



AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

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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

MOTION TO DISSOLVE THE RECEIVERSHIP AND SEQUESTRATION OF ASSETS

[Filer: DEAN MICHAEL GREGORY]

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

Comes now the Plaintiff, State of Alabama, and submits this response in opposition to the “Reply in Further Support of Their Motion to Dissolve the Receivership and Sequestration of Assets” filed by Defendants American Plumbing Service, LLC, A American Drain Cleaning & Plumbing Service, Richard J. Pesnell (“Josh Pesnell”), Jessica Pesnell, and Richard G. Pesnell. As grounds therefore, the State offers the following:

In their reply, the Defendants assert that “[t]he 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[.]’” (Reply [Doc. 143] at 2)(quoting Ala. Code § 8-19-8(b)(emphasis in original).¹ While this may be true,

¹ It is interesting to note here that the Defendants, who carry the burden of proof as the moving party, have only discussed two statutes in support of their argument (and one case only for the proposition that the State used the TRO issued in that

the reality is that the State in its request for the TRO, as well as the Court through the issuance of the TRO, anticipated exactly what has happened: that the Defendants have lied about the existence and location of assets, that Defendant Richard Pesnell (at least) instructed the Defendant's employees to hide assets, and that the Defendants attempted to avoid turning over some of those assets. This conduct shows that the Defendants have in fact tried to hide and conceal assets, and based on these facts alone, it must be said that the Court properly appointed the Receiver. *See* Ala. Code § 8-19-8(b). Thus, this Court should deny the Defendants' motion without further consideration.

The Defendants also assert that the State did not challenge the fact that its complaint only alleges that the Defendants owe restitution in the amount of \$118,270.87 and that, in light of that "concession" and their offer to deposit \$130,097.96 with this Court, that the receivership and the sequestration of assets should be dissolved. (Reply [Doc. 143] at 2) Of course, the Defendants neglect to mention that the State expressly asserted in its response that the \$118,270.87, which is the amount of restitution the State asserts is due to the victims who submitted affidavits, may ultimately be insufficient to compensate consumers who

case as a template for proposed TRO submitted to the Court in this case). *See* (Motion [Doc. 131]). However, they somehow assert that the State's response, which cited three statutes and one Alabama Supreme Court decision (as well as a citation to the 10-day hearing requirement in Rule 65 of the Alabama Rules of Civil Procedure) was "wholly devoid of any legal analysis." (Reply [Doc. 143] at 1)

have been affected by the Defendants' unlawful conduct. *See* (Response [Doc. 137] at 2-3) This is especially true in light of the fact that there are certainly additional victims of the Defendants' conduct, and this Court is authorized by the DTPA to grant "such other appropriate relief as [it] may determine." Ala. Code § 8-19-8(e). This is not unlike the power granted to federal courts by Section 13(b) of the F.T.C. Act, 15 U.S.C. § 53(b), which allows those courts to exercise their traditional equitable powers in actions brought pursuant to the Act. *See F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996)(" . . . the district court's equitable powers are extensive. Among the equitable powers of a court is the power to grant restitution and disgorgement."); *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994)("the authority granted by section 13(b) [of the F.T.C. Act] is not limited to the power to issue an injunction; rather, it includes the 'authority to grant any ancillary relief necessary to accomplish complete justice.' This power includes the power to order restitution.") (citation omitted). Given that courts hearing DTPA cases are to give "due consideration and great weight . . . where applicable to interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1))," Ala. Code § 8-19-6, it only makes sense that Section 8-19-5(e) grants Alabama courts the same equitable powers that the federal courts exercise under the F.T.C. Act. Thus, because this Court has the power to grant additional

relief as it deems necessary, the Defendants cannot successfully maintain their argument that depositing \$130,000.00 with this Court will be sufficient to satisfy all claims for restitution.

