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*Counsel to Mark E. Andrews,
Chapter 11 Trustee*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

In re:

TOMMY'S FORT WORTH, LLC., *et al.*,¹

Debtors.

§

§ Chapter 11

§

§ Case No. 24-90000 (ELM)

§

§ (Jointly Administered)

§

MOTION FOR ENTRY OF AN ORDER

**(I) AUTHORIZING AND APPROVING THE SETTLEMENT BY AND BETWEEN
THE TRUSTEE AND MALIBU BOATS; AND (II) GRANTING RELATED RELIEF**

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE ELECTRONICALLY AT [HTTPS://ECF.TXNB.USCOURTS.GOV/](https://ecf.txnb.uscourts.gov/) NO MORE THAN TWENTY-FOUR (24) DAYS AFTER THE DATE THIS MOTION WAS FILED. IF YOU DO NOT HAVE ELECTRONIC FILING PRIVILEGES, YOU MUST FILE A WRITTEN OBJECTION THAT IS ACTUALLY RECEIVED BY THE CLERK AND FILED ON THE DOCKET NO MORE THAN TWENTY-FOUR (24) DAYS AFTER THE DATE

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Tommy's Fort Worth, LLC (3473); Tommy's Holding Company, LLC (2662); Tommy's Grand Rapids, LLC (9224); Tommy's Castaic, LLC (7501); Tommy's Lewisville, LLC (4750); High Country Watersports, LLC (6160); Walloon Lake Village Marina, LLC (0277); MKB Florida Holdings, LLC (5698); Tommy's Detroit, LLC (5242); Tommy's California Fresno, LLC (8597); Tommy's Phoenix, LLC (3036); Tommy's Las Vegas, LLC (7721); Tommy's Chattanooga, LLC (0839); Tommy's California Ventura, LLC (5149); Tommy's Rancho Cordova, LLC (1070); Tommy's Stockton, LLC (1338); and Tommy's Knoxville, LLC (8052).

THIS MOTION WAS FILED. OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

A HYBRID HEARING WILL BE CONDUCTED ON THIS MATTER ON OCTOBER 31, 2024 AT 1:30 P.M. (CT) IN ROOM 204, U.S. COURTHOUSE, 501 W. TENTH STREET, FORT WORTH, TEXAS 76102. YOU MAY PARTICIPATE IN THE HEARING IN PERSON OR BY AUDIO AND VIDEO CONNECTION.

AUDIO COMMUNICATION WILL BE BY USE OF THE COURT'S DIAL-IN FACILITY. YOU MAY ACCESS THE FACILITY AT 1.650.479.3207. VIDEO COMMUNICATION WILL BE BY THE USE OF THE CISCO WEBEX PLATFORM. CONNECT VIA THE CISCO WEBEX APPLICATION OR CLICK THE LINK ON JUDGE MORRIS'S HOME PAGE. THE MEETING CODE IS 473 581 124. CLICK THE SETTINGS ICON IN THE UPPER RIGHT CORNER AND ENTER YOUR NAME UNDER THE PERSONAL INFORMATION SETTING.

VIRTUAL HEARING APPEARANCES MUST BE MADE ELECTRONICALLY IN ADVANCE OF ELECTRONIC HEARINGS. TO MAKE YOUR APPEARANCE, CLICK THE "ELECTRONIC APPEARANCE" LINK ON JUDGE MORRIS'S HOME PAGE. SELECT THE CASE NAME, COMPLETE THE REQUIRED FIELDS AND CLICK "SUBMIT" TO COMPLETE YOUR APPEARANCE.

Mark E. Andrews, as the chapter 11 trustee (the "Trustee") appointed in the above-captioned chapter 11 bankruptcy cases of Tommy's Fort Worth, LLC and its debtor affiliates (together, the "Debtors"), respectfully states the following in support of this motion (this "Motion"):

Preliminary Statement

1. The Debtors commenced these chapter 11 cases in the face of two separate lawsuits pending with the Debtors' primary supplier (Malibu Boats) and their senior secured lender (M&T Bank). These pre-bankruptcy disputes found their way into the Bankruptcy Court in the first few weeks of the bankruptcy cases in the form of multiple contested cash collateral hearings with M&T Bank and an emergency hearing on the Debtors' motion to enforce the automatic stay against Malibu Boats. After evidentiary hearings on the Debtors' emergency motions, this Court ultimately denied the Debtors' requested relief, and the Trustee was subsequently appointed to manage the Debtors' affairs and the administration of these bankruptcy estates.

2. Against this backdrop, the Trustee and his team worked quickly and diligently to maximize value for the Debtors' bankruptcy estates and their creditors. Those efforts included, among other things, consensual use of M&T Bank's cash collateral and Court authorization to conduct value-maximizing dealership liquidation sales.

3. After an extensive investigation of the Debtors' claims against Malibu Boats and a robust settlement process mediated by a retired federal judge with active participation from the Debtors' key creditor constituencies, the Trustee has negotiated a fair settlement with Malibu Boats. Under the Settlement Agreement (defined below), Malibu Boats will pay \$3.5 million and withdraw the Malibu Claim (defined below) to settle all estate causes of action asserted or assertable against Malibu Boats. Malibu Boats will also have an option to step into the Debtors' Knoxville dealership location in exchange for Malibu Boats paying the cure costs due to the landlord and paying the Trustee for the cost value of the personal property maintained at that location. As discussed further herein, the Trustee believes the settlement negotiated through the mediation process is fair and reasonable and in the best interest of the Debtors' bankruptcy estates and creditors.

Relief Requested

4. By this motion, the Movants seek entry of an order, substantially in the form attached hereto (the "Proposed Order"): (a) authorizing entry into and approving the settlement agreement on substantially on the terms attached as Exhibit 1 to the Proposed Order (the "Settlement Agreement"), by and among the Trustee, on the one hand, and Malibu Boats, Inc. and Malibu Boats, LLC (collectively, "Malibu"), on the other hand, and (b) granting related relief.

Jurisdiction and Venue

5. This Court has jurisdiction over the subject matter of this Motion pursuant to 28 U.S.C. § 1334. This is a core matter pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

6. The statutory bases for the relief requested in this Motion are sections 105(a), 363(b), 541(a), and 1107 of title 11 of the United States Code (the “Bankruptcy Code”), and rules 9014 and 9019(a) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Background

7. The Court is familiar with the Debtors’ litigious history with Malibu, having heard much of the following facts during a lengthy evidentiary hearing on June 6, 2024. The following serves to refresh the Court of the relevant facts.

