

**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,

Attorney Aid, LLC, a limited liability  
company,

David Botton,

April Botton Krawiecki, and

Samy Botton,

Defendants.

**PLAINTIFF FEDERAL TRADE COMMISSION'S RESPONSE IN OPPOSITION TO  
DEFENDANT DAVID BOTTON'S OMNIBUS MOTION**

Plaintiff Federal Trade Commission opposes the omnibus motion (DE 58) of Defendant David Botton which seeks to (1) appoint Defendant David Botton's counsel as counsel for Defendant Kirkland Young, LLC; (2) prohibit the Temporary Receiver from waiving privilege; (3) allow unrestricted access to all employees and records of the receivership; and (4) expedite discovery.

**I. COUNSEL FOR DEFENDANT DAVID BOTTON SHOULD NOT BE APPOINTED COUNSEL FOR DEFENDANT KIRKLAND.**

Plaintiff opposes the motion of Defendant David Botton to have his counsel Rumberger, Kirk & Caldwell appointed as counsel for Defendant Kirkland Young, LLC (“Kirkland”). First, the law firm of Conrad Scherer initially appeared on behalf of Defendant Kirkland through Gregory Barthelette, Esquire (DE 16). Although Rafael Garcia, Esquire, of the same firm has withdrawn (DE 42), there is no record that Mr. Barthelette has moved to withdraw.

Second, there is a divergence of interests between Defendants Kirkland and David Botton and a resulting conflict. The primary goal of Defendant Botton must be to avoid individual liability. One argument he may make is that although Kirkland is liable, he is not. On the other hand, Defendant Kirkland may wish to argue that Defendant David Botton is jointly and severally liable with it for the deceptive practices at issue here. There is an obvious conflict. Of course, Defendant David Botton would like to have his counsel represent Defendant Kirkland for tactical reasons, but that is not a reason for granting the motion.

Defendant Kirkland already has competing claims for its limited assets, including requests for refunds and Plaintiff’s potential claim for monetary equitable relief. Appointing additional counsel would cause additional depletion of Defendant Kirkland’s resources. The Receiver under the supervision of the Court is appropriately empowered to recommend what legal representation the Receivership Defendant should undertake.

Defendant has also argued that the Receiver has a conflict of interest because Plaintiff recommended his appointment. Plaintiff disagrees that this constitutes a conflict. Plaintiff nominated Mark Raymond as temporary receiver but also provided the Court with two alternate receiver candidates who were qualified and willing to serve. (DE 12). The TRO provides that

“the temporary receiver shall be the agent of this Court and solely the agent of this Court.”

(TRO, § X) It is the Court, and not Plaintiff, to whom the Temporary Receiver is beholden for his position.

Defendant Botton’s motion leaves the Court with a stark choice: Put the representation of Defendant Kirkland in the hands of Defendant David Botton, the manager and president of Kirkland, who used the corporate entity to victimize consumers who were in fear of losing their homes **or** put the representation of the corporate entity in the hands of the Temporary Receiver, who is the agent of the Court and was appointed based on his qualifications (TRO, Attachment D). To Plaintiff, the choice is clear. Defendant’s motion should be denied.

**II. PLAINTIFF OPPOSES DEFENDANT’S MOTION TO LIMIT THE RECEIVER’S ABILITY TO ASSERT OR WAIVE ANY PRIVILEGE HELD BY DEFENDANT KIRKLAND.**

In Defendant David Botton’s Omnibus Motion (DE 58), he argues that the Court should limit the Temporary Receiver’s ability to assert or waive any attorney-client or accountant-client privileges held by Defendant Kirkland or David Botton, as a manager of Kirkland, without an appropriate evidentiary hearing and disclosure of communications to defense counsel. Plaintiff opposes this argument because limiting the Temporary Receiver’s authority in this manner will unnecessarily impede his ability to perform the duties conferred upon him by this Court. *See* TRO Order (DE 19). The Temporary Receiver would not be able to perform all of the acts necessary or advisable to preserve the value of the receivership assets, prevent the inequitable distribution of assets, or protect the interests of consumers and creditors who have transacted business with the Receivership Defendant. Accordingly, Plaintiff respectfully requests that Temporary Receiver’s authority to control Kirkland’s privileges not be limited in any way.

