



AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: MICHAEL G DEAN
mdean@ago.state.al.us

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

STATE OF ALABAMA ET AL V. AMERICAN PLUMBING AND SEPTIC SERVICE, LLC E
11-CV-2018-900431.00

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C001 STATE OF ALABAMA

EMERGENCY MOTION TO FURTHER MODIFY THE TEMPORARY RESTRAINING ORDER

[Filer: DEAN MICHAEL GREGORY]

Notice Date: 8/9/2018 11:27:18 AM

KIM MCCARSON
CIRCUIT COURT CLERK
CALHOUN COUNTY, ALABAMA
25 WEST 11TH STREET
ANNISTON, AL, 36201

256-231-1750
Kim.McCarson@alacourt.gov

IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

| | | |
|------------------------------------|---|---------------------------------|
| STATE OF ALABAMA |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. CV-18-900431.00 |
| |) | |
| AMERICAN PLUMBING AND |) | |
| SEPTIC SERVICE, LLC, et al. |) | |
| Defendants. |) | |

STATE AND RECEIVER’S CORRECTED JOINT RESPONSE
IN OPPOSITION TO DEFENDANT’S MOTION TO
FURTHER MODIFY THE TEMPORARY RESTRAINING ORDER

COMES NOW the Plaintiff, State of Alabama, and the Receiver, Jeffery C. Schneider, and submit this joint response in opposition to the “Emergency Motion to Further Modify Temporary Restraining Order” filed by Defendants American Plumbing Service, LLC, American Drain Cleaning & Plumbing Service, Richard J. Pesnell (“Josh Pesnell”), Jessica Pesnell, and Richard G. Pesnell. As grounds therefore, the State and the Receiver offer the following:

In their motion, the Defendants complain that their employees are prohibited by the TRO from “[e]ngaging in business as a supplier, servicer, or any other type of skilled trade,” and they ask this Court to modify the TRO to order the Receiver to pay their employees “all amounts earned to date and to permit the employees to seek any other employment they can find[.]” (Motion at 2-3); *see also* (TRO at 5-6). With some exceptions stated below, the State and the Receiver oppose these requests.

Since this Court issued the TRO, the Defendants have done nothing but reaffirm this Court's decision to issue that order. The Receiver will issue a report detailing more specifically the Defendants' refusal to comply with the TRO at a later date, but so far the State and Receiver are aware that the Defendants and their employees have engaged in multiple deceptive acts intended to conceal assets from the Receiver.

On August 3rd, the Receiver specifically asked the Defendants whether anyone had any cellular phones or vehicles that were paid for by the business. Josh Pesnell and Jessica Pesnell told him there were none. The Defendants also represented to the Receiver, on more than one occasion, that all of the company vehicles had been returned to the business. On Monday, August 6th, the Receiver allowed the Defendants access to the business so they could begin reviewing records to prepare their defense. The Defendants made no mention of any phones or vehicles that were owned or paid for by the company that had not been turned over or otherwise disclosed to the Receiver.

Then, on the afternoon of Tuesday, April 7th, the falsity of these statements was revealed. The Defendants' former attorney informed the Receiver via email that both Josh and Jessica Pesnell had in their possession cellular phones that are paid for by the business. The Defendants' former attorney also revealed that Josh Pesnell's personal vehicle is leased through the business. The attorney also

informed the Receiver that the Defendants had recently purchased a “pump truck,” which was being stored at the residence of Defendant Richard G. Pesnell and which the Receiver understands was delivered on Sunday, August 5th, the existence of which was not revealed to the Receiver on Monday August 6th while the Defendants were present at the business. The attorney further told the Receiver that multiple employees took vehicles belonging to the company home rather than return them to the business as specifically directed by the Receiver. The hiding of these vehicles seems to be a direct result of the conduct of Defendant Richard G. Pesnell, who openly stated, in the presence and hearing of the Receiver, that he had texted employees who were away from the business and told them not to return.¹

Moreover, as if the Defendants’ multiple acts of dishonesty with the Receiver were not enough, the State and the Receiver have received information from multiple sources who have reported that the Defendants are still attempting to operate their business in violation of this Court’s order. Additional details will be reported as they are obtained.