8. The Debtors filed these cases after defaulting to their prepetition secured creditor, M&T Bank (“M&T Bank”), to whom they were indebted approximately \$105 million on a floor plan financing arrangement that began in May 2023. For reasons not directly relevant to this Motion, the Debtors struggled to remain in compliance with their loan agreements with M&T Bank since the inception of the loan. Within months of closing on the new loan, M&T Bank notified the Debtors that they had sold boats out of trust. The Debtors were able to cure these “sales out of trust” issues several times over the course of 2023, but the ongoing audits by M&T Bank presented problems for the Debtors in negotiating new dealership agreements with their primary manufacturer, Malibu.

9. Ultimately, on February 27, 2024, M&T Bank notified the Debtors that they were in default under their loan agreements. Malibu thereafter confirmed with the Debtors that Malibu would no longer consider renewing dealership agreements for the new model years, and Malibu

further terminated the Debtors' multi-year dealership agreements for the Texas locations. On March 29, 2024, M&T Bank notified the Debtors of its intent to exercise remedies as a result of the ongoing defaults and made demand for repayment of the loans in full.

10. On April 1, 2024, M&T Bank commenced a collection action and receivership action against the Debtors in the State of Michigan, Circuit Court for the County of Kent (the "Michigan Litigation"). Additionally, M&T Bank brought a cause of action against Mr. Borisch, personally, to recover alleged damages under certain guarantees. The Debtors and Mr. Borisch ultimately consented to the appointment of a receiver, who attempted to operate the Debtors' business for a brief period until Mr. Borisch caused the Debtors to commence these bankruptcy cases, as discussed below.

11. On April 10, 2024, Mr. Borisch caused the Debtors to file a *Verified Complaint* (the "Debtors' Complaint") against Malibu in the U.S. District Court for the Eastern District of Tennessee (the "Tennessee Court"), which action was captioned *Tommy's Castaic, LLC et al. v. Malibu Boats, Inc. et al.*, Case No. 3:24-CV-00166-KAC-JEM. The Debtors' Complaint alleged various bad acts by Malibu, including:

- a. Malibu's alleged false representations and false promises to the Debtors, including that Malibu allegedly misrepresented market demand for Malibu boats;
- b. Malibu's alleged false promises to enter into a repurchase agreement with M&T Bank;
- c. Malibu's alleged false promises to renew the Debtors' dealership agreements for Model Year 2024; and
- d. Malibu's alleged false promises to pay certain rebate and incentive payments.

12. The Debtors' Complaint asserted the following causes of action against Malibu:

Counts I-III	Breach of Contract
Count IV	Quantum Meruit
Count V	Unjust Enrichment
Count VI	Promissory Estoppel
Count VII	Intentional Misrepresentation/Fraud
Count VIII	Negligent Misrepresentation

13. The Debtors alleged that Malibu's misrepresentations and false promises induced Mr. Borisch and the Debtors to take actions, including increasing the size of their floor plan with a new lender in M&T Bank, and ordering and accepting delivery of a volume and mix of Malibu boats that were not suited to the Debtors' needs, which resulted in the Debtors' incurrence of unnecessary interest expense. The Debtors' Complaint contended that this increased financial burden, together with Malibu's failure to pay incentives and perform its alleged promises, caused the Debtors to default to M&T Bank, bringing about the end of the Debtors' ordinary operations.

14. The Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on May 20, 2024 (the "Petition Date"). On June 3, 2024, the Debtors filed the *Debtors' Emergency Motion to Enforce Automatic Stay and Punitive Damages for Willful Violations of the Automatic Stay Against Malibu Boats, Inc. and Malibu Boats, LLC* [Docket No. 107] (the "Debtors' Stay Motion"). Mr. Borisch filed a declaration in support of the Debtors' Stay Motion [Docket No. 113] (the "Borisch Declaration"), which included 51 exhibits. Mr. Borisch made several of the same arguments in support of the Debtors' Stay Motion that the Debtors previously alleged in the Debtors' Complaint against Malibu in the Tennessee Court.

15. On June 6, 2024, the Court conducted an evidentiary hearing on the Debtors' Stay Motion and the following day, on June 7, 2024, issued its findings of fact and conclusions of law denying the Debtors' Stay Motion. In that same ruling, the Court denied the Debtors' motion for

use of cash collateral, concluding among other things that the Debtors had not demonstrated how M&T Bank would be adequately protected.

16. The following week, the Debtors consented to the appointment of a chapter 11 trustee, and on June 17, 2024, the Court approved the appointment of the Trustee. The Trustee thereafter elected to nonsuit the Debtors’ Complaint against Malibu without prejudice to pursuing those claims at a later date. As this Court will recall, the Trustee resolved Malibu’s objections to the Trustee’s dealership liquidation procedures through very carefully negotiated terms, which included provisions for Malibu to repurchase approximately \$2.5 million of the Debtors’ inventory, agreed-upon procedures for obtaining customer acknowledgements for warranty purposes, and an agreed-upon mediation process to occur within 45 days of the order. See Docket No. 364, ¶¶ 33–38. That order was entered on August 9, 2024.

17. One week later, on August 16, 2024, Mr. Borisch filed a new complaint (the “Borisch Complaint”) against Malibu in the Tennessee Court. There are few substantive differences between the Borisch Complaint and the Debtors’ Complaint. In short, the Borisch Complaint alleges all of the same facts, adds a few more, and asserts the following four causes of action, which are substantially the same as those asserted just four months earlier in the Debtors’ Complaint. Below is a comparison of the two complaints:

Cause of Action	Debtors’ Complaint	Borisch Complaint
Breach of Contract	Counts I-III	Count III
Quantum Meruit	Count IV	n/a
Unjust Enrichment	Count V	Count IV
Promissory Estoppel	Count VI	n/a
Intentional Misrepresentation/Fraud	Count VII	Count I
Negligent Misrepresentation	Count VIII	Count II

18. By separate motion filed contemporaneously with this Motion, and as a condition to the Settlement Agreement, the Trustee is seeking a determination that the claims asserted in the

Borisch Complaint are property of the Debtors' bankruptcy estates that are being settled pursuant to this Motion (the "Estate Claims"). To ensure the effectiveness of the settlement negotiated by the parties, the Trustee asks this Court to enjoin Mr. Borisch from pursuing the Estate Claims so that the bankruptcy estates and their creditors may all benefit from the settlement, including the full release of those claims.

19. On September 30, 2024, Malibu filed proof of claim number 42, asserting a non-priority general unsecured claim of no less than \$9,606,044.00 against the Debtors' bankruptcy estates (the "Malibu Claim").

