



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 9/26/2018 2:08:30 PM

O001 JEFFERY SCHNEIDER, P.A., CRT APPOINTED RECEIVER
MOTION TO CLARIFY ORDERS REGARDING PAYMENT OF LEGAL FEES
[Filer: BARNES NOEL STEVEN]

Notice Date: 9/26/2018 2:08:30 PM

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**IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA
CASE NO.: 11-CV-2018-900431**

THE STATE OF ALABAMA,
THE ALABAMA BOARD OF ELECTRICAL CONTRACTORS,
THE ALABAMA DEPARTMENT OF PUBLIC HEALTH,
THE ALABAMA LIQUEFIED PETROLEUM GAS BOARD,
THE ALABAMA ONSITE WASTEWATER BOARD,
THE ALABAMA PLUMBERS AND GASFITTERS EXAMINING BOARD,

Plaintiffs,

vs.

AMERICAN PLUMBING AND SEPTIC SERVICE, LLC,
an Alabama corporation; et al

Defendants.

**RECEIVER'S RESPONSE TO MOTION TO CLARIFY
THE COURT'S ORDERS REGARDING PAYMENT OF LEGAL FEES**

Jeffrey C. Schneider, not individually, but solely in his capacity as the court-appointed receiver for American Plumbing and Septic Service, LLC and A American Drain Cleaning & Plumbing Service (the "Receivership Entities"), hereby responds to the individual defendants' Motion to Clarify the Court's Orders Regarding Payment of Legal Fees.

Introduction

This Court never ordered that the individual defendants' *personal* attorneys should be paid from the assets held by the *corporate* Receivership Entities. To the contrary, this Court unfroze the individual defendants' personal assets and ordered the exact opposite – that "the Individual Defendants shall pay their expenses from their individual personal funds including their attorneys' fees." (Preliminary Injunction Order at 8, III.E.) Plus, as set forth below, there are insufficient funds in the Receivership Estate to pay the *personal* legal fees of the individual defendants. Indeed, based on the personal financial statements submitted by the individual

defendants, they have more than enough assets to pay for their own attorneys. What little remains of the corporate funds that the Receiver is holding should be used to pay corporate expenses, the administration of this Receivership Estate, and consumer redress, as explicitly ordered by the Court.

For these reasons, the individual defendants' Motion should be denied.

The Orders Themselves

1. On August 3, 2018, this Court entered a temporary restraining order, appointed the Receiver, and set a hearing on the Plaintiffs' request for a preliminary injunction for August 16, 2018. (DE 29; the "TRO"). The TRO directed the Receiver, not the individual defendants, to (i) "[a]ssume full control of the Receivership Defendants;" (ii) "[m]anage and administer the business of Receivership Defendants;" and (iii) "[c]hoose, engage, and employ attorneys. . . ." (TRO at VII, B, ¶¶ 1, 7, and 8.)

2. The Receiver did not hire the Starnes Davis Florie LLP law firm to act on behalf of the Receivership Entities. Under the TRO, the individual defendants no longer had the authority to act on behalf of the Receivership Entities or to make decisions, such as hiring counsel, on behalf of the Receivership Entities. Further, at that time, all bank accounts, including the bank accounts of the individual defendants, had been frozen and were thus under the control of the Receiver.

3. The September 14, 2018 Preliminary Injunction Order (the "PI Order") entered by this Court confirmed that the Receiver, now the permanent equity receiver, had the same mandate as set forth above. (*See* DE 238 at VII, B, ¶¶ 1, 7, and 8.)

4. Contrary to the allegations in the Motion, no order entered by this Court ever required that Receivership Entities' funds – corporate funds – be used to pay the personal attorneys

of the individual defendants. Rather, the TRO merely states that:

Notwithstanding the Asset freeze provisions . . . subject to prior written agreement with the Receiver, Individual Defendants may, upon compliance with Section V (Financial Statements) *infra*, pay from their *individual* personal funds reasonable, usual, ordinary, and necessary living expenses.

(DE 29 at 8, III.E., emphasis added.)

