

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
 20TH JUDICIAL DISTRICT
 AT NASHVILLE

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STATE OF TENNESSEE,)
ex rel. JULIE MIX MCPEAK, solely)
 in her official capacity as)
 Commissioner of)
 Commerce & Insurance,)
)
 Plaintiff,)

v.)

No. 14-102-II

GALILEE MEMORIAL GARDENS,)
 JM&M SERVICES, INC.,)
 LAMBERT MEMORIAL CO., aka)
 LAMBERT MEMORIALS, INC.,)
 LAMBERT & SONS, INC.,)
 JEMAR LAMBERT,)
 MARJE LAMBERT,)
 and MARY H. LAMBERT, and ALL)
 PERSONS ACTING IN CONCERT)
 WITH THEM,)
)
 Defendants.)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY
 RESTRAINING ORDER AND FOR TEMPORARY INJUNCTION

The State of Tennessee (“State”), by and through counsel, and on behalf of and at the request of Julie Mix McPeak, Commissioner of the Tennessee Department of Commerce and Insurance (“Commissioner”), files this Memorandum of Law in support of the State’s Application pursuant to Tenn. Code Ann. § 46-1-301(c) and Tenn. R. Civ. Proc. 65.03 and 65.04, for a temporary restraining order to preserve the status quo until a hearing and entry of an order from the

Commissioner's Verified Petition for Appointment of the Commissioner as Receiver for Galilee Memorial Gardens (Galilee) cemetery. That Verified Petition and the State's request for immediate restraining orders and for preliminary injunctive relief seek to enjoin ongoing violations of the Cemetery Act of 2006, Tenn. Code Ann. Title 46, chapters 1 and 2, by all Defendants, by preventing Defendants from conducting any further operation of or affecting Galilee pending further orders of the Court.

The application for a restraining order relies on the Verified Petition as well as Affidavits submitted in support of all the foregoing, from Robert Gribble, the Executive Director of the Burial Services Program in the Tennessee Department of Commerce and Insurance, from Roy Bozeman, the field representative of the Division of Regulatory Boards in the Department, who had been charged with some investigations into the conditions of Galilee and burials at the cemetery, and from Robert S. Durham, investigator with the Office of the District Attorney General for the 30th Judicial District with respect to concern that prior notice to Defendants could hinder or impede a criminal investigation.

A Temporary Restraining Order Is Needed to Protect the Public and the Cemetery From Immediate Harm:

This Application seeks an immediate Court order, and puts in motion the Court's supervision over any necessary continuation orders, to stop violations of the Cemetery Act. The proposed Temporary Restraining Order would maintain the status quo financially and operationally by barring the Defendants from any

cemetery activities or acts affecting its records, business and assets until a full hearing on the Commissioner's Petition for Receivership can take place.

Receivership by the Commissioner could be granted under any one of the multiple grounds alleged by the Verified Petition under Tenn. Code Ann. § 46-1-312(a)(1)(A), (B) (E) and (G), (Petition, section V). This Davidson County Chancery Court has exclusive subject matter jurisdiction over such cemetery receivership, notwithstanding that Galilee is a cemetery located at 8283 Ellis Road, Memphis, Tennessee, an area also known as Bartlett, in Shelby County, and its order would grant the Commissioner exclusive broad powers to control Galilee, operationally and financially, and to make determinations whether it can be reformed or revitalized. This remedy, as shown by the information in this Application, will also address serious conditions that appear to imperil its capacity to conduct any further burials, or any further operations or business activity. Receivership incorporates many injunctive provisions authorized by the Cemetery Act to prevent anyone but those authorized by the Commissioner as receiver from operating the cemetery, managing its affairs or dealing with its assets, accounts or beneficial interests.