20. On October 1, 2024, the Trustee, Malibu, M&T Bank, and the Official Unsecured Creditors' Committee (the "Committee") attended a 14-hour mediation (the "Mediation") with the Hon. Nancy F. Atlas (ret.). As a result of the Mediation, the Trustee has negotiated the Settlement Agreement and hereby seeks approval thereof.

Pre-Mediation Investigation of Claims

21. When the Trustee was first appointed in mid-June, his initial priorities were to negotiate consensual use of cash collateral and begin orderly value-maximizing liquidation sales for the hundreds of new and used boats held by the Debtors. The Trustee's efforts in this regard have been successful. This Court entered the appropriate orders authorizing use of cash collateral and approving liquidation sale procedures. *See* Docket Nos. 272 & 364.

22. As noted above, the liquidation procedures order, which was entered on August 9, 2024, directed Mediation with Malibu, the Committee, and M&T Bank, which the parties scheduled for October 1, 2024. That left the Trustee and his professionals over seven (7) weeks to complete their investigation of the Debtors' claims and causes of action against Malibu before the Mediation. Mr. Borisch and the Debtors had given the Trustee's team a head start, having filed the

Debtors' Complaint and the Borisch Declaration. The Trustee and his professionals reviewed all public and non-public documents provided to Debtors' counsel in preparation for the hearing on the Debtors' Enforcement Motion. Such information included hundreds of e-mails and corresponding attachments. The Trustee and his professionals also reviewed the dealership agreements and incentive programs in effect during the relevant time periods, as well as the prior years' materials, to understand the Debtors' working history and course of dealing with Malibu. The Trustee's team then interviewed potential witnesses with knowledge of the facts and circumstances alleged in the Debtors' Complaint and the Borisch Declaration.

23. Based on this extensive review and analysis, the Trustee believes he and his professional team were adequately prepared to identify the strengths and weaknesses of potential Estate Claims to be addressed during Mediation.

Defenses and Settlement Considerations Supporting the Settlement

24. While the Trustee had identified and analyzed the potential Estate Claims against Malibu and was confident that colorable claims could be asserted against Malibu, the Trustee was cognizant of the potential weaknesses of such claims, as well as Malibu's potential defenses and counterclaims that may be asserted. The Estate Claims against Malibu are fact intensive. For example, the Debtors had identified nearly \$13 million in potentially unpaid incentives, as summarized on pages 11–12 of the Borisch Declaration:

TYPE of Rebate	DUE
2022 COOP ⁴⁷	\$364,750
2023 BCP ⁴⁸	\$666,250
2023 COOP	\$414,000
2023 QCP ⁴⁹	\$505,500
2023 MSB ⁵⁰	\$432,000

2024 OPI ⁵¹	\$258,500
2024 Interest ⁵²	\$508,429
2024 YESE Oct-Dec 2023 and BSP Discounts with no order ⁵³	\$1,506,950
Interest on 2023s since MBUU stopped covering ⁵⁴	\$5,302,285
Est 2024 COOP	\$400,000
TOTAL DUE TO TOMMY'S FROM MALIBU	\$12,983,664

25. The Trustee is aware of Malibu's factual and legal defenses to these claims. Among other things, Malibu contends that the Debtors did not actually earn these incentives for the 2022 or 2023 model years, and the Debtors could not have earned incentives for the 2024 model years without signed dealership agreements. Malibu has also noted that the dealership agreements provide Malibu with a degree of discretion to pay incentives, presenting another potential defense for Malibu. Similarly, while the Debtors had previously alleged fraud and misrepresentation by Malibu, the Trustee was less confident in the likely success of such claims for several reasons.

26. While the Trustee could not have reviewed every document relevant to the dispute or interviewed every witness with potential knowledge of the dispute with Malibu, the Trustee has considered enough potential evidence to understand the strengths and weaknesses of such claims. As part of the Mediation, the Trustee was also able to consider additional facts and circumstances relevant to the merits of the Estate Claims and Malibu's defenses thereto. Since accepting the settlement terms with Malibu, the Trustee has received no new evidence that would alter his views of the relative merits of the Estate Claims and the benefits of the settlement. It is also reasonable to conclude that Malibu would present vigorous defenses of these claims, making litigation a protracted and expensive endeavor with no certainty of success on the merits. Any litigation of these claims would likely require the engagement of one or more experts on the issues of boat dealership incentives and/or business valuations. These costs would be incurred by the estates or the liquidating trust with no guaranteed path to reimbursement.

27. Prior to the Mediation, the Trustee analyzed all claims identified by the Debtors in the Debtors' Complaint, as well as the Trustee's own alternative legal theories. As noted above, the Trustee considered the evidentiary support necessary to prevail on such claims, the potential damage models associated with such legal theories, the strength and weaknesses of those claims (including likely evidentiary burdens and defenses), and other considerations important to the analysis, such as administrative costs and the length of potential litigation. The Trustee calculated a settlement range based on all of these factors before and throughout the Mediation.

28. Finally, the Trustee evaluated the Malibu Claim, which Malibu filed alleging that it is owed nearly \$10 million relating to unpaid accounts receivable, as well as other counterclaims relating to the Debtors' prepetition conduct. While the Trustee believes that the estates have meritorious objections and defenses to the Malibu Claim, the costs associated with objecting to the Malibu Claim or litigating those counterclaims absent a settlement could add to the expenses and reduce positive recoveries that might otherwise be realized from further litigation with Malibu. Malibu's agreed withdrawal of the Malibu Claim benefits the Debtors' estates by removing nearly \$10 million from the general unsecured claims pool.

29. On the whole, the proposed settlement falls within the range of what the Trustee determined to be reasonable, based on his independent pre-mediation investigations and analyses, as discussed above.

The Settlement

30. Following extensive negotiations as part of the Mediation, the Trustee and Malibu entered into the Settlement Agreement, a true and correct copy of which is attached to the Proposed Order as Exhibit 1.

31. The Trustee firmly believes that the settlement memorialized in the proposed Settlement Agreement maximizes the value of the estates for the benefit of all creditors, including Mr. Borisch (to the extent his claims are allowed). The Settlement Agreement is an outcome that provides significant value to the Debtors' bankruptcy estates, and eliminates the risks associated with years of protracted legal proceedings which, even if successful, would significantly reduce any recovery by the costs of such litigation. Accordingly, the Trustee strongly believes the Settlement Agreement meets the standard of reasonableness under rule 9019(a) of the Federal Rules of Bankruptcy Procedure and should be approved.

32. As described herein, the Settlement Agreement resolves all of the aforementioned Estate Claims, and grants releases to Malibu and its officers and directors. The releases included also would encompass additional claims the bankruptcy estates may have beyond those outlined above.

