

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No.09-23507-CIV-GOLD/MCALILEY

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Kirkland Young, LLC, a limited liability
company, and

David Botton, individually and as manager of
Kirkland Young, LLC,

Defendants.

**DEFENDANT DAVID BOTTON'S OMNIBUS MOTION REGARDING (1)
APPOINTMENT OF COUNSEL FOR KIRKLAND YOUNG, LLC, (2) TO PROHIBIT
WAIVER OF PRIVILEGE BY RECEIVER; (3) ALLOWANCE OF UNRESTRICTED
ACCESS TO WITNESSES AND DOCUMENTS AND (4) ALLOWANCE OF
IMMEDIATE AND EXPEDITED DISCOVERY**

Defendant, David Botton, individually and as Manager of Kirkland Young, LLC, respectfully seeks an Order granting the following relief: (1) appointing Rumberger, Kirk & Caldwell as counsel for the Kirkland Young, LLC and permit David Botton to manage its defense; (2) prohibiting the Receiver from making blanket waivers of any attorney-client or accountant privilege held by Kirkland Young for communications occurring before November 19, 2009; (3) permitting Defendants to interview Kirkland Young employees and review documents without restriction or monitoring by Receiver; and (4) allowing Defendants to conduct expedited discovery. At the outset, Defendant notes that the relief requested is essential to adequately prepare for the preliminary injunction hearing now set for December 30, 2009.

I. PROCEDURAL BACKGROUND

On November 19, 2009, this Court granted the FTC's Emergency Motion for Ex Parte Temporary Restraining Order with Asset Freeze and other Equitable Relief [Docket No. 19]. That Order scheduled a Preliminary Injunction Hearing at 1:30 p.m. on Monday, November 30, 2009. *Id.* at P. 5. During that hearing, the Court instructed the parties to confer on a number of matters, and to raise any issues by Motion on or before December 11, 2009. This Omnibus Motion seeks relief regarding several topics – discussed below in turn - upon which the parties are unable to agree.

A. Allegations Of The FTC's Complaint

The FTC accuses the Defendants, Kirkland Young, LLC (receivership defendant) and David Botton of running a “deceptive loan modification scheme.” [DE 6], at P. 4.”¹ The core allegations of the Complaint relate to the sales function. [DE 3], ¶¶ 9-22. Specifically, the FTC claims that an unknown percentage of transactions were initially induced by misrepresentations.

The primary alleged misrepresentations include the assertion that a tape-recorded message was used by an unknown marketing company or companies to misrepresent the relationship with the caller so that the customer believed that the lender was contacting the customer regarding a requested loan modification. *Id.* ¶¶ 11-13. The second assertion is derivative of the first; the FTC bases that mis-representation theory on the premise that, during the initial contact, Defendants offered specific and unrealistic modified loan transactions, all the while knowing that the lender had not agreed to those specific terms. *Id.* ¶¶ 14-15.

¹ On December 8, 2009, the FTC amended its Complaint to include another corporate defendant – Attorney Aid, LLC – and two individual defendants – April Botton Krawiecki and Samy Botton. [DE 52-1]. The core allegations set forth in the Amended Complaint remain the same.

B. The Ex Parte Temporary Restraining Order And Appointment Of Temporary Receiver

Based upon the FTC's initial submissions, the Court granted an Ex Parte Temporary Restraining Order appointing a pre-selected Temporary Receiver for a period of seven (7) days through December 1, 2009. [DE 19], at § II.² The TRO prohibits the Defendants from operating Kirkland Young and freezes not only all of Kirkland's corporate assets, but David Botton's as well. [DE 19], at PP. 9-10, § 5.

The TRO also requires Defendants to prepare and serve, within three (3) business days, "completed financial statements fully disclosing the Defendants' finances and those of all corporations, partnerships, trusts or other entities that each Defendants owns, controls, or is associated with in any capacity, jointly or individually." [DE 19], at 10. These questionnaires, totaling approximately 31 pages, apply both to the individual and corporation. They require Mr. Botton to make all of these disclosures under penalty of perjury.

The questionnaire further requires Mr. Botton to provide information regarding "related individuals,' all counsel retained by the corporation, all lawsuits filed and a valuation of all other businesses, including the current fair market value of those businesses. Another provision requires the reporting of "each person, to whom you have transferred, in the aggregate, more than \$2,500 in funds or other assets during the previous three years by loan, gift, sale or other transfer."

The TRO bestows extraordinarily broad powers upon the Ex Parte Temporary Receiver. *See id.*, ¶¶15-24.³ For example, a cooperation provision requires Defendants to provide "any

² The Temporary Receiver moved to appoint counsel from his law firm to represent him.

³ The asset freeze provision was apparently intended to only apply to assets obtained by the alleged fraudulent conduct of the Defendants. In fact, the TRO is a *per se* violation of Rule 65's requirement that all temporary restraining orders and injunctions not rely on extrinsic documents or the underlying complaint. *See* Rule 65(d)(1)(C), Fed. R. Civ. P.

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information to the Temporary Receiver that the Temporary Receiver deems necessary to exercise the authority and discharge [his responsibilities] under this Order . . .” [DE 19], at P. 15, § XI. This requirement does not contain any restriction as to subject matter or provision for objection or assertion of fifth Amendment rights. Nor do the time parameters of the TRO allow sufficient time for the defendant to engage appropriate counsel, or for that counsel to gain a basic understanding of the facts as they pertain to their client.

