

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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**In re:**  
**ARCHDIOCESE OF MILWAUKEE,**  
**Debtor.**

**Case No. 11-20059-svk**  
**Chapter 11**  
**Hon. Susan V. Kelley**

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**DEBTOR'S OBJECTION TO MOTION OF OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS FOR LIMITED RELIEF FROM THE AUTOMATIC STAY  
TO PERMIT TAKING OF CERTAIN DEPOSITIONS**

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Archdiocese of Milwaukee, debtor and debtor in possession (the "Debtor" or "Archdiocese"), hereby submits this objection to the motion of the official committee of unsecured creditors (the "Committee") for limited relief from the automatic stay to permit taking of certain depositions [Docket No. 240] (the "Deposition Motion") by unnamed "parties in interest" [Dep. Mot. at page 12], and in support of this objection, the Debtor states as follows:

**Background of State Court Cases**

1. As of January 4, 2011 (the "Petition Date"), the Debtor was a defendant in twelve (12) state-court lawsuits (the "State Court Cases") brought by seventeen (17) individuals who claim they were victims of sexual abuse (all survivors of sexual abuse shall be referred to herein as "Victims/Survivors").

2. The State Court Cases first focused on whether there was insurance coverage for the claims of Victims/Survivors. While the issue of insurance coverage was being litigated the taking of depositions was generally prohibited. However, in the case of John Doe 1, et al., the

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Honorable Jean W. DiMotto issued an order permitting depositions of witnesses who are eighty (80) years of age or older (the “DiMotto Order”). Similarly, in the case of Jane Doe 2 & 3, the Honorable Thomas R. Cooper issued an order permitting the depositions of witnesses who are seventy-five (75) years of age or older (the “Cooper Order”). Both the DiMotto Order and the Cooper Order are attached hereto as Group Exhibit A.

3. In the Deposition Motion the Committee (the “Committee”) alleges that “[t]he parties treated the State Court Stay and the ‘cut off’ age for depositions as applying to each of the State Court Cases.” (*Dep. Mot.* ¶ 10) This statement is simply untrue and is a part of a troubling pattern that has emerged in this Reorganization Case. First, technically there never was a “State Court Stay” in the vast majority of the State Court Cases, though the procedural posture of the State Court cases is extremely complicated, and it is true that depositions were not generally permitted in the State Court Cases while the issue of availability of insurance coverage was being determined. Second, and more importantly, the DiMotto Order allowed the taking of depositions in the cases of four (4) Victims/Survivors, and the Cooper Order allowed the taking of depositions in the cases of two (2) Victims/Survivors. These Orders did not allow for the taking of depositions in the State Court Cases of the eleven (11) other Victims/Survivors, nor did the Debtor ever consent to depositions during the State Court Stay not directed by court order.

4. After two of the trial courts where the State Court Cases were pending issued rulings denying that the Archdiocese of Milwaukee had insurance coverage for the claims pending against it, the State Court Cases were consolidated for purposes of appeal. In an opinion filed on November 23, 2010, the District I Wisconsin Appeals Court denied the availability of insurance coverage in the State Court Cases (the “Appeals Court Order Denying Availability of Insurance Coverage”). Shortly thereafter, the Archdiocese filed with the Wisconsin Supreme

Court a petition for review, and that appeal was pending as of the Petition Date. *Doe v. Archdiocese of Milwaukee*, 2010 WI App 164, 794 N.W.2d 666.

### **The Deposition Motion**

5. On May 20, 2011, the Committee filed its Deposition Motion, which asks the Court to allow parties-in-interest (i) to conduct depositions of witnesses who are seventy-five (75) years old or older or are dying and (ii) to move the applicable courts in which the State Court Cases are pending to modify the state court stay to allow for depositions of witnesses who are seventy-five (75) years old or older or are dying, and (iii) to allow "parties-in-interest" to the State Court Cases to file a motion with the applicable state court(s) to modify the State Court Stay to allow depositions of individuals who are seventy (70) years or older.

6. The relief requested in the Deposition Motion should be denied because (i) the Committee is not a proper party to bring the Deposition Motion; (ii) the Committee has not shown cause for the relief it seeks, (iii) contrary to the Committee's assertions the relief sought is unprecedented, (iv) allowing stay relief for depositions would greatly prejudice the Debtor without any benefit to unsecured creditors, and (v) granting relief for depositions would result in significant state court proceedings at a tremendous expense to the Debtor.

#### **I. The Committee is Not a Proper Party to Bring the Deposition Motion**

7. The Committee was appointed in this case as the official representative of all of the unsecured creditors. From the contents of the Deposition Motion, it is clear that the Committee has instead taken on the role of advocate for the plaintiffs in the State Court Cases. While the Committee makes a half-hearted attempt in the Deposition Motion to ask for relief so that the Debtor and other "parties in interest" can take depositions, there are no parties in interest, including the Debtor, that have manifested any interest in taking any deposition in the State Court Cases other than counsel for the plaintiffs in the State Court Cases.

10. The Committee's frequent references to its concern for plaintiffs in the State Court Cases, including its contention that the burden to the Debtor from the relief sought in the Deposition Motion is "outweighed by the harm to plaintiff's", makes plain that the Committee's true allegiance is with the plaintiffs in the State Court Cases, a small sub-group of the unsecured claimants whose interests the Committee is required to represent. (*Dep. Mot.* ¶ 37.)

11. A Committee and its counsel must represent the entire class and cannot represent one part of the class to the detriment of other parts of the class. *In re Dow Corning Corp.*, 255 B.R. 445, 485 (E.D. Mich. 2000) (the fiduciary duty of the Committee extends to the entire class of unsecured creditors, not to its individual members); *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 717, 722 (Bankr. S.D.N.Y. 1992) (committee counsel may not maximize the recovery of certain members of the class to the detriment of other class members); *Matter of Levy*, 54 B.R. 805 (Bankr. S.D.N.Y. 1985) (Committee counsel does "not represent any individual creditors' interest in [a] case; they were retained to represent the entire unsecured creditor class. Therefore, counsel for the creditors' committee do not owe a duty to [a specific creditor] to maximize its interest at the expense of the remaining creditors in the represented class"); 7 COLLIER ON BANKRUPTCY § 1103.05[1][f] (Alan N. Resnick & Henry J. Somme eds., 16<sup>th</sup> ed.) (a committee has a duty to all unsecured creditors not to individual members of the group).