33. The key terms of the settlement are as follows:²

- a. **Settlement Payment.** Malibu shall pay to the Trustee in good funds the sum of Three Million, Five Hundred Thousand U.S. Dollars (\$3,500,000.00) (the "Settlement Payment"), within three (3) business days after the Effective Date.
- b. **Knoxville Lease Assignment.** In addition to the Settlement Payment and Malibu's releases set forth in Paragraph 7 of the Settlement Agreement, the Trustee will seek to assume and assign, or modify its master lease to allow for such assignment of, the Debtors' lease rights in the Debtors' Knoxville dealership location; *provided* that Malibu shall: (i) pay all cure amounts due to the applicable landlord pursuant to section 365 of the Bankruptcy Code in connection with such assumption, assignment or modification (the "Cure Amounts") and (ii) purchase from the Trustee, at the Debtors' cost, any and all FF&E, merchandise, and service parts maintained by the Debtors at the Knoxville location (the "Purchase Price" and, collectively with the Cure Amounts, the "Knoxville Payments"); *provided* further that Malibu shall

² The summary contained in this Motion is qualified in its entirety by the provisions of the Settlement Agreement. To the extent anything in this Motion is inconsistent with the Settlement Agreement, the terms of the Settlement Agreement shall control.

only be obligated to make the Knoxville Payments if Malibu successfully negotiates a new or modified lease with the applicable landlord. If Malibu is unwilling or unable to negotiate a new or modified lease with the applicable landlord by December 1, 2024, the Trustee, in his discretion, may assign such lease rights and sell the applicable personal property to other third parties.

- c. **Cooperation of the Parties.** The Parties agree to cooperate with one another to provide information necessary to obtain entry of an order approving the Settlement Agreement.
- d. **Mutual Releases.** The Trustee and Malibu provide mutual releases to one another, including Malibu's release of the Malibu Claim, and the Trustee's release of the Estate Claims, as set forth more fully in Paragraphs 7 and 8 of the Settlement Agreement.

34. The Trustee believes entry into the Settlement Agreement is in the best interests of the Debtors, their bankruptcy estates, and each of their respective stakeholders (including all general unsecured creditors). *First*, the Settlement Agreement resolves significant disputes between the Debtors and Malibu, the outcome of which is inherently uncertain, and resolves a number of material open issues in this case, including plan funding and the release of a substantial general unsecured claim asserted by Malibu. *Second*, the Settlement Agreement provides certainty because it provides a substantial recover that can be used toward plan funding and provides a path to finalizing the liquidation and wind-down of the Debtors' bankruptcy estates. *Third*, the Settlement Agreement avoids costly, risky, and protracted litigation that would be required to resolve the outstanding issues. *Fourth*, the Settlement Agreement is supported by the estates' largest stakeholders, including M&T Bank and the Committee.

35. The Trustee has concluded in his sound business judgment that settlement of the outstanding issues with Malibu as contemplated by the Settlement Agreement is in the best interests of the Debtors' bankruptcy estates and all parties in interest. Accordingly, the Trustee seeks authorization to enter into the Settlement Agreement and implement its terms as set forth therein and in the Proposed Order.

Basis for Relief Requested

I. Settlements Are Favored in Bankruptcy, and the Trustee’s Business Judgment Is Given Significant Deference.

36. Bankruptcy Rule 9019(a) provides, in relevant part:

On motion by the [debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, . . . as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

37. “To minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy.” *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (internal citation and quotation marks omitted); *In re Idearc Inc.*, 423 B.R. 138, 182 (Bankr. N.D. Tex. 2009), *aff’d*, 662 F.3d 315 (5th Cir. 2011). Settlements are considered a “normal part of the process of reorganization” and a “desirable and wise method[] of bringing to a close proceedings otherwise lengthy, complicated, and costly.” *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980) (citations omitted) (decided under the Bankruptcy Act).

38. A bankruptcy court may, after appropriate notice and a hearing, approve a compromise or settlement so long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See Official Comm. of Unsecured Creditors v. Moeller (In re Age Refin. Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, a decision to accept or reject a compromise or settlement is within the sound discretion of the Court. *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984) (citing *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602–03 (5th Cir. 1980)); *In re ASARCO LLC*, No. 05-21207, 2009 WL 8176641, at *10 (Bankr. S.D. Tex. June 5, 2009).

39. Generally, the role of the bankruptcy court is not to decide the issues in dispute when evaluating a settlement. *Watts v. Williams*, 154 B.R. 56, 59 (S.D. Tex. 1993). Instead, the court should determine whether the settlement as a whole is fair and equitable. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

40. Furthermore, a proposed settlement “need not result in the best possible outcome for the debtor, but must not fall beneath the lowest point in the range of reasonableness.” *In re Idearc Inc.*, 423 B.R. at 182 (quoting *Vaughn v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991) (internal quotation marks omitted)). “Basic to” the process of evaluating proposed settlements, then, “is the need to compare the terms of the compromise with the likely rewards of litigation.” *TMT Trailer Ferry, Inc.*, 390 U.S. at 425.

II. The Settlement with Malibu Satisfies the Three-Factor Test Courts in the Fifth Circuit Employ to Analyze Proposed Settlements.

41. To determine whether a settlement is fair and equitable, this Court should consider and evaluate the following factors: “(1) [t]he probability of success in the litigation, with due consideration for the uncertainty in fact and law, (2) [t]he complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) [a]ll other factors bearing on the wisdom of the compromise.” *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *In re Jackson Brewing Co.*, 624 F.2d at 602); *Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1997); *In re Wright*, 545 B.R. 541, 561 (Bankr. S.D. Tex. 2016); *see also TMT Trailer Ferry, Inc.*, 390 U.S. at 424–25 (providing that in determining whether a settlement is fair and equitable, a court should consider “the probabilities of ultimate success should the claim be litigated...[,] the complexity, expense, and likely duration

of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.”).

42. Factors “bearing on the wisdom of the compromise” include: (a) “the paramount interest of creditors with proper deference to their reasonable views”; and (2) “the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *In re Foster Mortg. Corp.*, 68 F.3d at 917–18; *Cajun Electric*, 119 F.3d at 356; *In re Wright*, 545 B.R. at 561.

43. In *Foster Mortgage*, the Court of Appeals for the Fifth Circuit vacated and remanded a bankruptcy court’s approval of a debtor’s settlement with its parent company where it concluded that the bankruptcy court failed to take into consideration “that nearly all creditors in interest opposed this settlement and that the settlement was reached between insiders without the participation of the creditors.” *See In re Foster Mortg. Corp.*, 68 F.3d at 918. Thus, when considering creditors’ paramount interests and the process by which the settlement was reached, this Court should recognize that the settlement has the support of the estates’ most significant creditor (M&T Bank) and the statutory body appointed to represent the interest of all general unsecured creditors. As such, the Trustee believes that the settlement is fair, equitable, in the best interest of the Debtors’ bankruptcy estates, and meets each of the *Jackson Brewing* factors as well as the heightened standards espoused in *Foster Mortgage*.