C. Kirkland Young’s Contracts And Consumer Witness Testimony

The November 30, 2009 hearing featured testimony from the FTC’s investigator and several consumer witnesses regarding Kirkland Young’s customer contracts. These Loan Mitigation/Modification and Presentation Fee Acknowledgements, in fact, expressly disclaim any relationship with the lender and also disclaim that any specific agreed-to terms could be guaranteed, or that the company could stop the foreclosure process.⁴ See Hearing Transcript (11/30/2009), Liggins Testimony; at PP. 19, l. 22 to P. 20, l. 5 (discussing Kirkland Young customer agreement).

The agreements explain up front the cost of the program, and advise the customer of the services Kirkland Young agreed to provide. See [DE 9], Plaintiff’s Exhibit 25 (P. 196-198).⁵

The contract specifically states, immediately below a signature line for the customer, that:

By signing the above, I/We understand and agree that the Loan Modification Submission fee of \$699.00 that I elect to pay is being collected exclusively for a formal presentation of my request for Loan Modification to my Lender and is considered earned upon sign up; ***it does not come with any implied results in connection***

⁴ In fact the contract states that “Kirkland Young is currently not accepting any borrowers at all who have a foreclosure sale date in place.. By signing up for Kirkland’s services you testify that you are not aware of any foreclosure sale dates for your property.”

⁵ The total balance included a smaller up-front, non-refundable fee. Kirkland Young earned the larger remaining balance only once “any agreement on the first mortgage from lender has been accepted or signed by Borrower . . .” *Id.* (emphasis in original).

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with this submission or guarantee by Kirkland Young, LLC, Licensee, or its agents.”

[DE 9], Plaintiff’s Exhibit 25, at 196 (emphasis supplied).

The customer’s initials also appear immediately below this text. In addition to the text above, the Agreement states that Kirkland Young:

“MAKES NO WARRANTIES CONCERNING THE SUCCESSFUL COMPLETION OF A LOAN MODIFICATION OF BORROWER’S MORTGAGE ON THE PROPERTY. BORROWER UNDERSTANDS THAT KIRKLAND YOUNG CAN ONLY ATTEMPT TO NEGOTIATE A LOAN MODIFICATION WITH YOUR LENDER AND CANNOT GUARANTEE THAT THE LENDER WILL BE RECEPTIVE TO A LOAN MODIFICATION NOR CAN KIRKLAND YOUNG GUARANTEE THAT A LOAN MODIFICATION RECEIVED FROM THE LENDER WILL BE SATISFACTORY TO BORROWER.

[DE 9], Plaintiff’s Exhibit 25, at P. 197-198 (emphasis in original).

The FTC, however, asserts that these terms were “buried” in the sales contract or in the alternative, that the customer did not see the contract before agreeing to its substantive terms. [Docket No. 6], at P. 7 (referencing a single, unspecified paragraph in the contract). Yet the FTC’s investigator, Michael Liggins, recognized that the text appeared in capital letters and agreed that it was “conspicuous.” Hearing Transcript, 11/30/2009 at P. 20, ll. 6-10. *See also* Amy Cross Cross Exam; Hearing Transcript (11/30/2009), at p. 35, ll. 11. 5-18 (acknowledging initials immediately below all-caps paragraph above); Miller Cross Exam; Hearing Transcript (11/30/2009), at p. 43, ll. 7-23 (“common sense” lead him to check whether Kirkland Young had any relationship with his lender); Marcum Cross Exam; Hearing Transcript (11/30/2009), at P. 51, l. 21 to P. 52, l. 4 (agreeing that a reasonable consumer “when dealing with an important transaction” should read documents carefully and pay “particular attention” to portions requiring

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her initials, which she did); Lewis Cross Exam; Hearing Transcript (11/30/2009), at p. 73, ll. 2-6 (noticed “no guarantee” language when reviewing initial Kirkland Young paperwork).

The FTC’s witnesses also refuted the assertion that Kirkland Young tricked them into thinking they were dealing directly with their lenders. In fact, they recognized at some point during the initial conversations that they were not, in fact, dealing with their lenders, but in rather a separate company.⁶ Likewise, the witnesses acknowledged that they either never paid money to KY or received their money back eventually.⁷ In addition, two witnesses received favorable mortgage modification offers through their lenders.⁸ This stands in contrast to very recently-released statistics indicating that only 4% of troubled borrowers receive any assistance under the current government’s mortgage modification program.⁹

Other portions of the initial loan package likewise refute the FTC’s characterization of KY’s contract language. For example, the company provided a set of written instructions (“The Process of a File”) which state, in connection with the category entitled “Modification In Review,” that “after a period of time, *your modification will either be accepted or denied by your lender.*” *Id.* at P. 201 (emphasis supplied). Additionally, a set of frequently asked questions (second question) asks why a lender would be willing to lower an interest rate and help get current as opposed to foreclosing. The response warns the customer that:

⁶ See Cross Cross Exam; Hearing Transcript (11/30/2009), at p. 30, ll. 19-22 (acknowledging that she was never under the impression that she was speaking with her lender). See also Williams Cross Exam; Hearing Transcript (11/30/2009), at p. 42, ll. 10-16; Marcum Cross Exam; Hearing Transcript (11/30/2009), at pp. 51, l. 21 to 52, l. 4; P. 53, ll. 13-21; Lewis Cross Exam; Hearing Transcript (11/30/2009), at pp. 71, ll. 7-14.