As for the employees, the State and Receiver take issue with the Defendants’ apparent contention that they are purely innocent players in this case. As the complaint sets out, the Defendants *and their employees* have engaged in numerous

¹ The Defendants’ current attorney has made arrangements to turn over these assets to the Receiver on Saturday, August 11th. Needless to say, this trip to Anniston was necessitated by the Defendants’ failure to make these disclosures, and return these items, during the Receiver’s earlier two trips.

deceptive and dangerous acts in the conduct of the Defendants' business. As the complaint illustrates, the same consumer experience is oft-repeated: the Defendants' employees come to a consumer's home, give an estimate, and then attempt to charge a significantly higher amount. It is also a frequently repeated story that the Defendants' employees arrive at a consumer's home to do a simple job only for the employees to suddenly discover that the consumer needs extensive – and expensive – additional work, which must be done immediately. And, if consumers don't simply go along, they are often bullied *by the Defendants' employees* into agreeing to have the work done, even if that means taking out a loan that they cannot afford. Indeed, since this Court issued the TRO, both the State and the Receiver have heard from other consumers who have been victimized by the Defendants and their employees in the same manner.

It is easy to see how this happens: the Defendants' employees are paid purely on commission, *which is sometimes as high as 40%*, which gives them every reason to inflate expenses and find work that “desperately” needs to be done. And so, to slake their greed, the Defendants' employees have abused consumers, many of whom are elderly and vulnerable to these abuses. They are not, as the Defendants would contend, entirely innocent.

Thus, given the conduct of the Defendants and their employees both before and since the issuance of the TRO, the State and the Receiver object to a

modification of the TRO to permit payment of the Defendants' employees for work they have previously done. Their conduct simply does not warrant it. Moreover, at this point, the Receiver has only identified approximately \$360,000 in the Corporate Defendants' possession. According to information the Defendants provided the Receiver on August 3rd, there are two weeks' worth of salaries to be paid, with each week's payroll amounting to approximately \$30,000. Thus, the Defendants are asking this Court to direct the release of \$60,000 out of a total of approximately \$360,000 that is currently available to pay the \$118,270 in consumer restitution and \$1,400,000 in penalties requested in the complaint. That \$60,000 represents more than half the consumer restitution that the State contends is due, and the State and the Receiver do not believe this Court should direct the Receiver to release those funds.

Moreover, the Defendants' request is difficult to square with their stance towards the extension of the TRO. The State wanted, and the Court originally set, a quick hearing so that this case could move toward a quicker resolution, which would better serve both consumers and the Defendant's employees. But the Defendants, fully aware of the restrictions imposed by the TRO, asked this Court to extend the TRO. It should be obvious that asking for an extension of the TRO will, if the request is granted, result in an extension of the TRO. But the Defendants are essentially asking to have their cake and eat it, too. They should not

be able to do so, especially given their and their employees' conduct both before and since this Court issued the TRO.

Lastly, the State and the Receiver would not object if the Court released the Defendants' employees from the TRO, provided that the release only applies to employees who are purely "W-2" employees and not the individual Defendants or any principals, officers, directors, or other individuals with a leadership role or ownership or other similar interest in the Defendants businesses, and that the release expressly prohibits those released from working directly or indirectly for any individual Defendant or any principal, officer, director, or other individual with a leadership role or ownership or other similar interest in any of the Defendants businesses.

Respectfully submitted, this the 9th day of August, 2018.

Steve Marshall
Attorney General

/s/ Michael G. Dean
Michael G. Dean
Noel S. Barnes
Assistant Attorneys General
Attorneys for Plaintiff State of Alabama

Office of the Attorney General
Consumer Interest Division
P.O. Box 300152

501 Washington Avenue
Montgomery, Alabama 36130-0152
(334)242-7300; (334) 353-0415*
Fax: (334)242-2848

/s/ Jeffery C. Schneider
Jeffery C. Schneider
Receiver
Levine, Kellogg, Lehman,
Schneider, & Grossman, LLP
201 South Biscayne Boulevard
22nd Floor, Citigroup Center
Miami, Florida, 33131
(305) 403-8799
Fax: (305) 403-8789
jcs@lklsg.com

CERTIFICATE OF SERVICE

We hereby certify that, on this 9th day of August, 2018, we have served a copy of the foregoing upon counsel for the Defendants by mailing copies of the foregoing by email or by first-class U.S. Mail, at the following addresses:

Tabor R. Novak III
J. Scott Dickens
Starnes Davis Florie, LLP
100 Brookwood Place, 7th Floor
P. O. Box 598512
Birmingham, Alabama 35259-8512
tnovak@starneslaw.com
sdickens@starneslaw.com

Chris Jefferson
Jefferson & Associates
1812 Wilmer Ave. Ste. A
Anniston, Alabama 36201
christopherjeffersonesq@gmail.com

/s/ Michael G. Dean
Michael G. Dean
Assistant Attorney General

/s/ Jeffery C. Schneider
Jeffery C. Schneider
Receiver