However, the efficacy of those remedies could be seriously undermined if this Court does not put in place a restraining order. To secure the records and assets and to prevent further deterioration of Galilee's operational status, liability to the improvement care trust fund or its clients, all business activity must cease. Also, because the Affidavits and the Verified Petition both reflect ongoing unlawful activities, this Application seeks temporary injunctive relief against Defendants

during the pendency of this action, until it is determined whether a permanent injunction is appropriate. These injunctions are authorized by Tenn. Code Ann. § 46-1-301(c), under the Commissioner's enforcement power to file suit at law or equity to enjoin any act or practice in violation of that chapter.

The Commissioner is responsible for administering and enforcing the provisions of the Cemetery Act. Tenn. Code Ann. § 46-1-301(a). Tenn. Code Ann. § 46-1-301(c) authorizes this request for restraining order and equitable relief, stating:

(c) The commissioner may seek relief at law or equity to restrain or enjoin any act or practice in violation of this chapter, or of any rule and regulation promulgated for the administration or enforcement of the provisions of this chapter. Jurisdiction is conferred upon the chancery and circuit courts of this state to hear and determine such a suit. No bond is required for the prosecution of the suit or for the issuance of an injunction.

A Restraining Order Under Tenn. R. Civ. P. 65.03 Should Issue on the Commissioner's Evidence Showing That Galilee Lacks Burial Capacity, That Potentially Fraudulent Activities Have Occurred, That Defendants Violate the Law by Operating Without Valid Registration, And That the Improvement Care Trust Fund Is Deficient

The affidavits and other evidence that the Commissioner has tendered in support of this Application establish that the requirements for the entry of a restraining order under Tenn. R. Civ. P. 65.03 are amply met. Under Rule 65, a person moving for a restraining order must show: (1) a likelihood of success on the merits; (2) the movant will be irreparably harmed in the absence of such relief; (3) the defendant will not suffer undue prejudice from the entry of the order; and (4) entry of the order is in the public interest.

Tenn. R. Civ. P. 65.03(1) provides as follows:

When Authorized. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

- (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition; and
- (B) the applicant's attorney (or pro se applicant) certifies in writing efforts made to give notice and the reasons why it should not be required.

Tennessee courts have stated as follows concerning the appropriate test in the related context of temporary injunction relief:

“The most common description of the standard for [temporary restraining order] in federal and state courts is a four-factor test: (1) the threat of irreparable harm to plaintiff if the [restraining order] is not granted [before the opposition may be heard]; (2) the balance between this harm and the injury that granting the [restraining order] would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.”

S. Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912, 919 (Tenn. Ct. App. 2000) (quoting Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 4-3(l) (1999)). The State is able to demonstrate each of these elements from the facts of Galilee Memorial Gardens and the Defendants’ conduct shown by the Affidavits submitted in support of this Application.

Central Statutory Violations by Defendants: Because of the reports and preliminary investigative results obtained by the Department, the State is likely to have success on the merits of its claims of violation of law, due to the lack of valid registration of the cemetery, violating Tenn. Code Ann. § 46-1-103. Moreover, the

cemetery has certainly violated law to the extent it has continued to fail to maintain trust funds required by Tenn. Code Ann. § 46-1-204. Galilee has publicly and demonstrably conducted burials and new sales in the months after the last date for which trust funds had been deposited, August 25, 2013, without making the new deposits.

The condition of Galilee cemetery, as shown by a consultant report commissioned by Defendants for Galilee, is now stated to have been full since sometime in 2010. In other words, the entire time since the prior registration of Defendants' father lapsed, Defendants ought to have refrained from new at-need burials at Galilee, both as a matter of law, and as a matter of practical ability. Instead of causing Galilee to be inactive, Galilee's owners and managers appear to have chosen deliberately to continue burials and sales of burial sites, merchandise and services, all while failing to disclose its full status to its customers. Further, Defendants applied for registration without disclosing the cemetery's true condition with respect to interment capacity.