A. The Trustee is not Certain to Succeed in Litigating the Issues with Malibu.

44. The claims and causes of action resolved as part of the Settlement Agreement are complex, and the risks of litigation are high. As detailed above, there are few settled issues of fact or law in connection with such claims and causes of action. If the parties litigated these claims

and causes of action, Malibu has made clear that it would deny and defend liability, leading to uncertainty as to how such claims would be resolved. In addition, Malibu has indicated it would assert counterclaims (as demonstrated by the Malibu Claim). While the Trustee believes the estates have meritorious objections to the Malibu Claim, the added complexity of these issues creates substantial uncertainty as to whether the Trustee (or his successor in interest) would prevail if such claims were litigated in or outside of this Court. The Settlement Agreement provides certainty where success in any litigation with Malibu would be far from certain. Accordingly, the Settlement Agreement satisfies the first factor of the *Jackson Brewing* test.

B. Continued Litigation with Malibu Would Be Complex, Costly, and Inconvenient.

45. As discussed above, the issues involved with the released claims and causes of action are extremely complex. There are numerous disputed issues of law and fact that are unlikely to be resolved quickly by any court or through any singular pre-trial filing. Moreover, the Trustee believes that Malibu may have valid defenses to some or all of these claims. Litigation of the disputes raised at the Mediation would be lengthy and costly, and the bankruptcy estates lack the necessary funding to pursue litigation in connection with these issues. Although the Trustee and the Committee have considered contingency counsel to take such claims to trial, the Trustee recognizes that contingency counsel would reduce any potential recoveries, which may take years to realize, if ever.

46. In contrast, the Settlement Agreement provides a quantifiable and certain resolution of all outstanding issues related to claims against Malibu, and ensures that the estates will realize at least \$3.5 million immediately (and more upon assumption and assignment of the Knoxville lease). The Trustee does not believe that expending time or resources litigating claims against Malibu would materially further the interests of the bankruptcy estates or their creditors,

considering the inherent risk of nonrecovery and the benefit of a comprehensive settlement that promotes closure. Accordingly, the Settlement Agreement satisfies the second factor of the *Jackson Brewing* test.

C. The Settlement is in the Best Interests of Creditors and was Conducted at Arms-Length, in Good Faith and with Participation by the Estates Primary Creditors.

47. The settlement is in the best interests of creditors, as evidenced by, among other things, the Committee and M&T Bank's active participation, negotiation, and support thereof. The Committee represents the interests of, and is mindful of its fiduciary obligation to act in the best interest of, all general unsecured creditors. M&T Bank on the other hand is likely to be the single, largest general unsecured creditor whose \$105 million secured claim will not be paid in full from the liquidation sales of its collateral. Not only were M&T Bank and the Committee present at the Mediation, but the Trustee considered their reasonable views before pursuing the settlement.³

48. The Settlement Agreement maximizes recovery to the bankruptcy estates from the Malibu claims and provides certainty while avoiding the risks, costs, and delays associated with litigation. In addition, the Settlement Agreement provides significant benefit to the bankruptcy estates by bringing in an immediate cash payment of \$3.5 million, release of a significant general unsecured claim (nearly \$10 million), and realization of additional benefits from the assignment of the Knoxville lease and sale of personal property therein. It is thus in the best interest of the Debtors' estates, considering creditors' reasonable views.

49. Additionally, the settlement with Malibu provides the Trustee with additional cash to contribute toward a confirmable a plan of liquidation. Without sufficient cash reserves to fund

³ The Trustee contacted counsel for Mr. Borisch in advance of the Mediation to obtain his reasonable views of a potential settlement. Mr. Borisch's counsel indicated Mr. Borisch's belief that all claims belonged to Mr. Borisch, and that he would oppose any settlement with Malibu that precluded him from pursuing such claims on his own.

a plan, these cases would have to convert to chapter 7, which could delay recoveries for creditors. Approval of the Settlement Agreement provides much-needed closure to numerous disputed issues and represents the best possible path to reach a successful conclusion to this chapter 11 case for all stakeholders.

50. Furthermore, the Settlement Agreement is the product of arms-length negotiations, and there was no fraud or collusion by or among the Trustee, the Committee, M&T Bank, or Malibu. Accordingly, the Settlement Agreement satisfies the third factor of the *Jackson Brewing* test.

51. Based on the foregoing considerations, the Trustee respectfully submits that the Settlement Agreement with Malibu represents a fair and reasonable compromise that is in the best interest of the Debtors' bankruptcy estates. Pursuant to the Proposed Order, the Trustee will be able to avoid the expense, delay, and distraction of further litigation with Malibu and resolve significant material issues standing in the way of proposing a confirmable plan of liquidation. Accordingly, the Trustee respectfully requests that the Court authorize him to enter into and implement the terms of the Settlement Agreement as such action is a reasonable exercise of the Trustee's business judgment and in the best interest of its bankruptcy estates.

WHEREFORE, the Trustee respectfully requests that the Court enter the Proposed Order, granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Respectfully submitted this 7th day of October, 2024.

GRAY REED

By: /s/ Aaron M. Kaufman

Jason S. Brookner
Texas Bar No. 24033684
Aaron M. Kaufman
Texas Bar No. 24060067
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*Counsel to Mark E. Andrews,
Chapter 11 Trustee*

Certificate of Service

I certify that on October 7, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas.

/s/ Aaron M. Kaufman

Aaron M. Kaufman

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

In re: TOMMY’S FORT WORTH, LLC., <i>et al.</i>,¹ Debtors.	§ § § § § § §	Chapter 11 Case No. 24-90000 (ELM) (Jointly Administered)
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**ORDER APPROVING MOTION FOR ENTRY OF AN ORDER
(I) AUTHORIZING AND APPROVING THE SETTLEMENT BY AND BETWEEN
THE TRUSTEE AND MALIBU BOATS AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of the Chapter 11 Trustee (the “Trustee”) for the entry of an order (the “Order”), approving and authorizing the Trustee to enter into and perform under the Settlement Agreement attached hereto as **Exhibit 1**, and granting related relief, all as set forth

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Tommy’s Fort Worth, LLC (3473); Tommy’s Holding Company, LLC (2662); Tommy’s Grand Rapids, LLC (9224); Tommy’s Castaic, LLC (7501); Tommy’s Lewisville, LLC (4750); High Country Watersports, LLC (6160); Walloon Lake Village Marina, LLC (0277); MKB Florida Holdings, LLC (5698); Tommy’s Detroit, LLC (5242); Tommy’s California Fresno, LLC (8597); Tommy’s Phoenix, LLC (3036); Tommy’s Las Vegas, LLC (7721); Tommy’s Chattanooga, LLC (0839); Tommy’s California Ventura, LLC (5149); Tommy’s Rancho Cordova, LLC (1070); Tommy’s Stockton, LLC (1338); and Tommy’s Knoxville, LLC (8052).

