

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FEDERAL TRADE COMMISSION and
OFFICE OF THE ATTORNEY GENERAL,
STATE OF FLORIDA,

Plaintiffs,

Case no. 6:16-cv-982-Orl-41TBS

vs.

LIFE MANAGEMENT SERVICES
OF ORANGE COUNTY, LLC, et al.,

Defendants.

**RECEIVER'S MOTION FOR APPROVAL
OF SETTLEMENT AGREEMENT RELATING TO THE TUFF LIFE II
AND FOR AUTHORITY TO SELL YACHT**

Mark J. Bernet (the "Receiver"), as Receiver for Life Management Services of Orange County, LLC, Loyal Financial & Credit Services, LLC, IVD Recovery, LLC, KWP Services, LLC, KWP Services of Florida, LLC, LPSOFFLA LLC, LPSOFFLORIDA L.L.C., PW&F Consultants of Florida, LLC, UAD Secure Services LLC, UAD Secure Service of FL LLC, URB Management, LLC, YCC Solutions LLC and YFP Solutions LLC (collectively the "Receivership Defendants"), moves the Court for entry of an order (i) approving a Settlement Agreement between the Receiver and the Defendant Kevin Guice, and (ii) authorizing the Receiver to sell the yacht named *Tuff Life II* at an absolute auction sale. In support of this motion the Receiver submits the accompanying memorandum.

I. PROCEDURAL BACKGROUND.

The Plaintiffs, the Federal Trade Commission ("FTC") and the State of Florida, Office of the Attorney General ("FLAG") commenced this case by filing their *Complaint for Permanent*

Injunction and Other Relief (doc. no. 1), on Tuesday, June 7, 2016. In their Complaint the FTC and FLAG alleged that the defendants operated their businesses in violation of Section 5(a) of the FTC Act, 15 U.S.C.A. §45(a), in violation of the Telemarketing Sales Rule, 16 CFR Part 310, and in violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§501.201 *et seq.* The FTC and FLAG specifically alleged that since 2013 the Defendants "engaged in a telemarketing scheme that defrauds financially distressed consumers by selling them two types of phony debt relief services: credit card interest rate-reduction services . . . and credit-card debt-elimination services." The FTC and FLAG alleged that since 2013 the Defendants "have initiated hundreds of thousands of illegal telephone calls to consumers throughout the United States," including to consumers on the National Do-Not-Call Registry. The FTC and FLAG also alleged that the Defendants utilized unlawful "robocalls" and that the Defendants utilized a host of deceptive and misleading representations to try to induce consumers to agree to pay for either the credit-card interest-rate-reduction product or service (hereafter referred to as the "Lower Interest Rate" or more simply the "LI" product or service) or the credit-card debt-elimination product or service (hereafter referred to as the "Debt Elimination" or more simply the "DE" product or service). The FTC and FLAG also allege that the LI and DE products or services do not work, and that the cost to consumers for the LI and DE products or services far outweighs any benefits that consumers receive from either product or service. As relief, the FTC and FLAG requested preliminary and permanent injunctive relief; a monetary judgment in an amount necessary to redress injury to consumers; fines; and the costs of bringing the lawsuit.

The Plaintiffs also filed *Plaintiffs' ex parte Motion for a Temporary Restraining Order with Asset Freeze, Appointment of a Receiver, Other Equitable Relief and an Order to Show Cause why a Preliminary Injunction should not Issue*, together with a supporting memorandum

of law. At approximately 1:00 p.m. on June 8, 2016, this Court granted the Plaintiffs' motion and entered an *Ex Parte Temporary Restraining Order* (hereafter the "TRO"). Among other things, the TRO appointed the Receiver as receiver for each of the 13 Receivership Defendants. See Section XIV, p. 18 of the TRO. The Court also scheduled a hearing for June 22, 2016, at which the Defendants were directed to appear and show cause why the Court should not enter a Preliminary Injunction.

At the June 22, 2016 show-cause hearing, none of the Receivership Defendants were represented by counsel, and no counsel had appeared on any of their behalfs. The Court was advised that most of the individual Defendants were prepared to stipulate to a preliminary injunction. The individual Defendants Clarence H. Wahl and Karen M. Wahl initially advised that they opposed the entry of a preliminary injunction, based on their argument that certain funds in their accounts at McCoy Federal Credit Union should not have been frozen by the TRO but should be made available to them. After discussions between the Wahls' attorney and counsel for the Plaintiffs, the Wahls agreed to the entry of a Preliminary Injunction, subject to the release of a small amount of the frozen funds.

