



## AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: MICHAEL G DEAN  
mdean@ago.state.al.us

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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 10/1/2018 4:35:29 PM

**C001 STATE OF ALABAMA**

RECEIVER'S UNOPPOSED MOTION TO ABANDON, REJECT, RETURN OR LIQUIDATE PERSONAL  
PROPERTY

[Filer: DEAN MICHAEL GREGORY]

Notice Date: 10/1/2018 4:35:29 PM

KIM MCCARSON  
CIRCUIT COURT CLERK  
CALHOUN COUNTY, ALABAMA  
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11-CV-2018-900431.00  
CIRCUIT COURT OF  
CALHOUN COUNTY, ALABAMA  
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**STATE OF ALABAMA**  
Unified Judicial System  
11-CALHOUN  
Revised 3/5/08  
 District Court  Circuit Court

Cas  
CV21

**CIVIL MOTION COVER SHEET**

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

Name of Filing Party: C001 - STATE OF ALABAMA

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

MICHAEL G DEAN  
501 Washington Avenue  
MONTGOMERY, AL 36104  
Attorney Bar No.: DEA037

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 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 \_\_\_\_\_

RECEIVER'S UNOPPOSED MOTION  
TO ABANDON, REJECT, RETURN OR  
LIQUIDATE PERSONAL PROPERTY

pursuant to Rule \* \_\_\_\_\_ (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:  
10/1/2018 4:33:23 PM

Signature of Attorney or Party  
/s/ MICHAEL G DEAN

\*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**  
**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;  
 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC  
 d/b/a A American Drain Cleaning & Plumbing Service;  
 RICHARD JOSHUA PESNELL, individually  
 and as owner/incorporator of AMERICAN  
 PLUMBING AND SEPTIC SERVICE, LLC  
 and AMERICAN PLUMBING AND SEPTIC  
 SERVICE, LLC d/b/a A American Drain &  
 Cleaning & Plumbing Service;  
 JESSICA PESNELL, individually  
 and as incorporator of AMERICAN PLUMBING  
 AND SEPTIC SERVICE, LLC and AMERICAN  
 PLUMBING AND SEPTIC SERVICE, LLC  
 d/b/a A American Drain & Cleaning &  
 Plumbing Service;  
 RICHARD G. PESNELL, individually  
 and as owner/incorporator of AMERICAN PLUMBING  
 AND SEPTIC SERVICE, LLC  
 and AMERICAN PLUMBING AND SEPTIC SERVICE, LLC  
 d/b/a A American Drain Cleaning & Plumbing  
 Service;  
 DAVIS UNLIMITED, LLC, an Alabama  
 corporation; RICHARD JOSHUA PESNELL,  
 as co-owner of DAVIS UNLIMITED, *et al*,

Defendants.

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**RECEIVER'S UNOPPOSED MOTION TO ABANDON,  
 REJECT, RETURN OR LIQUIDATE PERSONAL PROPERTY**

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”), moves for an order permitting him, on behalf of the Receivership Entities, to (i) terminate building leases of the Receivership Entities; (ii) terminate vehicle and equipment leases of the Receivership Entities; (iii) reject ongoing service, insurance, and other utility contracts at the appropriate time; (iv) return or sell any financed vehicles or equipment; and (ii) donate, abandon or sell any remaining personal property remaining on the leased premises. As stated above, this Motion is unopposed; the Receiver has consulted with the State and the Defendants and they agree with the relief requested herein.

#### **INTRODUCTION**

The Receiver is currently occupying two leased buildings and adjoining equipment yards of the Receivership Entities, both of which share a common mailing address: 401 Hamric Dr, Oxford, AL (the “Receivership Premises”). The Receivership Entities are not operating, and the Receiver does not intend to recommence their operations, particularly now that the Defendants have agreed to permanent injunctions. In order to save considerable sums on expenses, the Receiver seeks to terminate the leases for the Receivership Premises (collectively, the “Leases”) and return possession to their respective landlords. The Receiver will probably first terminate the lease on the main office building (which is more expensive) and reduce the footprint of the Receivership Estate to the remaining building (for which rent will be paid until the remaining personalty can be disposed of). Both office buildings contain furniture, fixtures, and equipment, and there is a host of new and used plumbing equipment in and around at least one of the equipment yards.

The vast majority of property at these locations, such as office furniture, used electronics, and weathered plumbing equipment, is of marginal value and is administratively infeasible to sell—that is, even considering the estimated income that could be generated from the sale of the property, it could cost the estate more in fees and expenses to sell the property than to donate or abandon it.

Thus, to expedite termination of the above leases and efficiently manage the remaining assets of the Receivership Estate, the Receiver seeks Court authorization to donate or abandon this equipment and to use his best judgment to make that determination.

Further, the Receivership Entities have financed certain vehicles and office furniture for which there is no longer any need. Accordingly, the Receiver seeks Court authorization to either return those vehicles and the furniture to the vendors or, to the extent there is any residual value, to sell the vehicles, so as to pay off the financing on them and provide liquidity to the estate.

Regardless, the Receiver seeks the authority to take action to cease the monthly payment obligations for these items in the most expeditious and cost-effective manner for the Receivership Estate.

