



AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: DEAN MICHAEL GREGORY
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

The following matter was FILED on 9/25/2018 5:01:02 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 CLARIFY ORDERS REGARDING PAYMENT OF LEGAL FEES

[Filer: NOVAK TABOR ROBERT III]

Notice Date: 9/25/2018 5:01:02 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
9/25/2018 4:59 PM
11-CV-2018-900431.00
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.

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

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 Clarify Orders Regarding Payment of Legal Fees _____

*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 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:
9/25/2018 4:56:51 PM

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.

the control of the Receiver for payment of legal expenses incurred or to be incurred in defense of the above-captioned matter.

4. On August 9, 2018, this Court entered an order modifying the TRO to specifically allow the Defendants to pay their legal fees from the funds under the control of the Receiver. (Doc. 83). The August 9, 2018 Order states, in part:

EMERGENCY MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER filed by AMERICAN PLUMBING AND SEPTIC SERVICE, LLC, AMERICAN PLUMBING AND SEPTIC SERVICE, LLC, PESNELL RICHARD JOSHUA, PESNELL JESSICA and PESNELL RICHARD G is hereby GRANTED IN PART. Upon the agreement of the parties, the TRO is hereby modified in the limited regard that **Defendants shall be allowed to pay their attorney's fees and reasonable living expenses from the funds under the control of the receiver.**

Id. (emphasis added).

5. “Defendants” is defined in the TRO as follows: “**Defendant(s)**” means all of the Individual Defendants and the Corporate Defendants, individually, collectively, or in any combination.” (*See* Doc. 22 at p. 4). The Court’s August 9, 2018 Order did not place any restrictions on the source of the funds, nor did it make any distinction between individual and corporate assets that could be used to defend this complex cause of action.

6. Defendants relied on the Order permitting the use of funds under the control of the Receiver to defend themselves. Over the course of five weeks, counsel for the Defendants spent substantial time preparing for and presenting the defense of this case at a preliminary injunction hearing that lasted two and a half days with the primary goal of obtaining an order that would allow the business to continue operating.

7. Under the terms of the TRO, counsel for Defendants remained in contact with the Receiver to advise him of the Defendants' legal fees. Following these discussions of legal fees, the Receiver requested counsel for Defendants' to provide a brief summary of its current fees. On September 6, 2018, counsel for the Defendants provided the requested summary of its current invoice for all time and expenses through August 20, 2018 and requested payment of the fees per the Court's August 9, 2018 Order.

8. On September 9, 2018, the Receiver responded to Defendants' request for payment of legal fees by stating that "[t]he TRO does not say from which funds attorneys' fees should be paid". The Receiver suggested seeking guidance from the Court on the attorneys' fees issue.

9. On September 14, 2018, this Court entered a Preliminary Injunction Order which states, in part:

[T]he assets of the Individual Defendants are not frozen pursuant to the Asset freeze provisions of Section III, A through E above, and the Individual Defendants shall pay their expenses from their individual personal funds including their attorneys' fees. The Receiver need not be involved in those decisions. The assets of the Receivership Defendants shall be used for the expenses of the Receivership Defendants, the administration of the receivership estate, and consumer redress.

(Doc. 238 at 8).

10. The undersigned counsel represents all the Defendants as defined herein, including the Receivership Defendants. There has never been an objection to counsel's representation of any of the Defendants, and both Defendants and their counsel proceeded under the terms of the August 9, 2018 Order allowing Defendants to pay their legal fees from funds under the control of the Receiver. Counsel for the Defendants continued to work on this matter

with the understanding that its fees would be paid from receivership funds, and Defendants have since incurred more legal fees through September 20, 2018.

11. Notwithstanding the Court's August 9, 2018 Order, which expressly allowed the Defendants (including the Receivership Defendants) to pay for legal fees from funds under the control of the Receiver, the Receiver has advised counsel for Defendants that he does not intend to pay from the assets of the receivership any legal fees incurred prior to the entry of the September 14, 2018 Order.

12. Defendants respectfully request an Order granting Defendants access to corporate funds under the control of the Receiver to pay for legal fees pursuant the terms of the August 9, 2018 Order. To the extent the Court requires a telephone conference or an *in camera* review of the invoices for Defendants' legal fees through the date of entry of the Preliminary Injunction Order, counsel for Defendants is available for a conference and will immediately provide the invoices to the Court for an *in camera* review.

Dated: September 25, 2018

Respectfully submitted,

/s/ Tabor R. Novak III

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

J. Scott Dickens (DIC023)

L. Graves Stiff III

STARNES DAVIS FLORIE LLP

100 Brookwood Place, 7th Floor

P. O. Box 598512

Birmingham, AL 35259-8512

tnovak@starneslaw.com

sdickens@starneslaw.com

gstiff@starneslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 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/ Tabor R. Novak III
Tabor R. Novak III (ASB-3580-B60N)