**A. The Temporary Receiver has succeeded to the rights and powers of Kirkland's management, including any attorney-client privileges held by Kirkland.**

The Court's Order has made Mark Raymond a full equity receiver (TRO § X), and, accordingly, he has full power to assert or waive the attorney-client privilege of Kirkland. Long-standing case law clearly establishes that a receiver, as a successor to the rights and power's of a corporation's management, is also a successor to any privileges held by that corporation and its management.<sup>1</sup> In this case, the Court should similarly find that the Receiver has succeeded to the corporate privileges of Kirkland and has the authority to preserve or waive such privileges.

**B. Good Cause Exists for the Temporary Receiver to Maintain Control over Kirkland's Privileges.**

The Temporary Receiver should be allowed to maintain his control over privilege in this matter because without this control, the Temporary Receiver would not be able to perform fully his duties as receiver. For example, in seeking to determine the value and location of any assets held by the Receivership Defendant, the Receiver must, among other steps, evaluate the conduct of prior management. If former management were allowed to control Kirkland's attorney-client privilege and therefore control access to its legal files, it would be extremely difficult to conduct this inquiry. If management has wrongfully diverted or appropriated corporate assets, it could

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<sup>1</sup> See *CFTC v. Weintraub*, 471 U.S. 343, 356 (1985), *SEC v. Elfindapan*, 169 F. Supp.2d 420, 431 (M.D.N.C.2001) (citing *Odmak v. Westside Bancorporation, Inc.*, 636 F. Supp. 552, 554 (W.D. Wash. 1986) and stating that the *Odmak* "court recognized that because the receiver succeeded to the rights and powers of the company and its management, he therefore "succeed[ed] to the corporate attorney-client privilege which existed between "the corporation and its former counsel. Relying on *Weintraub*, the court declared that the officers and directors of the corporation therefore could not assert an individual privilege."). See also *U.S. v. Shapiro*, 2007 WL 2914218 \*6, 7 (S.D.N.Y.) (stating the receiver plainly had the discretion to waive its corporate privileges in connection with the litigation and in other contexts).

use the privilege as a shield against the Receiver's efforts to identify those assets and to protect themselves from having to disgorge any ill-gotten gains that they may have obtained. *CFTC v. Weintraub* at 353-54; *See also SEC v. Elfindepan* at 431 (stating that "this court finds it significant that without succession to the attorney-client privilege, the receiver would encounter difficulties in discovering hidden assets and other potential schemes.") Any control by Defendant David Botton of the attorney-client privilege could also upset the Receiver's efforts to take legal action against certain third parties to recover assets or otherwise carry out his duties as Receiver. For these reasons, the Court should not grant Defendant David Botton's request to limit the Receiver's control of privileges.

### **III. PLAINTIFF OPPOSES, IN PART, DEFENDANT'S MOTION FOR UNRESTRICTED ACCESS**

Defendant has moved to have unrestricted access to employees of Defendant Kirkland. (D's Omnibus Motion, p. 15). Plaintiff does not oppose Defendant's motion as it relates to rank-and-file employees, who are not actively involved in the receivership. According to Defendant, this is the vast majority of the employees. (*Id.* at n. 14.) As to the remainder of the employees, it is Plaintiff's understanding that the Temporary Receiver has taken the position that he should be present at least during initial interviews. (*See id.* at p. 11). Plaintiff believes that this is a reasonable procedure and should not be disturbed.

Plaintiff also opposes Defendant's request for unrestricted access to records of Defendant Kirkland. The Temporary Receiver has a duty to maintain the records of the Receivership Defendant (TRO, § 12.B) and must impose reasonable restriction to carry out that mandate.