There are other vehicles and equipment, such as vending machines, copiers, office equipment, and dumpsters, that are being leased or otherwise subject to payment-for-usage agreements currently in the Receivership Estate. The Receiver seeks authority to terminate these leases and similar agreements (collectively, the “Equipment Leases”) and return the property to the lessors.

The Receivership Estate also pays for various utilities and other routine services (e.g., electricity, water, pest control, telephone), which will be unnecessary when the Leases are terminated or the footprint is reduced. Thus, the Receiver seeks authorization to terminate those services as they will no longer be needed.

Still further, the Receivership Estate has maintained liability insurance over the property and vehicles and equipment that are currently in the Receivership Estate (the “Property Insurance”). Accordingly, after resolving the foregoing issues, the Receiver seeks permission to terminate the Property Insurance. The Receiver seeks authority to reduce the coverage as the items are abandoned or returned or the footprint of the Receivership Estate is otherwise reduced.

The Receiver has also maintained the group insurance health care plan and other insurance/benefit related plans in place for the former employees and principals of the Receivership Entities. However, neither the employees nor the principals have rendered services on behalf of the Receivership Entities since August 3, 2018, and there is no longer any need to keep such coverage in place. The Receiver is mindful that employees will require notice of such termination and possibly assistance in transitioning their coverage elsewhere. Accordingly, the Receiver seeks permission to reject that coverage as well, but is mindful of his transitional obligations that may be necessary as a result of the termination of that coverage.

Lastly, the vast majority of vehicles and heavy equipment that were utilized by the Receivership Entities were owned individually by Defendant Richard G. Pesnell, and, to a lesser extent, Defendant Josh Pesnell. The Receivership Entities paid for the registration, insurance, and maintenance for those vehicles and equipment, even though the ownership remained in the individuals’ names. Many of those vehicles are not operational and are merely a drain on already limited Receivership resources. Accordingly, the Receiver seeks permission to abandon some of those vehicles to the Individual Defendants (particularly if there is little or no equity) and to otherwise sell the other vehicles and equipment for which the Receiver is asserting beneficial ownership.

### **BACKGROUND AND DISCUSSION**

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 September 14, 2018 Preliminary Injunction Order (the "PI Order") entered by this Court extended the tenure of the Receiver to permanent equity receiver. (*See* DE 238.)

As detailed in the Receiver's Initial Report, on August 3, 2018, the Receiver's team entered and took possession of the Receivership Premises and Contents. The Leases are (or will be, after administration of the equipment referenced herein) provide no value to the Receivership Estate.

The Contents are of marginal value to the Receivership Estate. Some items, such as the vending machines, copiers, phone equipment, and some newer office furniture, is leased or financed, and the Receiver can return those items to the lessors/creditors, with Court approval. The cost of auctioning the Contents would overwhelmingly eclipse the value of the Contents. The non-financed office furniture and equipment is used, varies widely in condition, and would require professional movers for disassembly and relocation. The cost of such movers would negate the potential resale value of those items. Similarly, selling the remaining office equipment would not generate enough funds to justify its sale.

The Receiver acknowledges the potential for listing the furniture and remaining equipment on classified websites, such as Craigslist.com, and requiring purchasers to move the property, but such efforts would generate hourly fees and costs on the Receiver's end that would similarly negate the value of the property to the Receivership Estate. And, such sales efforts would indefinitely delay the Receiver's ability to return the leased spaces to their respective landlords. The office furniture and some of the office equipment are of possible value to the landlords given the character of the space and may be retained for future tenants.



Further, as detailed in the Initial Report, the Receiver is currently paying for security for the Receivership Premises, given that much of the equipment is located outside in the equipment yards. The vast majority of the vehicles and equipment in the yards are either leased or financed by the Receivership Entities or owned by the Individual Defendants, although maintained and secured by the Receivership Entities. If the Receiver is authorized to terminate, reject, or abandon the contracts for the lease or financing of the vehicles and equipment subject to those agreements, and to otherwise abandon to the Individual Defendants the vehicles and equipment owned by them that are of minimal or no value to the Receivership Estate, then the Receiver can terminate the security and insurance in place for those vehicles and equipment and focus his efforts on selling the remaining vehicles and equipment for which the Receivership Estate asserts ownership. Similarly, he could reduce the cost of insurance coverage significantly for the remaining vehicles and equipment, with the Court's approval of same.

As of August 3, 2018, no employees or principals have rendered any services for the Receivership Entities and have not been paid for any such services. However, during the pendency of the TRO, when the Receiver was responsible for maintaining the status quo, the Receiver maintained the group health coverage in place for the employees and principals. However, given that the Receivership Entities are not and will not be doing business and many of those employees have likely obtained employment and health coverage elsewhere, it makes no sense for the Receiver to continue this coverage, and he seeks permission to terminate the group health plan and any other "cafeteria" benefits provided to the employees and principals, with appropriate notice to those individuals. The Receiver will explore ways to transfer the accrued benefits from any such cafeteria plans to the individuals themselves, so that such benefits are not lost.