12. The Committee appears to forget that it represents holders of claims, other than the plaintiffs in the State Court Action, including other Victims/Survivors, as well as general unsecured creditors with claims that may total more than \$19 million. Advocating for a particular group of unsecured claims that compete for the Debtor's assets with other unsecured claims is not the Committee's role. It is the role for counsel for the plaintiffs in the State Court Action, who have demonstrated that they have ample means and interest to pursue the specific

claims set forth in the State Court Cases.

## II. The Committee Has Not Shown Cause to Lift the Automatic Stay

13. The following three-part test is commonly used to analyze whether “cause” exists to grant relief from stay pursuant to § 362(d)(1) of the Bankruptcy Code:

- A. whether any great prejudice to either the bankruptcy estate or the debtor will result from the continuation of the civil suit;
- B. whether the hardship to the non-debtor by maintenance of the stay considerably outweighs the hardship of the debtor; and
- C. whether the creditor has a probability of prevailing on the merits.

*Int'l Bus. Mach. v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van. Co.)*, 938 F.2d 731, 735 (7<sup>th</sup> Cir. 1991); *Izzarelli v. Rexene Prods. Co. (In re Rexene Prods. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992), *rev'd on other grounds sub nom. Rexene Corp. v. Seltz*, No. 96-102-SLR, 1996 U.S. Dist. LEXIS 14758 (D. Del. Oct. 2, 1996), *rev'd* 129 F.3d 1256 (3d Cir. 1997) (citing *Fernstrom Storage*, 938 F.2d at 735).

14. Contrary to the Committee’s claim that the Debtor bears the burden of proving that relief from stay should not be granted, “Section 362(d)(1) requires an initial showing of cause by the movant.” *Sonnax Indus., Inc. v. TRI Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1285 (2d Cir. 1990)(emphasis added); *accord Orchard Door Corp. v. Allstar Bldg. Prods, Inc. (In re Allstar Bldg. Prods., Inc.)*, 834 F.2d 898, 900 (11<sup>th</sup> Cir. 1987) (party seeking to have the stay lifted must make a prima facie case that it is entitled to relief); *In re Rexene Prods. Co.*, 141 B.R. at 577 (generally the initial burden is on the moving party to establish a prima facie case for stay relief); *In re Stranahan Gear Co., Inc.*, 67 B.R. 834, 837 (Bankr. E.D. Pa. 1986).

15. The Deposition Motion seeks to depose witnesses seventy (70) years or older, based solely on their age, to reduce the likelihood that a witness should die or become

incapacitated prior to being deposed. The Committee suggests such extraordinary relief is warranted based on the Committee's estimate that of five deceased perpetrators who were ordained from 1965-1979, "only one would be older than 70 years old if he were still alive today." (Dep. Mot. ¶ 42.) This five-person sample size appears quite significant to the Committee, as it is the exclusive grounds for the Committee's argument that relief from the automatic stay is necessary because "a high percentage of perpetrators appear to die at a fairly young age." (Dep. Mot. ¶ 42.) The dubiousness of this argument is plain.

16. While it might be true that the death of a witness would impose a significant burden on certain plaintiffs in the State Court Cases, the Committee has presented no evidence that the death or incapacity of any witness is imminent. Moreover, the Debtor is unaware of any serious illness of any potential witness.

17. A mortality table, such as the one available on the Center for Disease Control's website, which is attached hereto as Exhibit B (the "Mortality Table"),<sup>1</sup> is commonly used by juries in Wisconsin to help determine life expectancy. *See* Wis. J.I. - Civil 1795 (allowing mortality tables to be used as an aid in determining life expectancy); *Donlea v. Carpenter*, 124 Wis.2d 305, 312 (Wis. 1963) (finding "no reason why a court should not take judicial notice of figures based on expectancies computed on the basis of current statistics and published by *responsible government agencies* and include such expectancies in [jury] instructions...").

18. Though the Committee intimates that there is an immediate need take certain depositions, the Mortality Table clearly suggests otherwise. A seventy (70) year old individual has a life expectancy of more than thirteen (13) years and an eighty-four (84) year old, the oldest witness identified by the Committee, has a life expectancy according to the Mortality Table of six (6) years.

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<sup>1</sup> The Mortality Table attached hereto is for white males because all of the witnesses the

19. Insofar as the Committee's real position is that depositions should be allowed to commence notwithstanding the automatic stay because a witness could theoretically die, the Committee's argument would gut the protections of the automatic stay, "one of the most fundamental protections granted the debtor under the bankruptcy Code." *In re Rexene Prods. Co.*, 141 B.R. at 576 (citing *Midlantic Nat'l Bank v. New Jersey Dept. of Env'tl. Prot.*, 474 U.S. 494, 503 (1986)).

20. The Committee cannot satisfy its prima facie burden of showing that cause exists pursuant to 362(d)(1) of the Bankruptcy Code for relief from the automatic stay. When, such as the case here, "the movant fails to make an initial showing of cause . . . the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection." *In re Sonmax Indus., Inc.*, 907 F.2d at 1285.

### **III. The Relief Requested by the Committee Is Unprecedented**

21. Though the Committee's Deposition Motion makes it seem as if it is common for relief from the automatic stay to be granted to permit depositions of individuals solely because of their advanced age, the relief requested in the Deposition Motion is actually without precedent.

22. The Deposition Motion states that "in the bankruptcy case of the Catholic Diocese of Wilmington, Inc. the U.S. Bankruptcy Court for the District of Delaware modified the automatic stay so that the parties in state court sex abuse litigation against the debtor could take depositions of elderly witnesses." (Dep. Mot. ¶ 33.) This characterization is patently false.

23. The motion of the unofficial committee of abuse survivors in Wilmington for stay relief to permit taking of *de bene esse* depositions did not seek to take depositions of individuals based solely on age. (*Mot. of Unofficial Committee of Abuse Survivors for Limited Relief from*

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Committee specifically identifies in its Deposition Motion are white men.

*the Automatic Stay to Permit Taking of De Bene Esse Deps. Pursuant to Mediation*, Case No. 09-13560 (the “Wilmington Deposition Motion”) [Docket No. 27], attached hereto as Ex. C.

24. Instead, the Wilmington Deposition Motion sought to take depositions of “infirm or dying parties and/or witnesses” such as a plaintiff who “is dying of numerous heart and respiratory problems, including congestive heart failure that has left him with 30% heart capacity,” a witness who is “dying of cancer,” and a witness who “suffers from acute lymphoid lymphoma and is currently undergoing intensive inpatient chemotherapy treatment, and will die at any time.” (*Wilmington Dep. Mot.* ¶¶ 5, 10.)

