

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-23507-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.

**RECEIVER'S FIFTH REPORT AND FOURTH INTERIM
AGREED APPLICATION FOR ALLOWANCE OF FEES AND EXPENSES**

Mark F. Raymond, Court-appointed Receiver ("Receiver") for Defendants Kirkland Young, LLC, Attorney Aid, LLC and ABK Consultants, Inc. (collectively, the "Receivership Entities"), by and through undersigned counsel, hereby submits his Fifth Report to the Court along with his Fourth Interim Application for Allowance of Fees and Expenses for the Receiver, his counsel, Broad and Cassel and forensic accountants Sharpton, Brunson & Company, P.A. ("Sharpton Brunson") for the period of July 1, 2011 through November 30, 2011. The undersigned is authorized to state that the Federal Trade Commission agrees to the entry of an order granting this application for fees and expenses.

This report also summarizes the activities undertaken by the Receiver since the filing of the Fourth Report of Receiver on July 27, 2011 [DE 212].

BROAD and CASSEL

One Biscayne Tower, 21st Floor 2 South Biscayne Blvd. Miami, Florida 33131-1811 305.373.9400

RECEIVERSHIP ACTIVITIES

A. Summary of Receivership Activities since July 1, 2011.

Since the filing of his Fourth Report in July 2011, the Receiver and his professionals have successfully accomplished the following:

- Implemented a claims procedure and distribution process to return Kirkland funds to customers and creditors;
- Responded to *hundreds* of inquiries from Kirkland customers and creditors and their lawyers regarding proof of claim issues;
- Reviewed and reconciled more than 1,100 Proofs of Claim submitted by customers and creditors;
- Worked closely with the forensic accountants to reconcile claim forms and prepare and file federal and state tax returns and other documentation;
- Liquidated assets recovered by the Receivership for the benefit of the Receivership Estate; and
- Continued the Receiver's practice of rendering legal and administrative services for many of the above duties and tasks without charge. All tasks were billed at substantially reduced rates, as discussed further below.

B. Receivership Finances

A copy of the unaudited balance sheet and statement of receipts, disbursements and changes in cash balances as of November 30, 2011, for Kirkland Young is attached as Exhibit 1. As reflected in Exhibit 1, Kirkland Young has \$422,724 in net assets which includes \$691,736 in cash and accounts receivable; and \$269,012 in accounts payable and escrow deposits. As of November 30, 2011, the Receivership's combined operating account cash balance was \$223,266, which includes 21 outstanding escrow distribution checks of \$29,901.00. The balance of Receivership funds, \$498,372, consists of: (1) pre-receivership monies deposited by Kirkland Young's customers into escrow/trust accounts in the name of the previous modification companies and escrow holders; (2) cash

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balances transferred from pre-receivership escrow/trust accounts in excess of the amounts accounted for in the pre-receivership books and records of Kirkland Young; and (3) Court-ordered settlement proceeds paid by Defendants Sammy Botton and David Botton.

C. Significant Assets Recovered.

The Receiver and his attorneys have pursued the recovery of assets from the Defendants in this case. Specifically, in accordance with Section VIII of the Court's Final Order, the Receiver has recovered the following assets:

- Sale of David Botton's 2003 BMW M3 which resulted in a net recovery of \$16,000 for the benefit of the Receivership Estate.
- Pending sale of David Botton's Condominium located at 7129 S. Marina Pacifica, Long Beach, CA. 90803. In December, 2011 the Receiver entered into a contract to sell this condominium. The Receiver notes that there is very little equity in the property and there may be more than \$15,000 owed to the HOA for past due fees incurred prior to the Receiver taking title to the property. The Receiver anticipates that the Receivership Estate will recover approximately \$3,000 from the sale of this property.
- David Botton's Mastercraft Boat CSX. The Receiver continues his efforts to market and sell the boat for the maximum possible price, currently valued at \$42,000.
- April Krawiecki's Condominium located at 1155 North La Cienega Blvd. #807 W. Hollywood, California 90069. The property is currently in foreclosure. The Receiver has determined that there is no equity in the property and remains in communication with the lender to determine the most efficient manner for liquidating this asset.

C. Claims Administration and Distributions.

On April 6, 2011, this Court entered a Stipulated Final Order for Permanent Injunction and Settlement of Claims [DE 208] ("Final Order"). Pursuant to paragraph VI.E.1 of the Final Order, the Receiver was obligated to return all escrow funds in the possession of the Receivership to consumers who provided those funds in connection with their purchase of loan modification services through Defendants Kirkland Young

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LLC and Attorney Aid, LLC. In August 2011, the Receiver distributed \$1,454,032.64 to 488 customers who were entitled to receive a distribution of their escrow funds, regardless of whether these customers submitted a Proof of Claim.

