

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 REPLY PURSUANT TO COURT'S ORDER DATED MAY 12, 2010**

The loan modification activities of this Receivership have not violated any state or federal law. On the contrary, the actions taken by the Receiver and his attorneys, pursuant to the terms of the Court's TRO have been entirely consistent with Florida's strong public interest in protecting its citizens from the misfeasance of mortgage brokerage and mortgage lending businesses, as well as the FTC and OAG's mandate of protecting consumers from fraud and abusive business practices. The services provided to the consumers of Kirkland Young have been carried out with the utmost regard for the Court's mandate pursuant to the Court's TRO and concern for each of the consumers that have been injured by Kirkland Young's activities prior to the entry of the Court's TRO. It is troubling that the Receivership must expend valuable time and suspend its important functions as a result of the OAG and FTC's recent positions as to what they now deem to be the proper duties and responsibilities of the Receivership. Duties and responsibilities the FTC sought by bringing the instant action. It is ironic that the same agencies

**BROAD and CASSEL**

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

whose mandate is to protect consumers are exacerbating the harm the consumers have suffered by their recent mandates.

Pursuant to this Court's Order, the Receiver is obligated to manage and administer the business of Kirkland Young and to "conserve, hold, and manage all receivership assets, and perform all acts necessary or advisable to preserve the value of those assets, in order to prevent any irreparable loss, damage, or injury to consumers . . ." (TRO, Sec. XII, par. D). The executory contracts between Kirkland Young and consumers constitute assets of the Receivership Estate. Therefore in fulfilling his obligations and in order to marshal these assets, the Receiver has taken all reasonable steps necessary to maximize these assets including assisting consumers with their mortgage modifications. Furthermore, these actions protect consumers. The Receiver is confident that every party, and intervenor, will agree that protecting consumers (and creditors) is one of the primary obligations of the Receivership. *See* 65 Am. Jur. 2d *Receivers* § 164 ("A receiver has the power to accept or reject executory contracts in order to preserve assets of the receivership estate and to promote the best interests of all parties.").

Florida prohibits a person from acting as a mortgage broker "without a current, active license." *See*, § 494.0025(3), Fla. Stat. To "act as a mortgage broker" means in part "negotiating or offering to negotiate the terms and conditions of a new or existing mortgage loan on behalf of a borrower." § 494.001(3), Fla. Stat. It is also prohibited in Florida "to pay a fee or commission in any mortgage loan transaction to any person or entity other than a mortgage brokerage business, mortgage lender, or correspondent mortgage lender, operating under an active license, or a person exempt from licensure under this chapter." § 494.0025(8), Fla. Stat. In turn, Florida Statutes § 494.00115 lists those who are exempt from licensure as mortgage brokers. Included

**BROAD and CASSEL**

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

in this list are attorneys who are “licensed to practice in this state who negotiate[ ] the terms of a mortgage loan on behalf of a client as an ancillary matter to the attorney’s representation of the client.” Fla. Stat. § 494.00115(d).

With these limitations and his duties under the Court's Order in mind, the Receiver instructed his attorneys, who are licensed to practice law in Florida, to, among other things, take steps to prevent further injury to consumers by closing out these executory contracts for the benefit of the Receivership Estate.<sup>1</sup>

The OAG also seeks to prohibit the Receivership from continuing to provide Kirkland Young’s consumers with assistance on the grounds that, by seeking to collect any fees for obtaining mortgage modifications, the Receivership is continuing the illegal activity initiated by Kirkland Young. The OAG’s argument is misplaced. First, the Receivership has not collected any fees for assisting consumers in obtaining loan modifications. Second, the Receivership should not be bound by the prior wrongful conduct of the Receivership Defendants or its officer or directors. *See Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1311 (M.D. Fla. 2009) (acknowledging application of the theory that upon appointment of the Receiver the entity was “cleansed” and was “no longer the perpetrator's evil zombie”). *Accord Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 550 (Fla. 2nd DCA 2003) (“a receiver does not always inherit the sins of his predecessors”). The Receiver is not responsible for the violations of Kirkland Young and its individual defendants, and was appointed by this Court to protect innocent consumers after the improper conduct occurred.