The Receiver seeks Court authority to terminate utility and other service contracts in due course, as the footprint of the Receivership Estate is reduced.

Lastly, as to any remaining assets, such as vehicles owned outright by the Receivership Entities and various plumbing equipment, the Receiver seeks Court authorization to either sell such or abandon such assets, whichever will result in the least financial drain on and potential gain to the Receivership Estate.

#### **LEGAL STANDARD**

Pursuant to the PI Order, the Receiver is authorized and directed to assume full control of the Receivership Entities and take exclusive control of the Receivership Entities' assets. (*See* PI Order § VII.B.1 and 2.). The Receiver is to conserve, hold and manage the assets of the Receivership Entities and administer the business of the Receivership Defendants to for the benefit of the Receivership Estate. (*Id.* § VII.B.3.) In addition, the Receiver is permitted to enter into contracts as he deems advisable or necessary and is to suspend business operations if the business of the Receivership Defendants cannot be continued legally or profitably. (*Id.* § VII.5 and 13). However, the PI Order is silent as to the Receiver's ability to sell, liquidate or otherwise dispose of the assets of the Receivership Estate. For this reason, Court approval is sought herein. There is legal precedent allowing such measures. Indeed, receivers have the discretion, subject to court approval, to sell or dispose of receivership property when it would preserve the assets of the estate. *See Darley v. Ala. Pub. Utils. Co.*, 183 So. 447 (Ala. 1938) (a court of equity may authorize the private sale of assets in the possession of a receiver); *SEC v. Lane*, 2009 WL 10671743, at \*1 (M.D. Fla. Dec. 28, 2009) (recognizing receiver's authority to abandon asset when necessary). This Receiver has sought and obtained similar permission to dispose of receivership assets in federal courts in Florida and Illinois and in Florida state courts.

The Receiver has consulted with counsel for Plaintiffs and the Individual Defendants, and they have expressed no objection to the relief requested herein.

**WHEREFORE**, the Receiver respectfully requests entry of an Order, substantially in the same form as **Exhibit A**, authorizing the Receiver to (i) terminate building leases of the Receivership Entities; (ii) terminate vehicle and equipment leases of the Receivership Entities; (iii) terminate or reject ongoing service, insurance, and other utility contracts at the appropriate time; (iv) return or sell any financed vehicles or equipment; and (ii) donate, abandon or sell any remaining personal property remaining on the Premises, along with such other relief the Court deems just and proper.

Dated: October 1, 2018

Respectfully submitted,

Jeffrey C. Schneider, P.A.  
*Court-Appointed Receiver*  
 201 South Biscayne Blvd.  
 Citigroup Center, 22<sup>nd</sup> Floor  
 Miami, Florida 33131  
 Telephone: 305.403.8788  
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By: /s/ Jeffrey C. Schneider  
 JEFFREY C. SCHNEIDER, P.A.  
*Court-Appointed Receiver*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 1, 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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# **EXHIBIT A**

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

THE STATE OF ALABAMA, et al

Plaintiffs,

vs.

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

Defendants.

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**AGREED ORDER GRANTING RECEIVER'S UNOPPOSED MOTION TO  
ABANDON, REJECT, RETURN OR LIQUIDATE PERSONAL PROPERTY**

THIS CAUSE is before the court upon Receiver Jeffrey C. Schneider's (the "Receiver") Motion to Abandon, Reject, Return, or Liquidate Personal Property (the "Motion"). The Court, having reviewed the Motion, been advised that the parties do not oppose the relief requested herein, and being otherwise advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Motion is **GRANTED**. The Receiver has made a sufficient and proper showing in support of the relief requested.
2. Pursuant to this Court's September 14, 2018 Preliminary Injunction, the Receiver is permitted to terminate the Receivership Entities' leases for the following properties (the "Properties"):
  - Main office building with mailing address of 401 Hamric Dr., Oxford, AL 36203;
  - At a later time determined by the Receiver, the second building with a mailing and physical address of 401 Hamric Dr., Oxford, AL 36203.
3. The Receiver is authorized to use his discretion to donate any non-leased or non-financed office furniture or equipment (the "Contents") of the Receivership Entities located in the Properties to a local charity of his choice or abandon the Contents, as the Receiver deems appropriate.

4. The Receiver is authorized to use his discretion to terminate or reject any and all leases in the name of the Receivership Entities for vehicles and equipment.

5. The Receiver is authorized, using his discretion as to the timing of such actions, to terminate or reject ongoing service, insurance, and other utility contracts that were maintained by the Receivership Entities.

6. The Receiver is further authorized to negotiate a return of all financed vehicles, furniture, and equipment. To the extent the Receiver, in his discretion, determines that there may be residual value in that equipment after payment of amounts owed, then the Receiver is authorized to sell such vehicles, furniture, and equipment.

7. Lastly, the Receiver is authorized to use his best efforts and discretion to sell any personal property or equipment remaining on the Properties.

**DONE** and **ORDERED** in Chambers in Calhoun County, this \_\_\_ day of October, 2018.

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HONORABLE BRIAN HOWELL  
CIRCUIT COURT JUDGE

*Copies provided to Receiver and counsel of record*