II. THE TUFF LIFE II

In the TRO the Court directed the defendants to complete financial disclosure forms and to provide them to the Plaintiffs and the Receiver. In the financial disclosures, the Defendant Kevin Guice ("K. Guice") disclosed that he owns a 55' Ocean Yacht, named the *Tuff Life II*. The *Tuff Life II* presently is docked at Port Canaveral. The cost of maintaining the yacht, including insurance, slip fees and other maintenance expenses, is approximately \$1,500 per month. However, as a consequence of the TRO K. Guice is not able to fund these expenses. This places

the *Tuff Life II* at risk of waste; unpaid slip fees likely will result in liens against the yacht, and a general lack of maintenance will cause the yacht to suffer a decline in value.

The Receiver has asserted that the funds utilized to purchase and refurbish the *Tuff Life II* originated with one or more of the Receivership Defendants. The Receiver has asserted, and can assert, a claim to the *Tuff Life II* under various legal and equitable theories, including constructive trust and fraudulent transfer. However, to avoid the risk and cost of litigation, the Receiver and K. Guice have entered into a Settlement Agreement, a copy of which is attached as Exhibit "1." Subject to this Court's approval, under the Settlement Agreement, K. Guice would surrender control of the *Tuff Life II* to the Receiver, who would sell it at a public, absolute auction for the benefit of the Receivership Estates.

Selling the *Tuff Life II* is in the best economic interests of the Receivership Estates, and K. Guice. As matters stand, K. Guice is unable to fund the necessary maintenance costs and slip fees, which places the yacht at significant risk of waste and deterioration of its value. The Receiver likewise is not willing to commit funds of the Receivership Estate for the maintenance of the *Tuff Life II*, absent a benefit to the Receivership Estates. Liquidating the yacht in short order therefore would accomplish the objectives of maximizing its value and preventing it from deterioration.

By entering into the Settlement Agreement, and by not opposing this motion, K. Guice does not admit to the facts that would support the Receiver's claims to the *Tuff Life II*, nor does he intend to waive any rights or privileges, including without limitation his privilege against self-incrimination under the constitutions of the United States of America or the State of Florida. The Receiver reserves all rights to assert and prosecute other claims against K. Guice or his assets under constructive trust, fraudulent transfer, or other legal or equitable theories, except

that the Receiver has agreed that he will not, pending a final resolution of the claims between the Plaintiffs and K. Guice, pursue claims against K. Guice's vehicles, home or other personal assets.

III. PROPOSED SALE TERMS

Subject to the approval of the Court, the Receiver proposes to hire John Harris of Harris Auctions, LLC, to auction the *Tuff Life II* at a public, absolute auction. The principal advantages of auctions are (i) they guaranty that property can be sold quickly,¹ and (ii) if marketed properly, they bring all interested potential purchasers into one forum at the same time. The Receiver routinely conducts public auctions of properties owned by companies in receivership, because with proper advance marketing a public auction is the best way to maximize the value of property to be sold. The *Tuff Life II* would be sold on an "as-is, where-is" basis, and without any representations or warranties of any kind or nature, including any warranty of fitness for any particular purpose. The Receiver has previously employed Mr. Harris to liquidate various items of property, including: yachts, boats and other watercraft; heavy equipment (dump trucks, bulldozers, etc.); real estate (including hotels and luxury real estate); collectibles (coins, crystal, baseball cards and other sports memorabilia, etc.); high-end jewelry and watches; guns; and luxury vehicles (including a collection of Ferraris).²

The Receiver proposes to sell the *Tuff Life II* in an absolute auction, meaning that the highest bidder will win the auction, regardless of price. Having engineered at least a dozen auctions over the past 10 or more years, the Receiver has learned that the ability to market an auction to interested potential buyers as "absolute," as opposed to setting minimum reserve bids

¹ Under 28 U.S.C. §§2001(b) and 2004, a receiver cannot sell personal property in a private sale absent three independent appraisals of the property to be sold. See Section IV below.