As of the filing of this Report, the Receiver has received and reviewed 1,149 Proofs of Claim, excluding duplicates. Claims were submitted by 1,126 former Kirkland Young customers, and 23 trade creditors such as vendors, suppliers, a former landlord, as well as former employees, pre-receivership professionals, and other potential claimants. The total amount claimed against the Receivership by all claimants totals \$3,130,338.93.

Pursuant to paragraph V.I.E.2 of the Court's April 6, 2011 Final Order, the Receiver is now obligated to use the remainder of the funds held by the Receivership, including the proceeds from the liquidation of assets transferred to the Receivership, for further equitable relief. To carry out this mandate, the Receiver, in consultation with the FTC, has determined that former customers of Kirkland Young should receive an interim distribution from the Receivership Estate as soon as possible.

Due to the sheer number of all former Kirkland Young customers (more than 4,500) and the limited resources currently available to the Receivership Estate, however, the Receiver has determined that it is simply not in the best interests of the Receivership Estate to allow former customers of Kirkland Young *who did not submit a Proof of Claim* to participate in "second phase" of the claims distribution process. The reason is simple. A pro rata plan of distribution cannot be determined without identifying and confirming the universe of claimants. Accordingly, the Receiver, in consultation with the FTC, has concluded that the most equitable and reasonable basis for distributing funds to former customers is to recognize only 629 claims of former customers who: (1) paid monies to

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Kirkland Young in the form of a front-end and/or back-end fee, **and**; (2) who did not previously receive a distribution of their escrow funds earlier this year, pursuant to paragraph V.I.E.1 of the Court's Final Order (the "Allowed Claims").

After reviewing the claims submitted by claimants eligible for a distribution, the Receiver has determined that 9 claimants who fit within this group should be deemed ineligible for participation in a distribution because they: (1) received a pre-receivership refund of upfront fees previously paid to Kirkland Young; (2) had their upfront fee payments returned for insufficient funds; (3) there are no record of payments made by the claimant; or (4) seek statutory damages based on the FTC's findings that Kirkland Young may have violated federal law. The Receiver will notify these claimants, by letter, of the Receiver's determination of his or her claim.

The remaining claimants, 629, have recognized allowed claims of \$848,228.12. The total amount of the Allowed Claims was determined based on the out-of-pocket fees paid by the claimants to Kirkland Young. The Allowed Claims are further detailed on the attached Exhibit 2. Based on the available assets of the Receivership Estate, the Receiver shall make a distribution of \$425,000, on a *pro rata* basis, to holders of Allowed Claims. The Receiver believes that by distributing \$425,000, he will be able to provide funds to claimants while still maintaining adequate reserves to cover the expenses of (1) addressing the remaining trade creditor and employee claims, to the extent these matters cannot be settled by the parties; (2) winding down the Receivership; and (3) paying the Receiver's professionals for services already and yet to be provided. The Receiver believes he has reserved more than in necessary for the payment of these expenses and intends to distribute the excess with the Receiver's final distribution.

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The Receiver's distribution plan provides for claimants with Allowed Claims to receive a percentage of their recognized claim amount from the aggregate \$425,000 distribution, resulting in a distribution of approximately 50% of their recognized amount. The Receiver will make this distribution in the amounts specified in Exhibit 3, within 30 days of the date of the filing of this Report. The Receiver will mail checks to each claimant holding a recognized claim by U.S. Mail to the address noted in their Proofs of Claim. If a check is not negotiated by the claimant within 120 days, the money will revert to the Receivership and likely will be distributed on a *pro rata* basis in the final distribution.

As previously noted, the amounts available for distribution in this Receivership will be far short of the amounts that would be required to fully compensate all recognized claimants, including trade creditors and former employees. The Receiver continues working to resolve several of these outstanding non-customer claims and will advise the Court of those efforts shortly. In the meantime, the Receiver has booked a reserve of \$100,000 to account for the Receiver's estimated recognized value of these claims in the event a settlement between the parties cannot be reached and the Court's assistance is required.

SUMMARY OF PROFESSIONAL SERVICES RENDERED

The professional services rendered by the Receiver, Broad and Cassel, and Sharpton Brunson, and the necessary and reasonable out-of-pocket costs associated with those services, are set forth and described in detail on Exhibits 3 and 4. The attached records convey information for the time period of July 1, 2011 through November 30, 2011, and include: (a) the number of hours worked by each attorney and staff member on a particular day; (b) the manner and type of work performed by each attorney and staff member; and (c) the discounted billing rate for each person rendering services in this matter. The attached records have been prepared based upon the contemporaneous daily time records maintained by the professionals rendering the services.