⁷ Cross Cross Exam; Hearing Transcript (11/30/2009), at p. 37, ll. 16-17 (acknowledging receipt of monies); Williams Cross Exam; Hearing Transcript (11/30/2009), at p. 44, ll. 5-7 (witness paid no money to Kirkland Young); Marcum Cross Exam; Hearing Transcript (11/30/2009), at p. 56, ll. 13-25 (initial \$600.00 payment was returned to mortgage company).

⁸ See Marcum Cross Exam; Hearing Transcript (11/30/2009), at pp. 58, ll. 6-15 (witness accepted modification; felt this was “the only way out”); Lewis Cross Exam; Hearing Transcript (11/30/2009), at pp. 75, ll. 6-16 (noting that KY obtained offer to modify her 6.375% interest-only mortgage to a 30-year, 4.75% loan, but that she declined the offer because she could not afford it).

⁹ See http://money.cnn.com/2009/12/10/news/economy/permanent_loan_modifications/index.htm

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“at the same time, *it’s important to understand that if you do not pay your mortgage or get a loan modification, the lender’s only option is [to] take your home and sell it for what they can. This is what we fight every minute of the day to avoid. We want you to never face foreclosure.*”

[DE 9], Plaintiff’s Exhibit 26, at P. 204 (emphasis supplied).

Unlike many companies in the loan modification service business, Kirkland Young obtained most of its income from successfully closing loan modifications. As the complaint states and the evidence establishes, the company charged an initial processing fee between \$300.00 and \$699.00, while the back-end charges were based on the value of the property and would only be released upon the negotiation of an expressly-approved loan modification or forbearance. [DE 9], Plaintiff’s Exhibit 25, at P. 196-197.

D. Appointment Of Counsel For The Receivership Defendant

On November 25, 2009, Rumberger, Kirk & Caldwell appeared on behalf of David Botton, individually and as Manager of Kirkland Young, LLC. [Docket No. 31]. At that time and until the hearing on November 30, 2009, Mr. Rafael S. Garcia, Esq., represented Kirkland Young, LLC. [Docket No. 42].¹⁰ During the hearing, Mr. Garcia made an *ore tenus* Motion to withdraw, which the Court granted. *Id.*

At the time of Mr. Garcia’s Motion, the parties and the Court discussed the status of Kirkland Young, LLC’s representation. Mr. Botton’s newly-retained counsel, Douglas Brown, expressed a desire to represent the company but noted a potential issue given the Receiver’s control of the entity. Hearing Transcript (11/30/2009), PP. 126-127. The Receiver felt that Mr. Botton, as the “managing member” of the company, had “full authority” to represent it. *Id.* at PP. 129-130 (“I believe by virtue of representing him individually, they’re also representing him

¹⁰ Mr. Garcia sought special admission on November 23, 2009 [Docket No. 28]. This Court, in addition to its Order dated December 1, 2009, issued an Order granting Mr. Garcia’s Motion on November 24, 2009 [Docket No. 21].

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as managing member”). The Court asked the parties to discuss the issue and potentially resolve it amongst themselves. *Id.* Following the hearing, Rumberger, Kirk & Caldwell expressed its desire to represent the company; the Receiver now stands in opposition. As set forth below, Mr. Botton’s interests are aligned with Kirkland Young, and the Receiver should not have the power to control its representation as to pre-receivership matters.

E. The Temporary Receiver’s Purported Waiver Of Attorney And Accountant / Client Privileges

On December 1, 2009, the Temporary Receiver’s counsel demanded that Kirkland Young, LLC’s corporate counsel – David A. Kochman of Reed Smith, LLP – “make available for inspection and copying [Reed Smith]’s entire file in connection with its representation of Kirkland Young, LLC.” *See* Exhibit A. As Mr. Kochman pointed out, “this request implicitly requires Reed Smith to disclose materials and information that are subject to the attorney client and work product privileges.” *See* Exhibit B

The Temporary Receiver responded that “Any applicable attorney-client privilege belongs to me as [Temporary] Receiver for Kirkland Young.” *See* Exhibit C. The Temporary Receiver then advised Defense counsel that “to the extent you seek to represent or purport to represent Kirkland Young, LLC you are not authorized to do so and any prior authorizations you may be acting under is hereby revoked.” *See* Exhibit D.

On December 1, 2009, the Temporary Receiver demanded the entire file maintained by another law firm -- Conrad and Scherrer -- which served as legal counsel to Kirkland Young and Mr. Botton up through the hearing on November 30, 2009. *See* Exhibit A. Mr. Rafael S. Garcia, Esq., responded that his firm:

has represented David Botton and Kirkland Young in connection with an investigation conducted by the Florida Office of the Attorney General, and represented Mr. Botton and Kirkland Young

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during the early stages of the above-referenced FTC action. The allegations investigated by the Attorney General are substantially the same as the allegations raised in the FTC case.

