

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

In re:	§	
	§	Chapter 11
	§	
TOMMY’S FORT WORTH, LLC., <i>et al.</i> , ¹	§	Case No. 24-90000 (ELM)
	§	
Debtors.	§	(Jointly Administered)
	§	

**DECLARATION OF MARK E. ANDREWS, CHAPTER 11 TRUSTEE,
IN SUPPORT OF MATTERS SCHEDULED FOR HEARING ON NOVEMBER 19, 2024**

Mark E. Andrews declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. On June 18, 2024 (the “Appointment Date”), I was appointed as chapter 11 trustee (the “Trustee”) in the above referenced chapter 11 cases. I submit this declaration (“Declaration”) in support of the two motions scheduled for hearing on November 19, 2024: (1) *Motion for Entry of an Order: (I) Determining That Certain Claims and Causes of Action Are Property of the Estates; (II) Determining That the Automatic Stay Applies to Such Estate Claims; and (III) Enforcing the Automatic Stay and Enjoining Matthew A. Borisch from Pursuing Such Estate Claims; and (IV) Granting Related Relief* [Docket No. 487] (the “Motion to Enforce”); and (2) *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* [Docket No. 486]

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 Vega’s, 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).

(the “9019 Motion” and, together with the Motion to Enforce, the “Motions”).² Unless otherwise indicated, I have personal knowledge of the facts set forth herein.

2. I have extensive experience in and knowledge of debtors’ protections, creditors’ rights, and complex proceedings under chapter 11 of the Bankruptcy Code. I was first admitted to the practice of law in 1983, and was practicing attorney for over 30 years, during which I regularly represented or served as a chapter 11 fiduciary in multiple venues around the United States, including Texas and the Northern District of Texas in particular. For over 30 years, I have provided operational leadership, business turnaround, and bankruptcy services to companies in operational and financial distress across a broad array of industries. I have experience with OEM-dealership relationships from a prior engagement of a car OEM in a distressed car dealership bankruptcy case, which was filed in this District. I previously served as a chapter 11 trustee in a case involving the ownership and operation of a small community hospital, and I am also serving as a chapter 11 trustee in another case that is pending in the Western District of Texas. Over the last five years, I have transitioned out of legal practice and into turnaround consultation and trustee roles.

3. In an effort to achieve success in these bankruptcy cases, I have become familiar with the Debtors’ businesses, financial affairs, and capital structure. I have reviewed pleadings filed prior to the Appointment Date and familiarized myself with the Court’s prior rulings in the contested matters that predate my appointment. I have also worked closely with the Debtors’ management and personnel, representatives of M&T Bank, and my professionals to assist with the myriad requirements of operating the Debtors’ businesses in the short term to assess the need for

² Unless otherwise defined herein, the defined terms used in this Declaration shall have the meaning ascribed to them in the Motions.

use of cash collateral and maximization of the Debtors' assets to provide the greatest possible recoveries for the Debtors' bankruptcy estates, creditors, and other parties in interest.

4. The following items summarize some of the key results my team has accomplished since the Appointment Date:

- a. Negotiation and entry of an agreed order governing the consensual use of cash collateral with M&T Bank;³
- b. Approved and paid retention and incentive bonuses to key non-insider employees to avoid the disintegration of the Debtors' operations due to imminent employee flight;⁴
- c. Entry of interim and final orders authorizing the engagement of Gordon Brothers and approval of a robust dealership liquidation sale process;⁵
- d. Negotiation and approval of a settlement with the Debtors' landlords in Phoenix and Arizona, where the Debtors did not have valid leases and had been locked out of the premises;⁶
- e. Negotiation and approval of several transactions to sell or assign the Debtors' rights in certain dealership leases, including Walloon Lake Village Marina in Northern Michigan,⁷ and Clermont in Central Florida;⁸ and
- f. Sales of all remaining new and used boats in the Debtors' inventory, subject to final closing and funding of the remaining subset.

5. On the whole, I believe the liquidation process has proven successful for these bankruptcy estates. To date, the estates have paid M&T Bank nearly \$40 million under the agreed cash collateral order, and we expect to make substantial additional payments to M&T Bank as the

³ See Docket No. 272 (Cash Collateral Order), as modified by Docket No. 353.