The Defendants also challenge the Receiver's conduct in this case, as well as the State's assertion that his duties include identifying additional victims of the Defendants' illegal conduct. (Reply [Doc. 143] at 2-3) But this Court did order the Receiver to "[t]ake exclusive custody, control, and possession of all assets *and documents* of, or in the possession, custody, or under the control of, the Receivership Defendants, wherever situated." (Temporary Restraining Order [Doc. 22], § VII.B.(2))(emphasis added). This certainly includes records of the Corporate Defendants' customers, many of whom have been victimized by the Defendants' conduct.

This Court also ordered the Receiver to refrain from "attempt[ing] to collect any amount from a consumer, if the Receiver believes the consumer was a victim of the unfair or deceptive acts or practices" alleged in the State's complaint. (TRO [Doc. 22], § VII.B.(2)) It follows, of course, that the Receiver must identify victims in order to avoid attempting to collect payment from them in violation of this Court's order.

This Court also ordered the Receiver to "[p]revent the inequitable distribution of assets and determine, adjust, and protect the interests of consumers

and creditors who have transacted business with the Receivership Defendants.” (TRO [Doc. 22], § VII.B.(6)) In order to adequately “protect the interests of consumers . . . who have transacted business with” the Defendants, the Receiver must determine whether those consumers have been victimized in order to preserve any claims that have been made, or may be made in the future, by those consumers or by the State acting on their behalf. He is doing that, in part, by taking calls and receiving complaints from additional consumers who have been victimized.

Lastly, this Court specifically ordered in the TRO that the State may remove materials from the Receivership Defendants’ premises for inspection, inventorying, and copying. (TRO [Doc. 22], § VIII.) So, while the Receiver is an agent of the Court and independent from the State, he still must provide the State access to documents related to the Defendants’ customers, which the State may then use to identify additional victims of the Defendants’ unlawful conduct.²

The bottom line in all of this is that this Court determined that the appointment of a receiver and the asset freeze were necessary to preserve the

² The Defendants also complain that the Receiver and the State filed a joint response (Doc. 99) to their “Motion to Further Modify the TRO” ([Doc. 92]). Of course, which specifically asked the Court to direct the Receiver to pay their employees and permit them to seek separate work. It only makes sense that the Receiver would wish to respond to a motion requesting that he personally be ordered to act. It also makes sense that the Receiver and the State would endeavor to save the Court some time and resources by filing a joint response. It does not mean that the Receiver is not independent.

Defendants' assets and protect consumers who will be due restitution for the Defendants' illegal conduct. This Court has that authority. *See* Ala. Code § 8-19-8(b). *See also F.T.C. v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433–34 (11th Cir. 1984)(recognizing the Court's power to exercise equitable powers in an action brought under the F.T.C. Act, including freezing assets, that are necessary "to make permanent relief possible.").

In the end, "[t]he great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The Defendants have done nothing to show that the Court has exercised its statutory or equitable powers in error. If anything, they have demonstrated that this Court has used those powers wisely. They should not be granted relief.

Finally, the State notes that, when the Defendants moved the Court to continue the preliminary injunction hearing, they expressly consented to the extension of the TRO, provided that the Court grant their request to allow them access to Receivership funds for the payment of legal fees and reasonable living expenses. *See* (Motion to Continue [Doc. 75] at 3); *see also* (Emergency Motion to Modify the TRO [Doc. 71]). The Court granted the Defendants' request for living expenses and legal fees, thus satisfying the one condition the Defendants' placed on their consent to a continuance. Yet, the Defendants continue to seek

modifications to, or dissolution of, the TRO. It would seem, then, that their consent to the extension was not entirely made in good faith.

So, in order to conserve scarce judicial resources and avoid the continuing barrage of motions being lobbed at the Court by the Defendants – who, again, asked this Court to delay a hearing at which all of their concerns could have been addressed – the State suggests that this Court consider moving the hearing up to an earlier date. Doing so would allow the Defendants’ concerns to be addressed without the need for the Defendants to continue filing “emergency” and other motions that do nothing but waste time and resources.

Respectfully submitted, this the 15th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of August, 2018, I 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:

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