

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

---

**In re:**

**ARCHDIOCESE OF MILWAUKEE,**

**Debtor.**

**Case No. 11-20059-svk**

**Chapter 11**

**Hon. Susan V. Kelley**

---

**RESPONSE OF THE DEBTOR TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' PARTIAL OPPOSITION TO DEBTOR'S MOTION FOR AN ORDER PURSUANT TO SECTION 363(b) OF THE BANKRUPTCY CODE TO (1) CONTINUE PAYING CERTAIN PSYCHOLOGICAL COUNSELING AND THERAPY FOR VICTIMS/SURVIVORS, (2) HONOR CERTAIN PRE-PETITION SETTLEMENT AGREEMENTS, AND (3) PARTICIPATE IN VOLUNTARY MEDIATIONS WITH TWO VICTIMS/SURVIVORS AND PAY ANY COSTS INCIDENT THERETO**

---

The Archdiocese of Milwaukee, Debtor and Debtor-in-Possession ("Debtor" or "Archdiocese"), hereby submits this response (the "Response") to the Partial Opposition (the "Opposition") of the Official Committee of Unsecured Creditors (the "Committee") to Debtor's Motion pursuant to 11 U.S.C. § 363(b) for the entry of an order authorizing Debtor to (1) continue paying for certain psychological counseling and therapy for Victims/Survivors, (2) honor certain pre-petition settlement agreements, and (3) participate in voluntary mediations with two victims/survivors and pay any costs incident thereto (the "Care for Victims/Survivors Motion"), and states as follows:

Daryl L. Diesing  
Bruce G. Arnold  
Michael E. Gosman  
WHYTE HIRSCHBOECK DUDEK S.C.  
555 East Wells Street, Suite 1900  
Milwaukee, Wisconsin 53202-4894  
Telephone: (414) 273-2100  
Facsimile: (414) 223-5000  
Email: [ddiesing@whdlaw.com](mailto:ddiesing@whdlaw.com)

## **Background**

1. On March 14, 2011, the Debtor filed the Care for Victims/Survivors Motion.<sup>1</sup>
2. On April 1, 2011, the Committee filed its Opposition, in which it agreed to the payment of certain psychological counseling and therapy for victims/survivors, subject to a yearly cap on such expenditures of \$100,000, but objected to the portions of the Care for Victims/Survivors Motion which seek to honor the Settlements, and allow the Debtor to participate in voluntary mediations with two Victims/Survivors and pay any costs incident thereto.
3. On April 15, 2011, the Debtor submitted an agreed proposed Order authorizing the payment of counseling and therapy for Victims/Survivors. This Response is directed to the aspects of the Care for Survivors Motion the Committee objects to: the Debtor participating in mediations with two Victims/Survivors and the honoring of the Settlements.

## **Argument**

### **I. The Mediation Program Should Continue for Two Victims/Survivors**

4. The Committee's Opposition to the continuation of the voluntary Mediation Program for two Victims/Survivors (the "Does") purports to be based on the following concerns:  
A) that participants in the Mediation Program are not guaranteed the right to have counsel present at mediation sessions, B) that the Debtor will unfairly make statements to the Victims/Survivors which downplay the Debtor's resources, and C) that the Debtor's resources are far greater than what has been represented to the Court and therefore reaching settlement with the Does is premature.

---

<sup>1</sup> Capitalized terms not defined herein shall have the same meaning as ascribed to them in the Care for Victims/Survivors Motion.

**A. Representation of Victims/Survivors in the Mediation Program**

5. The Agreement to Mediate, created by Professor Eva M. Soeka, Director of Marquette University's Center for Dispute Resolution, allows any party to the mediation including the Debtor, to be represented or accompanied by attorneys or advocates, so long as the other parties and the mediator consent. Numerous Victims/Survivors chose to have counsel present without objection from the Debtor, and the Debtor strongly encouraged any Victim/Survivor who participated in the voluntary Medication Program to consult with an attorney before signing a Settlement Agreement.

