



## AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

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

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# NOTICE OF ELECTRONIC FILING

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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

The following matter was FILED on 8/13/2018 5:55:44 PM

**D001 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC**

**D002 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC**

**D004 PESNELL JESSICA**

**D005 PESNELL RICHARD G**

**D003 PESNELL RICHARD JOSHUA**

MOTION TO DISSOLVE THE RECEIVERSHIP AND SEQUESTRATION OF ASSETS

[Filer: GRESHAM COLE ROBINSON]

Notice Date: 8/13/2018 5:55:44 PM

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

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



ELECTRONICALLY FILED  
8/13/2018 5:54 PM  
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CIRCUIT COURT OF  
CALHOUN COUNTY, ALABAMA  
KIM MCCARSON, CLERK

**STATE OF ALABAMA**

Revised 3/5/08

Cas

Unified Judicial System

11-CALHOUN

District Court  Circuit Court

CV21

**CIVIL MOTION COVER SHEET**

STATE OF ALABAMA ET AL V. AMERICAN PLUMBING AND SEPTIC SERVICE, LLC E

Name of Filing Party: D001 - AMERICAN PLUMBING AND SEPTIC SERVICE, LLC  
D002 - AMERICAN PLUMBING AND SEPTIC SERVICE, LLC  
D003 - PESNELL RICHARD JOSHUA  
D004 - PESNELL JESSICA  
D005 - PESNELL RICHARD G

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

COLE ROBINSON GRESHAM  
100 BROOKWOOD PL. 7TH FL.  
BIRMINGHAM, AL 35209

Attorney Bar No.: GRE127

Oral Arguments Requested

**TYPE OF MOTION**

**Motions Requiring Fee**

**Motions Not Requiring Fee**

- Default Judgment (\$50.00)  
Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative Summary Judgment (\$50.00)
- Renewed Dispositive Motion (Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other \_\_\_\_\_ pursuant to Rule \_\_\_\_\_ (\$50.00)

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other Motion to Dissolve the Receivership and Sequestration of Assets

\*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0

pursuant to Rule Rule 65 (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees)

Date:  
8/13/2018 5:53:47 PM

Signature of Attorney or Party  
/s/ COLE ROBINSON GRESHAM

\*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.  
\*\*Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.



any indication that they would remove, conceal, or dispose of any property, they are willing to deposit with the Court \$130,097.96 (\$118,270.87 plus 10%) until such time as the claims against the Defendants can be decided on the merits.

**THE STATE’S REQUEST FOR A RECEIVER AND SEQUESTRATION OF DEFENDANTS’ ASSETS IS INCONSISTENT WITH THE TERMS OF THE DTPA.**

The breadth of the State’s TRO is beyond the scope envisioned by § 8-19-8, as it freezes more assets than necessary to “prevent damage of persons to whom restoration would be made.” ALA. CODE § 8-19-8. According to Plaintiff’s allegations, Defendants only owe a total of \$118,270.87 in consumer restitution,<sup>1</sup> and the Receiver acknowledges that American has at least \$360,000 in liquid assets.<sup>2</sup> Doc. 99 at p. 5. As a result, Defendants’ liquid assets are more than sufficient cover any restitution that may be owed if the State prevails.

The State’s Motion claims that a receiver should be appointed to protect the potential civil penalties that may be collected in the event the State prevails. Doc. 21 at p. 8. This argument, however, is contrary to the plain language of the statute. Section 8-19-8, clearly provides that the only issue to be considered is possible “damage of **persons to whom restoration would be made.**” (emphasis added). The State’s Motion for a Temporary Restraining Order even acknowledges that a receiver or order of sequestration of assets may only be entered where it is necessary to prevent “damage of persons to whom restitution should be made.” Doc. 21 at p. 8. Under the State’s claims and the DTPA, no

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<sup>1</sup> State’s Exhibit 51.

<sup>2</sup> Defendants expect that a full accounting of all assets will demonstrate that the Defendants’ liquid assets exceed \$360,000.

restitution (or “restoration”) is owed to the State. The State is only allowed “civil penalt[ies]” under Alabama Code § 8-19-11(b). In other words, § 8-19-8 only allows appointment of a receiver and sequestration of assets to insure assets will be available for restitution to consumers. In this case, the appointment of a receiver and sequestration of assets are wholly inappropriate, given that Defendants’ assets are substantially more than any potential restitution that may be owed, and Defendants offer to deposit collateral with the Court to prevent removal, concealment of disposal of those assets.