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Trustee's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' bankruptcy estates, their creditors, and other parties in interest; and this Court having reviewed the Motion, and all objections, if any, to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein are overruled with prejudice; and the Court having determined that the legal and factual bases set forth in the Motion and the record of the hearing (the "Hearing") on the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefore, and based on the Court's findings of fact and conclusions of law made at the Hearing, which are incorporated herein by reference,

IT IS HEREBY FOUND AND DETERMINED THAT:³

A. The terms and conditions of the Settlement Agreement, including the total consideration to be realized by the Debtors' estates pursuant thereto, is fair and reasonable, and the transactions are in the best interest of the Debtors, their creditors, and their bankruptcy estates. The Trustee has demonstrated compelling circumstances and a good, sufficient, and sound

³ To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such. See Bankruptcy Rule 7052.

business purpose and justification for entering into the Settlement Agreement. The Trustee's entry into the Settlement Agreement reflects the Trustee's exercise of prudent business judgment consistent with his fiduciary duties.

B. The Settlement Agreement has been negotiated by the Trustee and Malibu (and their respective affiliates and representatives) in good faith, at arm's length, and without collusion or fraud. The Trustee and Malibu will be acting in good faith if they proceed to consummate the transactions contemplated by the Settlement Agreement at any time after entry of this Order, subject to the terms and conditions of this Order and the Settlement Agreement, as applicable. In pursuing approval of the Settlement Agreement, the Court finds that the Trustee has considered the reasonable views of the Debtors' primary creditor constituencies, including M&T Bank and the Committee.

C. The claims and causes of action settled under the Settlement Agreement, including all claims and causes of action currently in the Borisch Complaint, constitute property of the Debtors' bankruptcy estates, and the releases provided under the Settlement Agreement and this Order are reasonable and in the best interests of the Debtors' bankruptcy estates and their creditors.

D. Pursuant to *In re Foster Mortg. Corp.*, 68 F.3d 914, 918 (5th Cir. 1995), the Court has given due and adequate deference to the reasonable views of creditors in considering the proposed settlements and compromises embodied in the Settlement Agreement.

Now, therefore, upon the record of the Hearing and any related proceedings held before this Court with respect to the Motion, the evidence adduced at the Hearing, and the statements of counsel during such Hearing, and based upon all such findings and conclusions, IT IS HEREBY ORDERED THAT:

1. The Motion is granted subject to the terms of this Order.

2. The settlement is approved pursuant to the Settlement Agreement attached hereto as **Exhibit 1**.

3. The Trustee is hereby authorized to enter into the Settlement Agreement and to enter into, perform, execute, and deliver all documents, and take all actions, necessary or desirable to immediately continue and fully effectuate, comply with, and implement the terms of the Settlement Agreement in accordance with the terms, conditions, and agreements set forth in the Settlement Agreement.

4. Pursuant to sections 105 and 363(b) of the Bankruptcy Code, Bankruptcy Rule 9019, and all applicable law, the Settlement Agreement and the terms and provisions included therein are approved in their entirety. The Settlement Agreement is valid, binding, and enforceable against the Trustee (or his successors in interest), the Committee and all creditors of the Debtors' bankruptcy estates (including but not limited to M&T Bank), and Malibu. The Settlement Agreement satisfies all applicable requirements of the Bankruptcy Code and Bankruptcy Rules, including Bankruptcy Rule 9019.

5. All parties are enjoined from pursuing Estate Claims or otherwise interfering with the Settlement Agreement or the releases provided thereunder.

6. The failure to describe specifically or include any particular provision of the Settlement Agreement in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of this Court that the Trustee's and Malibu's entry into and performance under the Settlement Agreement is approved in its entirety.

7. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of the Settlement Agreement and this Order.

END OF ORDER

Submitted by:

Jason S. Brookner (Texas Bar No. 24033684)
Aaron M. Kaufman (Texas Bar No. 24060067)
Lydia R. Webb (Texas Bar No. 24083758)
Emily F. Shanks (Texas Bar No. 24110350)

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Counsel to the Mark E. Andrews, Chapter 11 Trustee

Exhibit 1

Settlement Agreement

SETTLEMENT AGREEMENT

This Settlement Agreement (this “Agreement”) is entered into as of October 7, 2024, by and among Mark E. Andrews, chapter 11 trustee (the “Trustee”) for Tommy’s Fort Worth, LLC and its affiliate chapter 11 debtors (collectively, the “Debtors”),¹ and Malibu Boats, Inc. and its indirect subsidiary Malibu Boats, LLC (“Malibu” and, together with the Trustee, the “Parties” or each a “Party”).

Recitals

WHEREAS, the Debtors had previously entered into several dealership agreements (the “Dealership Agreements”) with Malibu, which expired or were terminated before the Petition Date (defined below), under their own terms or by Malibu’s written notice.

WHEREAS, on April 10, 2024, the Debtors filed a *Verified Complaint* in the United States District Court for the Eastern District of Tennessee (the “Tennessee Court”), captioned *Tommy’s Castaic, LLC et al. v. Malibu Boats, Inc. and Malibu Boats, LLC*, Case No. 3:24-cv-00166 (the “Tommy’s Lawsuit”).

WHEREAS, on May 20, 2024 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) initiating the bankruptcy cases jointly administered under the case captioned *In re Tommy’s Fort Worth, LLC*, No. 24-90000 (the “Chapter 11 Cases”) in the U.S. Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the “Bankruptcy Court”).

WHEREAS, on June 3, 2024, the Debtors filed in the Bankruptcy Cases the *Debtors’ Emergency Motion to Enforce Automatic Stay and Punitive Damages for Willful Violations of the Automatic Stay Against Malibu Boats, Inc. and Malibu Boats, LLC* (the “Debtors’ Enforcement Motion”).

WHEREAS, on June 6, 2024, the Bankruptcy Court held an emergency hearing on the Debtors’ Enforcement Motion and denied said motion the next day on June 7, 2024.

WHEREAS, the Debtors consented to the Trustee’s appointment, which the Bankruptcy Court approved on June 17, 2024.