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I understand your assertion that a receiver controls a corporation's attorney-client privilege. However, our firm's dual representation of Mr. Botton and Kirkland Young in connection with the Attorney General and FTC matters makes it impossible to release Kirkland Young records to you without disclosing records pertaining to Mr. Botton.

As for the Court's November 19, 2009 Temporary Restraining Order, we do not agree that its wording compels the type of disclosure that you are seeking from this firm. Furthermore, the Temporary Receiver was appointed by the Court for the purpose of receiving and preserving the Receivership Defendant's property during the pendency of this litigation. Therefore, I do not believe that the Temporary Receiver can demonstrate a need for confidential attorney-client records that are wholly unrelated to his directive or preserving receivership assets.

Id.

In addition to the disclosure of privileged law firm records, the Temporary Receiver has demanded access to all files maintained by Kirkland Young's accountants. He further denied Defendant the right to speak with the accountants or review any documents. On December 7, 2009, he advised:

Neither the accountant nor David Botton are authorized to have discussions regarding Kirkland Young. Moreover, only after the accountant turns over all of the materials in his possession respecting KY will I permit David to meet with him.

See Exhibit E.

At this time, Defendant is not aware of whether the Temporary Receiver has reviewed privileged documents or obtained any other type of protected information from any source.

F. Defendant's Inability To Conduct Discovery And Marshal A Defense

The TRO, which was initially set to expire on December 1, 2009, exists to protect the status quo, gather the corporation's assets and avoid fraudulent transfers. *See e.g. Schiavo ex rel. Schindler v. Schiavo*, 357 F.Supp.2d 1378, 1383 (M.D.Fla. 2005). The Temporary Receiver has obtained complete control of not only Kirkland Young and its records, but, as described below, has taken extraordinary steps to limit Defendant's ability to prepare a defense.

1. The FTC Refuses Defendants' Request For Expedited Formal Discovery

Pursuant to Rule 26(d), parties cannot seek discovery "from any source before the parties have conferred as required by Rule 26(f) . . ." As this case was filed less than a month ago, the parties have not had a chance to hold a Rule 26(f) meeting. On December 7, 2009, defense counsel asked the FTC to agree to an expedited discovery schedule and to permit depositions before the resumption of the preliminary injunction hearing. The FTC has categorically refused to agree to any expedited discovery on the ground that it would interfere with its preparation for the continued preliminary injunction hearing on December 30, 2009. Defendant's counsel respectfully suggests that allowing discovery of essential facts is not tantamount to interference, especially where the government seeks such draconian relief.

In any event, Defendant's counsel also requested all communications between the Receiver and the FTC. When the FTC raised concerns about producing such documents, defense counsel offered to restrict the search time to a few hours. The FTC would not commit to any pre-hearing formal discovery, and stated that he would have to review Rule 26 regarding the initial case management meeting. Defendants have not received any response from the FTC regarding their request to conduct a Rule 26 meeting.

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2. The Temporary Receiver Restricts Access To Kirkland Young, LLC's Employees And Documents

The accessibility of key witnesses and documents is critical to the defense of any matter; without it, the ability to present a meaningful response is almost non-existent. Unfortunately, Defendant finds himself in exactly this position. The Court's Order of November 19, 2009 [Docket No. 19] prohibits Defendant from operating Kirkland Young, LLC; that task now rests with the Temporary Receiver.

Following Rumberger, Kirk & Caldwell's retention on November 25, 2009, Defendant was allowed initial access to Kirkland Young, LLC's business premises. This was the first time Defendant could physically look at any of its documents. However, neither Defendant or his counsel were allowed to view any hard copy or electronic document without advising the Temporary Receiver or his agents what the document was and why they wanted to view it.

The Temporary Receiver took an equally aggressive position with regard to witnesses. During the meeting on November 27, 2009, the Temporary Receiver refused to allow interviews of any present employees unless they occur in the presence of himself or his agents. Moreover, the Temporary Receiver claims that he has not terminated a single employee; rather, any person employed on the day he took over still has a job. This is so despite the fact that these "employees" are not working and not being paid. On December 2, 2009, the Temporary Receiver affirmed this position, but noted that depending on the circumstances, Defendant may be able to speak freely with an employee after an initial, joint interview.

II. THE COURT SHOULD APPOINT RUMBERGER, KIRK & CALDWELL TO REPRESENT KIRKLAND YOUNG, LLC

Kirkland Young, LLC does not presently have counsel. As the Court recognized at the November 30, 2009 hearing, a corporate entity must appear through counsel and cannot proceed

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pro se. *See* Hearing Transcript (11/30/2009), P. 127, ll. 14-16. Douglas Brown of Rumberger, Kirk & Caldwell expressed a desire to represent Kirkland Young; the Court advised the parties to meet and confer about the matter. The Temporary Receiver now opposes Rumberger's appointment, perhaps for strategic reasons relating to his ability to gain easier access to certain corporate documents.

Remarkably, the Receiver seeks the right to represent Kirkland Young, LLC in the very FTC action where the FTC recommended its appointment and urged the Court to grant the Receiver virtually unlimited authority. This would constitute a classic conflict of interest that would deprive Kirkland Young of any meaningful defense. In fact, under the Receiver's apparent position, he could concede the allegations of the complaint and refuse to defend the actions of the entity.

