UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:	
The Diocese of Buffalo, N.Y.,	Case No. 20-10322 (CLB)
Debtor.	Chapter 11
The Diocese of Buffalo, N.Y.,	
Plaintiff,	
v.	Adversary No. 20-01016
JMH 100 Doe, *et al.*[1]	
Defendants.	

MOTION FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. §§ 105(a) AND 362(a) ENJOINING THE PROSECUTION OF CERTAIN STATE COURT LAWSUITS

The Diocese of Buffalo, N.Y. (the "Diocese"), by and through its undersigned counsel, hereby moves the Court (this "Motion"), pursuant to sections 105(a) and 362 of title 11 of the United States Code (11 U.S.C. § 101 *et seq.*, the "Bankruptcy Code"), for entry of an order, enjoining the prosecution of certain lawsuits identified in ***Exhibit A*** to this Motion (collectively, the "Abuse Actions") brought by individuals seeking damages for alleged sexual abuse (the "Abuse Claimants") against the Diocese and/or certain parishes, schools and other Catholic entities affiliated with the Diocese (collectively, the "Related Entities").[2] Submitted herewith in support

[1] A full list of the Defendants in this in this adversary proceeding is attached as Exhibit A to the *Second Amended Complaint Seeking Declaratory and Injunctive Relief Pursuant to 11 U.S.C. §§ 105 and 362 or, Alternatively, a Preliminary Injunction Pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure* [Adv. Proc. 20-01016, Docket No. 251], which has been redacted protect the privacy interests of survivors.

[2] The Related Entities are identified on ***Exhibit B***.

of this Motion are the *Declaration of Attorney James R. Murray* dated October 23, 2023 (the "2023 Murray Declaration"), and the *Declaration of Melissa Potzler, Esq.* dated October 23, 2023 (the "Potzler Declaration").[3] In further support of this Motion, the Diocese respectfully represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G) and (O). To the extent it may be determined that this proceeding is not within the Court's core jurisdiction, the Diocese submits that it is clearly within its "related to" jurisdiction pursuant to 28 U.S.C. § 157(c). The Diocese confirms its consent to the entry of a final order or judgment by this Court in connection with this Motion if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

4. The statutory and rule-based predicates for the relief requested herein are sections 105(a) and 362 of the Bankruptcy Code and Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

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[3] The Diocese also incorporates by reference the *Declaration of Attorney James R. Murray in Support of the Motion to Enjoin the Continued Prosecution of Certain Lawsuits* (the "Initial Murray Declaration") [Adv. Docket No. 45] the *Declaration of John M. Scholl Regarding the Diocese's Self-Insurance Program and Available Insurance Coverage* (the "Scholl Declaration") [Adv. Docket No. 5], the *Declaration Of Attorney James R. Murray In Support Of The Diocese's Motion for Preliminary Injunction Pursuant to 11 U.S.C. §§ 105(a) and 362(a) Enjoining the Continued Prosecution of State Court Actions By Certain Litigants Whose Actions Are Not Subject To Prior Stipulation Staying Further Litigation* (the "2021 Murray Declaration") [Adv. Docket No. 116], previously filed in this Adversary Proceeding, all providing additional information in support of this Motion.

PRELIMINARY STATEMENT

A. Factual Background

5. Mediation is progressing in this chapter 11 case (the "Case").

6. Pursuant to this Court's Decision and Order dated December 27, 2021 [Docket No. 1487], the Court appointed Judge Michael J. Kaplan (retired) as the initial mediator in this case.

7. While mediation before Judge Kaplan brought the parties together to outline positions, the parties and Judge Kaplan ultimately concurred that the process would benefit from the addition of a mediator with expertise in personal injury and insurance issues to compliment Judge Kaplan's bankruptcy experience. Therefore, by Order dated January 19, 2023 [Docket No. 2215], Judge Patrick NeMoyer (retired) was appointed as an additional mediator in this Case.