Request for Restraining Order: As stated in the Petition, the Commissioner brings this action for her appointment as receiver of Galilee and for a restraining order and other injunctive relief to prevent further violations of the Cemetery Act, further conduct of business of the cemetery while unregistered, and the destruction or concealment of books and records and/or the sale, transfer, concealment or other disposition of cash and assets pending a hearing on this Petition. As alleged, such action is necessary and appropriate to prevent further

irreparable harm to the public and the cemetery, because there is reasonable cause to believe that since the end of 2010, Galilee has operated without a valid certificate of registration. In addition, one or more of the Defendants have engaged in fraudulent acts that have affected Galilee's ability to deliver merchandise or services, since evidence discloses that the cemetery is full. Furthermore, there is reason to believe that Galilee will not be able to meet all of its contractual obligations as they become due. Finally, there is reason to believe there is a deficiency in Galilee's improvement care trust fund, the perpetual fund mandated by Tenn. Code Ann. § 46-1-204.

Defendants have submitted a series of insufficient and unsuccessful applications for certificate of registration of the cemetery since the death of the previous registrant, their father, Jesse Lambert. Another has been filed but has not been granted, nor does it appear it should be granted, either because Defendants have submitted false information, or because the cemetery itself is incapable of operation and supporting any new burials. They have nevertheless continued to do business, continuing to make new sales of pre-need and at-need burials, lately in violation of not just the law, but an Order of the Commissioner to cease and desist, and the terms of a temporary authorization in July 2013 which did not allow any new business.

The continued operation of the cemetery, although providing a source of income to individual Defendants, is harmful to the public as well as violative of the law.

The Facts Showing the Status of the Cemetery: While the Commissioner needs to be appointed receiver to determine the actual condition of Galilee, the factual evidence submitted to this Court reflects these main concerns:

1) The Defendants have been operating the cemetery and conducting new business in violation of their status, without a valid registration, and in violation of a temporary authority in July 2013 directing them just to service previous contracts. Tenn. Code Ann. § 46-1-103, makes it unlawful, and a misdemeanor, for a cemetery company to operate a cemetery in this state without a valid certificate of registration for the cemetery.

2) Defendants pose a danger to the public and the community to the extent it operates in any manner, especially by conducting any further burials at Galilee. Galilee is impaired because it may be full and thus no longer capable of satisfying its existing obligations or supporting any new business of any nature. This harmful status is reflected in new information obtained by the Burial Services Section of the Department, which describes the cemetery as full, either because any of its remaining empty burial sites nonetheless are already sold to pre-need customers, OR because insufficient burial plots exist even to bury those persons whose families have already purchased these sites in advance. On top of concerns that faulty interments have occurred, any operation of the cemetery at all poses a hazard to the public until these issues are investigated and resolved.

This status represents a further violation of law by Defendants as it would contradict essential burial map information submitted to the Commissioner by the

Defendants with their applications under Tenn. Code Ann. § 46-1-103(b)(4), whereby they must show proof of a map showing all interment sites that will be available for sale and developed or planned for development upon approval of the application. At this time, the information submitted by Defendants regarding the mapping of Galilee and availability of interment sites is suspect, and has been reported to be false or even deliberately misleading. Verifying the degree of error or misrepresentation is time-consuming and requires competent, methodical investigation. Compounding this circumstance is the far more damaging report which challenges any ability of Galilee to fulfill its obligation to perform improvement care or deliver merchandise or services, or to meet its contractual obligations when they come due – reporting that the entire burial ground in fact is at least pre-sold, and that existing burials have been crowded and mishandled.

These suspect circumstances meet the receivership ground at Tenn. Code Ann. § 46-1-312(a)(1)(E) that there is “reasonable cause to believe that there has been . . . fraud affecting the ability of the cemetery to perform its obligation to perform improvement care or deliver merchandise or services” as well as the receivership ground that “the cemetery cannot or will not be able to meet all of its contractual obligations when they come due.” Tenn. Code Ann. § 46-1-312(a)(1)(G). In the case of a cemetery, the inability of a cemetery to perform its obligations means it poses a severe danger to the public.

Summary of Supporting Evidence

Affidavit of Robert Gribble, Executive Director of the Burial Services Program – Mr. Gribble states that Galilee lacks a valid registration of the cemetery, and has been so unregistered since 2010 after the death of Jesse Lambert, father of Jemar Lambert, Marje Lambert and Mary H. Lambert, when ownership of Galilee passed to them. Affidavit of Gribble, Para. 3-4.