25. The U.S. Bankruptcy Court for the District of Delaware allowed for the taking of *de bene esse* depositions only of witnesses “whose testimony would otherwise imminently be lost due to death or mental or physical impairment.” (*Order Modifying the Automatic Stay to Permit the Taking of De Bene Esse Deps. Subject to Debtor’s Opportunity to Object*, Case No. 09-13560 (the “Wilmington Order”) [Docket No. 282] ¶ 2, attached hereto as Exhibit D.) While many “infirm or dying” parties or witnesses may have been of advanced age, nothing in the Wilmington Order makes age a basis for stay relief.

26. In addition to only allowing for depositions of witnesses whose testimony would otherwise be imminently lost, the Wilmington Order required any party wishing to take a deposition to provide witness medical records showing the proposed witness is infirm or dying and required that the Bankruptcy Court work with the parties to resolve any disputes over whether there was cause for stay relief for any particular witness.

27. Most of the remaining cases cited in the Committee’s Deposition Motion are inapplicable to the relief sought herein; they involve creditors seeking to litigate the issue of liability so that they can recover from the debtor’s insurer, not the debtor. *In re Fernstrom Storage & Van Co.*, 938 F.2d 731 (7<sup>th</sup> Cir. 1991); *In re Winterland*, 101 B.R. 547 (Bankr. C.D.



Ill. 1988); *cf. In re Bock Laundry Mach. Co.*, 37 B.R. 564 (Bankr. N.D. Ohio 1984) (creditor was primarily seeking to recover from the debtor's insurer, though some recovery against the debtor was possible). In these insurance cases, especially where the expense of defending against a creditors claim rests with the insurer, courts often will grant relief from stay to allow a creditor to recover from an insurer without delay. These rulings in no way address the type of relief sought in the Deposition Motion.

**IV. There Is No Basis for the Relief the Committee Seeks**

28. Even if the Committee had carried its prima facie burden of showing there was cause for relief from stay, the Deposition Motion should still be denied because great prejudice to the Debtor and its bankruptcy estate would result from the premature taking of depositions, and the hardship to the Debtor in needing to prepare for and defend the depositions is significant, without any countervailing benefit to creditors.

29. The Debtor estimates that if the Deposition Motion is granted the Committee will attempt to take the depositions of ten (10) or more individuals, and the Debtor's cost of defending such depositions and paying for Committee's counsel's preparation for and participation in such depositions would likely be between \$25,000-\$35,000 per deposition, funds that otherwise would likely be available for distribution to creditors.

30. Until all parties with claims against the Debtor have presented themselves (which will occur no earlier than the passing of any claims bar date established for this Reorganization Case), new Victim/Survivors may file claims and contend that they also have the right to depose the same witnesses.<sup>2</sup> To prevent the serial deposing of the same witnesses, which would be

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<sup>2</sup> The Debtor is already aware of two lawyers, other than lawyers for the plaintiffs in the State Court Cases, who represent current or potential claimants.

expensive for the Debtor and burdensome to the witnesses, this Court should not allow any depositions to occur until all interested parties can be noticed and given the option to participate.

31. Furthermore, the Deposition Motion stands the relationship between the bankruptcy court and state courts on its head. The Bankruptcy Code embodies Congress' intent to let the bankruptcy courts determine the extent of the claims against the Debtor and the size of the Debtor's estate. Here, the Committee proposes to conduct depositions which the Debtor believes will prove completely unnecessary. For example, if the Debtor does not object to Victims'/Survivors' claims, discovery related thereto would be made unnecessary, or, if the Debtor or the Committee in the exercise of its fiduciary duty successfully challenges the claims of Victims/Survivors based on the expiration of the statute of limitations or on other grounds, the taking of certain depositions will be similarly unnecessary. Even if depositions prove necessary, the Debtor will suffer great prejudice if forced to defend depositions before all claims against it have been filed because the Debtor's deposition response is dependent in large part on the number and type of claims against it.

32. Because the claims pool and assets pool in this case are either unknown or undetermined at this point, the provisions of a plan of reorganization are still in the incubator. It is entirely possible that the parties will follow other multiple tort cases where the claims are not liquidated at all, but determined by a claims master who will allocate a pool of assets toward the claims. This is a concept offered for consideration by the Committee in the past and it is therefore surprising that at this time the Committee would seek to begin the claims adjudication process.

33. Finally, while there may be some limited benefit to certain plaintiffs in the State Court Cases if the Deposition Motion is granted, the vast majority of the Debtor's creditors, including Victims/Survivors that are not party to the State Court Cases, and the Debtor's non-

Victim/Survivor creditors, would be greatly harmed by the diminution in value of the Debtor's estate that would result from the premature and potentially unnecessary taking of depositions.

V. **The State Court Proceedings that Would Result from a Grant of Stay Relief Would Greatly Diminish the Debtor's Estate and Reduce the Potential Recovery of Unsecured Creditors**

34. If the Deposition Motion is granted, a tremendous amount of litigation involving the Debtor in state court would need to be resolved before any depositions could be taken. The cost of this litigation would be in addition to the costs of the depositions mentioned in paragraph 30 above.

35. A party cannot simply notice a deposition in a case in which an appeal has been taken because once an appeal has been filed the trial court loses jurisdiction over the case. Wis. Stat. § 808.075.

36. Instead, in each of the State Court Cases, a party-in-interest would need to file and serve on the parties and deponent a motion for leave to take a deposition for the reason of perpetuation of testimony, pursuant to the provisions of Wis. Stat. § 804.02(2). Only if the trial courts find that the taking of depositions is necessary to avoid "a failure or delay of justice" will the motions be granted. Wis. Stat. § 804.02(c). This bar will be difficult to meet, especially in the cases of the eleven (11) Victims/Survivors for which no prior order was entered allowing for depositions.

37. Additionally, a motion to take depositions in each State Court Case would likely be opposed by the several insurers involved in those cases. The insurers presumably will not want to spend money on discovery prior to the Supreme Court's determination of whether to hear the Debtor's appeal of the Appeals Court Order Denying Availability of Insurance Coverage. To protect its interests the Debtor would need to be an active participant in these proceedings, resulting in a significant diversion of resources away from the Reorganization Case.

