



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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OBJECTION TO STIPULATED ORDER FOR PERMANENT INJECTION AND MOTION TO CLARIFY...

[Filer: DEAN MICHAEL GREGORY]

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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 GREENSKY'S OBJECTION AND MOTION

Jeffrey C. Schneider, not individually, but solely in his capacity as the court-appointed receiver for American Plumbing and Septic Service, LLC ("American Plumbing") and American Drain Cleaning & Plumbing Service (the "Receivership Entities"), hereby responds to Non-Party GreenSky, LLC's (1) Objection to the Parties' "Stipulated Order for Permanent Injunction," and (2) Motion for Clarification or, in the Alternative, Modification of this Court's Preliminary Injunction Order (the "Motion").

Introduction

GreenSky, LLC ("GreenSky") is missing the point. The "Stipulated Order" about which GreenSky complains is, as its title suggests, a "Stipulation" (the "Stipulation"). In the Stipulation, all of the Defendants specifically agree and acknowledge that they engaged in a pattern of violations of the Deceptive Trade Practices Act involving GreenSky, and specifically, that they facilitated loans through GreenSky for customers that did not authorize said loans, were

not informed of the applicable interest rates, or were charged a different rate than what was promised by the Defendants. (Stipulation at ¶ 14.) This was an admission by the Defendants themselves regarding their practices with GreenSky. Simply because GreenSky was not present at the hearing or a party to the Stipulation does not change the import of what the Defendants acknowledged and agreed to—that their “facilitation of GreenSky loans” “violated Alabama’s consumer fraud law.” (*Id.* at ¶ 15.)

Said another way, the Defendants *admitted* that their employees were essentially working as loan brokers for GreenSky. GreenSky ignores the import of the admissions and downplays its own role in the victimization of the consumers. And GreenSky understandably does not like the admissions, but GreenSky’s feelings on this topic are irrelevant to the fact that the Defendants admitted that they engaged in these violations, subjecting consumers to unnecessary loans, and agreed with the State that the consumers should not continue to suffer any further lingering harm resulting from those practices.

GreenSky also complains loudly that the Receiver is doing his job—that he asked questions about GreenSky’s practices, demanded information about the American Plumbing consumers who received GreenSky loans, and importantly, demanded that GreenSky cease collection efforts and cease contacting already-confused American Plumbing consumers with their so-called “consumer surveys” that accomplish nothing but bolster GreenSky’s anticipated defense of a not-yet-filed case.

This Court appointed the Receiver to take control of the Receivership Entities and to help this Court aid the consumers that had been victimized by the practices of the Receivership Entities. The Receiver was not appointed to “go easy” on certain lenders or financial institutions like GreenSky merely because they hired counsel and objected to the subpoenas that the

Receiver was authorized to serve in furtherance of his mandate. GreenSky was ordered to cooperate with the Receiver and that is precisely what it should do. Asking GreenSky to identify the names of all American Plumbing customers who received GreenSky loans is not asking too much, yet GreenSky still has not answered that very simple question. But that is an issue for another day. For now, GreenSky should be required to comply fully with the Preliminary Injunction Order (the “PI Order”).

Complaining versus Non-Complaining Customers

In the Motion, GreenSky goes to great lengths to distinguish between customers who complained about their GreenSky loans and those who have not. GreenSky notes that only a “fraction of [the more than 100 American Plumbing] customers have complained.” (Motion at 2.) It desires that any limitations on its behavior be limited to that fraction. Contrary to GreenSky’s protestations, however, it matters not whether the customers complained (yet) or not. Many of the American Plumbing consumers do not even know yet that they were victimized by American Plumbing.

Importantly, the Defendants have already stipulated, in writing, that they victimized consumers and induced them into accepting GreenSky loans. It does not matter whether the customers knew or have yet realized that they were victims. Unless those customers themselves were plumbing professionals, the customers had no way of knowing whether, for example, they actually needed a new septic tank or other services. All they knew is that they had a plumbing problem, and the plumbing professionals they called to assist them advised them that they had “bigger issues” that had to be addressed. And, the only way these customers could pay for those “bigger issues” was to seek financing, ever so conveniently made available on the spot. But, as the Stipulation acknowledged, those loans were made without the proper disclosures required

under the law. The customers may have been left with working toilets, faucets, and perhaps a new septic tank, so they did not know to complain that they did not need the work and did not need the new loan that went with it. Just because a victim does not know he or she is a victim does not take away the magnitude or severity of what happened.

Taking GreenSky's contention to its ultimate conclusion necessarily requires this Court to effectively approve the harm that has been done to unsuspecting consumers simply because they have not yet complained. By asking for relief from the Stipulation and the PI Order, GreenSky asks this Court to countenance its continued collection of admittedly fraudulently obtained loans from consumers who have not yet realized that they were victimized. Essentially, following GreenSky's logic, it is acceptable to continue victimizing them until and unless they recognize that they have been victimized. Such circular logic should not be countenanced by this Court.