As noted in the Petition, Tenn. Code Ann. § 46-1-103 prohibits any operation without a valid subsisting cemetery registration granted by the Commissioner.

Mr. Gribble describes the succession of faulty applications, that did not satisfy the requirements for registration, which were submitted by the Defendants. These have been denied, or affirmed as denied after a lengthy administrative review, by the Commissioner. The Commissioner has been compelled in connection with her Final Order of December 12, 2012 denying one of these application for registration to order the Defendants to cease operating Galilee without a valid registration. (Gribble, Exhibit 3).

Mr. Gribble also describes a further application for registration that denied, and led to his letter of July 23, 2013, notifying Galilee of the denial but for the Commissioner to grant Galilee a limited authorization to provide merchandise and services to persons who had previously purchased burial plots on a pre-need basis. (Gribble, Exhibits 4-5). An application filed on August 28, 2013 is now pending from JM&M Services, Inc., but since its filing, Mr. Gribble obtained a report from a funeral director, Derrick Gunn, retained by Defendants to review operations at Galilee that contains disturbing findings. (Gribble, Paras.7-9; Report at Exhibit 7.)

In part (and most significant to the State's Application for a Restraining Order) the Gunn Report identifies that Galilee had reached *full capacity in 2010*. Accordingly, no at-need burials should have taken place after that time. Gunn also noted that Jemar Lambert recycled older graves and buried multiple bodies in a single grave to be able to continue business operations at Galilee. Mr. Gribble has asked Jemar Lambert to confirm whether he or his siblings provided any of the information in the Gunn Report and whether he agreed with Mr. Gunn's findings, but he has not responded. (Gribble, Paras. 8-9, Exhibits 8 and 9).

Mr. Gribble also states that the Burial Services Division confirmed on January 14, 2014 that no new trust deposits had been received by Commercial Bank & Trust Company, which maintains the improvement care trust fund (established under Tenn. Code Ann. § 46-1-204) on behalf of Galilee, since on or about October 24, 2013. That deposit of \$31,000 in October, was to cover, in part, a deficiency that ran only through August 25, 2013, plus penalties from failure to make timely deposits. (Gribble, Para. 10.) Mr. Bozeman's search of newspaper obituaries and funeral establishment Web pages, indicated that at least nineteen interments occurred at Galilee between August 31, 2013 and October 26, 2013, (see Roy Bozeman's Affidavit), but no additional trust deposits have been made regarding those interments. (Gribble, Para. 11). This last information supports the Verified Petition allegation that the improvement care trust fund is again deficient. (Petition, Paragraphs 4.14 and 5.2).

Affidavit of Roy Bozeman, Field Representative of the Department, Division of Regulatory Boards – In July 2013, upon the denial of the application for cemetery registration filed in January 2013, Galilee was granted a temporary authority to operate the cemetery, but this was limited to the servicing of old business. It was worded to permit Galilee “to provide improvement care and general upkeep of the cemetery grounds and to fulfill existing contracts for merchandise and services.” It specifically prohibited “[a]ll other operations of the cemetery, including any new sales of lots, grave spaces, merchandise, or services...” (Exhibit 1 to Bozeman Affidavit, Letter of July 23, 2013.)

Mr. Bozeman, who describes his experience in the funeral and cemetery industry for many years, was specifically assigned the task over dates in November 2013 to gather information from Memphis-area funeral establishments to determine whether Galilee was violating the terms of this temporary authorization. Mr. Bozeman shows how that order was violated in several instances from information and records he obtained from licensed funeral establishments, including obituary information, death certificates, cancelled checks, receipts and statements of funeral goods and services contracts related to burials at Galilee. The new sales could be identified by the presence of a copy of a check or evidence of payment tendered at or around the time arrangements and/or payment was made for funeral services, meaning the payment for the burial plot is made after death. He found at least eleven instances demonstrating the at-need purchase of a lot and grave opening and

closing services from Galilee, after the July letter. (Bozeman, Paras. 7-8, Exhibits 2-12.) His conclusion is that these were not fulfillments of prior contracts by Galilee.

