

STATE OF MAINE  
KENNEBEC, SS.

RECEIVED AND FILED  
KENNEBEC COUNTY SUPERIOR COURT

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. CV-05-124

2005 JUN 17 A 8:05

STATE OF MAINE,

Plaintiff,

v.

KIMBERLY MARK SMITH and  
DAVID J. BLAIS, d/b/a CBS  
ENTERPRISES,

Defendants.

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**AFFIDAVIT AND  
REQUEST FOR DEFAULT**  
CONSUMER PROTECTION DIVISION  
**RECEIVED**

**JUN 23 2005**

OFFICE OF ATTORNEY GENERAL

STATE OF MAINE  
COUNTY OF KENNEBEC, ss.

I, James McKenna, Assistant Attorney General, being duly sworn, deposes and states as follows:

1. I am an attorney for the Plaintiff in the above-captioned matter. The Summons and Complaint were served upon Defendant David J. Blais on May 24, 2005, and the Certificate of Service is being filed with this Court as an attachment to this Affidavit.

2. The Defendant has failed to plead or otherwise defend this action, and the time to plead or otherwise defend has expired.

3. The Defendant is not an infant or incompetent person, and to the personal knowledge of the undersigned, the Defendant is not in the Military Service of the United States, as defined in Article I of the Soldiers' and Sailors' Relief Act of 1940, as he is a resident of Livermore, Maine.

4. On June 9, 2005, this affiant met with Defendants Smith and Blais. At that time, Mr. Smith indicated that he was aware that the deadline for answering the State's Complaint was Monday, June 13, 2005.

5. That this Affidavit is executed by affiant herein in accordance with Rule 55(a) of the Maine Rules of Civil Procedure, for the purpose of enabling the Plaintiff to obtain an entry of default against Defendant Blais for his failure to answer or otherwise defend as to the Plaintiff's Complaint.

6. Venue is proper in Kennebec County pursuant to 5 M.R.S.A. § 209.

Dated: 6/16/05

*James A. McKenna*

JAMES A. MCKENNA, Bar No. 1735  
Assistant Attorney General  
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State House Station #6  
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SUBSCRIBED and SWORN to me before on this 16<sup>th</sup> day of June, 2005.

*Susan L. Paradis*

Notary Public, Attorney at Law

SUSAN L. PARADIS  
Notary Public • State of Maine  
My Commission Expires: 3/12/06

*6/21/05*  
*Default entered against David J. Blaw.*

*Nancy Nevardin*  
*Clerk of Courts.*

STATE OF MAINE  
KENNEBEC, SS.

SUPERIOR COURT  
CIVIL ACTION  
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 Plaintiff, )  
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 KIMBERLY MARK SMITH and )  
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 Defendants. )

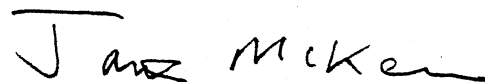
**STATE'S MOTION FOR  
DEFAULT JUDGMENT  
(M. R. Civ. P. 55(b))**

NOW COMES the State of Maine, Plaintiff in this matter, and pursuant to M. R. Civ. P. 55(b) moves this Court for default judgment against Defendants Smith and Blais, for the reasons set forth more fully in the Memorandum of Law submitted in support of this Motion. A proposed Order is attached to this Motion.

WHEREFORE, the State respectfully requests that its Motion for Default Judgment be granted.

Dated: June 27, 2005

Respectfully submitted,



JAMES A. MCKENNA, Bar No. 1735  
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Attorney for the Plaintiff  
Office of the Attorney General  
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**NOTICE**

Pursuant to M. R. Civ. P. 7(c), opposition to this Motion must be filed not later than 21 days after the filing of the Motion unless another time is provided by the rules or set by the Court. The failure to file timely opposition will be deemed a waiver of all objections to the Motion, which may be granted without further notice or hearing.

STATE OF MAINE  
KENNEBEC, SS.

SUPERIOR COURT  
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STATE OF MAINE, )  
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 KIMBERLY MARK SMITH and )  
 DAVID J. BLAIS, d/b/a CBS )  
 ENTERPRISES, )  
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 Defendants. )

**MEMORANDUM OF LAW  
IN SUPPORT OF THE  
STATE'S MOTION FOR  
DEFAULT JUDGMENT**

**INTRODUCTION**

NOW COMES the State of Maine, Plaintiff in this matter, and moves this Court pursuant to M. R. Civ. P. 55(b) for a default judgment against Defendants Smith and Blais. The grounds for this Motion are set forth below.

**FACTS**

Between May and October of 2004, the Defendants entered into numerous contracts to build residential garages or other home construction projects. In at least 12 different instances, the Defendants either failed to complete the project or the work they did complete was done extremely poorly. When the consumers complained to the Defendants about the extremely poor quality workmanship and unfinished structures, the Defendants refused to either properly complete the structures or provide restitution. In at least two instances, the Defendants accepted down payments but failed to do any work at all.

The contracts the Defendants entered into with these consumers were for more than \$3,000 and were in violation of the provisions required by the Home Construction Contract Act,

14 M.R.S.A. §§ 1486-1490. One of the required provisions of the Home Construction Contract

Act is a warranty statement which reads:

In addition to any additional warranties agreed to by the parties, the contractor warrants that the work will be free from faulty materials; constructed according to the standards of the building code applicable for this location; constructed in a skillful manner and fit for habitation or appropriate use. The warranty rights and remedies set forth in the Maine Uniform Commercial Code apply to this contract.

The Defendants' faulty workmanship was most certainly in violation of this express warranty. Pursuant to 10 M.R.S.A. § 1490, violations of the Home Construction Contract Act constitute "*prima facie* evidence" of a violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207.