The State’s appointment of a receiver and sequestration of Defendants’ assets is more about punishing the Defendants than it is providing restitution for consumers. This is demonstrated by the fact that the State has chosen a receiver who is located in Miami, Florida, requiring that every time someone needs access to American’s premises, a lawyer must fly up from Miami, rent a car, and then drive over to Oxford, Alabama. This is a waste of time and money, and does not serve the purpose of preserving Defendants’ assets for restitution. It is difficult to identify any justifiable reason for the State to propose appointing a receiver located more than 700 miles from the receivership entity, especially when there are innumerable qualified candidates who reside in the State of Alabama or within driving distance of Oxford, Alabama and are more than capable of marshalling and preserving the assets of a family-run plumbing business. If the State’s purpose in requesting a receivership was to preserve assets to protect the persons to whom restitution should be made, then it should not have proposed a receiver whose location creates a drain on company assets every time travel to Calhoun County becomes necessary to fulfill receivership obligations.

The State's sequestration order also prevents Defendants' from paying their employees for work performed prior to the TRO, potentially subjecting Defendants to a lawsuit for violation of the Fair Labor Standards Act. The Defendants are also currently prevented from engaging in ongoing work, which results in breaches of contracts the Defendants are obligated to fulfill and exposes the company to contractual and other liabilities. Likewise, calls from customers and others are going unreturned. In short, the receivership as currently set up, has effectively shut this business down and is subjecting the company to potential liabilities, some of which Defendants are not even able to discern because they do not have access to bills, mail, or other documents necessary to operate a business. All of this demonstrates that the State's real purpose is not to preserve assets, but to punish Defendants before they have even had an opportunity to defend themselves.

The issues with the State's order appear to stem from the State presenting this Court with a proposed order the State cut-and-pasted from an unrelated, factually distinguishable action such as the one brought by the Federal Trade Commission against telemarketers in a California federal court. (*See e.g.*, Temporary Restraining Order entered in *Federal Trade Commission v. MDK Media Inc., et al.*, Case No. CV 2014-5099, United States District Court for the Middle District of California, attached hereto as Exhibit A). This order has nothing to do with a family-owned plumbing business. Yet, the State appears to have copied this order virtually verbatim. As pointed out in the Defendants' filings, the State's failure to tailor the proposed order to the circumstances, in this case, has resulted in an order that is substantially overbroad and unduly burdensome given the nature of Defendants' business.

In lieu of the receivership, Defendants offer to pay into Court \$130,097.96, which is the alleged amount required to make restitution to consumers, plus ten percent (10%). Doing so will eliminate any theoretical need for a receiver as there will then be absolutely no chance that the Defendants can “remove, conceal, or dispose of [those assets] to the damage of persons to whom restitution would be made. . . .” ALA. CODE § 8-19-8(b). Given this offer and concession by the Defendants, the only rational motive for the State to oppose the discharge of the Receiver is to further punish the Defendants by creating massive, unnecessary costs and imposing those costs on the Defendants.

### **CONCLUSION**

The State’s appointment of a receiver and sequestration of assets oversteps the bounds of the DTPA. Therefore, the Defendants request that the receivership and sequestration be dissolved, and that, in lieu of the receivership and sequestration, the Defendants be permitted to pay into Court \$130,097.96 to cover any potential restitution that would be owed should the State prevail.

Dated: August 13, 2018

Respectfully submitted,

/s/ Tabor R. Novak III

Tabor R. Novak III (ASB-3580-B60N)

J. Scott Dickens (DIC023)

STARNES DAVIS FLORIE LLP

100 Brookwood Place, 7<sup>th</sup> Floor

P. O. Box 598512

Birmingham, AL 35259-8512

*tnovak@starneslaw.com*

*sdickens@starneslaw.com*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 2018, I electronically filed the foregoing with the Clerk of the Court using the Ala-File system to the following:

Noel S. Barnes  
Michael G. Dean  
Assistant Attorneys General  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, AL 36104  
nbarnes@ago.state.al.us  
mdean@ago.state.al.us  
(334) 353-9196

Matt Bledsoe  
Assistant Attorney General  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, AL 36104  
mbledsoe@ago.state.al.us  
(334) 242-7443

T. Cameron McEwen  
General Counsel  
Alabama Plumbers & Gas Fitters Examining Board  
11 W. Oxmoor Road #104  
Birmingham, AL 35209  
cameron.mcewen@fsb.alabama.gov  
(205) 945-4857

/s/ Cole R. Gresham  
Cole R. Gresham (ASB-8993-L74G)