WHEREAS, on July 3, 2024, the Trustee voluntarily dismissed the Tommy’s Lawsuit, without prejudice.

WHEREAS, by order entered on August 9, 2024, the Bankruptcy Court authorized, with Malibu’s consent, the Trustee’s liquidation procedures as set forth in the *Final Order*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Tommy’s Fort Worth, LLC (3473); Tommy’s Holding Company, LLC (2662); Tommy’s Grand Rapids, LLC (9224); Tommy’s Castaic, LLC (7501); Tommy’s Lewisville, LLC (4750); High Country Watersports, LLC (6160); Walloon Lake Village Marina, LLC (0277); MKB Florida Holdings, LLC (5698); Tommy’s Detroit, LLC (5242); Tommy’s California Fresno, LLC (8597); Tommy’s Phoenix, LLC (3036); Tommy’s Las Vegas, LLC (7721); Tommy’s Chattanooga, LLC (0839); Tommy’s California Ventura, LLC (5149); Tommy’s Rancho Cordova, LLC (1070); Tommy’s Stockton, LLC (1338); and Tommy’s Knoxville, LLC (8052)

(I) Authorizing Entry into the Liquidation Consulting Agreement with Gordon Brothers; (II) Approving Procedures for Dealership Liquidation Sales; (III) Approving the Sale of Inventory Free and Clear of All Liens, Claims and Encumbrances; (IV) Waiving Compliance with Applicable Restrictions on Liquidation and Approving Dispute Resolution Procedures; and (V) Granting Related Relief (the “Liquidation Procedures Order”).

WHEREAS, pursuant to the Liquidation Procedures Order, the Parties agreed to attend a full-day mediation with the Debtors’ prepetition secured lender M&T Bank, N.A. (“M&T” or the “Bank”) and the Official Unsecured Creditors’ Committee (the “Committee”).

WHEREAS, the Parties selected Hon. Nancy F. Atlas (ret.) to serve as mediator (the “Mediator”).

WHEREAS, on August 16, 2024, Matthew A. Borisch (“Borisch”) filed a *Complaint* in the Tennessee Court, commencing a new lawsuit captioned *Matthew Allen Borisch v. Malibu Boats, Inc., Malibu Boats, LLC, and Jack Springer*, Case No. 3:24-cv-00339 (the “Borisch Lawsuit”).

WHEREAS, by letter dated August 22, 2024, the Trustee advised Borisch that the Borisch Lawsuit violated the automatic stay.

WHEREAS, Borisch’s counsel responded by electronic mail dated August 27, 2024, disputing the Trustee’s position that the Borisch Lawsuit violated the automatic stay and declining to amend or withdraw the Borisch Lawsuit.

WHEREAS, on September 30, 2024, Malibu filed proof of claim number 42, asserting a non-priority general unsecured claim of no less than \$9,606,044.00 against the Debtors’ bankruptcy estates (the “Malibu Claim”).

WHEREAS, the Committee and the Trustee believe that the Debtors’ estates may have meritorious claims against Malibu, which Malibu disputes.

WHEREAS, on October 1, 2024, pursuant to the Liquidation Procedures Order, the Trustee, the Committee, M&T, and Malibu participated in a full-day mediation.

WHEREAS, in order to avoid further costs, inconvenience, and burdens of further litigation, the Parties wish to resolve and fully settle and compromise all outstanding claims among them, without either party admitting any facts or liabilities in connection with the Malibu Claim, the Tommy’s Lawsuit, the Borisch Lawsuit, or any other claims or lawsuits, whether threatened, filed, or otherwise.

Agreement

NOW THEREFORE, in consideration of the recitals set forth above and the mutual promises and covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Recitals.** The above statement of facts set forth in the Recitals is true and correct.

2. **Effective Date.** The effective date (the “Effective Date”) of this Agreement is the date of entry of a final non-appealable order of the Court entered in the Chapter 11 Case pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure approving this Agreement (the “Approval Order”) and satisfaction of all conditions set forth in Paragraph 9.

3. **Consideration.** The Parties have agreed to enter into this Agreement in exchange for the releases and other covenants expressed herein, as well as for the Settlement Payment described in Paragraph 4.

4. **Settlement Payment.** Malibu shall pay to the Trustee in good funds the sum of Three Million, Five Hundred Thousand U.S. Dollars (\$3,500,000.00) (the “Settlement Payment”), within three (3) business days after the Effective Date.

5. **Knoxville Lease Assignment.** In addition to the Settlement Payment and Malibu’s releases set forth in Paragraph 7 below, the Trustee will seek to assume and assign, or modify its master lease to allow for such assignment of, the Debtors’ lease rights in the Debtors’ Knoxville dealership location; *provided* that Malibu shall: (i) pay all cure amounts due, which the Trustee estimates to be approximately \$68,000, to the applicable landlord pursuant to section 365 of the Bankruptcy Code in connection with such assumption, assignment or modification (the “Cure Amounts”) and (ii) purchase from the Trustee, at the Debtors’ cost, any and all FF&E, merchandise, and service parts maintained by the Debtors at the Knoxville location (the “Purchase Price” and, collectively with the Cure Amounts, the “Knoxville Payments”); *provided* further that Malibu shall only be obligated to make the Knoxville Payments if Malibu successfully negotiates a new or modified lease with the applicable landlord. If Malibu is unwilling or unable to negotiate a new or modified lease with the applicable landlord by December 1, 2024, the Trustee, in his discretion, may assign such lease rights and sell the applicable personal property to other third parties.

6. **Cooperation of the Parties.** The Parties agree to cooperate with one another to provide information necessary to obtain entry of the Approval Order, including any further information reasonably requested to be provided by the Mediator, and any information shared hereunder shall be subject to the mediation privilege under Texas law in all respects.

7. **Malibu’s Release of Claims.** On the Effective Date, to the maximum extent permitted by law, Malibu Boats, Inc. and Malibu Boats, LLC, in each case on behalf of themselves and their respective present and former successors, assigns, directors, officers, employees, and agents, and representatives, and any and all other entities who may purport to assert any causes of action, directly or derivatively, by, through, for, or because of the foregoing entities, shall be deemed to have released and waived any and all claims and causes of action against the Trustee, his attorneys, advisors, and agents, the Debtors and their bankruptcy estates, including, but not limited to, the Malibu Claim, which shall be disallowed for all purposes and expunged from the claims register (collectively, the “Malibu Releases”); *provided, however*, that the Parties do not release any claims to enforce this Agreement. For the avoidance of doubt, and notwithstanding anything in this Agreement to the contrary, the Malibu Releases do not encompass any claims Malibu may have against Borisch individually, and nothing in this Agreement prevents Malibu

from bringing the Malibu Claim against him individually or asserting defenses or claims in response to claims brought by Borisch against Malibu.