**IV. THE COURT SHOULD DENY DEFENDANT’S MOTION FOR EXPEDITED DISCOVERY.**

Plaintiff opposes the motion for expedited discovery as unjustified. Defendant Botton claims to have “virtually no access to evidence necessary to marshal its defense.” This claim is unsupported. Defendant Botton is the manager and president of Defendant Kirkland. He has submitted his own declaration in support of his opposition to entry of a preliminary injunction. (DE 16). Defendant David Botton also had access to at least two employees of Kirkland, who signed declarations and were in attendance at the Preliminary Injunction hearing on November 30, 2009, for the purpose of testifying. Before the preliminary injunction hearing, Plaintiff provided Defendant Botton with the underlying recordings for transcripts that were exhibits used at the preliminary injunction hearing on November 30, 2009, and with the Excel spreadsheet that was the subject of the Supplemental Declaration of David Rosemberg. (Plaintiff’s Exhibit 71). In addition, the TRO already provides that Defendant has reasonable access to the office of Defendant Kirkland and the records therein. (TRO, § XIX). Defendant Botton has not shown what efforts he has made to obtain information from the receivership nor what information he has been obtained through whatever efforts he has made. He has also not provided any information to the Court about what requests he has made to interview employees of Kirkland and what employees have been interviewed by him. Defendant has had ample time since entry of the TRO to seek information from the Receivership. If he has failed to do, his failure is not justification for expedited discovery.

As part of marshaling his defense, Defendant Botton has also requested a one-day deposition of the Temporary Receiver. (D’s Motion, p. 18). What a full-day deposition of the Temporary Receiver has to do with the marshaling of Defendant’s defense is unknown because

Defendant does not explain this request. Defendant's counsel already crossed examined the Temporary Receiver at the preliminary injunction hearing and should not have another bite at the apple through expedited discovery.

The Court has already granted the Defendant a 30-day extension to prepare his defense for the preliminary injunction and he should have been preparing it. Defendant has not shown good cause for the extraordinary discovery requested, and his request should be denied.

Respectfully submitted,

WILLARD K. TOM  
General Counsel

Dated: December 16, 2009

/s/Chris M. Couillou  
Chris M. Couillou, Court ID No. A5500462  
ccouillou@ftc.gov  
Sana Chriss, Court ID No. A5501393  
schriss@ftc.gov  
Robin L. Rock, Court ID No. A5500620  
rrock@ftc.gov  
Federal Trade Commission  
225 Peachtree Street, NE, Suite 1500  
Atlanta, Georgia 30303  
(404) 656-1353 (Couillou)  
(404) 656-1364 (Chriss)  
(404) 656-1368 (Rock)  
Facsimile: (404) 656-1379  
Attorneys for Plaintiff, Federal Trade Commission

**Certificate of Service**

**I hereby certify** that on December 16, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Chris M. Couillou  
Chris M. Couillou  
Attorney for Plaintiff  
Federal Trade Commission

**SERVICE LIST**

Gregory R. Barthelette, Esquire  
gbarthelette@conradscherer.com  
Conrad & Scherer, LLP  
633 South Federal Highway,  
Ft. Lauderdale, FL 33301  
954-462-5500  
Fax: 954-463-9244  
Attorney for Defendants Kirkland Young, LLC, and David Botton  
Via *CM/ECF*

Douglas B. Brown, Esq.  
Darren K. McCartney, Esq.  
dbrown@rumberger.com  
dmccartney@rumberger.com  
Rumberger, Kirk & Caldwell, P.A.  
Lincoln Plaza, Suite 1400  
300 South Orange Ave.  
Post Office Box 1873  
Orlando, FL 32801  
407-872-7300  
Fax: 407-841-2133  
Attorneys for Defendant David Botton  
Via *CM/ECF*

David Rothman, Esquire  
dbr@rothmanlawyers.com  
Rothman & Associates, P.A.  
200 South Biscayne Blvd., Suite 2770  
Miami, Florida 33131  
305-358-9000

Fax: 305-374-5747  
Attorney for Defendant Attorney Aid, LLC  
Via *CM/ECF*

David B. Rosemberg, Esq.  
droseberg@broadcassel.com  
Broad and Cassel  
One Biscayne Boulevard  
Miami, Florida 33131  
305-373-9400  
Fax: 305-373-9443  
Attorney for Temporary Receiver of Kirkland Young, LLC, Mark F. Raymond, Esq.  
Via *CM/ECF*

Mr. Samy Botton  
17201 Collins Ave., Apt. 3507  
Sunny Isles Beach, FL 33160-3484  
*Pro se*  
Via United States first class mail, postage prepaid

Ms. April Botton Kraweicki  
40 Mohegan Avenue,  
Port Washington, NY 11050  
*Pro se*  
Via United States first class mail, postage prepaid