

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-23507-CIV- GOLD/MCALILEY

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

KIRKLAND YOUNG, LLC, a limited
liability company, and

DAVID BOTTON, individually and as
manager of Kirkland Young, LLC,

Defendant.

**DEFENDANT, DAVID BOTTON'S, MEMORANDUM OF LAW IN
RESPONSE TO EX PARTE TEMPORARY RECEIVER'S
MOTION TO EMPLOY LEGAL COUNSEL**

The ex parte temporary Receiver seeks to appoint the law firm of Broad & Cassel as his counsel. Defendant David Botton, individually and as Manager of Kirkland Young, LLC ("Botton") has no objection to Broad and Cassel's appointment as counsel for the Receiver as to matters not relating to the allegations brought by the Federal Trade Commission ("FTC") in this case or similar cases. Further, the Receiver's counsel and the Receiver should be subject to a reasonable budget and reporting obligations to the Court and all parties.

I. BROAD & CASSEL CANNOT REPRESENT KIRKLAND YOUNG, LLC IN THIS ACTION BROUGHT BY THE FTC

Defendant Botton's initial concern is a clear conflict of interest with representing the entity Kirkland Young LLC (hereinafter "Kirkland") in the case against the FTC for conduct that allegedly occurred before to the Receiver's appointment. Regarding these issues, Botton has a

complete identity of interest with Kirkland. Both are motivated to contest the allegations of misconduct, causation and injury.

The Receiver, on the other hand, under the Order is practically speaking as an agent of the FTC charged with marshalling assets and redistributing such assets to consumers who have allegedly been injured. No greater proof of that can be demonstrated by the fact that the Receiver's Motion to Employ Legal Counsel states: "Pursuant to the Receivership Order, the Receiver is obligated to, among other things, take custody, control and possession of Kirkland's assets for the 'benefit of its customers and consumers'." See Receiver's Motion to Employ Legal Counsel [DE 32], paragraph 2.

The ex parte Temporary Restraining Order ("TRO") defines the Receiver's responsibilities as follows: "prevent the inequitable distribution of assets and to determine, adjust, and protect the interest of consumers and creditors who have transacted business with the receivership entity." [D.E. 19], § 12(F). Conspicuously absent from the FTC-drafted TRO is any reference to the interest of the owners. The Defendants have not been found guilty or liable of anything. To allow the Receiver to represent the entity in the FTC action would allow them to admit the allegations of the Complaint. Even if the Receivers' counsel decided to litigate the case aggressively, its prior positions and its conflicting obligations to consumers would constitute an un-waivable conflict of interest that no court could tolerate.

The FTC-drafted TRO does authorize certain judicial participation by the Receiver. Under Section XII, Duties and Authorities of Temporary Receiver, the Receiver is "directed and authorized" to:

- K. Institute, compromise, adjust, appear in, intervene in, or become party to such actions or proceedings in state, federal or foreign courts that the Temporary Receiver deems necessary and advisable to preserve or recover the

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assets of the Receivership Defendant or to carry out the Temporary Receiver's mandate under this Order.

- L. Defend, compromise, adjust, or otherwise dispose of any or all actions or proceedings instituted against the Receivership Defendant or the Temporary Receiver, that the Temporary Receiver deems necessary and advisable to preserve the assets of the Receivership Defendant or to carry out the Temporary Receiver's mandate under this Order.

However, the Order cannot be reasonably interpreted to allow the FTC-recommended Receiver to contest claims brought by the FTC when its duties are not to protect the owners, but only the consumers and creditors that dealt with Kirkland. Such a representation would require the Receiver to represent completely divided interests. The Receiver may sincerely claim that it will also protect the interest of the owners. But such an assertion cannot avoid the direct and material conflict in the interest of Kirkland and the consumers claiming refunds or other relief. Even much less direct conflicts have led to the disqualification of counsel. *See Florida Ins. Guar. Ass., Inc. v. Carey*, 749 F. Supp. 255, 258 (S.D. Fla. 1990).

The competition for limited assets to pay competing claims prohibits one counsel from representing the same interest. *See First National Insurance Co. v. Federal Deposit Insurance Corp.*, 977 F. Supp. 1051, 1059 (S.D. Cal. 1997) ("If the FDIC maintains that any judgment rendered in this case will be paid out of the assets of the receivership estate, there is a conflict of interest."). *See also Fleming v. Bank of Boston Corporation*, 127 F.R.D. 30, 37 (D. Mass. 1989) (Intervention motion denied in part because representation "presents an obviously impermissible conflict of interest. Receiver has an obligation to protect the creditors and serving as class representative would require protection of interest of investors (owners)".) The ethical rules prohibit representation when the clients have materially adverse interests in entirely unrelated cases. In this matter, the Receiver has refused to abandon its position that it has the right to

represent Kirkland in the same litigation it is claiming fraud against consumers which is co-extensive with the FTC's theory. The purported justification for this position is that David Botton is responsible for the alleged bad acts as managing agent. However, if Botton is liable as the manager, then Kirkland is liable to an equal extent.¹

Further, the Verified Interim Report of the Receiver reads like an indictment, not the position of a party seeking to protect the interests of Kirkland from consumer claims. Defendants do not consider this a mere formality that can be dispensed with in the name of efficiency or blind trust in the proposition that if the government goes to the trouble of filing a complaint all the assertions must be true.