² Mr. Harris has been employed under federal court order on several occasions. See e.g. *Order Granting Receiver's Agreed Motion for Authority to Conduct Auction Sale of Jet Skis and Trailer*, dated October 8, 2014, in *Consumer Financial Protection Bureau, et al. v. Michael Harper, et al.*, no. 14 CV 80931/COHN/SELZER, United States District Court, Southern District of Florida.

on the property to be sold, vastly increases the interest of bidders and facilitates a greater turnout and ultimately, a better sale price.

Because of a longstanding relationship, Mr. Harris is prepared to charge a fee that is below the customary rate. The auction would include a 10 percent "buyer's premium," which means that the final sale price would be the amount of the successful bid, plus 10 percent. The auctioneer would receive 75 percent of the buyer's premium, plus 5 percent of the total price (including the buyer's premium). Thus, for example, if the *Tuff Life II* should sell for \$150,000 at auction, then:

- The total sale price to the buyer would be \$165,000 (\$150,000 plus the 10 percent buyer's premium of \$15,000);
- The auctioneer would be paid \$20,000, consisting of (i) \$11,250.00 (75 percent of the \$15,000 buyer's premium), plus (ii) \$8,250 (5 percent of \$165,000).

The Receiver also would reimburse the auctioneer for the cost of marketing, up to \$3,000.

IV. LEGAL AUTHORITY

Under 28 U.S.C. §§2001 & 2004, a district court has the authority to direct an appointed federal equity receiver to arrange a public sale of any real or personal property under the receivership. *See e.g. Order, FTC v. Johnson*, no. 2:10-CV-02203-RLH-GWF, United States District Court, District of Nevada (August 25, 2011). Here, the TRO directs the Receiver to "[c]onserve, hold and manage all receivership Assets, and perform all acts necessary or advisable in the opinion of the Receiver to preserve the value of those Assets"³ In his business judgment the Receiver submits that the value of the *Tuff Life II* can best be realized by avoiding the ongoing

³ Similar provisions are contained in the proposed Preliminary Injunction presently under consideration by the Court.

expenses of insurance, maintenance, storage and protection. Liquidating the *Tuff Life II* therefore presents the most efficient means of proceeding.

An alternate means of liquidating the yacht would be to list it with a yacht broker, who would solicit a private sale. The cost would be roughly the same as would be charged by the Receiver's proposed auctioneer (the industry standard for yacht brokers is to charge a 10 percent sales commission). However, under 28 U.S.C. §§2001(b) and 2004, a Court cannot authorize a *private* sale of personal property until after it first appoints "three disinterested persons to appraise [the personal property]," and then only if the proposed sale price is at least two-thirds of the appraised value.⁴ Also, the Court must publish notice of any proposed private sale "in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation [of the sale]." The proposed sale is then subject to competing offers that exceed the proposed sale price by 10 percent or more. These statutory requirements of a private sale would add expense and delay, and also tend to depress the interest of potential purchasers, who often are not comfortable being set up as "stalking horses." These cumbersome statutory requirements, however, do not apply to a *public* auction; accordingly, a public auction is, in the Receiver's business judgment, the preferable sales procedure.

V. CONCLUSION

The Court should approve the proposed settlement between the Receiver and K. Guice. The settlement affords a practical solution to the problem of how to maintain an expensive asset and to prevent it from declining in value. By agreeing to the settlement, K. Guice reserves all rights and privileges, and admits no wrongdoing, and the Receiver commits not to pursue K. Guice's other personal assets at this time. The Court also should authorize the Receiver to

⁴ The necessity of obtaining three appraisals is mandatory for a private sale, even where the cost of the appraisals exceeds the value of the receivership estate. *SEC v. T-Bar Resources, LLC*, 2008 WL 4790987 (N.D. Tex. 2008).

employ John Harris and Harris Auctions, LLC as the Receiver's auctioneer, on the terms identified above, for the purpose of selling the *Tuff Life II* at an absolute auction sale, to be held within approximately 45 days.

LOCAL RULE 3.01(g) CERTIFICATION

The Receiver certifies that, prior to filing this motion he consulted with all counsel who have appeared in this case for any party, and that all such counsel advised that they do not oppose the relief requested herein, except that, attorney Mario Ceballos, who represents defendants Jackowski, LPSOFFLA, LPSOFFLORIDA and YFP Solutions has not advised as to whether he opposes the requested relief.⁵ The Receiver therefore can advise the Court that most, but not all, of the parties do not oppose the requested relief.