The Receiver views his role as primarily providing a public service to customers. The Receiver and his counsel have already discounted their hourly rates considerably in this matter. It warrants noting that the Receiver and his counsel attend to the Receivership's affairs, including operating the Receivership, winding down the affairs of Kirkland Young, responding to frequent inquiries from customers, their counsel and others, resolving personnel issues for former Kirkland Young staff and employees, and overseeing and interacting with the forensic accountants, on a daily basis. The Receiver and his counsel perform and will continue to perform routine work such as answering emails and calls from victims and creditors and much of the drafting of the instant report, without charging the Estate for the time spent.

Receiver's counsel and his forensic accountants have applied only for reimbursement for those actual and necessary out-of-pocket expenses, such as subpoena charges, photocopy charges, fax charges, delivery charges, and various expenses in

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connection with this matter. All such expense items would typically be billed by a law firm and accounting firm to their clients. All in-house costs have been substantially discounted if not written off entirely.

**SUMMARY OF INVOICES FOR SERVICES
PROVIDED TO THE RECEIVERSHIP¹**

(NEXT PAGE)

¹ The detailed invoices supporting all services by the Receiver and his counsel are attached as Exhibits hereto. Those invoices have been redacted in certain places to avoid disclosure of attorney-client and work-product privileged materials, customer names and other information deemed confidential as to third-parties for litigation purposes.

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Summary for Broad and Cassel**July 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver and the Receiver's counsel, Broad and Cassel, who presently handles the receivership day-to-day matters under the Receiver's supervision for the month of July 2011:

<u>Attorney</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Mark F. Raymond, Receiver	3.40	\$1,156.00
David B. Rosemberg	38.40	\$9,216.00
Robert Barkin	0.50	\$125.00
<u>Paralegal</u>		
Gisela Fasco	0.70	\$122.50
Patricia Anzalone	29.30	\$5,127.50
Omar Pelea	54.20	\$8,130.00
Subtotal Fees of Receiver, Receiver's Counsel and Paralegals:		\$23,877.00
Total Expenses of Receiver and Receiver's Counsel:		\$748.13

**Total Fees and Expenses
for Receiver, Receiver's
Counsel and Paralegals:**

\$24,625.13

Summary for Broad and Cassel

August 2011

The following is an aggregate tabular summary of fees and expenses for the Receiver and the Receiver’s counsel, Broad and Cassel, who presently handles the receivership day-to-day matters under the Receiver’s supervision for the month of August 2011:

<u>Attorney</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Mark F. Raymond, Receiver	5.70	\$1,938.00
David B. Rosemberg	14.80	\$3,552.00
<u>Paralegal</u>		
Patricia Anzalone	6.60	\$1,155.00
Omar Pelea	29.90	\$4,485.00
Subtotal Fees of Receiver, Receiver’s Counsel and Paralegals:		\$11,130.00
Total Expenses of Receiver and Receiver’s Counsel:		\$171.31

**Total Fees and Expenses
for Receiver, Receiver’s
Counsel and Paralegals:**

\$11,301.31

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Summary for Broad and Cassel**September 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver and the Receiver's counsel, Broad and Cassel, who presently handles the receivership day-to-day matters under the Receiver's supervision for the month of September 2011:

<u>Attorney</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Mark F. Raymond, Receiver	1.40	\$476.00
David B. Rosemberg	18.20	\$4,368.00
<u>Paralegal</u>		
Omar Pelea	22.80	\$3,420.00
Subtotal Fees of Receiver, Receiver's Counsel and Paralegals:		\$8,264.00
Total Expenses of Receiver and Receiver's Counsel:		\$265.01

**Total Fees and Expenses
for Receiver, Receiver's
Counsel and Paralegals:**

\$8,529.01

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Summary for Broad and Cassel**October 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver and the Receiver's counsel, Broad and Cassel, who presently handles the receivership day-to-day matters under the Receiver's supervision for the month of October 2011:

<u>Attorney</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Mark F. Raymond, Receiver	1.40	\$476.00
David B. Rosemberg	11.70	\$2,808.00
<u>Paralegal</u>		
Omar Pelea	16.00	\$2,400.00
Subtotal Fees of Receiver, Receiver's Counsel and Paralegals:		\$5,684.00
Total Expenses of Receiver and Receiver's Counsel:		\$349.44