The Receiver has been candid in his conclusions about the conduct of the responsible party. He claims that Defendant David Botton is totally responsible as KY's managing member, and in a feat of mental gymnastics, suggests that KY is less responsible because its managing member directed the activities. Obviously, if Mr. Botton committed wrongful acts in his capacity as a managing agent of the entity, the entity would be equally liable. And because the Receiver has concluded that Mr. Botton committed wrongful acts as the managing agent, Kirkland Young will be compelled to concede liability. In all likelihood, the Receiver will sue Mr. Botton on the theory that he acted improperly.

More fundamentally, the Receiver purportedly seeks to protect the interests of purportedly defrauded consumers while simultaneously protecting the interests of the owners such as David Botton, April Botton and allegedly, Samy Botton. The Receiver must make an initial determination of whether some or all of the customers were defrauded or victimized by

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unfair or deceptive acts in its role as protecting putative creditors such as the customers. Clearly, the interests of such putative creditors stand directly in contrast to the owners that the Receiver purports to represent, and who have every interest in showing the legitimacy of each transaction or alternatively, that the consumers knowingly ratified the transaction with full knowledge of the relevant facts.¹¹

The Receiver cannot serve two separate masters and doing so would present an unwaivable conflict of interest.¹² This fact is further complicated by the Receiver's decision to hire his own law firm to purportedly represent the corporate entity. In relationship to the FTC action, the interests of Kirkland Young and David Botton are identical. Mr. Botton and Kirkland Young have the same interest in proving that the transactions were fundamentally fair and that the customers received the benefit of the bargain. This clear identity of interest contrasts sharply with the Receiver's dual role and responsibilities, coupled with its close relationship with the FTC.

Further, the marginal cost of the defense of the corporation for Mr. Botton will be minor and will include the defense of the same points. An example of the clear conflict with the Receiver representing the company is demonstrated by the fact that the Receiver has sought to require Kirkland Young's attorneys to waive the attorney-client privilege for pre-receivership conduct. What could be the possible reason for such a demand other than furthering the interest of the FTC in establishing Mr. Botton's alleged misconduct. Any such proof of misconduct by Mr. Botton in his role as a manager of the entity would establish the entity's liability as well.

¹¹ *Harbaugh v. Greslin*, No. 03-61674-CIV., 2004 WL 5589736, * 10 (S.D.Fla. Dec. 14, 2004) ("ratification occurs where a contract is purportedly induced by fraud, but the defrauded party, after knowledge of the fraud which allegedly induced the contract, continues to perform under the contract, thereby ratifying the contract and precluding one from recovering for the alleged fraud") (citation omitted).

¹² It is difficult if not impossible to imagine an appropriate waiver letter in this circumstance.

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For these reasons, Defendants request that the law firm of Rumberger, Kirk & Caldwell be appointed to represent Kirkland Young as to pre-receivership issues and that reasonable funds be made available from the entity to fund that litigation.

III. THE COURT SHOULD PROHIBIT THE TEMPORARY RECEIVER FROM WAIVING ATTORNEY-CLIENT OR ACCOUNTANT-CLIENT PRIVILEGES HELD BY KIRKLAND YOUNG, LLC OR DAVID BOTTON WITHOUT AN APPROPRIATE EVIDENTIARY HEARING AND DISCLOSURE OF COMMUNICATIONS TO DEFENSE COUNSEL

The Temporary Receiver seeks the “entire file” maintained by Kirkland Young’s corporate counsel as well as counsel previously representing the company in this litigation. He claims that he now holds Kirkland Young’s attorney-client and work product privileges and can make blanket waivers prospectively and retrospectively. Even if the Court does not appoint Rumberger, Kirk & Caldwell as Kirkland Young’s counsel (at which time it would assert the privilege), it should not permit the purported blanket waiver without allowing Defendant’s counsel to inspect the documents for the potential assertion of any applicable privileges, including the joint defense privilege or privilege applicable to David Botton.

Whether the Temporary Receiver could waive Kirkland Young’s privileges or not, Defendant has a right to initially review the materials, determine the applicability of any joint or individual privileges and assert them (via privilege log pursuant to Rule 26(b)(5)) if appropriate. The obvious purpose of the Receiver’s waiver is to use the materials against Kirkland Young to justify the payment of consumer claims. Why else would the Receiver waive the privilege to documents and information that presumably he has yet to review. Defendant respectfully suggests that the desire to waive the privilege for un-reviewed documents is irresponsible and demonstrates conclusively that the Receiver is serving as an agent of the FTC. The Court should

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not permit unfettered disclosure of these materials until this occurs, as once the Temporary Receiver and the FTC gain access to these materials, the privilege evaporates forever.¹³

IV. THE COURT SHOULD ALLOW UN-RESTRICTED ACCESS TO KIRKLAND YOUNG, LLC'S EMPLOYEES

Defendant should not have to prepare his case before the Temporary Receiver's eyes. But as the situation now stands, he has no other choice. Fundamental fairness requires that Defendant be allowed to discuss pre-receivership matters with Kirkland Young's employees outside the Temporary Receiver's presence.¹⁴

The Ex Parte Temporary Restraining Order grants broad powers to the Temporary Receiver, but does not contain any "sunshine" provision authorizing him to attend interviews conducted by Defendants or analyze documents which Defendants have selected to review. Nor does any other authority permit this type of arrangement.