Mr. Bozeman further describes interviewing Ms. Madison Strauss, the daughter of a woman who died in February 2009 and was buried at Galilee, but that when Ms. Strauss visited Galilee in December 2013, she was unable to locate the grave, even after asking a cemetery employee for assistance. Ms. Madison Strauss' sworn statement is attached to the Bozeman Affidavit as Exhibit 13.

Finally, Mr. Bozeman describes his research from the obituary postings in The Commercial Appeal and funeral establishment websites. He was able to determine that a minimum of nineteen (19) verifiable interments were conducted at Galilee beginning August 31, 2013 and ending October 26, 2013, using the services of 13 different funeral establishments. An on-site physical examination of Galilee on October 30, 2013 revealed additional interments, but these could not be verified where temporary grave markers were either missing or illegible. Bozeman, Para. 10, Exhibit 14.

Affidavit of Robert S. Durham, Investigator in Office of District Attorney General, 30th Judicial District, The Affidavit of Mr. Durham was submitted to support the State's request that the Court dispense with the requirement of prior notice of the Application for Restraining Order. As stated by Mr. Durham, the District Attorney General of the 30th Judicial District has an active criminal matter pending against one or more of the Defendants who are named in this action and

prior notice to Defendants of the Commissioner's application could hinder or impede that criminal investigation.

Irreparable Harms to the State and the Public Interest if Restraining Order not Granted – The Commissioner is charged with acting in the public interest, and in enforcing the cemetery statutes, can seek to prevent irreparable harms that the cemetery statutes were designed to avoid. While the cemetery is in the precarious and impaired condition represented by the facts described in the Affidavits and Verified Petition, its continued operation and control by the Defendants could impose further damages on the cemetery property and the burial rights past and present. Particularly the Defendants should be prevented from affecting any of the assets and records related to the business of the cemetery, which could impede any appropriate efforts of the Commissioner to determine its condition and reform or revitalize the cemetery under the requested receivership order.

Danger of Delay and Harms Due to Full Cemetery: Most importantly, if the cemetery is full, and questions exist over whether any burial spaces are available, it is irreparably harmful to conduct any new burials. It is imperative that the Court prevent any use or sales pertaining to the cemetery burial spaces at this time, and that a moratorium on Galilee activities take place. A mis-interment might not be remedied easily, whereas the problem is easily avoided by compliance with the law and the prevention of new burials entirely.

The Commissioner seeks the opportunity to take control and determine the condition of Galilee cemetery, through becoming the statutory Receiver. Only a reasoned study and competent certification of available space, together with such restraining order and injunction pending the result of the investigation, could avoid the harm to the families and the public of any other faulty or crowded burial. Any further mis-burial poses a financial risk and emotional upheaval to the families of the deceased, and harms Galilee Memorial Gardens as well to the extent that an expensive and burdensome corrective action must be taken.

To avoid increasing the financial liabilities of the cemetery, a restraining order and temporary injunction should be granted.

Defendants Do Not Suffer Undue Harm or Prejudice From an Order Restraining Operation of Galilee or Acts Affecting its Records and Finances – The Court should find no harm whatsoever arising from an Order barring Defendants from continued operation of Galilee given Galilee was already directed not to conduct new business, and has no registration with which to operate. Without the registration, Defendants have no right to make sales, and should have been consigned before now to a caretaker role as owners of the cemetery. There would be no harm to preventing additional burials when there was no legal right to undertake new obligations for burials, and especially when any burials pose a serious risk of mis-interment. To avoid such potential upheaval to families of additional decedents, and potential harm, even those who may have previously paid

for Galilee burials could be directed to make alternative burial arrangements if the need arises before the true state of the cemetery grounds can be determined.

The balance of harms is clearly in favor of the issuance of a protective Restraining Order pending the outcome of the Commissioner's petition to be made receiver of Galilee.

