

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 IN SUPPORT OF MOTION TO DISTRIBUTE
PROOFS OF CLAIM AND ESTABLISH A CLAIM BAR DATE**

The Court's November 19, 2009 Order to Show Cause and *Ex Parte* Temporary Restraining Order with Asset Freeze and Other Equitable Relief ("TRO") [DE 19] instructs the Receiver to "determine, adjust, and protect the interests of consumers and creditors who have transacted business with the Receivership Defendant." (*See* TRO, Sec. XII, par. F). To carry out this mandate, the Receiver has sought to implement a procedure to distribute claim forms to customers and creditors who may be entitled to a refund of assets under the control of the Receiver.

The FTC makes three arguments in opposition to the Receiver's Motion to distribute these claim forms. Specifically, the FTC argues that: (1) the Motion should be denied because it creates a preference among the Kirkland Young victims; (2) a claims cutoff date would unduly burden victims by, among other things, requiring them to timely return the claims forms; and (3) the process proposed by the Receiver will impose an unnecessary expense on the Receivership

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Estate. The FTC's preference argument is premature and based upon the false premise that all of Kirkland's victims are similarly situated. This is simply not the case. The FTC's remaining arguments are impracticable and, if accepted, would ultimately place a greater burden on the limited resources of the Receivership Estate.

I. It is Premature to Recommend a Plan of Distribution

In order to recommend an equitable distribution of the Receivership Estate's assets, the Receiver needs a complete understanding of the business activities of the Receivership Entities and the degree to which, if at all, their assets were commingled. While it appears that there was no commingling between the Receivership Entities, the Receiver cannot make any final determinations or recommendations regarding the most appropriate method of distribution because information continues to be gathered, including the sources and uses of funds by the Receivership Entities.

The FTC's proposal seeks to merge all customers of Kirkland Young, Attorney Aid, LLC, and those customers who retained the law firms of Michael Botton, P.A., Brian Rokaw, P.A. and RMG Law PLLC into a single customer claimant class. All claims would be treated similarly and all claimants, regardless of which company or law firm they retained, would be entitled to share equally in all receivership assets. Based upon his review of records, however, the Receiver has not seen any evidence that customers' escrow accounts were invaded or commingled. Therefore, the FTC's proposal is counter to prevailing law. Moreover, the FTC's proposal logically requires a finding that all of the Receivership Entities are alter egos. No such finding has been made. It is the Receiver's opinion that such a legal undertaking is neither required nor warranted to protect consumers or the creditors of the Receivership Estate.

The results of the Receiver's investigations thus far have revealed two distinct and disparate classes of Kirkland customers for which a straight pro rata distribution plan would appear to be inappropriate and inequitable. The first group of customers is "current" customers whose contracts with the Receivership Entities are currently pending. As of the filing of this Reply, there are close to 1,564 current customers who paid Kirkland Young an upfront fee in amounts between \$299 and \$699. Nearly half of these current customers also collectively deposited in excess of \$2,000,000 into escrow accounts at the direction of Kirkland Young under the belief that such funds would be used to help secure mortgage modifications.¹ These funds are currently under the control of the Receiver.

The second group of customers is the "former" customers whose contracts with Kirkland Young were either canceled or completed prior to entry of the Court's TRO. Based upon his review of Kirkland Young's records, the Receiver believes there may be as many as 4,700 former customers. Former customer also paid an upfront fee to Kirkland Young in the same amounts charged to current customers. Former customers may or may not have deposited monies into escrow accounts and to the extent that such funds were deposited. They were (i) refunded to customers; or (ii) paid to their lenders if the customers received and accepted a mortgage modification, in which case a portion of those funds were retained by Kirkland Young as back-end fees before the TRO was entered.

Current customers stand to lose more and suffer greater injury by the FTC's proposal because unlike the upfront fees paid by all customers, the monies paid by current customers into

¹ Approximately \$550,000 of the total escrowed funds was due to be returned to customers who had canceled their contracts with Kirkland Young but did not receive these funds because of Kirkland Young's lack of diligence in returning these funds prior to entry of the Court's TRO. This group also consists of customers who had escrow payments debited from their checking accounts by Kirkland Young without authorization, and after the customers had canceled their contracts.

escrow accounts were made under the belief that such funds would be used to secure a mortgage modification--a modification which will be jeopardized and likely put them at risk of losing their homes. This is not a risk (or injury) that will be shared by former customers since they have already completed the mortgage modification process or never even participated in the first place.

Pro rata distributions have generally been approved in the context of investors who are the victims of investor fraud or Ponzi schemes because, in such cases, (1) the victims funds are commingled, *and* (2) the victims are similarly situated with respect to the defrauders. *See, e.g., SEC v. Credit Bancorp, Ltd.*, 290 F. 3d 80, 88-89 (2d Cir. 2002) (approving pro rata distribution plan for victims of Ponzi scheme); *SEC v. Elliot*, 953 F. 2d 1560, 1570 (11th Cir. 1992) (preferential treatment to some security owners improper where all victims occupy same legal position). Even in these cases, however, straight pro rata distributions have been recognized as inequitable. *See U.S. Commodity Futures Trading Comm'n v. Lake Shore Mgmt Ltd.*, Case No. 07 C 3598, 2010 WL 960362 * 10 (N.D. Ill. Mar. 15, 2010) (rejecting straight pro rata distribution as inequitable where it would unfairly elevate investors who received pre-receivership payments).