The prejudice caused by the proposed arrangement is obvious and irreparable; his presence during a witness interview would most certainly impact the questions defense counsel might ask, as well as what matters the witness might be willing to discuss. Likewise, if the Temporary Receiver is entitled to know what records Defense counsel seeks and why they seek

¹³ Certain authority in the context of bankruptcy litigation suggests that a bankruptcy trustee controls the privilege. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985). Cases in other contexts permitting receivers to waive the attorney-client or work product privileges are inopposite because those matters did not involve purported blanket waivers within a matter of days after the temporary receiver's appointment. Rather, the waivers occurred after the receivership became permanent or the case had otherwise progressed for at least a number of months. See *U.S. v. Shapiro*, No. 06 Cr. 357(KMW)(FM), 2007 WL 2914218, at **1-2 (W.D. N.Y. Oct 1, 2007) (receiver in S.E.C. proceeding waived corporate privilege months after appointment of temporary receivership became permanent); *S.E.C. v. Marker*, No. 1:02CV01109, 2006 WL 288426, at * 1-2 (M.D. N.C. Feb. 6, 2006) (receiver sought to waive corporate privilege six months after initial appointment); *S.E.C. v. Elfindapan, S.A.*, 169 F. Supp.2d 420, 423-24 (M.D. N.C. 2001) (suit commenced in August, 2000; receiver not appointed until March, 2001; subpoena at issue served in April 2001). In contrast, this is a temporary receivership with no final determination of liability. If the Receiver can effect a blanket waiver of the privilege, and the matter is appealed, the case would require a re-trial. This would further erode the limited resources of the receivership defendant.

¹⁴ There should be no dispute that Defendant and his counsel may interview Kirkland Young's rank-and-file "employees" especially since the vast majority of them no longer have active roles with the company and, for all practical purposes, have the status of former employees. See *H.B.A. Mgmt. v. Estate of Schwartz*, 693 So.2d 541, 545 (Fla. 1997).

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them, the work product privilege evaporates completely. The Temporary Receiver has independent access to Kirkland Young's employees, and may look at any documents it chooses. But it should not have the ability to invade and destroy Defendant's work product privilege.¹⁵

V. THE COURT SHOULD PERMIT DEFENDANT TO ENGAGE IN EXPEDITED DISCOVERY

As the Court is aware, the Temporary Receiver has investigated this matter extremely aggressively. Defendant, meanwhile, cannot undertake any affirmative discovery until the parties meet and confer pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(d) (parties "may not seek discovery from any source before the parties have conferred as required by Rule 26(f)"). This Court, however, has broad discretion to manage discovery, and may expedite proceedings "when some unusual circumstances or conditions exist that would likely prejudice the party if he were required to wait the normal time." *Fimab-Finanzairia Maglificio Biellese Fratelli Fila S.p.A. v. Kitchen*, 548 F.Supp. 248, 250 (S.D. Fla. 1982). Such a situation may arise where, as here, the litigation involves a request for a preliminary injunction. *See* Fed.R.Civ.P. 26 advisory committee notes to 1993 Amendments to Subdivision (d). *See also Educational Comm'n for Foreign Sch.Med. Graduates v. Repik*, Civil Action No. 99-1381, 1999 U.S. Dist. Lexis 7185, at *7 (E.D. Pa.May 14, 1999) ("Expedited discovery in connection with a preliminary injunction motion is appropriate.").

The circumstances here, which involve the FTC's request for a preliminary injunction, clearly provide sufficient good cause to allow expedited discovery. Defendant has had virtually no access to evidence necessary to marshal its defense. In contrast, the FTC's investigator testified that its investigation had been ongoing since the spring of 2009. Hearing Transcript,

¹⁵ Any employee interview conducted by the Temporary Receiver should not, of course, require the witness to disclose any communications occurring in any previous conference with defense counsel.

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11/30/2009, P. 14, ll. 15-18. The FTC had obviously conducted a substantial investigation before filing suit and seeking this extraordinary relief.

Now, however, the FTC and Receiver, in lock-step fashion, refuse to provide communications between them, and will not permit Defendant to conduct any formal discovery. This asymmetry of disclosure, in which the FTC and Receiver have used the draconian *ex parte* procedure to obtain virtual complete control over information regarding the case while at the same time denying any formal discovery to Defendant, is fundamentally unfair. As set forth in Section V below, Defendant seeks narrowly-tailored discovery necessary to defend against the FTC's claim for preliminary injunctive relief. The Court should allow this discovery to proceed immediately.