8. **Trustee's Release of Claims.** Upon the Effective Date, to the maximum extent permitted by law and upon payment of the Settlement Payment described herein, the Trustee, for the Debtors and their bankruptcy estates, in each case on behalf of themselves and their respective present and former successors, assigns, directors, officers, employees, and agents, and representatives, and any and all other entities who may purport to assert any causes of action, directly or derivatively, by, through, for, or because of the foregoing entities, shall be deemed to have released, waived, and shall be permanently enjoined from any prosecution or attempted prosecution of, any and all claims, causes of action, interests, damages, remedies, demands, rights, actions (including, but not limited to avoidance actions arising under chapter 5 of title 11 of the United States Code, and any claims or causes of action asserted in the Tommy's Lawsuit or assertable by the Debtors as of the Petition Date), suits, debts, sums of money, obligations, judgments, liabilities, accounts, defenses, offsets, counterclaims, crossclaims, powers, privileges, licenses, liens, indemnities, guaranties, and franchises of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, now existing or hereafter arising, contingent or non-contingent, liquidated or unliquidated, choate or inchoate, secured or unsecured, assertable, directly or derivatively, matured or unmatured, suspected or unsuspected, in contract, tort, law, equity, or otherwise, which any of them has or may have against (a) Malibu Boats, Inc.; (b) Malibu Boats, LLC; and (c) for each person listed in (a) and (b), each of their respective current or former officers, directors, employees, managers, attorneys, professional advisors, and agents; *provided* that the Parties do not release any claims to enforce this Agreement.

9. **Conditions Precedent.** The effectiveness of this Agreement is conditioned upon the following conditions precedent, any or all of which may be waived by Malibu in its sole discretion:

- i. The Trustee shall seek and obtain entry of the Approval Order via a motion (the "Settlement Motion"), the forms of which shall be reasonably acceptable to all Parties, and the Approval Order shall include a finding by the Bankruptcy Court that all claims currently pending in the Borisch Lawsuit are property of the Debtors' bankruptcy estates and are released under the terms of this Agreement.
- ii. The Trustee shall use reasonable good faith best efforts to obtain joinders from the Committee and M&T Bank in support of the Settlement Motion and entry of the Approval Order.
- iii. The Trustee shall use reasonable good faith best efforts to file a motion to enforce the automatic stay against Borisch by October 7, 2024, seeking a determination that the claims presently asserted in the Borisch Lawsuit constitute property of the Debtors' estates and that Borisch is enjoined from pursuing such claims or any other claims that constitute property of the Debtors' bankruptcy estates.

10. **Costs.** The Parties agree that all costs and expenses associated and incurred in connection with this Agreement, including attorneys' fees, shall be paid by the Party incurring same.

11. **Merger.** This Agreement contains the full, final, and complete agreement of the Parties, and supersedes all prior negotiations, understandings, representations, warranties, and agreements pertaining to the subject matter of this Agreement.

12. **Severability.** If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions shall nevertheless survive and remain in full force and effect and shall in no way be affected, impaired, or invalidated.

13. **Voluntary Agreement and Advice of Counsel.** The Parties hereto, and each of them, acknowledge, represent, and declare that they have been represented in the negotiations for and in the performance of this Agreement by counsel of their own choice or have had such opportunity; that they have carefully read this Agreement; that they have had this Agreement fully explained to them by such counsel or have had such opportunity; and that they understand and are fully aware of the contents, implications, and ramifications of this Agreement and of its legal effect. This Agreement, including all of its terms and conditions, was negotiated at arms'-length and represents a final, mutually agreeable, and acceptable agreement. The Parties, and each of them, further acknowledge, represent, and declare that they each sign this Agreement freely, voluntarily, of their own free will and volition, and without duress.

14. **Authority.** All Parties represent and warrant that they have the full right and authority to execute this Agreement. All Parties represent and warrant that the signatory below has the full right and authority to sign for and bind the Party. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective agents, parents, subsidiaries, affiliates, representatives, officers and directors, successors, heirs, and assigns.

15. **Investigation.** Each Party hereto represents that it has made a full and complete investigation of the circumstances surrounding the subject matter of this Agreement, that it has full knowledge of all facts involved therein, and in making this Agreement has not relied upon any statements or representations pertaining to this matter by the other Parties hereto or any person or persons representing them.

16. **Mutual Construction.** This Agreement shall be construed as if all of the Parties jointly prepared this Agreement, and any uncertainty or ambiguity shall not be interpreted against any one Party.

17. **Disclaimer of Reliance.** Each Party warrants and represents that no express or implied promise, agreement, representation, inducement, or condition not set forth in this Agreement has been made or relied upon by said Party in executing this Agreement and disclaims any reliance on any such express or implied promise, agreement, representation, inducement, or other condition.

18. **Further Assurances.** Each Party agrees to take or cause to be taken any and all action and to execute and deliver any and all additional documents, instruments, and writings

necessary to consummate, make effective, and carry out the terms and provisions of this Agreement.

19. **Headings.** The headings of the sections and subsections of this Agreement have been inserted for convenience of reference only and shall in no way restrict or otherwise modify any of the terms or provisions hereof or affect in any way the meaning or interpretation of this Agreement.

20. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which together shall be deemed to be one and the same instrument. All counterparts so executed shall constitute one agreement binding upon all Parties, notwithstanding that all Parties are signatory to the original or the same counterpart. A photocopy of the executed version of this Agreement is for all purposes deemed original.

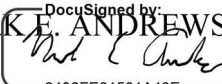
21. **Jurisdiction and Choice of Law.** This Agreement shall be construed pursuant to the laws of the State of Texas without regard to its conflicts of law rules. The Court shall have exclusive jurisdiction over any and all disputes between or among the Parties, whether in law or equity, arising out of, relating to, or connected with this Agreement, and the Parties hereby consent to and submit to the jurisdiction of the Court for any such action. To the extent the Court fails or refuses to assert jurisdiction over any such dispute, the Parties agree that any such dispute shall be brought in and heard by the state or federal courts sitting in Harris County, Texas.

[signature page follows]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

MARK E. ANDREWS, CHAPTER 11 TRUSTEE

By:



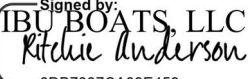
Mark E. Andrews

Solely in the Capacity as Chapter 11 Trustee
For the Debtors' Bankruptcy Estates

MALIBU BOATS, INC. AND

MALIBU BOATS, LLC

By:



Ritchie Anderson

President and Authorized Representative