

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

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.

**PLAINTIFF FEDERAL TRADE COMMISSION'S RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION FOR PARTIAL RELEASE OF FUNDS FROM  
ASSETS FROZEN PURSUANT TO THE *EX PARTE* TRO TO PAY  
ATTORNEYS' FEES FOR PRELIMINARY INJUNCTION HEARING**

Plaintiff Federal Trade Commission opposes the motion of Defendants to pay attorneys' fees from frozen assets. At this point Defendants have not complied with the provisions of the *Ex Parte* Temporary Restraining Order ("TRO")(Dkt. No. 19) requiring disclosure of their assets.<sup>1</sup> As a result, it is unknown whether there will be sufficient assets to pay an equitable

<sup>1</sup> The TRO (¶¶ VI, VIII) required Defendants to provide specified financial disclosures within three days of service of the order. Service occurred on November 20, 2009, and the financial disclosures were due on or before November 25, 2009. Defendants filed an emergency motion on November 23, 2009, to stay the financial disclosure provisions of the TRO. (Dkt. No. 14). After a hearing on November 24, 2009, the Court denied Defendants' motion. (Dkt. No. 27). On the afternoon of November 25, counsel requested Plaintiff's stipulation to an extension of the

monetary remedy that is justified as a result of the Defendants' unlawful deceptive practices. No relief from the asset freeze should be given at this juncture because it would risk impairing the Court's ability to provide a meaningful remedy after its consideration of the merits.

Defendants have not provided the financial disclosure required by the TRO. (TRO, ¶¶ VI.A, VI.C, and VIII). As a result, the extent of their assets is unknown. At the same time, Defendants' sales in 2008 and 2009 exceed \$2,000,000 based on information currently available (See Supplemental Declaration of Michael S. Liggins, ¶ 10, Dkt. No. 20). Their ability to satisfy a monetary judgment commensurate with their deceptive practices remains indeterminate. Their assets should remain frozen until Defendants comply with the Court's order to provide financial disclosure, and more definite information is provided on which to evaluate a request for attorneys' fees.

Defendants have no legal entitlement to use of the frozen funds to pay attorney fees. Courts regularly deny or limit releases from frozen assets. *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9<sup>th</sup> Cir. 1989); *CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 775 (9<sup>th</sup> Cir. 1995)(district court did not abuse its discretion in denying release of funds for attorneys' fees). The Ninth Circuit has held that, in light of the Supreme Court's decisions in *Caplan & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989), there cannot be "[a]ny doubt as to the constitutionality of freezing assets and precluding entirely their use for payment of attorney fees. . . ." *World Wide Factors*, 882 F.2d at 347. The Supreme Court ruled that even in a criminal proceeding, where the Constitution protects the right to counsel, a defendant has "no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that the defendant will be deadline for compliance. Plaintiff's counsel orally stipulated to a 24-hour extension.

able to retain the attorney of his choice.” *Caplin & Drysdale*, 491 U.S. at 626. Defendants have no absolute right to an attorney in this matter, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25 (1981) (right to counsel exists only where a litigant’s physical liberty is at risk), and Defendants should not be entitled to use the proceeds of their fraudulent activities to pay for attorneys’ fees.

In addition, defendants’ counsel has assumed the risk of non-payment of fees. A law firm that knowingly consents to represent Defendants whose assets are frozen assumes the risk of not being paid from those funds. *CFTC v American Metals Exchange*, 991 F.2d 71, 80 (3rd Cir. 1993); *FTC v. Image Sales and Consultants, Inc.*, 1997 U.S. Dist. Lexis 18905 at \*8 (N.D. Ind. 1997); *FTC v. Jordan Ashley, Inc.*, 1994 U.S. Dist. LEXIS 7577 at \*10 (S.D. Fla. May 1994).

For the foregoing reasons, the Court should deny Defendants’ motion to release frozen funds to pay attorneys’ fees.

Respectfully submitted,

WILLARD K. TOM  
General Counsel

Dated: November 27, 2009

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**CERTIFICATE OF SERVICE**

I, Chris M. Couillou, hereby certify as follows:

1. I am an attorney employed by and representing the Federal Trade Commission. I am not a party to this action.

2. On November 27, 2009, I served the foregoing document on interested parties in this matter by causing a true and correct copy to be filed electronically via the CM/ECF system and mailed, postage prepaid, United States first class mail and by email to the following:

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I hereby certify that the foregoing is true and correct. Executed on this 27th day of November 2009 at Atlanta, Georgia.

/s/Chris M. Couillou  
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