the merchandise is not delivered.

13 14. Consumers send, via a wire or check, the required deposit to Defendants.

14 15. Defendants deposit the funds into Top Stone, Inc.’s “Business Economy
15 Checking” account at Bank of America.

16 16. Defendants do not deliver merchandise to consumers within a reasonable time
17 and sometimes, not all. In some cases, consumers have had to wait two or four years to receive
18 merchandise that was to be shipped four to twelve weeks after they placed their order and paid a
19 deposit towards the sale price.

20 17. According to Gendler, ninety-nine percent (99%) of consumers do not receive
21 their merchandise within the time frame Defendants represent to them at the time they enter into
22 the contract with Defendants. In fact, as the following examples demonstrate, Defendants often
23 do not deliver any merchandise at all:

- 24 a. Michael Harris, acting on behalf of Allergy Arts, ordered merchandise from
25 Defendants on or about October 12, 2005 and paid a deposit of \$8,250.00. Mr.
26 Harris requested a refund on July 2, 2007, but has not received the merchandise
27 or a refund of the deposit money he paid. Gendler told Mr. Harris that he has
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1 “never given a refund, even when contacted by the Arizona Attorney General and
2 is not about to start now.” *See* Attached Exhibit B.

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4 b. Seth Collins, acting on behalf of Feng Shui Fusion, Inc., ordered merchandise
5 from Defendants on or about June 2, 2006. The merchandise was to be shipped
6 to Mr. Collins six to eight weeks from July 10, 2006. Mr. Collins has not
7 received the merchandise or a refund of the deposit money he paid. *See* Attached
8 Exhibit C.

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10 c. Leah Burrough Atlas, acting on behalf of Atlas Building and Design, first
11 ordered merchandise from Defendants on or about December 17, 2004 and has
12 not received any of the merchandise she ordered. On or about December 18,
13 2007, Ms. Atlas requested a refund of the deposit money she paid, but has not
14 received a refund. *See* Attached Exhibit D.

15 d. Ifeoma Mogbo ordered merchandise from Defendants on or about October 23,
16 2006 and was to receive the merchandise by January 31, 2007. Ms. Mogbo has
17 not received the merchandise or a refund of the deposit money she paid. *See*
18 Attached Exhibit E.

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20 18. According to Gendler, Defendants do not keep records that show what portion, if
21 any, of an individual consumer’s deposit they send to their suppliers to cover the cost and
22 shipping of the merchandise the consumer has ordered.

23 19. Most of the deposit amounts that Defendants require consumers to pay are
24 sufficient to cover Defendants’ total cost for the merchandise, some of Defendants’ profit and
25 any shipping costs. For example, Defendants required a consumer to pay an \$8,500.00 deposit
26 for merchandise that cost \$6,000.00, including shipping. *See* Attached Exhibit F.

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28 20. Defendants use, at a minimum, a portion of the consumers’ deposit money to pay

1 their personal living expenses rather than using the funds to cover the actual costs and shipping
2 expenses of having merchandise shipped to consumers within the contracted shipping time.

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4 21. For example, Defendant Top Stone, Inc.'s Bank of America "Business Economy
5 Checking" account summary for December 1, 2005, through December 31, 2005, demonstrates
6 that Defendants used funds in the corporation's account to purchase items at Big Lots, Fry's
7 Food and Drug, Circle K, Susie's Deals, Factory 2-U, American Home Shield, and The Home
8 Depot. *See* Attached Exhibit G.

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10 22. For example, Defendant Top Stone, Inc.'s Bank of America "Business Economy
11 Checking" account summary for September 1, 2007, through September 30, 2007, indicates that
12 Defendants used funds in the corporation's account to purchase items at Wal-Mart, Video Game
13 Central, Circle K, Safeway, Bangkok Café, Stronghold Auto Repair, and Pets West as well as
14 make a \$1594.00 mortgage payment to "Wamu Bank." *See* Attached Exhibit H.

15 **VIOLATIONS OF THE ARIZONA CONSUMER FRAUD ACT**

16 **A. FIRST CLAIM FOR RELIEF**

17 1. The State re-alleges all preceding paragraphs as though fully set forth herein.

18
19 2. Beginning in or around May, 2004, and continuing through the present
20 Defendants, in connection with the sale of merchandise, have used or employed deception,
21 deceptive acts or practices, fraud, false pretenses, false promises, misrepresentations or
22 concealment, suppression or omission of material fact with the intent that others rely on such
23 concealment and/or suppression or omission in violation of A.R.S. § 44-1522(A).¹

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27 ¹ A violation of the Consumer Fraud Act means "the act, use or employment by any person of
any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation,

28 (continued ...)