38. Furthermore, pending as of the Petition Date was a motion for protective order (the “Motion for Protective Order”) in the cases of Jane Doe 2 & 3. The hearing of the Motion for Protective Order was delayed at the request of counsel for Jane Doe 2 & 3, and prior to any deposition being conducted, the significant arguments raised in his Motion for Protective Order would need to be addressed. The Debtor would have an interest in these proceedings and would be forced to expend resources supporting the relief sought in any motions for protective orders, because these motions would likely benefit the Debtor and its creditors. Furthermore, numerous other witnesses may seek similar protective orders, resulting in additional state court litigation.

#### Conclusion

39. The Committee has not made a prima facie case for the relief it seeks in the Deposition Motion; a potential witness being seventy (70) years or older, standing alone, is simply insufficient reason for relief from the automatic stay to take depositions.

40. The expense to the Debtor of defending depositions at this time would be a tremendous waste of its assets given that (i) the Debtor and its creditors may eventually agree on a reorganization plan that would not require the taking of depositions, (ii) many Victims/Survivors who may wish to participate in the depositions of witnesses have not yet received notice of this Reorganization Case, and the premature taking of depositions therefore could result in certain witnesses being subject to multiple depositions, posing a significant burden on the witnesses and the Debtor, and (iii) the extent of the claims against the estate are unknown, making it difficult for the Debtor to determine a deposition response.

41. The estate’s limited resources would be further diminished if the Deposition Motion is granted because the Debtor will need to represent its interest in the motions that would be brought in state court for the taking of depositions pursuant to Wis. Stat. § 804.02(c) and any motions brought by witnesses for the issuance of protective orders.

For the reasons set forth above, the relief sought by the Committee in the Deposition Motion should be denied.

Dated this 3<sup>rd</sup> day of June, 2011.

ARCHDIOCESE OF MILWAUKEE  
Debtor and Debtor-in-Possession  
by its counsel,  
Whyte Hirschboeck Dudek S.C.

By: /s/ Daryl L. Diesing

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# **GROUP EXHIBIT A**

STATE OF WISCONSIN

CIRCUIT COURT

COUNTY OF MILWAUKEE

JOHN DOE I, et al.

Case No.: 05-CV-1331

Plaintiffs,

vs.

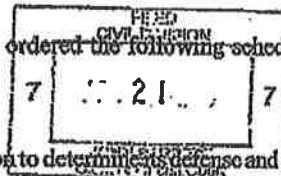
ARCHDIOCESE OF MILWAUKEE,

Defendant.

**ORDER ON SCHEDULING CONFERENCE**

On April 2, 2008 the Court held a scheduling conference in the above consolidated cases. Appearing on behalf of Plaintiffs were Attorneys Jeff Anderson, Michael Finnegan and Kevin Henderson. Appearing on behalf of Defendant Archdiocese of Milwaukee was Attorney John Rothstein. Appearing on behalf of intervening party and movant, Commercial Union Insurance Company, was Attorney Phillip Tallmadge. Appearing on behalf of other non-party interested persons were Attorneys Pamela Tillman on behalf of TIG Insurance Co., Jason Frankowiak on behalf of Fireman's Fund Ins. Co., and Dale Kurth on behalf of American Motorist Insurance Company. The conference was conducted simultaneously with a scheduling conference in Case No. 2007-CV-8390 which is also pending before this Branch.

After inviting the comments of counsel, the Court ordered the following scheduling and provisions.



1. Intervening party Commercial Union's motion to determine its defense and indemnity insurance obligations for these cases will be orally argued on August 14, 2008 at 10:00 a.m. In connection with the motion, Commercial Union will file its brief and supporting papers on June 9,

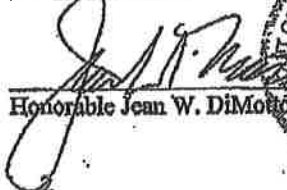
2008. All parties wishing to oppose or comment on the motion shall file their responding briefs and papers on July 9, 2008. Thereafter, Commercial Union shall have until July 31, 2008 to file a final rebuttal brief.

2. Notwithstanding the objections of Commercial Union and the Archdiocese concerning respectively its burden of defense costs and the latter's risk of prejudice, until such time as the Court orders otherwise, plaintiffs shall be given a right to conduct limited discovery on the merits of the underlying cases. Specifically, plaintiffs shall be permitted to depose those witnesses of the Archdiocese of Milwaukee who are 80 years of age or older, to preserve testimony. To avoid the need for repeat depositions later on, during the deposition of any such limited persons, the deponent(s) may be questioned not only as to matters pertaining to plaintiffs' pending claim of fraud, but also on any potentially contingent assertions of negligent failure to warn. The Court is aware that the Wisconsin Supreme Court has already heard arguments on the viability of a theory for negligent failure to warn and is expected to issue a decision on that matter before its normal annual summer recess. Apart from the foregoing approved depositions, no other discovery shall be conducted at this time pending the further order of the Court or by the mutual consent of the parties.

3. Immediately following the hearing on Commercial Union's motion on August 14, 2008, a further scheduling conference will be held with all counsel to discuss the scheduling of the remainder of these cases.

Dated this 21<sup>st</sup> day of April, 2008.

BY THE COURT:

  
Honorable Jean W. DiMotto





STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

JANE DOE 2 AND JANE DOE 3,

FILED  
CIVIL DIVISION

Plaintiffs,

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NOV 23 2009

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v.

Case No.: 07-CV-10888

Case Code: 30107

ARCHDIOCESE OF MILWAUKEE AND  
DIOCESE OF SIOUX FALLS,

JOHN BARRETT  
Clerk of Circuit Court

Defendants.

**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT AND MOTION FOR RECONSIDERATION**

WHEREAS, Defendants Archdiocese of Milwaukee and Diocese of Sioux Falls filed Motions for Summary Judgment in the above-referenced matter;

WHEREAS, the Court held a hearing on these motions on June 16, 2009, with counsel for all parties and Intervening Defendant Commercial Union Insurance Company present;

WHEREAS, Defendant Diocese of Sioux Falls filed a Motion for Reconsideration that was joined by the Archdiocese of Milwaukee;

WHEREAS, the Court held a hearing on the Motion for Reconsideration on October 27, 2009, with counsel for all parties and Intervening Defendant Commercial Union Insurance Company present;

NOW, THEREFORE, the Court having reviewed the file and pleadings in this matter and being advised of the same, and for the reasons stated on the record on June 16, 2009 and October 27, 2009, it is hereby ordered as follows:

1. Defendants' Motions for Summary Judgment are hereby DENIED.
2. Defendant Sioux Falls' Motion for Reconsideration, joined by Defendant Archdiocese of Milwaukee, is hereby DENIED.