Clearly, the situation among the two classes of Kirkland customers is different than that of defrauded investors or other victims to which a straight pro rata distribution may be appropriate because in those cases all the victims can generally be identified as "current" customers of the defrauding party. Indeed, all the victims of an investor fraud invest funds and occupy the status of investors when the fraud is revealed. Under those circumstances, courts have determined that it is equitable for victims to share in these losses on a straight pro rata basis. *See SEC v. Elliot*, 953 F. 2d 1560 at 1570 (noting that "equality is equity" where creditors

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occupy same legal position as other creditors).² Here, a straight pro rata distribution of the available Receivership assets, irrespective of any pre-receivership refund payments made to former customers or consideration of the services rendered to these customers would be inequitable because it unfairly elevates former customers over current customers.

In the meantime, to expedite the process for implementing a claims process to eventually distribute the Receivership's assets to customers and creditors, the Receiver will undertake efforts to notify former customers of the claims process and the pendency of this Receivership. Former customers reside throughout the United States and it is likely that a number of these former customers may already have lost their homes in a foreclosure. The Receiver is therefore unlikely to have current mailing addresses for all former customers. Therefore, in lieu of mailing claim forms to former customers, the Receiver proposes to place an advertisement in a national publication such as *USA Today* publicizing the pendency of the Receivership and requesting that all persons who may have a claim file a claim (in whatever form) by the Claims Bar Date.

II. Proof of Claim Forms are a Necessary Expense

The FTC also argues that the Receiver's plan to send the Proof of Claim form to current customers is an unnecessary expense. The Receiver disagrees. The Proof of Claim form is a necessary first step in the distribution process. As indicated above, the Receiver has determined that the records of Kirkland are unreliable and, as such, the Receiver believes that it is necessary to require customers to provide additional documentation in order to verify the amounts collected and/or refunded by Kirkland Young. In an effort to control costs, the Receiver had initially

² Indeed, to the extent any "former" investors are able to cash in their investments before the fraud is uncovered, their funds may be subject to disgorgement in order to pay current victims under a truly proportionate system. *See Lake Shore Mgmt Ltd.*, 2010 WL 960362 at * 10 ("[T]he Court notes that the "Net Investment" method adherents do not propose that they return their pre-receivership payments so that all of the investors can receive a true proportionate shares of their initial investments.") Given the facts of this Receivership such an approach would be impracticable.

identified current customers as the focus of this mailing because of the likelihood that they will have records which will assist the Receiver in verifying the amounts held in escrow. Ultimately, this verification process will preserve the resources of the Receivership Estate by ensuring that eventual distributions are fair and accurate.

III. A Claims Bar Date is Necessary to Develop a Distribution Plan

Claims bar dates are routinely used in receiverships and bankruptcies and are necessary to provide finality and enable the Receiver to identify the interests of the claimants. *See In re PT-1 Commc'n, Inc.*, 403 B. R. 250, 259 (E.D.N.Y. 2009) (noting that claims bar date allows parties to identify claimants and amounts of claims in bankruptcy action); *In re Hooker Inv., Inc.*, 937 F. 2d 833, 840 (2d Cir. 1991) (“[E]stablishing the identities and interests of the participants so that claims-allowance process may begin is an essential function served by a bar order.”)

The Receiver believes that a claims bar date is necessary in order to determine a distribution plan and ultimately return funds to Kirkland customers because without it, the Receiver will not be able to identify the universe of claimants with any certainty and, consequently, will not be able to calculate the amounts owed to customers. Indeed, even a pro rata plan of the type advocated by the FTC would require the implementation of a bar date since a pro rata share cannot be determined until the final number of customers is determined. Consequently, the Receiver opposes the FTC’s recommendation that the claim process remain open indefinitely as this will delay, if not preclude, the Receiver from distributing proceeds of the Receivership Estate to Kirkland victims.

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Accordingly, the Receiver respectfully requests this Court enter an Order: (i) authorizing the Receiver to distribute proofs of claims to current customers; (ii) authorizing the Receiver to publicize notice of the pendency of this Receivership proceeding for three days over a two week period; (iii) finding that such notice is sufficient to discharge the Receiver and the Receivership Entities from its obligations, if any, to former customers and creditors who may not have knowledge of the pendency of these receivership proceedings; (iv) setting a claims bar date that is sixty (60) days from the date of initial mailing of the forms for current customers and creditors to send in a response; (v) setting a claims bar date that is ninety (90) days from the date of the last day of publication of the pendency of this Receivership for former customers to send in a response; and (vi) granting such further relief as is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 20 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
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