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3. These acts include, but are not limited to, the acts described below.

4. Defendants deceptively induce consumers to enter into contracts and pay deposits of up to \$30,000.00 for the delivery of merchandise, when, in fact, Defendants are using at least a portion of the deposit money they receive from consumers to pay for their personal living expenses.

5. Defendants fail to use the deposit money to secure the merchandise for which consumers have paid the deposit.

6. Defendants falsely and deceptively represent to consumers that the merchandise they order will be shipped to them in a specified period of time, when, in fact, Defendants do not deliver the merchandise within the specified period of time.

7. Defendants take deposits for merchandise that they have no present intent to deliver.

8. Defendants deceive consumers into believing they do not have any rights under the “Mail or Telephone Order Merchandise Rule,” 16 C.F.R. § 435.1 *et seq.*, which requires Defendants to seek consumer consent for delayed shipping once Defendants realize they cannot ship the merchandise in the time stated on the contract and to immediately refund deposits if Defendants are unable to obtain consumer consent.

9. Defendants are engaging in a pattern and practice of misrepresentations and deceit in the sale of goods to consumers.

(... continued)
or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby.”
A.R.S. 44-1522(A).

1 **B. SECOND CLAIM FOR RELIEF**

2 1. The State re-alleges all preceding paragraphs as though fully set forth herein.

3 2. With regard to the foregoing violations, Defendants know or should know that
4 the above acts and practices violated the Consumer Fraud Act, and those violations were,
5 therefore, willful within the meaning of A.R.S. § 44-1531(A).²

6 **PRAYER FOR RELIEF**

7 WHEREFORE, the State respectfully requests that the Court:

8 A. Prohibit Defendants from violating the Consumer Fraud Act, A.R.S. § 44-1521
9 *et seq.*, as it is currently written or may be amended in the future.

10 B. Prohibit Defendants from conducting any business in, into, or from the State of
11 Arizona, including any Internet business.

12 C. Enjoin and restrain Defendants permanently from engaging in the course of
13 conduct alleged herein as a violation of A.R.S. § 44-1521 *et seq.* Such conduct includes, but is
14 not limited to,

15 (1) Inducing consumers to enter into contracts and pay deposits for the
16 delivery of merchandise, when Defendants use all, or a portion, of the deposit money
17 they receive from consumers to pay for Defendant's personal living expenses before
18 Defendants' insure merchandise will be delivered to consumers in the time specified in
19 the contract.

20 (2) Representing to consumers that the merchandise they order will be
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26 ² "[A] wilful violation occurs when the party committing the violation knew or should have
27 known that his conduct was of the nature prohibited by § 44-1522." A.R.S. § 44-1531(B).
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1 delivered in a specified period of time, when Defendants are unable and/or unwilling to
2 deliver merchandise within the specified period of time.

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4 D. Order Defendants, jointly and severally, to restore to all persons any money or
5 property, real or personal, that was acquired by means of any practice alleged herein to be a
6 violation of A.R.S. § 44-1521 *et seq.*, and such additional amounts as may be deemed proper
7 by the Court pursuant to A.R.S. § 44-1528(A)(2).

8 E. Order Defendants, jointly and severally, to pay to the State of Arizona a civil
9 penalty of up to \$10,000.00 for each violation of the Arizona Consumer Fraud Act pursuant to
10 A.R.S. § 44-1531.

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12 F. Order Defendants, jointly and severally, to reimburse the Attorney General for
13 the costs of investigation and reasonable attorneys' fees pursuant to A.R.S. § 44-1534.

14 G. Order such other and further relief as the Court deems proper.

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16 DATED this _____ day of _____, 2008.

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18 TERRY GODDARD, Attorney General

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20 _____
21 Taren M. Ellis
22 Assistant Attorney General
23 Attorneys for Plaintiff
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1 STATE OF ARIZONA)
2) §.
3 County of Pima)

4 The undersigned hereby certifies that she is a Legal Assistant with the Arizona Attorney
5 General's Office. In that capacity, she is authorized to make this affidavit on behalf of the
6 State; that she has read the foregoing Complaint and knows the contents thereof, and the same
7 are true to the best of her knowledge, information and belief, as set forth therein.

8 DATED this _____ day of _____, 2008.

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10 _____
11 Barbara Marvel, Legal Assistant
12 Office of the Attorney General

13 SUBSCRIBED AND SWORN to before me this _____ day of _____, 2008.

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15 _____
16 Notary Public

17 Commission Expires:

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