



## AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: DEAN MICHAEL GREGORY  
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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 8/15/2018 10:53:22 AM

**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: 8/15/2018 10:53:22 AM

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**IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA**

STATE OF ALABAMA,

Plaintiff,

vs.

AMERICAN PLUMBING AND SEPTIC  
SERVICE, LLC, et al,

Defendants.

CASE NO CV18-900431

**DEFENDANTS’ REPLY IN FURTHER SUPPORT OF THEIR MOTION TO  
DISSOLVE THE RECEIVERSHIP AND SEQUESTRATION OF ASSETS**

COME NOW, American Plumbing and Septic Service, LLC, American Drain  
Cleaning & Plumbing Service, Richard J. Pesnell, Jessica Pesnell, and Richard G. Pesnell  
(collectively “Defendants”) and respectfully submit this Reply in Further Support of their  
Motion to Dissolve the Receivership and Sequestration of Assets.

**INTRODUCTION**

The State’s Response to Defendants’ Motion to Dissolve the Receivership and  
Sequestration of Assets (“Response”) further confirms that the receivership and  
sequestration of the assets should never have been granted. The State’s Response  
demonstrates a fundamental misunderstanding of the law and the duties of the Receiver. In  
fact, the Response is wholly devoid of any legal analysis. Instead, the State relies on a host  
of unsubstantiated allegations that, even if true, do not support the appointment of a  
receiver and sequestration of assets under the Alabama Deceptive Trade Practices Act  
(“DTPA”). The DTPA permits the appointment of a receiver only when “the defendant  
threatens or is about to remove, conceal, or dispose of his property to the damage of persons

to whom restoration would be made. . . .” ALA. CODE § 8-19-8(b). First, Defendants have never threatened to remove, conceal, or dispose of property to the damage of the American Plumbing’s customers who are making the allegations, which Defendants deny and will vigorously defend in this Court, and there is no evidence to suggest they have. Second, Defendants’ offer to deposit funds in excess of the damages to American Plumbing’s customers eliminates any arguable need for the appointment of a receiver and sequestration of assets under the DTPA.

**THE ORDER APPOINTING THE RECEIVER AND SEQUESTERING DEFENDANTS’ ASSETS IS CONTRARY TO THE PLAIN LANGUAGE OF THE DTPA.**

The State does not challenge the fact that the DTPA permits the appointment of a receiver **only** when “the defendant threatens or is about to remove, conceal, or dispose of his property to the damage of persons to whom restoration would be made. . . .” ALA. CODE § 8-19-8(b). The State also does not challenge the fact that the Receiver has determined that the Corporate Defendants have liquid assets in the amount of \$360,000.00 and it does not challenge the fact that its Complaint only alleges that the Defendants owe restitution in the amount of \$118,270.87. Given the State’s concessions on these points and Defendants’ offer to deposit \$130,097.96 with the Court, the plain language of the DTPA compels the conclusion that the receivership and sequestration of Defendants’ assets are due to be dissolved.

Recognizing that there is no legal basis for opposing Defendants’ motion, the State attempts to expand the role of the receiver far beyond the plain language of the DTPA. The State first argues that “the Receiver’s duties in this case go well beyond granting the

Defendants access to Receivership property. For example the Receiver is also responsible for identifying additional victims . . . .” Doc. 137 at p. 2. As an initial matter, this argument finds no support in the plain language of the DTPA, and the State provides no legal authority supporting such activities by the Receiver.

Furthermore, nothing in the TRO gives the Receiver the responsibility to identify additional victims. In fact, the Order specifically states that “The Receiver **shall be the agent of this Court**, and **solely the agent of this Court**, in acting as Receiver under this Order.” Doc. 22 at § VII(A) (emphasis added). As an agent of the Court, it would certainly be improper if the Receiver were actively attempting to assist the State’s case. Thus, if the Receiver is attempting to identify further victims on behalf of the State, he is acting in direct violation of the Court’s Order.<sup>1</sup>

The State’s remaining arguments are all disputed allegations for which the State provides no citations. Even if true, the unsupported allegations do nothing to overcome the legal deficiencies of the sequestration and receivership order. As a result, the order appointing the receiver and sequestering Defendants’ assets is due to be dissolved.

### **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 (Sections III-VIII of the *Ex Parte* TRO), and that, in lieu of the

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<sup>1</sup> It should also be noted that the State and the Receiver have filed a joint response (Doc. 99) in opposition to Defendants’ Motion to Further Modify the TRO, further demonstrating that the Receiver is acting as an agent of the State not the Court.

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 15, 2018

Respectfully submitted,

/s/ Tabor R. Novak III

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

J. Scott Dickens (DIC023)

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2018, I electronically filed the foregoing with the Clerk of the Court using the Ala-File system to the following:

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