QB9086443.1

AOM-APP 1

3. Discovery in this matter is stayed pending further order of the Court except that Plaintiffs shall be permitted to depose those witnesses who are 75 years of age or older to preserve testimony.

Dated this 23 day of March 2009.



BY THE COURT:

*Thomas R. Cooper*  
The Honorable Thomas R. Cooper  
Milwaukee County Circuit Court Judge

QB9086443.1

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AOM-APP 2

# **EXHIBIT B**

Table 5. Life table for white males: United States, 2006

Age	Probability of dying between ages $x$ to $x + 1$	Number surviving to age $x$	Number dying between ages $x$ to $x + 1$	Person-years lived between ages $x$ to $x + 1$	Total number of person-years lived above age $x$	Expectation of life at age $x$
	$q_x$	$l_x$	$d_x$	$L_x$	$T_x$	$e_x$
0-1	0.006119	100,000	612	99,462	7,566,361	75.7
1-2	0.000398	99,388	40	99,368	7,466,899	75.1
2-3	0.000296	99,349	29	99,334	7,367,531	74.2
3-4	0.000227	99,319	22	99,308	7,268,197	73.2
4-5	0.000182	99,297	18	99,288	7,168,889	72.2
5-6	0.000171	99,279	17	99,270	7,069,601	71.2
6-7	0.000161	99,262	16	99,254	6,970,331	70.2
7-8	0.000148	99,246	15	99,238	6,871,078	69.2
8-9	0.000127	99,231	13	99,225	6,771,839	68.2
9-10	0.000100	99,218	10	99,213	6,672,615	67.3
10-11	0.000079	99,208	8	99,205	6,573,401	66.3
11-12	0.000082	99,201	8	99,197	6,474,197	65.3
12-13	0.000132	99,192	13	99,186	6,375,000	64.3
13-14	0.000240	99,179	24	99,167	6,275,814	63.3
14-15	0.000390	99,155	39	99,136	6,176,647	62.3
15-16	0.000549	99,117	54	99,090	6,077,511	61.3
16-17	0.000699	99,062	69	99,028	5,978,421	60.4
17-18	0.000846	98,993	84	98,951	5,879,393	59.4
18-19	0.000986	98,909	98	98,861	5,780,442	58.4
19-20	0.001115	98,812	110	98,757	5,681,581	57.5
20-21	0.001250	98,702	123	98,640	5,582,824	56.6
21-22	0.001374	98,578	135	98,511	5,484,184	55.6
22-23	0.001449	98,443	143	98,372	5,385,674	54.7
23-24	0.001462	98,300	144	98,229	5,287,302	53.8
24-25	0.001428	98,157	140	98,087	5,189,073	52.9
25-26	0.001377	98,017	135	97,949	5,090,987	51.9
26-27	0.001335	97,882	131	97,816	4,993,038	51.0
27-28	0.001304	97,751	127	97,687	4,895,221	50.1
28-29	0.001294	97,624	126	97,560	4,797,534	49.1
29-30	0.001303	97,497	127	97,434	4,699,974	48.2
30-31	0.001322	97,370	129	97,306	4,602,540	47.3
31-32	0.001345	97,241	131	97,176	4,505,234	46.3
32-33	0.001382	97,111	134	97,044	4,408,058	45.4
33-34	0.001417	96,976	137	96,908	4,311,015	44.5
34-35	0.001469	96,839	142	96,768	4,214,107	43.5
35-36	0.001530	96,697	148	96,623	4,117,339	42.6
36-37	0.001610	96,549	155	96,471	4,020,716	41.6
37-38	0.001721	96,393	166	96,311	3,924,245	40.7
38-39	0.001866	96,228	180	96,138	3,827,934	39.8
39-40	0.002046	96,048	197	95,950	3,731,796	38.9
40-41	0.002241	95,851	215	95,744	3,635,847	37.9
41-42	0.002445	95,637	234	95,520	3,540,103	37.0
42-43	0.002670	95,403	255	95,275	3,444,583	36.1
43-44	0.002915	95,148	277	95,009	3,349,308	35.2
44-45	0.003177	94,871	301	94,720	3,254,298	34.3
45-46	0.003449	94,569	326	94,406	3,159,578	33.4
46-47	0.003735	94,243	352	94,067	3,065,172	32.5
47-48	0.004045	93,891	380	93,701	2,971,105	31.6
48-49	0.004393	93,511	411	93,306	2,877,404	30.8
49-50	0.004782	93,101	445	92,878	2,784,098	29.9
50-51	0.005211	92,655	483	92,414	2,691,220	29.0
51-52	0.005668	92,173	522	91,911	2,598,806	28.2
52-53	0.006137	91,650	562	91,369	2,506,895	27.4
53-54	0.006593	91,088	601	90,787	2,415,526	26.5
54-55	0.007037	90,487	637	90,169	2,324,738	25.7
55-56	0.007487	89,850	673	89,514	2,234,589	24.9
56-57	0.007974	89,178	711	88,822	2,145,055	24.1
57-58	0.008521	88,467	754	88,090	2,056,233	23.2
58-59	0.009179	87,713	805	87,310	1,968,143	22.4
59-60	0.009973	86,908	867	86,474	1,880,833	21.6
60-61	0.010930	86,041	940	85,571	1,794,359	20.9
61-62	0.012013	85,100	1,022	84,589	1,708,788	20.1
62-63	0.013165	84,078	1,107	83,525	1,624,199	19.3
63-64	0.014293	82,971	1,186	82,378	1,540,674	18.6
64-65	0.015396	81,785	1,259	81,156	1,458,296	17.8
65-66	0.016598	80,526	1,336	79,858	1,377,140	17.1
66-67	0.017847	79,190	1,413	78,483	1,297,282	16.4

Table 5. Life table for white males: United States, 2006—Con.