Injunctive Terms Warranted: Accordingly, each of the order terms set forth in the proposed Restraining Order is necessary to prohibit Defendants JM&M Services, Inc., Lambert Memorial Co. aka Lambert Memorials, Inc. or also aka Lambert & Sons, Inc., Jemar S. Lambert, Marje E. Lambert, and Mary H. Lambert (collectively "Defendants"), and any and all officers, directors, employees, agents, parents, affiliates, successors and assigns, and any other persons in active concert or participation with Defendants who receive notice of the restraining order and/or temporary injunction, from engaging, directly or indirectly, in any act which constitutes the operation of the cemetery, or which interferes in any way with the operation of the cemetery known as Galilee Memorial Gardens (Galilee) until an order granting or denying a permanent injunction is entered.

There is also a likelihood of irreparable harm without the entry of a temporary restraining order. Unless Defendants are restrained by the Court, there is nothing to prevent the Defendants from destroying or concealing records or from transferring, concealing, selling or disposing of cash and other assets. Any such act would materially interfere with or defeat the Commissioner's ability to effectively administer the receivership of Galilee. At the same time, a restraining order would

not impose any undue hardship upon the Defendants. It would impose no costs or duties on defendants and would do nothing more than prohibit the destruction or concealment of records or the transfer of disposition of assets. Furthermore, there is a strong public interest in the subject matter of this litigation and that public interest would be best served by the maintenance of the status quo until this matter can be heard.

CONCLUSION

Now therefore, in view of the foregoing, the State submits that:

1. The Commissioner's Application for a Temporary Restraining Order should be granted and that for good cause shown, the prior notice of an application for a restraining order that is required under section 19.02(a) of the Local Rules be waived.

2. Pending further orders of the Court, the Court should order that the Defendants be restrained and prohibited from engaging in any or all or the following acts:

- 2.1. From engaging in the business of operating a cemetery in violation of the Cemetery Act of 2006, Tenn. Code Ann. Title 46, chapters 1 and 2 (Act);

- 2.2. From concealing or destroying any books, papers, records and other documents related to the operation and management and business activities of Galilee;

- 2.3. From transferring, withdrawing, concealing or disposing of any cash that is held on deposit in any bank, credit union or other financial institution

in any account that is owned by or held for the benefit of Defendants or to sell, destroy, conceal or make any other disposition of Galilee's assets, wherever located.


3. A hearing be set on the Commissioner's Application for a Temporary Injunction as well as via the Show Cause Order pertaining to the Petition for Appointment of Commissioner as Receiver.

4. That the Temporary Restraining Order remain in effect until dissolved by further Order of this Court or operation of law, and

5. That any expenditure or other action Defendants believe needs to be undertaken during the pendency of the Temporary Restraining Order be presented to the Court for approval.

Respectfully submitted,

ROBERT E. COOPER, JR. (10934)
Attorney General and Reporter


MICHAEL A. MEYER (9230)
Deputy Attorney General
Special Litigation Division
(615) 741-4082


SARAH ANN HIESTAND (14217)
Senior Counsel
Financial Division
P.O. Box 20207
Nashville, TN 37202
(615) 741-6035; fax 532-8223

CERTIFICATE OF SERVICE

The undersigned certifies that this Pleading will be served on the below listed Defendants at the same time and in the same manner as the Summonses and the Petition for Appointment of Receiver that has been filed in this cause on the 24th day of January, 2014:

Galilee Memorial Gardens
8283 Ellis Road
Memphis, TN 38133

JM&M Services, Inc.
8283 Ellis Road
Memphis, TN 38133

Lambert Memorial Co, aka Lambert Memorials Inc.
Lambert & Sons, Inc.
8283 Ellis Road
Memphis, TN 38133

Jemar Lambert
8283 Ellis Road
Memphis, TN 38133

Marje Lambert
8283 Ellis Road
Memphis, TN 38133

Mary H. Lambert
8283 Ellis Road
Memphis, TN 38133


MICHAEL A. MEYER