Dated: Tampa, Florida
July 6, 2016

/s/ Mark J. Bernet

Mark J. Bernet, Receiver
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Telephone: (813) 223-7333
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Email: mark.bernet@akerman.com
Secondary: judy.barton@akerman.com

⁵ The Court's TRO and preliminary injunctions direct the defendants to turn over to the Receiver all of the corporate records and assets of the Receivership Defendants. Mr. Ceballos also has not responded to the Receiver's written demand for documentation from the Receivership Defendants LPSOFFLA, LPSOFFLORIDA and YFP Solutions. The Receiver may have to proceed with a motion requesting that Mr. Ceballos' clients appear and show cause why they should not be held in contempt for violating the Court's TRO and preliminary injunctions.

CERTIFICATE OF SERVICE

I CERTIFY that on July 6, 2016, a copy of the foregoing was served by electronic or U.S.

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/s/ Mark J. Bernet

Mark J. Bernet, Receiver

AGREEMENT

THIS AGREEMENT (hereafter the "Agreement") is made and entered into effective as of July 5, 2016, subject to court approval, between the following:

1. Kevin Guice ("Guice"); and
2. Mark J. Bernet, as Receiver for Life Management Services of Orange County, LLC, Loyal Financial & Credit Services, LLC, IVD Recovery, LLC, KWP Services, LLC, KWP Services of Florida, LLC, LPSOFFLA LLC, LPSOFFLORIDA L.L.C., PW&F Consultants of Florida, LLC, UAD Secure Services LLC, UAD Secure Service of FL LLC, URB Management, LLC, YCC Solutions LLC and YFP Solutions LLC (the "Receiver").

WITNESSETH:

WHEREAS, on June 7, 2016, the Federal Trade Commission ("FTC") and the State of Florida, Office of the Attorney General ("FLAG") filed a civil lawsuit against Life Management Services of Orange County, LLC, and others styled *Federal Trade Commission and the State of Florida, Office of the Attorney General v. Life Management Services of Orange County, LLC, et al.*, case no. 6:16-cv-982-Orl-41TBS (the "Lawsuit"); and

WHEREAS, in the Lawsuit the FTC and FLAG alleged that the Defendants committed multiple violations of (i) Section 5 of the FTC Act, 15 U.S.C. §45(a), (ii) the Telemarketing Sales Rule codified at 16 CFR Part 310, and (iii) the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes; and

WHEREAS, Judge Carlos E. Mendoza entered an *Ex Parte Temporary Restraining Order* (the "TRO") on June 8, 2016, in the Lawsuit; and

WHEREAS, among other things, the TRO appointed the Receiver as a federal equity receiver for each of the Receivership Defendants, and also froze the assets of Guice and the Receivership Defendants; and

WHEREAS, Guice is the owners of the *Tuff Life II*, a 55' Ocean Yacht presently berthed in Port Canaveral, Florida; and

WHEREAS, the Receiver maintains that Guice purchased and improved the *Tuff Life II* utilizing funds that originated with one or more of the Receivership Defendants, and that as a result the Receivership Estates are the equitable owners of the *Tuff Life II*, or have a constructive trust over it; and

WHEREAS, Guice denies that the Receivership Estates have any claim to the *Tuff Life II*; and

WHEREAS, Guice and the Receiver agree that, as a result of the asset freeze, Guice is unable to maintain the *Tuff Life II*, and that both Guice and the Receiver fear that without maintenance it will lose value, and that the best course of action is to have the Receiver sell the *Tuff Life II* at a public auction;

NOW, THEREFORE, the Guice and the Receiver agree as follows:

1. Affirmation of Recitals. The recitals set forth above are true and correct



EXHIBIT 1

and incorporated herein by reference.