VI. CONCLUSION

For the reasons set forth above, Defendant respectfully seeks an Order granting the following relief:

- (1) Appointing Rumberger, Kirk & Caldwell as counsel for the Kirkland Young, LLC, and permitting David Botton to direct the defense as to pre-receivership conduct relating to the FTC lawsuit;
- (2) Prohibiting the Receiver from making blanket waiver of any attorney-client privilege on behalf of Kirkland Young for communications occurring before November 19, 2009;
- (3) Permitting Defendants to interview employees and review documents without restriction or monitoring by Receiver; and
- (4) Permitting Defendants to commence discovery immediately. The discovery permitted should include:
 - (a) Within 72 hours, the collection and production of communications and related documentation between the Receiver and FTC regarding this matter. The related documents should include:
 - (1) The Receiver's expenditures along with fees incurred by the Receiver's counsel and accountant(s); and

Case No.09-23507-CIV-GOLD/MCALILEY

- (2) The number of transactions closed by the Receiver since November 19, 2009 and related documents.
- (b) A one-day deposition of the Temporary Receiver on or about December 21, 2009, or at another mutually agreeable date;
- (c) Access by Defendants to all of Kirkland Young's corporate records and files upon 72 hours notice, including all recent transactions in which consumers have been offered or agreed to loan modifications or forbearance agreements, including payments to the Receiver for such transactions;
- (d) Unencumbered access to KY's current and former employees regarding their pre-receivership conduct and
- (e) Depositions of up to seven Kirkland Young employees or other witnesses for up to three hours each
- (f) A list of all Kirkland Young employees and contractors, including email addresses, phone numbers and physical addresses, so that Mr. Botton may notify them as required by the TRO.

Respectfully submitted,

/s/ Michael R. Holt

Douglas B. Brown
Florida Bar No. 0242527
Michael R. Holt
Florida Bar No. 455067
Darren K. McCartney
Florida Bar No. 0011616
RUMBERGER, KIRK & CALDWELL
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Email: dmccartney@rumberger.com
**Attorneys for David Botton, individually and
David Botton, individually and as manager of
Kirkland Young, LLC**

Case No.09-23507-CIV-GOLD/MCALILEY

CERTIFICATE OF COUNSEL

Pursuant to Rule 7.1(A)(3) S.D. Fla.L.R., counsel for Defendant has conferred with Plaintiff in a good faith effort to resolve the issues raised in the motion, but has been unable to do so.

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

1610759

EXHIBIT A

12/01/09 13:56:59

Broad and Cassel->

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Page 002



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2 SOUTH BISCAYNE BOULEVARD
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DAVID B. ROSENBERG, ESQ.
DIRECT LINE: 305-373-9437
DIRECT FACSIMILE: 305-995-6433
EMAIL: drosenberg@broadandcassel.com

December 1, 2009

Via Facsimile and U.S. Mail

Rafael S. Garcia, Jr. Esq.
Conrad Scherer
633 S Federal Highway
Suite 800
Fort Lauderdale, FL 33301

**Re: Federal Trade Commission v. Kirkland Young, LLC and David Botton
Case No.: 09-23507-GOLD/MCALILEY**

Dear Rafael:

Pursuant to the Court's November 19, 2009 Temporary Restraining Order, we are requesting that you make available for inspection and copying your firm's entire file in connection with its representation of Kirkland Young, LLC. I would appreciate a prompt response from you as to whether you will agree to this and would ask that you let me know when the files will be available for our review.

Thank you for anticipated courtesies and cooperation in this matter.

Cordially yours,



David B. Rosenberg
Counsel to Temporary Receiver

DBR:nf

cc: Mark F. Raymond, Temporary Receiver

EXHIBIT B

From: Kochman, David A. [mailto:DKochman@ReedSmith.com]
Sent: Wednesday, December 02, 2009 12:22 PM
To: David Rosenberg
Cc: Mark Raymond; Brown, Doug
Subject: FTC v. Kirkland Young and David Botton, Case No. 09-23507 (S.D. Fla.)

Mr. Rosenberg,

This morning I received your December 1, 2009 correspondence, wherein you request that Reed Smith "make available for inspection and copying [Reed Smith]'s entire file in connection with its representation of Kirkland Young, LLC." As you know, this request implicitly requires Reed Smith to disclose materials and information that are subject to the attorney client and work product privileges.

Subsequent to receiving that letter, I was informed by Douglas Brown, counsel to David Botton and/or Kirkland Young Botton in the above-referenced action, that he will be speaking with you in an effort to resolve your request.

In the event that you are able to resolve this issue with Mr. Brown, Reed Smith fully will comply with your joint instructions. In the event, however, that you are unsuccessful in resolving this issue amongst yourselves, Mr. Brown informs me that he will file an appropriate motion with the Court. Reed Smith will, of course, fully comply with any Court Order requiring disclosure of such information and materials.

I note that, on or about November 24, 2009, I received a call from Mark Raymond of your office during which he stated his opinion that he, as Temporary Receiver, had the authority to retrospectively waive the attorney client and work product privileges on behalf of Kirkland Young. Later that same day, I left a message for Mr. Raymond which was not returned. Had Mr. Raymond called me back, I would have communicated to him that I spent some time looking for legal authority to support this position, and was unable to find any binding authority under the specific facts and circumstances of this case. In the event that you can present me with such binding case precedent, we may be in a position to reconsider disclosure absent a Court Order.

Please note further that I will be traveling beginning today at 3:00 Eastern through Monday, December 7, and expect only to be intermittently available during that time. Should you need to reach me immediately, please feel free to contact me on my cell phone at 646-526-0753.