6. The Debtor does not and will not object to the Does being represented by counsel at the mediation sessions. To alleviate the concerns of the Committee, the Debtor will inform the Does that if they so desire, they may be accompanied or represented at the mediation by any party, including an attorney.

**B. Statements Regarding the Debtor's Financial Condition**

7. The Committee alleges, without foundation, that it fears the Debtor has in the past and will with the Does' mediation make inaccurate claims regarding the extent of its financial resources and the likely recovery from insurance policies.

8. These unsubstantiated and reckless charges not only challenge the motives and conduct of the Debtor during the voluntary Mediation Program, but are an affront to Dr. Soeka and the nationally recognized Marquette University's Center for Dispute Resolution, who supervised the design of the Mediation Program with the Debtor.

9. Although the Debtor strenuously objects to the suggestion that it has or will mislead Victims/Survivors in an effort to get inexpensive settlements, to placate the Committee, the Debtor pledges to not make any statements regarding the financial condition of the Debtor or a Victim/Survivor's potential recovery outside of the voluntary Mediation Program, other than to

state the obvious fact that i) the Debtor is currently reorganizing pursuant to Chapter 11 of the Bankruptcy Code and ii) that it is possible that should the Does file claims in the Debtor's Reorganization Case that their financial recovery could be significantly more or less than what is offered through the voluntary Mediation Program.

**C. The Extent of the Debtor's Resources is Unrelated to the Question of Whether the Does Should be Permitted to Participate in the Mediation Program**

10. Even though the Debtor merely requests permission to allow the two Does to participate in the Mediation Program and would need to seek Court authority before paying any settlements with the Does, the Committee focuses roughly half of its Opposition and prepared an affidavit arguing as to the value of the Debtor's bankruptcy estate.

11. The focus on property of the estate issues reflect a fundamental misunderstanding of the relief sought and the purpose of the voluntary Mediation Program. First, the cost of allowing the Does to participate in the voluntary Mediation Program is inconsequential, involving at most several hours of a mediator's time. The Debtor has not asked the Court to approve any settlement payments to the Does.

12. Second, while the Committee scoffs at the voluntary Mediation Program's goals of offering dignity, flexibility, and control to Victims/Survivors, it is critically important to the Debtor that Victims/Survivors have an opportunity for healing, restoration, and closure. The voluntary Mediation Program was designed to offer that opportunity for interested Victims/Survivors. While financial recovery is one component of the Mediation Program, providing an outlet for Victims/Survivors to speak about their abuse with Archdiocesan officials, offering Victims/Survivors psychological counseling and therapy, and providing spiritual resources, are more important parts of the process, especially to many Victims/Survivors. These other benefits of the voluntary Mediation Program come at little or no expense to the Debtor.

13. The real reason the Committee objects to the continuation of the Mediation Program is that it represents a loss of control over the Victims/Survivors. The Does (two Victims/Survivors) are insistent that they wish to mediate their disputes with the Debtor, not litigate. You would expect since the Does are members of the class theoretically represented by the Committee, that the Committee would support their position, especially given that the mediation will not have an impact on the recovery of the other Victims/Survivors. However, the Committee seems more interested in challenging the voluntary Mediation Program and making unfounded and reckless financial allegations than in effectively resolving unsecured creditor claims when there is an effective way to do so.

14. There is no reason for the Court to deny the Does participation in the voluntary Mediation Program given its de minimus cost. This is especially true where the Court retains exclusive jurisdiction to decide whether to approve any settlement recommended by the impartial mediator and agreed to by the parties.

## **II. The Debtor Should be Allowed to Honor the Settlement With Victims/Survivors**

15. Contrary to the Committee's protestations, section § 363(b) of the Bankruptcy Code provides the support for the Debtor's payment of the Settlement Agreements.