⁴ See Docket No. 363 (KERP Order).

⁵ See Docket Nos. 281 & 364 (Interim and Final Liquidation Procedures Order).

⁶ See Docket No. 388 (Litjens Settlement Order).

⁷ See Docket No. 421 (Walloon Lake Village Marina Sale Order).

⁸ See Docket No. 466 (Clermont Sale Order). I am also in the process of obtaining authority regarding Lewisville in North Texas, see Docket Nos. 469 (Order on Lease Assumption and Rejection Procedures) & 556 (Notice of Assumption and Assignment of Lewisville Lease), and I anticipate filing additional assumption notices for additional dealership locations in short order.

final sales are funded, when we consummate settlements such as the one proposed in the 9019 Motion, and as we complete our reconciliation of the claims filed in these bankruptcy cases.

6. On October 7, 2024, I filed the two Motions now before the Court. I am familiar with the facts recited in both Motions and adopt them as my testimony for purposes of the hearing on November 19, 2024. The Motions were filed as a result of the settlement reached through a mediation that was conducted pursuant to this Court's liquidation procedures order.⁹ The mediation process is discuss further below in **Part A**. I believe the relief sought in both Motions is reasonable, necessary, and serves the best interests of the bankruptcy estates and their creditors.

A. Proposed Settlement with Malibu Boats

7. On October 1, 2024, I attended a mediation in Houston, Texas. The mediation was conducted by Nancy F. Atlas, a retired federal district judge who previously served the United States District Court for the Southern District of Texas, Houston District. The mediation was conducted pursuant to Paragraph 38 of this Court's liquidation procedures order. In attendance at the mediation were representatives of my legal and financial team, representatives of the Committee, representative of M&T Bank, and representatives of Malibu.

8. The process leading up to the mediation was fulsome and included extensive "homework" assigned to all parties by Judge Atlas, including joint and individual submissions. The actual day of mediation began at 8:00 a.m. and concluded around 10:00 p.m. with a signed term sheet that was used to prepare the Settlement Agreement that is Trustee's Exhibit 13.¹⁰

⁹ See Docket No. 364, ¶ 38.

¹⁰ Exhibit references made herein are in reference to the *Trustee's Witness and Exhibit List for Hearings Scheduled on November 19, 2024*, filed contemporaneously herewith.

9. In general terms, the Settlement Agreement provides for a \$3.5 million payment by Malibu and a release of Malibu's claims against the Debtors and their bankruptcy estates. According to Malibu's proof of claim, which is Trustee's Exhibit 14, Malibu asserts a claim for nearly \$10 million. In addition to such consideration, Malibu has agreed to assume the Debtors' lease at the Knoxville dealership and pay the Trustee the "cost value" of the Debtors inventory, merchandise, and FF&E located in the Knoxville dealership.

10. As a condition to this settlement, I agreed to seek a ruling from this Court that certain claims asserted by Matthew Borisch against Malibu are claims that belong to the Debtors and their bankruptcy estates. As discussed further in **Part B** below, I agreed to this term because it was an integral condition to the Settlement Agreement with Malibu. Based on my independent review and assessment, I agree that the claims asserts in the complaint filed by Mr. Borisch against Malibu in August (as amended in October), Trustee's Exhibits 5 and 9, respectively, are estate claims that are derivative of harms suffered by the Debtors. Thus, I believe this condition was a reasonable request in exchange for the consideration offered by Malibu under the Settlement Agreement.

11. The Settlement Agreement and Proposed Order attached to the 9019 Motion were negotiated at arms' length with Malibu. There are no agreements between myself and Malibu other than those expressed in the Settlement Agreement and corresponding Proposed Order. Moreover, before I accepted these terms, I considered input from the Committee and M&T Bank, who both attended the mediation. While Mr. Borisch did not attend the mediation, I solicited input from Mr. Borisch's counsel before the mediation, and I instructed my legal counsel to apprise Mr. Borisch's counsel of the settlement after the mediation, before the filing of the 9019 Motion, which I

understand was done. To date, Mr. Borisch is the only party expressing dissatisfaction with the settlement negotiated with Malibu.