Very truly yours,

David

David A. Kochman
212.205.6056
dkochman@reedsmith.com

ReedSmith LLP
599 Lexington Avenue
New York, NY 10022
212.521.5400 Main
212.521.5450 Fax
www.reedsmith.com

Please consider the environment before printing the contents of this email

12/11/2009

EXHIBIT C

From: Mark Raymond [mailto:mraymond@broadandcassel.com]
Sent: Wednesday, December 02, 2009 2:23 PM
To: 'Kochman, David A.'
Cc: Brown, Doug; David Rosemberg; 'Couillou, Chris M.'; 'schriss@ftc.gov'
Subject: RE: FTC v. Kirkland Young and David Botton, Case No. 09-23507 (S.D. Fla.)

David:

Our request is limited to your firm's representation of Kirkland Young, LLC, not David Botton or any of this family members. Your refusal to comply with my request for the turnover of all files, including the work product paid for by Kirkland Young, LLC by invoking the attorney-client privilege is misplaced. Any applicable attorney-client privilege belongs to me as Receiver for Kirkland Young.

Also, Doug Brown was specifically asked by District Judge Alan Gold if he represented Kirkland Young or any of the related entities and he said no. Since Doug Brown does not represent Kirkland Young he has no standing to object.

As you know from the Court's order appointing me, I am duty bound to marshal the assets and property of the receivership entities. Your firm's files are property of the estate. I would like to avoid having to file a motion for an order to show cause why you and your firm should not be held in contempt for failing to comply with my requests as Receiver. I hope you will agree to provide us via email and FedEx the requested Kirkland Young LLC files.

Thank you in advance for your anticipated cooperation.

Sincerely,

Mark F. Raymond, Receiver



Mark F. Raymond, P.A.
MANAGING PARTNER
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Pursuant to federal regulations imposed on practitioners who render tax advice ("Circular 230"), we are required to advise you that any tax advice contained herein is not intended or written to be used for the purpose of avoiding tax penalties that may be imposed by the Internal Revenue Service. If this advice is or is intended to be used or referred to in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement, the regulations under Circular 230 require that we advise you as follows: (1) this writing is not intended or written to be used, and it cannot be used, for the purpose of avoiding tax penalties that may be imposed on a taxpayer; (2) the advice was written to support the promotion or marketing of the transaction(s) or matter(s) addressed by the written advice; and (3) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

EXHIBIT D

From: Mark Raymond [mailto:mraymond@broadandcassel.com]
Sent: Wednesday, December 02, 2009 4:49 PM
To: Brown, Doug; 'Kochman, David A.'
Cc: David Rosemberg; 'Couillou, Chris M.'; 'schriss@ftc.gov'
Subject: RE: FTC v. Kirkland Young and David Botton, Case No. 09-23507 (S.D. Fla.)

Doug,

Please do not make assumptions about what I am going to do. It is reckless. I report to the Court, not to you and not to the FTC.

As Receiver for Kirkland Young, LLC I am advising you that to the extent you seek to represent or purport to represent Kirkland Young, LLC you are not authorized to do so and any prior authorizations you may be acting under is hereby revoked.

Thank you,
Mark F. Raymond,
Receiver



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Pursuant to federal regulations imposed on practitioners who render tax advice ("Circular 230"), we are required to advise you that any tax advice contained herein is not intended or written to be used for the purpose of avoiding tax penalties that may be imposed by the Internal Revenue Service. If this advice is or is intended to be used or referred to in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement, the regulations under Circular 230 require that we advise you as follows: (1) this writing is not intended or written to be used, and it cannot be used, for the purpose of avoiding tax penalties that may be imposed on a taxpayer; (2) the advice was written to support the promotion or marketing of the transaction(s) or matter(s) addressed by the written advice; and (3) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

THE INFORMATION CONTAINED IN THIS TRANSMISSION IS ATTORNEY PRIVILEGED AND CONFIDENTIAL. IT IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. ANY ATTACHMENTS TO THIS TRANSMISSION ARE FOR THE SOLE PURPOSE OF CONVEYING THE DIRECT WRITTEN AND COMMONLY VISIBLE COMMUNICATION CONTAINED THEREIN. NO TRANSMISSION OF UNDERLYING CODE OR METADATA IS INTENDED. USE OF ANY ATTACHMENT FOR ANY PURPOSE OTHER THAN RECEIPT OF THE DIRECT WRITTEN COMMUNICATION CONTAINED THEREIN IS STRICTLY PROHIBITED. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY AND RETURN THE ORIGINAL MESSAGE TO THE SENDER. THANK YOU.

EXHIBIT E

From: Mark Raymond [mailto:mraymond@broadandcassel.com]
Sent: Monday, December 07, 2009 7:26 PM
To: Brown, Doug
Cc: Holt, Michael; McCartney, Darren; Byerley, Linda; David Rosemberg; 'Couillou, Chris M.'; 'schriss@ftc.gov'
Subject: RE: Access to Accountants

Doug,

Neither the accountant nor David Botton are authorized to have discussions regarding Kirkland Young. Moreover, only after the accountant turns over all of the materials in his possession respecting KY will I permit David to meet with him. Of course, if the accountant shows me that he was separately engaged by David Botton, in writing, prior to November 19 and paid for by David individually than that would not be covered by KY's engagement. Failing a separate written engagement, David is not the client. So before a meeting can occur, the accountant needs to respond to my calls to him and get me materials.

Sincerely,

Mark F. Raymond
Receiver