5. The August 9, 2018 Order (DE 83) to which the individual defendants refer, merely added legal fees to the litany of reasonable living expenses that could be paid from the funds under the control of the Receiver. It, too, did not order the payment of *personal* attorneys from the accounts of the *corporate* entities. At that time, the individual defendants' personal accounts were still frozen.

6. To the extent there was any ambiguity about which bucket of funds should be used to pay the individual defendants' personal attorneys – personal or corporate – this Court's September 14, 2018 PI Order made it clear. It unfroze the individual defendants' personal funds and *specifically* stated that they should pay their own bills, including their personal attorneys:

Stated differently, the 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.

(PI Order at 8, III.E.)

The Receivership Estate Cannot Afford the Individual Defendants' Personal Lawyers

7. The Receiver froze \$321,044.24¹ for the Receivership Entities (*i.e.*, corporate funds) from the accounts at BB&T. (DE 195, Ex. B.) Because the individual defendants elected to continue the preliminary injunction hearing by approximately one month (rather than proceeding in 13 days, as originally scheduled), the Receiver was required to maintain the status quo for six weeks (incurring two months' worth of bills). These status quo expenses included maintaining health insurance for all employees, maintaining insurance on all vehicles, paying lease expenses for two offices, and paying financing and lease charges for all of the trucks and equipment. As a result, the Receiver has paid \$96,423.72 to maintain and protect those assets.² That is approximately one-third of the total amount frozen, which does not include *any* fees or expenses incurred by the Receiver or his professionals in carrying out the Receiver's mandate, which will be the subject of a future fee application.

8. Notably absent in the individual defendants' Motion is any disclosure of the amount being claimed by the individual defendants. However, based on communications with the Starnes firm, the Receiver believes that amount to be at least \$100,000, if not significantly higher. Put another way, the individual defendants are asking this Court to authorize payment of their *personal* legal fees in an amount equivalent to at least another one-third of the total corporate assets frozen.

9. There is simply no justification for such a massive depletion of the Receivership Estate. The actions of the individual defendants did not confer any benefit on the victims of the Receivership Entities.

¹ The Receiver was originally advised by BB&T that \$339,593.69 had been frozen, and relied on that amount in his report, but due to stopped payments and various chargebacks, the final amount frozen by BB&T and ultimately transferred to the Receiver was \$321,044.24.

² This amount was advanced by the Receiver's law firm given the delay by BB&T in transferring the frozen funds to the Receiver.

10. Now that the PI Order has been issued, the Receiver is turning his attention to pursuing claims, and liquidating as much of the Receivership Estate as possible, to find some way to provide redress to consumers. If one-third of the money is used to pay the *personal* legal fees of the individual defendants, then there simply will not be enough money left to do anything other than liquidate this estate and shut it down.

The Individual Defendants Have Sufficient Assets to Pay Their Own Legal Fees

11. Importantly, individual defendants Richard Pesnell and Josh Pesnell appear to have plenty of assets to pay for their own attorneys. Here are just a few examples:

Josh Pesnell

- a. In the personal financial statement (“PFS”) submitted by Josh Pesnell pursuant to the TRO, he swore that he has at least \$350,000 in equity in his home (\$870,000 purchase price in 2016; \$486,000 mortgage);
- b. The PFS also demonstrates that he owns a second home and has rental income;
- c. The PFS identifies eleven (11) vehicles titled in his name with an estimated value of \$69,200. Several, if not all, of those vehicles bear the “American Plumbing” logo and are being secured and maintained by the Receiver, at the expense of the Receivership Estate, at the Receivership premises. Whether they are assets of the Receivership Estate or Josh can be resolved at a later time, but these, too, could be a source of payment for his personal legal fees.
- d. Josh also apparently has a boat, even though it was not disclosed on his PFS, but which was either purchased with or pledged to BB&T four days after

issuance of the TRO. (*See* attached **Exhibit A.**) That boat, and its accoutrements, could also be used to pay for his personal legal fees.