---

<sup>1</sup> The Receiver’s First Interim Report [DE 38], Supplemental Report Concerning Business Conditions of Kirkland Young, LLC and its Affiliated Entities [DE 75] and Second Report and First Interim Application for Allowance of Fees and Expense [DE 120] describe in detail the services rendered by the Receiver’s attorneys to the Receiver and to the Receivership Estate and amply demonstrate that the closing out of these executory contracts is indeed only ancillary to the numerous responsibilities associated with representing the Receiver.

Accordingly, the prior bad acts of these defendants should not be imputed to the Receiver because to do so would undermine the important public policy considerations motivating the appointment of receivers in these very circumstances. Thus, the Receiver should be permitted to redress the injuries of the consumers, which at the moment, includes assisting them in obtaining loan modifications in an effort to avoid foreclosure.

Furthermore, although the Receiver does not seek to defend the actions of Kirkland Young prior to the entry of the Court's TRO, the Receiver notes that, based upon his review of Kirkland Young's records, the company's activities as of late 2008 were limited to working on behalf of consumers outside of the State of Florida. The Receiver believes that Section 501.1377, pursuant to its express statutory language, does not apply to Kirkland Young's business practices, especially during the receivership. Florida Statute § 501.1377 provides, in part:

**(1) Legislative findings and intent.**--The Legislature finds that homeowners who are in default on their mortgages, in foreclosure, or at risk of losing their homes due to nonpayment of taxes may be vulnerable to fraud, deception, and unfair dealings with foreclosure-rescue consultants or equity purchasers. The intent of this section is to provide a homeowner with information necessary to make an informed decision regarding the sale or transfer of his or her home to an equity purchaser. It is the further intent of this section to require that foreclosure-related rescue services agreements be expressed in writing in order to safeguard homeowners against deceit and financial hardship; to ensure, foster, and encourage fair dealing in the sale and purchase of homes in foreclosure or default; to prohibit representations that tend to mislead; to prohibit or restrict unfair contract terms; to provide a cooling-off period for homeowners who enter into contracts for services related to saving their homes from foreclosure or preserving their rights to possession of their homes; to afford homeowners a reasonable and meaningful opportunity to rescind sales to equity purchasers; and to preserve and protect home equity *for the homeowners of this state*.

Fla. Stat. § 501.1377 (emphasis added).

Florida Statute 501.1377 makes expressly clear that its intended purpose is to regulate conduct for and on behalf homeowners in the State of Florida. As noted in the Receiver's

CASE NO.: 09-23507-GOLD/MCALILEY

Emergency Motion for Instructions [DE 117] and Second Report [DE 120], none of the consumers that received assistance through the Receivership are residents of Florida and none of the properties at issue are located in Florida. *See Coastal Physician Servs. of Broward County, Inc.*, 764 So. 2d 7, 8 (Fla. 4th DCA 1999) (in a putative class action for unfair and deceptive business practices, denying plaintiffs' discovery requests "related to non-Florida recipients of the offending billing notices . . . [because] these [statutes] are for the protection of in-state consumers from either in-state or out-of-state debt collectors."); *In re NationsRent Rental Fee Litig.*, No.: 06-60924-CIV, 2009 WL 636188, at \*5 (S.D. Fla. Feb. 24, 2009) (denying class certification as to unfair and deceptive practice claims but out-of-state consumers based on out-of-state transactions because in such instances, "the alleged wrongful injury occurred outside the state."). For these reasons, the Receiver does not believe that Section 501.1377 applies to the Receivership business activities.

Accordingly, the Court should reject the OAG's arguments, for the reasons stated and because the OAG's demands would imperil the assets of the Receivership Estate, its creditors and consumers.