**Total Fees and Expenses
for Receiver, Receiver's
Counsel and Paralegals:**

\$6,033.44

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Summary for Broad and Cassel**November 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver and the Receiver's counsel, Broad and Cassel, who presently handles the receivership day-to-day matters under the Receiver's supervision for the month of November 2011:

<u>Attorney</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Mark F. Raymond, Receiver	0.80	\$272.00
David B. Rosemberg	13.60	\$3,264.00
<u>Paralegal</u>		
Omar Pelea	19.20	\$2,880.00
Subtotal Fees of Receiver, Receiver's Counsel and Paralegals:		\$6,416.00
Total Expenses of Receiver and Receiver's Counsel:		\$152.62

**Total Fees and Expenses
for Receiver, Receiver's
Counsel and Paralegals:**

\$6,568.62

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Summary for Sharpton, Brunson & Company, P.A.**July 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver's forensic accountant, Sharpton, Brunson & Company, P.A., for the month of July, 2011:

<u>Accountants</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Leisha Austin	20.0	\$4,000.00
Subtotal Fees:	20.0	\$4,000.00
Total Expenses:		

**Total Fees and Expenses for
Receiver's Forensic Accountants: \$4,000.00**

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Summary for Sharpton, Brunson & Company, P.A.**August 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver's forensic accountant, Sharpton, Brunson & Company, P.A., for the month of August, 2011:

<u>Accountants</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Leisha Austin	16.0	\$3,200.00
Wesley Agee	8.0	\$800.00
Subtotal Fees:	24.0	\$4,000.00
Total Expenses:		

**Total Fees and Expenses for
Receiver's Forensic Accountants: \$4,000.00**

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Summary for Sharpton, Brunson & Company, P.A.**September 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver's forensic accountant, Sharpton, Brunson & Company, P.A., for the month of September, 2011:

<u>Accountants</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Leisha Austin	42.0	\$8,400.00
Wesley Agee	19.0	
Subtotal Fees:	61.0	\$8,400.00
Total Expenses:		

**Total Fees and Expenses for
Receiver's Forensic Accountants: \$8,400.00**

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Summary for Sharpton, Brunson & Company, P.A.**October 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver's forensic accountant, Sharpton, Brunson & Company, P.A., for the month of October, 2011:

<u>Accountants</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
Darryl K. Sharpton	16.0	\$5,200.00
Leisha Austin	49.0	\$9,800.00
Subtotal Fees:		\$15,000.00
Total Expenses:		

**Total Fees and Expenses for
Receiver's Forensic Accountants:**

\$15,000.00

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Summary for Sharpton, Brunson & Company, P.A.**November 2011**

The following is an aggregate tabular summary of fees and expenses for the Receiver's forensic accountant, Sharpton, Brunson & Company, P.A., for the month of November, 2011:

<u>Accountants</u>	<u>Number of Hours</u>	<u>Bill Amount</u>
--	0.0	\$0.00
Subtotal Fees:		\$0.00
Total Expenses:		

**Total Fees and Expenses for
Receiver's Forensic Accountants: \$0.00**

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EVALUATION OF SERVICES RENDERED AND EXPENSES INCURRED

The foregoing sets forth the extent of the professional services rendered by the Receiver and his professionals (the “Applicants”) in connection with their request for compensation. The attached Exhibits 4 and 5 details the nature of the professional services rendered and the costs incurred. These recitals, however, constitute only a summary of the time spent and it must be recognized that a mere reading of the time summaries cannot completely reflect the full range of services rendered by the applicants, the complexity of the issues, and the pressures of time and performance which have been placed upon the Applicants in connection with this case.

No understanding exists among the Receiver, his counsel, his forensic accountants or any other person or entity for a sharing of the compensation to be awarded herein except between the Receiver and Broad and Cassel.

APPLICABLE ANALYSIS

In determining fees, a Court must (1) determine the nature and extent of the services rendered; (2) determine the value of the those services; and (3) consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *see Grant v. George Schumann Tire and Battery Co.*, 908 F.2d 874, 877-878 (11th Cir. 1990)(bankruptcy fee award case addressing the issue of attorney’s fees generally before considering specific requirements in the bankruptcy context). The twelve factors set forth in *Johnson*, which involved an award of attorneys’ fees under the federal civil rights statutes, as incorporated by the Eleventh Circuit in *Grant*, a bankruptcy case, are as follows: (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services

properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or by the circumstances; (8) the amount involved and results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

A. Time, Nature and Extent of Service, Results Obtained and Related Factors

The forgoing summary description, together with the time records attached hereto detail the time, nature and extent of the professional services rendered by the Applicants during the approximate six-month period covered by this Application. The Applicants believe that the time spent is justified by the nature, complexity and the pressures of the work, as well as the results that have been achieved thus far.