Age	Probability of dying between ages $x$ to $x + 1$	Number surviving to age $x$	Number dying between ages $x$ to $x + 1$	Person-years lived between ages $x$ to $x + 1$	Total number of person-years lived above age $x$	Expectation of life at age $x$
	$q_x$	$l_x$	$d_x$	$L_x$	$T_x$	$e_x$
67-68	0.019290	77,777	1,500	77,026	1,218,799	15.7
68-69	0.020954	76,276	1,598	75,477	1,141,772	15.0
69-70	0.022866	74,678	1,708	73,824	1,066,295	14.3
70-71	0.025004	72,970	1,825	72,058	992,471	13.6
71-72	0.027456	71,146	1,953	70,169	920,413	12.9
72-73	0.030320	69,192	2,098	68,143	850,244	12.3
73-74	0.033597	67,095	2,254	65,967	782,101	11.7
74-75	0.037249	64,840	2,415	63,633	716,133	11.0
75-76	0.041289	62,425	2,577	61,136	652,501	10.5
76-77	0.045637	59,848	2,731	58,482	591,364	9.9
77-78	0.050419	57,116	2,880	55,676	532,882	9.3
78-79	0.055672	54,237	3,019	52,727	477,206	8.8
79-80	0.061438	51,217	3,147	49,644	424,479	8.3
80-81	0.067757	48,070	3,257	46,442	374,835	7.8
81-82	0.074675	44,813	3,346	43,140	328,393	7.3
82-83	0.082238	41,467	3,410	39,782	285,253	6.9
83-84	0.090491	38,057	3,444	36,335	245,491	6.5
84-85	0.099482	34,613	3,443	32,891	209,156	6.0
85-86	0.109259	31,170	3,406	29,467	176,265	5.7
86-87	0.119870	27,764	3,328	26,100	146,798	5.3
87-88	0.131359	24,436	3,210	22,831	120,698	4.9
88-89	0.143769	21,226	3,052	19,700	97,867	4.6
89-90	0.157140	18,174	2,856	16,746	78,167	4.3
90-91	0.171505	15,318	2,627	14,005	61,421	4.0
91-92	0.186892	12,691	2,372	11,505	47,416	3.7
92-93	0.203321	10,319	2,098	9,270	35,910	3.5
93-94	0.220802	8,221	1,815	7,314	26,640	3.2
94-95	0.239334	6,406	1,533	5,639	19,326	3.0
95-96	0.258905	4,873	1,282	4,242	13,687	2.8
96-97	0.279489	3,611	1,009	3,107	9,445	2.6
97-98	0.301044	2,602	783	2,210	6,338	2.4
98-99	0.323515	1,819	588	1,524	4,128	2.3
99-100	0.346831	1,230	427	1,017	2,604	2.1
100 and over	1.00000	804	804	1,587	1,587	2.0

# EXHIBIT C

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
THE CATHOLIC DIOCESE OF	)	
WILMINGTON	)	Case No. 09-13560 (CSS)
	)	
Debtor.	)	Hearing Date: To Be Determined
	)	Objections Due: To Be Determined

**MOTION OF UNOFFICIAL COMMITTEE OF ABUSE SURVIVORS  
FOR LIMITED RELIEF FROM THE AUTOMATIC STAY TO PERMIT TAKING  
OF DE BENE ESSE DEPOSITIONS PURSUANT TO MEDIATION ORDER**

The Unofficial Committee of Abuse Survivors, by and through its undersigned counsel, hereby moves pursuant to Section 362 of Title 11 of the United States Code (the "Bankruptcy Code"), Rules 4001(a) and 9014 of the Federal Rules of Bankruptcy Procedure and Rule 4001-1 of the Local Rules of Bankruptcy Procedure for the entry of an order modifying the automatic stay with respect to the litigation pending in the Superior Court of the State of Delaware ("Clergy Sexual Abuse Cases") involving debtor and debtor-in-possession The Catholic Diocese of Wilmington (the "Diocese"), solely to allow the parties to take *de bene esse* depositions to perpetuate the testimony of infirm or dying parties and/or witnesses as ordered by the Delaware Superior Court in its *Alternative Dispute Resolution Order*, entered October 7, 2009 (the "Mediation Order"). In support of this motion, the Committee respectfully states as follows:

**Jurisdiction and Venue**

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, Rule 9024 of the Federal Rules of Bankruptcy Procedure, and Rule 60(b)(6) of the

Federal Rules of Civil Procedure. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b).

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief requested is Section 362(d) of the Bankruptcy Code.

### Background

3. The Catholic Diocese of Wilmington ("the Diocese"), which was established in 1868, encompasses the state of Delaware and the Eastern Shore region of Maryland. It consists of 57 parishes, 20 missions, and 39 elementary and secondary schools and serves a population of about 215,000 registered Catholics with 77 deacons and 119 priests.

4. The purpose of this bankruptcy case is to address the Diocese's liabilities for child sexual abuse perpetrated by priests or others for whom the Diocese was responsible. The Diocese has acknowledged that priests or volunteers sexually assaulted children over a period of more than three decades, engaging in such acts as exposing themselves, genital touching and fondling over and under clothing, oral sex, child rape including vaginal penetration and sodomy. More than 175 lawsuits, involving at least 190 victims have been filed and are pending in the Delaware Superior Court under the Child Victim's Act, 10 Del. C. § 8145(b).<sup>1</sup> In addition, a small number of cases are pending before Judge Robinson in the United States District Court for the District of Delaware.

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<sup>1</sup> The abuse was widespread. Lawsuits have been filed against the Diocese and/or Parishes based on allegations of abuse by Rev. Francis G. DeLuca, Rev. Edward B. Carley, Leonard J. Mackiewicz, Rev. Walter D. Power, Rev. Eugene F. Clarahan, Rev. Edward F. Dudzinski, Rev. Alfred J. Lind, Rev. Harry P. Weaver, Rev. Carmen D. Vignola, Rev. William E. Irwin, Rev. James E. Richardson, Rev. Henry J. Dreyer, Rev. Francis O'Brien, Rev. Francis P. Cornely, Rev. Douglas W. Dempster, Rev. Peter Paul Harney, Rev. Joseph A. McGovern, Rev. James W. O'Neill, Rev. Francis L. Norris, Rev. Harold Heirmley, Rev. John X. Harvey, Rev. Gerald M. Dunne, Rev. John Heckel, Rev. Dennis W. Killion, Rev. John A. Gilvey, Rev. Albert J. Gondek, Rev. Edward J. Smith, Rev. Vincent Freiberg, and Rev. Robert M. Schmidt.