The Defendants breached their construction contracts with the following consumers by either substandard work or not completing the contracted for home construction job:

Dennis Clark/William Folger  
51 Western  
Boothbay Harbor, ME 04538

Natalie M. Cochran  
784 Farmington Falls Road  
Farmington, ME 04938

Rachel Cyr-Matthews  
18 Gladys Lane  
Oxford, ME 04270

Thomas E. Foss  
P.O. Box 332  
East Machias, ME 04630

Owen Gomes  
232 South Main Street  
Mechanic Falls, ME 04256

Joe and Lora Jackson  
161 Mountain Road  
Nottingham, NH 03920

Robert J. Jackson  
371 Cat Mousam Road  
Kennebunk, ME 04043

Anne Marie Jefferson  
P.O. Box 129  
Sebago, ME 04029

Ellwood W. Kelley  
P.O. Box 16  
Seal Cove, ME 04674

Edward Kwasz  
42 Hawthorne Street  
Portland, ME 04103

Don and Sally Leach  
891 Augusta Road  
Belgrade, ME 04917

Scott and Darlene Lee  
P.O. Box 801  
Jackman, ME 04945

Keith Morris  
45 Brooke Lane  
New Gloucester, ME 04260

Joyce L. Moore  
611 Moose Hill Road  
Livermore Falls, ME 04254

Terrence and Sharon O'Neil  
16 Richardson Road  
Warren, NH 03279

### ARGUMENT

Pursuant to M. R. Civ. P. 55(b)(4), no judgment by default shall be entered until the Plaintiff or the Plaintiff's attorney files an affidavit setting forth the facts showing that the

Defendant is not a person in the military service, as defined in the Soldiers' and Sailors' Relief Act of 1940 and that venue is properly laid at the place where the action was brought.

Both Defendant Smith and Defendant Blais reside in Livermore, Maine 04253 and have conducted a home construction business called CBS Enterprises. See attached McKenna Affidavit and Request for Default. This shows that the Defendants are not in the military service. This also shows that the venue is proper in Kennebec County, pursuant to 5 M.R.S.A. § 209 of the Maine Unfair Trade Practices Act.

Defendants Smith and Blais have failed to answer either the State's Unfair Trade Practices Act Complaint or its Motion for Preliminary Injunction. Because the Defendants failed to plead or otherwise defend this action, and the time to plead or otherwise defend expired, the Clerk on June 20, 2005 entered a default against both Defendants.

To date, Defendants Smith and Blais, against whom judgment by default is sought, have failed to appear in any way in this action. Pursuant to M. R. Civ. P. 55(b)(2), the State is seeking a hearing at which the Court can determine the proper relief that should be granted by the default judgment.

The Defendants repeated breaches of their home construction contracts are in violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207. See *State v. Weinschenk*, 868 A.2d 200 (Me. 2005) (serious home construction defects are in violation of the Maine Unfair Trade Practices Act). Further, the Defendants are also in violation of the Unfair Trade Practices Act due to their repeated violation of the Home Construction Contract Act, 10 M.R.S.A. § 1490, which requires a written contract containing specific provisions. Each of the contracts used for the above-listed consumers was in violation of this law.

## RELIEF REQUESTED

### Restitution

The Complaint alleges that the Defendants violated the Maine Unfair Trade Practices Act (5 M.R.S.A. § 207) due to their very serious breaches of home construction contracts. The State is requesting that this Court order Defendants Smith and Blais to pay restitution to the following persons, pursuant to 5 M.R.S.A. § 209:

NAME	AMOUNT
Dennis Clark/William Folger	\$45,600.00
Rachel Cyr-Matthews	\$ 3,820.00
Thomas Foss	\$ 4,000.00
Owen Gomes	\$ 6,184.00
Joe and Lora Jackson	\$ 2,689.80
Robert J. Jackson	\$15,521.00
Anne Marie Jefferson	\$17,000.00
Ellwood W. Kelley	\$ 3,397.00
Edward Kwasz	\$ 5,194.00
Scott and Darlene Lee	\$ 3,340.00
Keith Morris	\$ 4,500.00
Terrence and Sharon O'Neil	\$ 5,700.00

### Injunction

Pursuant to the Maine Unfair Trade Practices Act (5 M.R.S.A. § 209), the State is entitled to an injunction permanently enjoining Defendants Smith and Blais, their agents, servants, employees and those persons in active concert or active participation with them, who receive



actual notice of the injunction, from engaging in any future home construction work, either as contractors or laborers.

### **Civil Penalties**

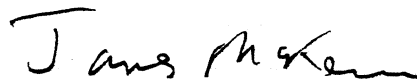
In addition to the restitution and injunctive relief, the State is entitled to a civil penalty of up to \$10,000 for each intentional violation of the Unfair Trade Practices Act (5 M.R.S.A. § 209). The Defendants breaches of the home construction contracts of the consumers listed above were in violation of the Maine Unfair Trade Practices Act. In addition, the Defendants' failures to use the form contract required by the Maine Home Construction Contract Law (10 M.R.S.A. § 1490) are also in violation of the Unfair Trade Practices Act. Therefore, the State is requesting that the Defendants each be assessed a civil penalty of \$1,000 per each consumer violation, for a total civil penalty of \$12,000 each.

### **CONCLUSION**

For these reasons, the State respectfully requests that the Court enter an Order granting its request for injunctive relief and scheduling a testimonial hearing on the civil penalty and restitution issues. See M. R. Civ. P. 52(b)(2). Finally, the State requests that in lieu of testimony before the Court, the consumers listed above may submit affidavits describing the damages caused by the Defendants and the amount of restitution they believe they are entitled to.

Dated: 6/27/05

Respectfully submitted,



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