16. The Committee argues that the Debtor should not be permitted to honor the Settlements with Victims/Survivors because the Debtor cannot satisfy the standard set out in *In re Kmart Corp.*, 359 F.3d 866 (7<sup>th</sup> Cir. 2004). The flaw with this argument is that *Kmart* deals with the payment of creditors that are "critical" to the Debtor's reorganization and will not provide critical services or supplies to the Debtor without full payment of their prepetition claims. *Id.* 359 F.3d at 868. The Debtor is not requesting permission to pay critical vendors, and as a result, the *Kmart* standard is irrelevant. Reference to *Kmart* is simply a misstatement of the applicable law.

17. The authority for the Debtor's request to honor its promises to Victims/Survivors is section 363(b) of the Bankruptcy Code, which provides that after notice and a hearing, the trustee "may use, sell, or lease other than in the ordinary course of business, property of the estate...." 11 U.S.C. § 363(b)(1).

18. In *Kmart*, the very case upon which the Committee's arguments rely, the Seventh Circuit found that the use of § 363(b)(1) as justification to pay pre-petition claims was "promising" in circumstances where other classes of creditors will do as well or better than they would do in a straight liquidation. *In re Kmart*, 359 F.3d at 872; *See also* Douglas G. Baird, *The New Face of Chapter 11*, 12 Am. Bankr. Inst. L. Rev. 69, 97 n. 102 (2004) ("In *Kmart*, Judge Easterbrook did not exclude the possibility of post-petition payments to pre-petition creditors if the record showed the prospect of benefit to other creditors."); *see also Comm. of Equity Sec. Holders v. Lionel Corp.*, ( *In re Lionel Corp.*), 722 F.2d 1063, 1071 (2d Cir. 1983) (in deciding whether to approve a use of property outside the ordinary course of business the bankruptcy court should "consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interest of the debtor, creditors and equity holders, alike.")

19. In analogizing to "cram down" analysis, the Seventh Circuit was in essence telling courts to look to the benefit or enhancement of the estate that will result from the payment of a prepetition claim. *In re Kmart*, 359 F.3d at 872-873; *see also In re Federated Dep't Stores*, No. 1-90-00130, 1990 Bankr. LEXIS 122, at \*\*5-6 (Bankr. S.D. Ohio Jan. 15, 1990) (indicating that where proposed expenditures are in best interests of the estate, a bankruptcy court has power to authorize the debtor to expend funds outside the ordinary course of business under § 363).

20. The Debtor's ability to continue to honor pre-petition Settlements is vital to the Debtor's reorganization, as failure to honor the Settlements would cause significant harm to the

Victims/Survivors and the Debtor. The economic and emotional harm to Victims/Survivors, many of whom rely on settlement payments for the necessities of life, including in some cases health insurance, cannot be overstated. Moreover, while the Committee is apparently content to relegate these Victims/Survivors to a breach of contract claim for the unpaid amounts owing under the Settlements, it just is not the right thing to do to withhold payment from these individuals who may treat the failure to make these payments as a breach of trust which undermines the psychological improvement they achieved through the voluntary Mediation Program. Finally, failure to pay the Settlements would have a negative impact on the morale of the diligent persons, inside and outside of the Archdiocese, that heavily invested their time and effort to make the voluntary Mediation Program successful.

21. In the Committee's own words, admittedly in a slightly different context, "the harm caused by the cessation of these payments would far outweigh any dilution to the other unsecured creditors of the estate..." (Opp'n ¶ 22.)

WHEREFORE, the Debtor respectfully request that the Court grant the relief sought in the Motion.

Dated this 15<sup>th</sup> day of April, 2011.

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

By: /s/ Michael E. Gosman

Daryl L. Diesing  
State Bar No. 1005793  
Bruce G. Arnold  
State Bar No. 1002833  
Michael Gosman  
State Bar No. 1078872

POST OFFICE ADDRESS:  
555 East Wells Street, Suite 1900  
Milwaukee, WI 53202  
Telephone: (414) 273-2100  
Facsimile: (414) 223-5000  
Email: [ddiesing@whdlaw.com](mailto:ddiesing@whdlaw.com)  
[barnold@whdlaw.com](mailto:barnold@whdlaw.com)  
[mgosman@whdlaw.com](mailto:mgosman@whdlaw.com)