2. Sale of Tuff Life II. The Receiver shall sell the *Tuff Life II* at an "absolute" public auction to the highest bidder for cash. Guice hereby grants to the Receiver and his agents the absolute and exclusive right to board the *Tuff Life II* and operate it as the Receiver deems necessary for marketing and otherwise preparing it for sale. In this regard, Guice shall notify the pilot for the *Tuff Life II* that he is to cooperate fully with the Receiver and the Receiver's agents by granting them access to the *Tuff Life II* at such times as are convenient for the pilot and the Receiver. Subject to the approval of the Court, the Receiver shall have complete discretion to market the *Tuff Life II* and to choose the auctioneer to conduct the auction sale. Guice shall cooperate fully with the Receiver in connection with the marketing and sale of the *Tuff Life II* by providing all necessary technical information concerning the *Tuff Life II*, along with all relevant documentation, including documents relating to repairs or improvements made. Guice also shall execute all documents that may reasonable be necessary to consummate the sale of the *Tuff Life II*. If requested, Guice shall grant to the Receiver a limited power of attorney authorizing the Receiver to take all steps necessary and sign all documents necessary, to effectuate the sale of the *Tuff Life II*.

3. Sale Proceeds. The proceeds realized from the sale shall be disbursed, first, to pay the costs of the sale (including without limitation marketing costs and the auctioneer's fee), and then to the Receiver to hold pending further direction from the Court.

4. No Admissions. By entering into this Agreement Guice in no way admits or acknowledges any wrongdoing or unlawful activity whatsoever, including in particular relating to the allegations of the Complaint filed in the Lawsuit. Instead, Guice and the Receiver have entered into this Agreement solely for the purpose of seeking to protect and preserve the value of the *Tuff Life II*.

5. Entire Agreement. Each party acknowledges that there are no other agreements, representations, either or oral or written, expressed or implied, not referenced or embodied in this Agreement.

6. Voluntary Agreement. Each party represents and warrants that he is or could have been represented by legal counsel of his choice and that his counsel has or had the opportunity to review this Agreement, that he and it are fully aware of the terms contained herein, and that he and it each has voluntarily and without coercion or duress of any kind or nature whatsoever entered into this Agreement. The provisions of this Agreement shall survive the execution and delivery of this Agreement.

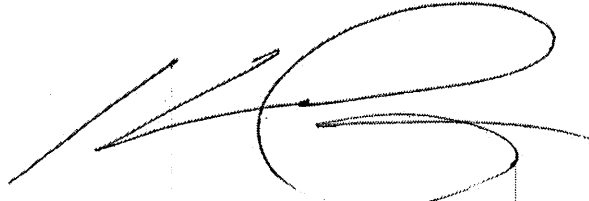
7. Governing Law and Binding Effect. This Agreement shall be deemed to be a contract under the Laws of the State of Florida, and for all purposes shall be governed by and construed and enforced in accordance with the Laws of the State of Florida. Any action to enforce this Agreement shall be by motion brought in the Lawsuit; and the parties hereto consent to the jurisdiction of the Court in which the Lawsuit is pending, and to submission of any disputes hereunder to the Court by motion filed in the Lawsuit. This Agreement shall become effective upon the entry of an order approving it in the Lawsuit.

8. Miscellaneous. This Agreement is made for the sole benefit and protection of the parties hereto, and their respective successors and assigns. No other persons shall have any rights hereunder. If any provision of this Agreement is held invalid or unenforceable, the remaining provisions shall remain in effect



without impairment, unless the provision held invalid or unenforceable goes to the essence of this Agreement. All representations and warranties of the parties hereto contained herein or made in connection herewith shall survive the making of this Agreement. Unless the context of this Agreement clearly requires otherwise, references to the plural include the singular, the singular the plural and the part the whole, and "or" has the inclusive meaning represented by the phrase "and/or". The words "hereof", "herein", "hereunder", and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement. The section and other headings contained in this Agreement are for reference purposes only and shall not control or affect the construction of this Agreement or the interpretation thereof in any respect. Section and subsection references are to this Agreement unless otherwise specified.

WHEREFORE, the parties have caused this Agreement to be executed and delivered as of the date set forth above.

Mark J. Bernet, Receiver 

Mark J. Bernet, as Receiver for Life Kevin Guice Management Services of Orange County, LLC, Loyal Financial & Credit Services, LLC, IVD Recovery, LLC, KWP Services, LLC, KWP Services of Florida, LLC, LPSOFFLA LLC, LPSOFFLORIDA L.L.C., PW&F Consultants of Florida, LLC, UAD Secure Services LLC, UAD Secure Service of FL LLC, URB Management, LLC, YCC Solutions LLC and YFP Solutions LLC

7/1/2016