12. I believe the settlement is well within the range of reasonableness considering the applicable factors in the Fifth Circuit. I reviewed the Debtors' Complaint against Malibu, which is included as Trustee's Exhibit 2. As discussed in the 9019 Motion, the Debtors' Complaint asserted various legal theories against Malibu to recover unpaid incentives and lost business resulting from the non-renewal and termination of dealership agreements. I initially dismissed the Debtors' Complaint in early July, without prejudice, not because of any specific doubt about the merits of the Debtors' claims. Rather, at the time, Malibu had filed a motion to dismiss, and I did not have the time or the capacity to substantively address Malibu's motion to dismiss while negotiating terms of cash collateral, retaining key employees, and conducting value-maximizing dealership liquidation sales. Thus, I decided to non-suit the Debtors' Complaint, knowing that I could revisit the claims at a later date.

13. That later date presented itself about a month later, when Malibu objected to the dealership liquidation procedures. In resolving Malibu's objection, I was able to get two key concessions from Malibu: (1) an express agreement from Malibu to honor its manufacturer warranties under certain agreed-upon conditions set forth in the order; and (2) the structure for meaningful settlement discussions after an appropriate time for my professional team to understand the merits of the potential claims against Malibu. These terms were incorporated into the final liquidation procedures order, entered on August 9, 2024. We scheduled mediation for October 1, 2024, which provided my professional team nearly two months to investigate claims against Malibu. Given the amount of data provided to my professional team by early August, I believed this was more than sufficient time to assess the value of these claims.

14. The data available to my professional team included over 1,000 files provided by the Debtors' professionals upon my appointment. These files included all relevant dealership agreements, incentive programs, and e-mail history with Malibu and M&T Bank dating back to the middle of 2022. My team also reviewed Mr. Borisch's written and oral testimony regarding these alleged damages, which are included as Trustee's Exhibits 3 and 4, respectively. Mr. Borisch previously asserted that Malibu failed to pay the Debtors nearly \$13 million in rebates, as summarized below:

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

15. My professional team dug into these numbers and interviewed potential witnesses, including Mark Wells, a former employee of the Debtors and Mr. Borisch's other related companies. In doing so, we became aware of circumstances that might inhibit the collection of these rebates, including (but not limited to) the expiration of the Model Year 2023 dealership agreements on June 30, 2023, and the absence of any signed Model Year 2024 dealership agreements for all but two of the Debtors' locations. I also discussed the potential claims against Malibu with several employees myself. My legal team researched applicable law in the states where the Debtors were organized and where they operated to assess the viability of the Debtors' legal theories asserted in the original Verified Complaint, as well as other potential claims the Debtors could have asserted as of the Petition Date.

16. We then engaged with Judge Atlas to provide her key documents and our factual and legal positions. Judge Atlas pushed back on all parties in advance of, and during, the mediation. Without getting into the substance of the pushback, my team provided several iterations of submissions in response to various questions raised by Judge Atlas in advance of the mediation. The day of mediation was equally hard fought, and, at times, I felt like the parties might declare an impasse. Ultimately, we reached the agreement that has now been incorporated into the Settlement Agreement.

17. After the mediation, but before prosecuting the 9019 Motion, my legal team and I went to the law offices of Malibu's counsel to review over 2,000 additional internal Malibu e-mails and documents, as well as all known e-mails between Malibu and M&T Bank. I undertook this exercise to confirm that there was no "smoking gun" that would alter my view of the merits of potential claims against Malibu. Nothing in these additional e-mails changed my view on the merits of settlement.

18. Based on this extensive analysis and mediation process, I believe that the Settlement Agreement and consideration provided thereunder fall well within the range of reasonableness and should be approved for several reasons. *First*, the Settlement Agreement resolves significant disputes between the Debtors and Malibu, the outcome of which is inherently uncertain, and helps me resolve 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 guarantees a substantial recovery from the Malibu claims that I hope to be able to use 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 with Malibu that would be required to

resolve such dispute. *Fourth*, the Settlement Agreement is supported by the estates' largest stakeholders.