Richard Pesnell

a. In the PFS submitted by Richard pursuant to the TRO, he apparently failed to disclose a second parcel of real estate owned by him in Cleburne County. (*See* attached **Exhibit B.**) The real property he listed also has no mortgages, so it could be used to generate funds for his personal legal fees.

b. Like Josh's PFS, Richard's PFS identifies *twenty-eight* (28) vehicles and other heavy equipment with a staggering total estimated value of **\$421,584 – more than the total amount frozen by the Receivership Entities.** As with Josh, most of those items are currently secured by the Receiver, but if those are indeed his personal items, then there is certainly no need for the Receivership Estate to bear any costs for them or to pay for his personal attorneys.

12. Quite frankly, given the obvious assets of these two individual defendants, the Receiver is offended that they would make their attorneys file a motion to try to use what little remains in the Receivership Estate to pay for their *personal* legal fees rather than agreeing to allow those funds to be used to administer the estate, pursue claims, and hopefully provide some redress for the consumers who were victimized by American Plumbing's deceptive practices.

Conclusion

None of this Court's orders require that corporate funds be used to pay the individual defendants' *personal* attorneys. Indeed, this Court's PI Order requires the exact opposite. And there is no compelling reason to deviate from this Court's Order. Now that the PI Order has been issued, the individual defendants could be cooperating with the Receiver to develop and

pursue third-party claims to help recover funds to distribute to their victims. Thus far, they have not. Nor can the Receivership Estate afford to pay the individual defendants' personal lawyers. It is at risk of running out of cash, even without paying those fees. And the individual defendants have plenty of assets to use to pay for their own lawyers.

The Motion to Clarify should respectfully be denied.

Dated: September 26, 2018

Respectfully submitted,

Jeffrey C. Schneider, P.A.
Court-Appointed Receiver
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 Citigroup Center, 22nd Floor
 Miami, Florida 33131
 Telephone: 305.403.8788
 Facsimile: 305.403.8789
 Email: jcs@lklsg.com

By: /s/ Jeffrey C. Schneider
 JEFFREY C. SCHNEIDER, P.A.
Court-Appointed Receiver

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2018, the foregoing document was served this day on all counsel of record identified on the attached Service List via electronic mail.

/s/ Jeffrey C. Schneider
 Jeffrey C. Schneider, P.A.
Court-Appointed Receiver

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CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA
KIM MCCARSON, CLERK

EXHIBIT A

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional] Jacquelyn Lee Berg 470-228-5075	
B. SEND ACKNOWLEDGMENT TO: (Name and Address) Skier's Marine, Inc [REDACTED] Westover, AL 35147 USA	

Alabama
Sec. Of State

B 18-7392290 FS
Date 08/07/2018
Time 01:53 PM
180807 2 Pg

File	\$15.00
Access	\$9.75
Conv	\$5.50
Total	\$30.25

37320546

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME					
OR					
1b. INDIVIDUAL'S LAST NAME Pesnell		FIRST NAME Richard	MIDDLE NAME J	SUFFIX	
1c. MAILING ADDRESS [REDACTED]		CITY Anniston	STATE AL	POSTAL CODE 36207	COUNTRY USA
ADD'L INFO RE ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION	1f. JURISDICTION OF ORGANIZATION	1g. ORGANIZATIONAL ID #, if any		
			<input type="checkbox"/> NONE		

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME					
OR					
2b. INDIVIDUAL'S LAST NAME Pesnell		FIRST NAME Wendy	MIDDLE NAME	SUFFIX	
2c. MAILING ADDRESS [REDACTED]		CITY Anniston	STATE AL	POSTAL CODE 36207	COUNTRY USA
ADD'L INFO RE ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	2g. ORGANIZATIONAL ID #, if any		
			<input type="checkbox"/> NONE		

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME Branch Banking & Trust Company					
OR					
3b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX	
3c. MAILING ADDRESS [REDACTED]		CITY Whiteville	STATE NC	POSTAL CODE 28472	COUNTRY USA

4. This FINANCING STATEMENT covers the following collateral:

ATTACHMENT

5. ALTERNATIVE DESIGNATION [if applicable]:	<input type="checkbox"/> LESSEE/LESSOR	<input type="checkbox"/> CONSIGNEE/CONSIGNOR	<input type="checkbox"/> BAILEE/BAILOR	<input type="checkbox"/> SELLER/BUYER	<input type="checkbox"/> AG. LIEN	<input type="checkbox"/> NON-UCC FILING
6. <input type="checkbox"/> This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum [if applicable]	7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [OPTIONAL FEE]		<input type="checkbox"/> All Debtors	<input type="checkbox"/> Debtor 1	<input type="checkbox"/> Debtor 2	