5. As the abuse alleged in the Clergy Sexual Abuse Cases dates back to the 1950's, many plaintiffs and key fact witnesses are elderly and frail, and several have severe health problems that will impede the ability to obtain their testimony, particularly in view of the delay occasioned by this bankruptcy case. These include:

a. *Sheehan v. Oblates*, C.A.No. 07C-11-234-CLS (Del.Super.).

Plaintiff Jimmy Sheehan is dying of numerous heart and respiratory problems, including congestive heart failure that has left him with 30% heart capacity. Judge Scott has given him an expedited trial date of November 16, 2009.

b. *Heaney v. Diocese*, C.A.No. 08C-11-097-CLS (Del.Super.). Barry

Lamb, key witness in this case and a plaintiff in C.A.No. 09C—06-187-CLS (Del.Super.) is dying of cancer. Judge Scott has indicated that the deposition should go forward, but it has not yet taken place.

c. *Dougherty v. St. Ann's Roman Catholic Church*, C.A.No. 09C-06-

141-CLS (Del.Super.). Plaintiff and key fact witness John Dougherty suffers from acute lymphoid lymphoma and is currently undergoing intensive inpatient chemotherapy treatment, and will die at any time.

6. Courts have granted requests for the expedited scheduling of trials for seriously ill plaintiffs. In federal district court, Judge Robinson granted an expedited trial in *Quill v. Diocese*, C.A.No. 07-435-SLR (D.Del.), due to plaintiff Robert Quill's life threatening health conditions, and the case settled. In *McClure v. Diocese*, C.A.No. 06C-12-235-CLS (Del.Super.), Judge Scott ordered that a deposition be held to perpetuate testimony, before the case settled. Seventeen cases, involving twenty victims (including the *Sheehan* case referenced

above), have been scheduled for trial from October 2009 through October 2010. The Diocese and Roman Catholic parishes are defendants in 131 of the remaining, unscheduled cases, involving 142 victims (the "Unscheduled Cases").

7. On October 7, 2009, Superior Court Judge Calvin L. Scott, Jr. issued the Mediation Order in the proceedings entitled *In re: Child Victim's Act Litigation* (a copy of which is attached hereto as Exhibit A). In summary, it provides the following:

a. The Unscheduled Cases are stayed until February 19, 2010, except as provided, including (i) all motion practice, (ii) all discovery, and (iii) all response deadlines.

b. During the stay period, Defendants shall produce all non-privileged documents for use in mediation (i) concerning the alleged abuser, (ii) reflecting any sexual abuse policies from 1952-present, and (iii) concerning the plaintiff in that case.

c. Plaintiffs shall produce (i) documents concerning the plaintiff, (ii) documents concerning the alleged abuser, (iii) names and addresses of each plaintiff's educational institutions, employers and healthcare providers, with consents, and (iv) an unsworn statement concerning the details of plaintiff's abuse and general damages.

d. The court will issue a confidentiality order governing the document production regarding medical records, financial information and the identities of nonparty victims.

e. Defendants shall provide certain information regarding insurance coverage.

f. All parties shall disclose the identities of all person who have been interviewed.

g. A mediation shall be conducted, commencing on or before January 15, 2010.

h. Plaintiffs may conduct trial depositions of any infirm or dying witness in any case. Such witnesses are to be identified and a schedule proposed by October 23, 2009. Any party may also conduct a *de bene esse*<sup>2</sup> or trial deposition of any infirmed or dying plaintiff or witness.

8. Plaintiffs have identified several persons for whom they contend *de bene esse* depositions are essential to obtain the testimony of sick or dying plaintiffs and/or witnesses: William Fleming, John Coe # 1, John Coe # 7, Barry Lamb, and Fr. Oscar Frundt.

9. On October 18, 2009, the Diocese filed its voluntary petition under chapter 11 of the Bankruptcy Code, thereby staying further proceedings in the Clergy Sexual Abuse Cases pursuant to section 362 of the Bankruptcy Code.

#### **Relief Requested**

10. The Committee respectfully requests that this Court enter an order modifying the automatic stay in this chapter 11 case solely to allow the parties to the Clergy Sexual Abuse Cases to take *de bene esse* depositions to perpetuate the testimony of infirm or dying parties and/or witnesses on the terms set forth in the Mediation Order, or as permitted in the cases pending before Judge Robinson.

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<sup>2</sup> "De bene esse" means "provisionally," and refers to the right to use the deposition in the event of the absence of the witness at the time of the trial. It is applicable in situations such as this where witnesses may become unavailable due to death or sickness. See *In re Asbestos Litigation*, 492 A.2d 256 (Del.Super. 1985). "In the context of asbestos litigation where the protracted and complex nature of the litigation is coupled with the fact that plaintiff deponents may be sufferers of life-consuming asbestos-related diseases, the nature of the deposition testimony, of necessity, takes on the character of *de bene esse* testimony. See generally Woolley on Delaware Practice § 583 (1906)." *Id.* at 257.

**Basis for Relief**

11. Section 362 of the Bankruptcy Code provides, in pertinent part, that:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if-

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

11 U.S.C. § (d).

12. What constitutes "cause" for relief from the automatic stay is not defined in the Bankruptcy Code. Consequently, a bankruptcy court must decide what constitutes "cause" on a case-by-case basis. *In re Mid-Atlantic Handling Systems, LLC*, 304 B.R. 111 (Bankr. D. N.J. 2003); *In re Rexene Products Company*, 141 B.R. 574, 576 (Bankr. D. Del. 1992) ("*Rexene Products*") (citing *In re Fernstrom Storage and Van Co.*, 938 F.2d, 731, 735 (7th Cir. 1991)).

13. The legislative history of section 362(d)(1) provides: The lack of adequate protection of an interest in the property of the party requesting relief from the automatic stay is one cause for relief, but it is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include any lack of any connection with or interference with the pending bankruptcy case.

H.R. Rep. No. 950595, 95th Cong., 1st Sess. 343-4 S.R. Rep. No. 95-989, 95th Cong., 2d Sess. 52-3 (1976); *Rexene Products*, 141 B.R. at 576. Significantly, it is the debtor or trustee, not the creditor, who has the burden of proof. The debtor or trustee must show the absence of cause to prevent the lifting of the stay. 11 U.S.C. § 362(g).

