



AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: BARNES NOEL STEVEN
nbarnes@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

The following matter was FILED on 9/1/2018 9:33:49 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

RESPONSE TO MOTION TO STRIKE/MOTION TO ACCEPT FILINGS

[Filer: NOVAK TABOR ROBERT III]

Notice Date: 9/1/2018 9:33:49 AM

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

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



ELECTRONICALLY FILED
9/1/2018 9:32 AM
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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

CV2

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

CIVIL MOTION COVER SHEET

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.

TABOR R. NOVAK III
100 BROOKWOOD PLACE, 7TH FLOOR
BIRMINGHAM, AL 35209

Attorney Bar No.: NOV003

 Oral Arguments Requested
TYPE OF MOTION**Motions 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)

*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

Motions Not Requiring Fee

- 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 Response to Motion to Strike/Motion to
Accept Filings

pursuant to 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:
9/1/2018 9:28:23 AM

Signature of Attorney or Party
/s/ TABOR R. NOVAK III

*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.

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

**MOTION TO ACCEPT FILINGS OR, ALTERNATIVELY,
 TO CONTINUE HEARING**

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 move and request the Court to accept their filings in opposition to the State of Alabama’s Application for Preliminary Injunction or, alternatively, to reschedule the hearing currently set for September 6, 2018, leaving the Temporary Restraining Order (“TRO”) in place. Defendants offer the following grounds for this motion:

1. On August 3, 2018, the Court entered its Ex Parte Temporary Restraining Order (“TRO”) which scheduled a hearing for Thursday, August 16, 2018, on the Plaintiffs’ application for preliminary injunction. The Court required responses in opposition to be filed four (4) business days before the hearing — Friday, August 10, 2018.

2. On August 8, 2018, the Court entered an Order postponing the hearing three weeks to Thursday, September 6, 2018.

3. Counsel for Defendants calculated the deadline to file their opposition three weeks from the original date, Friday, August 31, 2018.

4. On August 31, 2018 at 3:02 PM, Defendants filed their Opposition to Motion for a Preliminary Injunction with supporting documents.

5. Immediately upon realizing that the Labor Day holiday may affect the timing of the response deadline, counsel for Defendants attempted to resolve the issue by first calling and then emailing counsel for the State on August 31, 2018 at 4:52 PM. (*See* 8/31/18 E-mail, attached hereto as Exhibit 1). Counsel for Defendants offered to consent to a continuance of the hearing if the State thought it was prejudiced by the August 31 filings. *Id.* Without responding to the e-mail, at 6:50 p.m., the State filed a Motion to Strike Defendants' evidence and opposition to the application for preliminary injunction.

6. In its Motion to Strike, the State does not contend that it is prejudiced by the filings or that it needs additional time to prepare for the September 6, 2018, hearing. The State has been preparing for this hearing since late 2017 or early 2018.

7. Defendants — the actual parties — will be highly prejudiced if evidence supporting their defenses is not considered by the Court. The State has asked the Court to continue to prevent Defendants from operating their business or from engaging in any service industry, and to maintain a receivership that is imposing massive costs on Defendants, with no consideration of the information Defendants contend the Court should consider.

8. In equity and good conscience, Defendants should not be punished and prevented from having the Court consider all relevant evidence.

9. A preliminary injunction is an equitable remedy, and the Court should decide these issues on the merits, based upon all evidence available, even if that requires a short postponement of the hearing. The State will not be prejudiced by a short postponement of the hearing because all relief and restrictions sought in the application for preliminary injunction will remain in place pursuant to the TRO.

10. Defendants do not oppose the State's request for live testimony based upon the timeliness of their motion to permit such testimony.

WHEREFORE, Defendants respectfully request the Court to accept their August 31, 2018 filings or, alternatively, to grant a brief continuance of the hearing currently scheduled for September 6, 2018.

Respectfully submitted,
/s/ Tabor R. Novak III
Tabor R. Novak III (ASB-3580-B60N)
J. Scott Dickens (DIC023)
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Birmingham, AL 35209
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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2018, I electronically filed the foregoing with the Clerk of the Court using the Ala-File system to the following:

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



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CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA
KIM MCCARSON, CLERK

From: [Tabor Novak](#)
To: ["Barnes, Noel"](#)
Cc: [Scott Dickens](#); [Gray Stiff](#)
Subject: American Plumbing
Date: Friday, August 31, 2018 4:51:00 PM

Noel:

In reviewing the Court's order, we interpreted "4 business days" to include next Monday and operated under the same schedule we had for the original hearing. Please let me if the State has a different interpretation. If you do, and it creates a problem, we have no objection to a continuance of the hearing. If you need to reach me over the weekend, my cell [REDACTED]. Have a nice Labor Day weekend.

-Tabor