8. OPTIONAL FILER REFERENCE DATA

Richard Pesnell

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)
B. E-MAIL CONTACT AT FILER (optional)
C. SEND ACKNOWLEDGMENT TO: (Name and Address)
<div style="border: 1px solid black; padding: 5px;"> BRANCH BANKING & TRUST COMPANY WHITEVILLE, NC 28472 </div>

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME						
OR	1b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX	
	PESNELL		RICHARD	J		
1c. MAILING ADDRESS			CITY	STATE	POSTAL CODE	COUNTRY
			ANNISTON	AL	36207	USA

2. DEBTOR'S NAME: Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank, check here and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

2a. ORGANIZATION'S NAME						
OR	2b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX	
	PESNELL		WENDY			
2c. MAILING ADDRESS			CITY	STATE	POSTAL CODE	COUNTRY
			ANNISTON	AL	36207	USA

3. SECURED PARTY'S NAME: (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

3a. ORGANIZATION'S NAME						
BRANCH BANKING & TRUST COMPANY						
OR	3b. INDIVIDUAL'S SURNAME		FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX	
3c. MAILING ADDRESS			CITY	STATE	POSTAL CODE	COUNTRY
			WHITEVILLE	NC	28472	USA

4. COLLATERAL: This financing statement covers the following collateral:

2018 SUPRA SE 450 24 ISRSE043B818
 2018 BOATMATE TANDEM AXLE 2 5A7BB2521JT003682
 2018 INDMAR RAPTOR 440 6.2L INBOARD 208797

5. Check <u>only</u> if applicable and check <u>only</u> one box: Collateral is <input type="checkbox"/> held in a Trust (see UCC1Ad, item 17 and Instructions) <input type="checkbox"/> being administered by a Decedent's Personal Representative	
6a. Check <u>only</u> if applicable and check <u>only</u> one box:	6b. Check <u>only</u> if applicable and check <u>only</u> one box:
<input type="checkbox"/> Public-Finance Transaction <input type="checkbox"/> Manufactured-Home Transaction <input type="checkbox"/> A Debtor is a Transmitting Utility	<input type="checkbox"/> Agricultural Lien <input type="checkbox"/> Non-UCC Filing
7. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> Lessee/Lessor <input type="checkbox"/> Cosignee/Cosignor <input type="checkbox"/> Seller/Buyer <input type="checkbox"/> Bailee/Bailor <input type="checkbox"/> Licensee/Licensor	
8. OPTIONAL FILER REFERENCE DATA:	

EXHIBIT B

Cleburne County Alabama - 2017					
Property Record Card					Print Close
Parcel Info					
Parcel Number		ACCOUNT#	Exempt	AMENTITES ROAD TOPO SEWER WATER GAS	
18-15-05-16-1-002-017.000		--			
Subdivision	NOT APPLICABLE				
Neighborhood	7				
District	City	S-T-R	Acreage	Lot Size	Deed B/P
02	HEFLIN	16-16S-10E	0	98.00 X 194.00	B/P D2013-2212 D 09/13/2013
Legal	BEG 200' S OF INT S R/W TURNER RD & W R/W HWY 9 TH: SW 194'(S); TH: S 92'(S); E 194'(S) TO W R/W HWY 9; TH: N ALG W R/W 105'(S) TO POB; DB 146 PG 24; D2013 PG 2212				

Owner			
Name	PESNELL RICHARD		
Mailing Addr	HEFLIN, AL 36264	Physical Addr	

Values	
Land Total:	\$24,260.00
Building Total:	\$26,900.00
Appraised Value:	\$51,160.00
Annual Taxes:	\$501.76

Building							
	Bldg No	Use Type	Yr Built	Base Area	TAA Area	Story	Appr Value
<u>Detail</u>	1	111	1962	1064	1103	1.0	\$26,900.00