14. In *Rexene Products*, the court held that the following test should be used to decide whether relief from the automatic stay should be granted for cause to permit the continuation of a proceeding:

- a. Whether any great prejudice to either the bankruptcy estate or the debtor will result from continuation of the civil suit,
- b. Whether the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor, and
- c. Whether the creditor has a probability of prevailing on the merits.
- d. *Rexene Products*, 141 B.R. at 576 (internal citations omitted); *In re W.R. Grace & Co.*, 2007 WL 1129170, \*2 (Bankr. D. Del. 2007); In this instance, the *Rexene Products* test heavily favors Sheehan's request for modification of the automatic stay.

15. The first prong of the *Rexene Products* test is satisfied because the Diocese will not experience any great prejudice if this motion is granted. There are only a small number of persons for whom *de bene esse* depositions are needed. Diocesan personnel and resources would not be overly taxed or distracted by its counsel's participation in depositions.

16. The corresponding hardship to claimants considerably outweighs the negligible prejudice to the Diocese. If this case follows in the mold of previous diocesan bankruptcy cases, the Diocese will seek to maintain in effect for as long as possible the stay on

all proceedings in the Clergy Sexual Abuse Cases, while it negotiates with its insurance carriers and attempts to stave off determinations concerning what church property constitutes property of its bankruptcy estate. In the meantime, plaintiffs and witnesses will die. Past experience in diocesan bankruptcies indicates that granting relief from the automatic stay provides an essential impetus toward reorganization, as insurers have little incentive to negotiate meaningfully with the dioceses or claimants so long as the stay remains in effect. The depositions pursuant to the Mediation Order can also provide guidance on liability and damage issues that can facilitate settlement in other cases. Whatever minor prejudice the Diocese incurs by participating in a limited number of depositions is more than counter-balanced by these positive effects on the case.

17. Finally, the third prong in the *Rexene Products* test appears inapplicable to this motion, which seeks only limited relief from the stay relating to discovery, rather than to permit cases to go to trial. In any event, this prong requires only a minimal showing that the claimant has a likelihood of prevailing on the merits. *Rexene Products*, 141 B.R. at 578. The claims in the Clergy Sexual Abuse Litigation clearly satisfy any such requirement, based merely on the plaintiffs' testimony and the admissions of the Diocese.

18. Relief from stay to permit depositions for the perpetuation of testimony of sick and dying witnesses was approved by the Court in *W.R. Grace & Co.*

I think what I'm going to do is have another administrative order entered. So, I will ask the parties to simply get together to address so that it will apply to anyone who wants preservation of testimony until plan confirmation. And it can simply layout the procedures whereby a motion that complies with Rule 27(c) must be filed along with the copies of the medical evidence that are going to be used to support the motion, that there must be an allegation by counsel that he has interviewed the client and believes that it's

necessary to go forward with the deposition for whatever reasons counsel feels are appropriate in addition to the medical criteria that are set forth.

*In re W.R. Grace & Co.*, Case No. 01-01139 (Bankr. D. Del.), transcript of 8/23/04 hearing (doc. no. 6266) at p. 73:8-20, as referenced in *In re W.R. Grace & Co.*, 386 B.R. 17, 35-36 (Bankr. D. Del. 2008). Here, rather than creating new procedures and an extra layer of supervision by a court unfamiliar with the Clergy Sexual Abuse Cases, the Committee submits that this Court should simply grant relief from stay to permit the procedure and resolution of any disputes concerning such depositions to the courts in which the cases are pending.

*[Remainder of Page Intentionally Left Blank]*

**Conclusion**

WHEREFORE, for the reasons set forth herein, the Committee respectfully requests that this Court (i) enter an order modifying the automatic stay as attached hereto and (ii) grant such other and further relief as this Court deems just and proper.

Dated: October 20, 2009

THE NEUBERGER FIRM, P.A.

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*Attorneys for the Unofficial Committee of Abuse Survivors*



# EXHIBIT D

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
THE CATHOLIC DIOCESE OF WILMINGTON, INC.,	)	Case No. 09-13560 (CSS)
Debtor.	)	Ref. Docket No. 27

**ORDER MODIFYING THE AUTOMATIC STAY TO PERMIT  
THE TAKING OF DE BENE ESSE DEPOSITIONS  
SUBJECT TO DEBTOR'S OPPORTUNITY TO OBJECT**

Upon consideration of the motion (the "Motion")<sup>1</sup> of the Unofficial Committee of Abuse Survivors ("Unofficial Committee"), pursuant to Section 362 of Title 11 of the United States Code (the "Bankruptcy Code"), Rules 4001(a) and 9014 of the Federal Rules of Bankruptcy Procedure, and Rule 4001-1 of the Local Rules of Bankruptcy Procedure, for the entry of an order (this "Order") modifying the automatic stay to permit the taking of *de bene esse* depositions; the Response of the above-captioned debtor and debtor-in-possession (the "Debtor") thereto; the arguments presented by the Unofficial Committee and the Debtor at the Court's November 2, 2009 hearing; notice of the Motion having been adequate and appropriate under the circumstances; and after due deliberation and sufficient cause appearing therefore:

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:**

1. The Motion is granted as set forth herein.
2. A party (the "Requesting Party") who wishes to take the *de bene esse* deposition of a witness in the underlying State Court Litigation whose testimony would otherwise

<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

imminently be lost due to death or mental or physical impairment shall provide the Debtor with the following:

- a) A written notice of the intent to take the deposition ("Written Notice");
- b) A written statement of the basis for requesting the deposition ("Statement of Basis"); and
- c) Documents in support of the party's Statement of Basis for requesting the deposition ("Supporting Documents"). The Supporting Documents must evidence the need for the deposition to be taken in order to immediately preserve the witness' testimony.

3. The Debtor will respond, in writing, to the Requesting Party no more than 5 business days after receipt of the Supporting Documents. If the Debtor does not respond to the Requesting Party within 5 business days of the receipt of the Supporting Documents, the deposition will go forward as noticed.

4. If the Debtor responds in accordance with the terms prescribed in Paragraph 3 above, but the Requesting Party and the Debtor cannot reach agreement as to whether the requested deposition will go forward, or there is a dispute between the parties as to any other issue with respect to the requested deposition, the parties will contact the Court to seek resolution of the disputed issue(s).

5. Nothing in this Order shall impair the rights of any witness under the applicable law to oppose the taking of his or her deposition, either in this Court, or any other Court where the witness' rights may be implicated.

6. The Court retains jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

Dated: Wilmington, Delaware  
January 26 2010



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THE HONORABLE CHRISTOPHER S. SONTCHI  
UNITED STATES BANKRUPTCY JUDGE