Respectfully submitted,

BROAD AND CASSEL  
*Attorneys for Receiver,*  
*Mark F. Raymond*

One Biscayne Tower, 21st Floor  
2 South Biscayne Boulevard  
Miami, Florida 33131  
Telephone: 305.373.9400  
Facsimile: 305.373.9443

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

**BROAD and CASSEL**

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 19, 2010, 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

**SERVICE LIST**

**Chris M. Couillou, Esq.**  
**Sana C. Chriss, Esq.**  
Federal Trade Commission  
225 Peachtree Street, Suite 1500  
Atlanta, GA 30303  
Tel: 404.656.1353 (Couillou)  
404.656.1364 (Chriss)  
Fax: 404.656.1379  
e-mail: [ccouillou@ftc.gov](mailto:ccouillou@ftc.gov) ;  
[schriss@ftc.gov](mailto:schriss@ftc.gov);

**Darren Keith McCartney, Esq.**  
Rumberger Kirk & Caldwell  
300 S Orange Avenue, Suite 1400  
Orlando, FL 32802-1873  
Tel: 407.872.7300  
Fax: 407.841.2133  
e-mail: [dmccartney@rumberger.com](mailto:dmccartney@rumberger.com)

**Amanda Maxwell, Esq.**  
Robert D. Hertzberg, P.A.  
Bank of America Tower, Suite 3550  
100 SE 2<sup>nd</sup> Street  
Miami, FL 33131  
Tel: 305.371.6060  
Fax: 305.358.5917  
e-mail: [amaxw@aol.com](mailto:amaxw@aol.com)

**David B. Rothman, Esq.**  
Rothman & Associates P A  
200 S Biscayne Blvd., Suite 2770  
Miami, Florida 33131  
Tel.: 305.358.9000  
Fax: 305.374.5747  
e-mail: [DBR@RothmanLawyers.com](mailto:DBR@RothmanLawyers.com)

**Richard Wayne Epstein, Esq.**  
Greenspoon Marder P A  
100 W Cypress Creek Rd Ste 700  
Fort Lauderdale, Florida 33309  
Tel.: 954.491.1120  
Fax: 954. 771.9264  
e-mail: [richard.epstein@gmlaw.com](mailto:richard.epstein@gmlaw.com)

**Gregory Richard Barthelette, Esq.**  
PO Box 400  
Cobleskill, New York 12043  
Tel.: 518.295.8383  
e-mail: [george5252@hotmail.com](mailto:george5252@hotmail.com)

**Douglas Brown, Esq.**  
Rumberger Kirk and Caldwell  
Attorneys For David Botton  
Lincoln Plaza, Suite 1400  
300 South Orange Avenue  
Orlando, Florida 32801  
Tel.: 407.872.7300  
Fax: 407.841.2133  
e-mail: [dbrown@rumberger.com](mailto:dbrown@rumberger.com)

**Michael Holt, Esq.**  
Rumberger Kirk & Caldwell P A  
80 SW 8th Street, Suite 3000  
Miami, Florida 33130  
Tel.: 305.358.5577  
Fax: 305.371.7580  
e-mail: [mholt@rumberger.com](mailto:mholt@rumberger.com)

**Arthur R. Rosenberg, Esq.**  
Arthur R. Rosenberg, P.A.  
6499 Powerline Rd., Suite 106  
Fort Lauderdale, Florida 33309  
Tel: 954.772.5151  
Fax: 954.772.4224  
e-mail: [arr@arosenberg.com](mailto:arr@arosenberg.com)

**Assistant Attorney General George Rudd**  
Office of the Attorney General  
110 SE 6<sup>th</sup> Street, 10<sup>th</sup> Floor  
Fort Lauderdale, Florida 33301  
Tel.: 954.712.4600  
Fax: 954.712.4658  
e-mail: [george.rudd@myfloridalegal.com](mailto:george.rudd@myfloridalegal.com)

**Richard Alan Sharpstein, Esq.**  
Jordan Burt LLP  
777 Brickell Ave Ste 500  
Miami, Florida 33131  
Tel.: 305.371.2600  
Fax: 305.372.9928  
e-mail: [ras@jordenusa.com](mailto:ras@jordenusa.com)