Even a cursory review of the Receiver's interim report establishes the inappropriateness of the Receiver or its counsel seeking to represent Kirkland Young in the FTC matter. As set forth below, the Receiver's report is essentially an investigation of wrongdoing against the very same consumers the FTC purports to represent in this action:

The Receiver believes that ABK is a contrived company that serves the same function that April did in her role as escrow account manager at Kirkland Young. ABK served no purpose other than to generate fees for itself and its affiliated entities. It is the Receiver's opinion that it is an entity established to provide the appearance of arms-length relationships but is in fact a sham. (Interim Report, [DE 38], p. 10).

Attorney AID LLC purports to work (sic) with attorneys in assisting them with their processing of loan modification on behalf of their clients. However, the Receiver's investigation reveals that Attorney Aid was nothing more than a sham business used by David Botton to continue Kirkland Young's loan modification business under guise of having any attorney involved in the process. (Interim Report, p. 12).

Attorney Aid's (and Kirkland Young's) misrepresentations to consumers may have led consumers to believe they were

¹ The Court and the Receiver has implicitly recognized the appropriateness of Defendant Botton and his counsel representing Kirkland Young in this matter. See Hearing Transcript (11/30/2009), at PP. 129-130.

“retaining” the services of an attorney, even though there is no evidence an attorney ever contacted a lender on behalf of a customer of Kirkland Young or one of its affiliated entities. (Interim Report, p. 13).

Moreover, the Receiver has not found any evidence that any of the attorneys performed any legal services for a targeted consumer. For example, clients who received a loan modification welcome package from Michael Botton, Esq. were also provided a telephone number (on Michael Botton’s Esq.’s letterhead) that was linked to Kirkland Young’s office in Miami. When a client tried to contact Michael Botton, Esq. regarding the status of their loan modification, a customer service representative at Kirkland Young’s office would answer the phone. (Interim Report, p. 14).

The Receiver and his professionals have worked diligently to familiarize themselves with the business of Kirkland Young and its affiliated and related entities. The incestuous relationship is readily apparent, but additional information is necessary in order to fully understand their affiliations and working relationships. (Interim Report, p. 15).

These are the statements of an advocate hostile to Kirkland and Attorney Aid, which the receiver claims is a mere instrumentality of Kirkland. Neither the Receiver nor its counsel should be permitted to represent Kirkland in the FTC matter (or similar actions) since they cannot adequately defend the company. These prior statements made under oath could be used by the Federal Trade Commission as omissions. Due process does it allow such a conflict of interest.

II. Service Of The Counsel For The Receiver Should Be Subject To A Budget And Ongoing Reporting Obligation

The Receiver’s Initial Interim Report suggests that Kirkland was a money-losing operation and that there is a preliminary estimate of consumer injury that exceeded \$250,000.00. *See* David Rosemberg Affidavit [DE 35]. This preliminary list simply included everyone who did not get a loan modification for any of the following reasons:

- Client cancelled services

- Attempting modification on their own with the bank
- Modification declined (unqualified)
- Modification declined by borrower no longer interested

Significantly, none of these reasons establishes liability or injury. To the contrary, some of these reasons suggest a breach of the Agreement by the consumer or a failure to cooperate in the process.

It is apparent that the costs of this litigation could substantially exceed the value of the case. We recognize that the Receiver and its counsel should be reasonably compensated. Further, Defendant recognizes that significant time must be spent understanding the accounting records, marshalling assets, and managing the business. However, “no receivership is intended to generously reward court-appointed officers”. *SEC v. Kirkland*, No. 6:06-cv-183-ORL-28KRS, 2008 WL 4144424, *5 (M.D. Fla. Sept. 5, 2008).

We do not question the competence, reputation, ethical standards, or experience of the Receiver or its counsel. However, just as Defendant’s counsel must be subject to a budget, so should counsel for the Receiver. To do otherwise would risk the depleting resources for consumer redress if proper, or assets that belong to the owners, if the Defendant prevails. Worse, uncontrolled expenses by either party will make the case more difficult to settle because of the high transactional cost involved.

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Respectfully submitted,

/s/ Michael R. Holt

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**Attorneys for David Botton, individually and
David Botton, individually and as manager of
Kirkland Young, LLC**

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on the 11th day of December, 2009, we electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: Chris M. Couillou, and Sana C. Chriss, Federal Trade Commission, ccouillou@ftc.gov and schriss@ftc.gov., Rafael S. Garcia, Conrad & Scherer, LLP, rgarcia@conradscherer.com, and Mark F. Raymond, Temporary Receiver for Kirkland Young, LLC, Broad and Cassel, mraymond@broadcassel.com.

/s/ Michael R. Holt