Inequitable Treatment of Consumers

In the PI Order, the Receiver has been ordered to "prevent the inequitable distribution of assets and determine, adjust, and protect the interests of consumers" (DE 238 at VII.B.6.) The Receiver interpreted this mandate to demand that GreenSky cease *all* collection efforts from *all* American Plumbing customers. Otherwise, the complaining customers would be relieved of any obligation to repay the GreenSky loans while the non-complaining customers would be required to repay the GreenSky loans, thus resulting in a classic case of inequitable treatment of consumers. GreenSky takes issue with the Receiver's interpretation of his mandate, claiming that it is "*quite* inequitable to suspend the accounts of loan customers who have asserted no

complaint.”¹ (Motion at 7-8, emphasis in original.) GreenSky apparently interprets “inequitable” to mean that it is unfair *to GreenSky* to suspend all collection efforts even when there has been no complaint. But preventing inequities to GreenSky was not part of the Receiver’s mandate.

Otherwise, GreenSky’s position, as noted above, simply makes no sense. If the Receiver did not demand cessation of all efforts, then continuing to allow GreenSky to collect loans from non-complaining customers is obviously inequitable to those customers who have not yet realized that they, too, were victimized. It serves as a further penalty to those who were simply unaware that they had been taken advantage of. It is precisely that type of predatory practice that the State sought to prevent here—and that this Court mandated the Receiver address.

In light of the admissions by the Defendants themselves, *all* customers who obtained GreenSky loans were victims, and this Court should approve the provisions in the Stipulation that prevent GreenSky’s collection of those loans.

Chargebacks and Surveys

GreenSky complains that the Receiver demanded that GreenSky cease purportedly taking any action on behalf of consumers regarding chargeback rights. Tellingly, GreenSky told only half the story. Since the issue first arose, GreenSky has been less than forthcoming about what its precise role in purportedly assisting consumers would be, merely noting that “[w]hile we can confirm that the customers’ chargeback rights are not against GreenSky, *we can tell you very*

¹ It is also worth noting that GreenSky talks out of both sides of its mouth in its Motion. It acknowledges that the Receiver demanded that it cease collection from all American Plumbing customers, and it toots its horn for magnanimously agreeing to do so. (*See, e.g.*, Motion at 4.) But when it realized that the State and the Defendants agreed to remove any time limits on its purported magnanimity, GreenSky is now taking the position that all collection efforts are valid and that it should even be entitled to enforce the loans as against complaining customers. (*See* Motion at 6, ¶ 3.)

little else about the process in the circumstances present in this case.” (Motion, Ex. B, emphasis added.) In other words, GreenSky refused to answer the Receiver’s questions about the chargeback rights. Notably, GreenSky is not protecting the consumers here, or the Receivership Estate—if the chargebacks happen, then ultimately GreenSky (or the banks it works with on these loans) will not be paid. If the collection of those loans is stopped, then chargeback rights become irrelevant and the result is the same. At any rate, GreenSky’s explanation as to exactly what assistance it claims to provide to consumers here remains entirely opaque. It is not clear what, if any, assistance from GreenSky is actually required. By its own admission, GreenSky is the servicer for the lenders. It is not the liaison or advocate for the consumers. Thus, the Receiver was well within his mandate to demand that GreenSky cease such efforts until GreenSky answer the Receiver’s questions and explain what exactly it intends to do and how the consumers will be affected.

Similarly, the Receiver received reports from consumers that GreenSky was polling them about their satisfaction with the services rendered to them. These surveys only occurred *after* the Receiver contacted GreenSky and began making his demands—after the institution of this lawsuit and the appointment of the Receiver. GreenSky maintains that such customer satisfaction surveys are routine, but the fact remains that they did not happen before the Receiver asked GreenSky to cease collection efforts. The Receiver perceived such efforts as confusing to consumers at best and an attempt to muster a defense from unsuspecting consumers before any claims have been made at worst. To its credit, GreenSky agreed to cease such efforts when the Receiver demanded it, and the Receiver has not received any further reports of continued survey activity.

The Receiver's Demand for Information

In addition to serving a subpoena,² the Receiver demanded that GreenSky simply provide the names of all American Plumbing customers who received GreenSky loans. GreenSky claims that the Receiver's demands for such information somehow violate the discovery process. However, GreenSky is once again incorrect. The Receiver's subpoena included such requests for similar information and other documentation, but the TRO and the PI Order both also require that people and entities that receive the TRO or PI "fully cooperate with and assist the Receiver." (PI Order at VII.C.1.) That cooperation includes "providing any information to the Receiver that the Receivers deems necessary to exercising the authority and discharging the responsibilities of the Receiver under this Order." (*Id.*)

The Receiver perceives GreenSky to be an entity that was in active concert or, at a minimum, in participation with the Receivership Entities when it came to the GreenSky loans made to American Plumbing customers to fund the work that was solicited deceptively. Thus, the PI itself required GreenSky to cooperate and give basic information like consumer names to the Receiver. It did not require the Receiver to use the formal discovery process to obtain basic information. The Receiver is working with GreenSky to negotiate an acceptable confidentiality order for the documents sought by the Receiver in his subpoena, but that is separate and apart from GreenSky's basic obligations under the PI Order itself. GreenSky should be required to provide the basic information requested by the Receiver immediately.

WHEREFORE, the Receiver respectfully requests that this Court deny GreenSky's Motion, enter and approve the Stipulation as drafted, refrain from clarifying or modifying the PI

² The "ins-and-outs" of the subpoena negotiations are not properly before this Court and will be addressed separately, as necessary, via appropriate motion practice.

Order in any way that would work to the benefit of GreenSky to the detriment of any consumer, and require that GreenSky comply with the Receiver's demands.

Dated: October 3, 2018

Respectfully submitted,

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By: /s/ Jeffrey C. Schneider
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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 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
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