B. Novelty/Difficulty of the Question Presented

This case required a high level of skill due to the nature of the financial transactions involved and the shoddy records kept by the Defendants.

C. The Skill Requisite To Perform the Service Properly

In order to perform the services and obtain the results required, substantial legal skill and experience in the areas of commercial law, litigation and negotiations were required of the Receiver and his counsel. The Receiver is sensitive to the financial considerations arising in receiverships such as this and is making every effort to control costs.

D. Preclusion of Other Employment by the Attorneys Due to the Acceptance of the Case

Although the Receiver and his professionals were not explicitly precluded as a result of this case from accepting other matters, matters in this case were treated by them in an expeditious and professional manner.

E. The Customary Fee

The hourly rates of the Applicants set forth on the attached exhibits reflect a rate that is generally lower than (in the case of the Receiver) or equal (for the other professionals) to the hourly rates billed by Applicants to clients in other commercial cases.

Discounts already given:

- In addition, as promised by the Receiver in his original application to the FTC (attached to the FTC's recommendation of a receiver to this Court), the Receiver has already discounted his rates and those of his counsel.
- Further, as described above, as a public service, the Receiver and his counsel routinely do not charge the Receivership for numerous tasks and, as a practice, round their time down to the nearest hour.

F. Whether the Fee is Fixed or Contingent

The compensation of the Applicants in this matter is subject to the approval of this Court. The above factors should be taken into consideration by the Court and the compensation should reflect the assumption of the risk of non-payment and delay in payment.

G. Time Limitation Imposed by the Client or Other Circumstances

This case has imposed serious time limitations on the Applicants due to the necessity of rapid resolutions of many issues. Indeed, the preliminary stages of this case required almost *all* of the available time of the Receiver and his professionals.

H. The Experience, Reputation and Ability of the Attorneys

The Receiver and his counsel enjoy a fine reputation and have substantial ability in the fields of receiverships, litigation and commercial law. The Receiver is acutely aware of the financial considerations arising in receiverships such as this.

I. The “Undesirability” of the Case

This case is not undesirable, and the Applicants have been privileged to appear before the Court in this proceeding and to represent the interests of customers and creditors who were victimized by Kirkland Young’s activities.

J. Nature and Length of Professional Relationship with the Client

The Applicants have had no relationship with the Receivership Entities or any other entities or principals prior to this case.

K. Awards in Similar Cases

The amounts requested by the Applicants are reasonable in terms of awards in cases of similar magnitude and complexity. The compensation requested by the Applicants comport with the mandate of applicable law, which directs that services be evaluated in light of comparable services performed in other cases in the community. The hourly rates requested by the Applicants are either lower than or equal to the ordinary and usual hourly rates billed by the Applicants to their ordinary commercial

clients, notwithstanding the risks of non-payment and delayed payment associated with this case.

L. Source of Payment for Amounts Sought Hereunder

The Receiver requests that the amounts for which payment is authorized hereunder be paid from funds presently held, or soon to be received, by the Receiver.

WHEREFORE, the Applicants respectfully request that this Court enter an order, a proposed version of which is attached as Exhibit 5 for the Court’s convenience, for authorization of compensation and reimbursement for the period July 1, 2011 through November 30, 2011 to the following:

	<u>Receiver</u>	<u>Counsel</u>	<u>Expenses</u>	<u>Total By Month</u>
Broad and Cassel				
July 2011	\$1,156.00	\$22,721.00	\$748.13	\$24,625.13
August 2011	\$1,938.00	\$9,192.00	\$171.31	\$11,301.31
September 2011	\$476.00	\$7,788.00	\$265.01	\$8,529.01
October 2011	\$476.00	\$5,208.00	\$349.44	\$6,033.44
November 2011	\$272.00	\$6,144.00	\$152.62	\$6,568.62
				\$57,127.51
Sharpton, Brunson & Company, P.A.				
July 2011		\$4,000.00		\$4,000.00
August 2011		\$4,000.00		\$4,000.00
September 2011		\$8,400.00		\$8,400.00
October 2011		\$15,000.00		\$15,000.00
November 2011		\$0.00		\$0.00
				\$31,400.00

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Respectfully submitted,

BROAD AND CASSEL
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By: /s/ David B. Rosemberg
DAVID B. ROSEMBERG
Florida Bar No.: 0582239

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record 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 who are not authorized to receive electronically Notices of Electronic Filing.

/s/ David B. Rosemberg
DAVID B. ROSEMBERG

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