19. The Debtors' Verified Complaint includes allegations of fraud and misrepresentation perpetrated by Malibu. I reviewed the key documents presented to my professional team as the basis for these allegations. Reasonable minds can differ on whether such evidence would persuade a finder of fact. In the absence of settlement, this issue could present a genuine fact issue requiring a time-consuming and costly trial.

20. I also considered Mr. Borisch's admission that the Debtors committed "sales out of trust" on multiple occasions before M&T Bank ultimately declared a default. The first such occurrence was discovered in August 2023, while the 2024 dealership agreements were being negotiated. Based on our review of the relevant documents, it is clear that the Debtors' potential default under the floorplan loan agreements with M&T Bank could have served as grounds for Malibu to terminate the agreements had they been renewed. Based on our review of the key e-mail exchanges in the summer and fall of 2023, it became increasingly clear that the Debtors were suffering a liquidity crisis, which ultimately led to irreconcilable conflicts among the Debtors, Malibu, and M&T Bank. Reasonable minds could differ on the cause for this liquidity crisis. In the absence of a settlement, this issue could also present a genuine fact issue requiring a time-consuming and costly trial.

21. While I cannot predict the likelihood of success on the merits of the potential claims against Malibu, I do believe, based on our analysis of the facts and the applicable law, that litigation with Malibu is inherently uncertain. I also believe that litigation with Malibu will be expensive and could take years to achieve a recovery, which may ultimately net the estates less than what Malibu proposes to pay under the Settlement Agreement. I considered the paramount interests of

creditors. M&T Bank is the estates' primary secured creditor and will likely be the estates' single largest unsecured creditor. M&T Bank has already filed a joinder confirming its support for the settlement. The Committee, who represents the interests of all unsecured creditors, also supports the settlement and.

22. Mr. Borisch is the only party opposing the settlement. I did consider his interests in accepting the settlement. For the reasons discussed in **Part B** below, I do not believe his interests in pursuing direct or derivative claims against Malibu serve the interests of the bankruptcy estates' other creditors. Moreover, I do not believe Mr. Borisch has articulated a basis to deny approval of the Settlement Agreement, because it is not my intention to settle or release any direct claims he might have against Malibu. I simply believe that the claims presently asserted are estate claims that I have the authority to settle.

23. On the whole, I believe the Settlement Agreement is fair and reasonable and serves the best interests of the Debtors' bankruptcy estates. As such, I believe the Settlement Agreement should be approved.

B. Motion to Enforce the Automatic Stay

24. As discussed in **Part A**, I reviewed the Debtors' Complaint against Malibu filed before these chapter 11 cases, which was verified by Mr. Borisch and is included as Trustee's Exhibit 2. The claims and factual allegations contained in the Debtors' Complaint speak for themselves, but in general, the Debtors alleged they suffered harm as a result of Malibu's actions or inactions relating to the non-renewal and termination of dealership agreements.

25. On August 16, 2024, Mr. Borisch filed his Complaint against Malibu. The claims and factual allegations contained in Mr. Borisch's Complaint speak for themselves, but a cursory review of Mr. Borisch's Complaint reveals that a substantial portion of the claims asserted therein, including the supporting facts and circumstances, are substantially if not entirely redundant of the

claims asserted in the Debtors' Complaint. To preserve value to the estates, I instructed my legal team to send a letter to counsel to Mr. Borisch advising them that Mr. Borisch's Complaint likely violated the automatic stay. This letter is included as Trustee's Exhibit 6. Mr. Borisch's counsel responded, see Trustee's Exhibit 7, that the two complaints read similarly because they arose from the same transactions and occurrences.

26. As discussed in **Part A** above, the relief requested in the Motion to Enforce is an integral part of the Settlement Agreement. Absent the limited relief requested in the Motion to Enforce, I do not believe Malibu will consummate the Settlement Agreement. Based on my review of Mr. Borisch's Complaint, I believe this condition in the Settlement Agreement is reasonable.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 15th day of November, 2024

/s/ Mark E. Andrews

Mark E. Andrews
Chapter 11 Trustee