8. Since Judge Patrick NeMoyer was appointed as an additional mediator in the Case, the parties have had multiple sessions of in-person mediation, including sessions on February 21 and 22, 2023, March 29 and 30, 2023, May 23 and 24, 2023, June 12 and 13, 2023, July 18 and 19, 2023, August 16, 2023, and September 19 and 20, 2023. Those sessions have been conducted with the active involvement of the Diocese (including participation by the Diocesan Bishop, Chief Operating Officer, Chief Financial Officer, and other Diocesan personnel), and the Related Entities (the Diocese and the Related Entities are collectively referred to as the "Catholic Family"); the Official Committee of Unsecured Creditors in the Case, along with the state court counsel who represent the members of such committee in their individual Child Victim Act lawsuits (the "Committee"); and the principal insurers who are on the risk for Child Victim Act claims against the Catholic Family (the "Insurers"). In addition to global mediation sessions, certain mediation sessions have focused primarily on negotiations between the Catholic Family and the Committee, and some have been focused on negotiations between the Catholic Family and the Insurers.

9. While the Diocese submits that some progress toward a settlement has been made, the parties have not yet been able to achieve a global settlement that would serve as a basis for a successful chapter 11 plan. The Diocese points out that substantive mediation has been ongoing for less than nine months at this point. The Diocese remains committed to continuing with the mediation because it still believes that mediation presents the best available avenue to fairly compensate survivors and for the Diocese to emerge from chapter 11.

10. As the Court is aware, the Diocese and the other members of the Catholic Family have voluntarily produced thousands of documents in this case to the Committee and the Insurers. That voluntary disclosure has included extensive disclosure of financial information relating to all members of the Catholic Family. Additionally, the Committee has retained the services of an appraiser to perform valuations of the real property owned by the Diocese. Therefore, the Committee and the Insurers have in their possession the same information that the Diocese has about the extent of the Catholic Family's assets. The Diocese also would expect that, by this point in the Case, the Committee would have reviewed such information and grasped some awareness of how much the Diocese and other members of the Catholic Family reasonably have available to fund a settlement, bearing in mind the need to retain certain assets to continue operations following confirmation of a plan of reorganization.

11. A guiding principle in the Diocese's approach to negotiations has been that substantially all of its unrestricted liquid assets, and the value of any of its real estate that will not be critical to the ministries of the reorganized Diocese, are likely "on the table" to be committed to any settlement. Similarly, the ad hoc committee of Related Entities has participated in negotiations with full intentions to make a substantial contribution at a level that would support a

channeling injunction under Second Circuit precedent, giving due consideration to the amount of their respective unrestricted liquid assets.

12. Quite perplexingly to the Diocese, and notwithstanding the fact that the Diocese and the Committee have access to the very same financial information regarding the Diocese and other members of the Catholic Family, to date there has been no settlement in this Case, not even a settlement involving only the Catholic Family and the Committee, such as the one that has been announced publicly in the *Diocese of Syracuse* chapter 11 case.[4]

13. The Diocese and the entire Catholic Family are very sincere in their desire to reach a fair and just resolution of this Case. Upon receiving the consent of the Committee, the Diocese is prepared to propose a chapter 11 plan of reorganization where the Catholic Family would collectively contribute up to $100 million to a settlement trust for survivors, exclusive of any additional insurance contributions. In order to fund such a plan, the Diocese would contribute substantially all of its unrestricted liquid assets, save those necessary to preserve post-confirmation operations. The Diocese would likely also need to sell the Catholic Center building at 795 Main Street in Buffalo, the former Christ the King Seminary campus in East Aurora, and other non-essential real property. Even then, the Diocese anticipates that as much as half of the funding for such a plan would come from non-debtor Related Entities.

14. The Diocese is concerned, however, that the Committee members and their state court counsel, emboldened by recent decisions in other cases that have noted the difficulty in confirming a chapter 11 plan that provides third party releases and channeling injunctions in the

[4] On July 27, 2023, the Roman Catholic Diocese of Syracuse, New York and the official committee of unsecured creditors appointed in its chapter 11 case issued a joint press release announcing a settlement that provides for a payment by that diocese, its parishes and related Catholic entities in the aggregate amount of $100 million to a survivor trust to be formed under its chapter 11 plan. At a status conference on September 28, 2023, counsel advised that the parties anticipated filing a chapter 11 plan embodying that settlement as early as November 2023.

absence of overwhelming consent of creditors,[5] have grown to believe that they have nearly limitless leverage to make demands against the Catholic Family in this Case.

15. Apparently with that mindset, and even though mediation is still ongoing in the Case, the Committee has refused to further extend the Stipulated Stay[6] of actions against the Related Entities that has been in place since December, 2020. Apparently, it is the Committee's position that allowing piecemeal litigation to proceed in state court will advance this Case more than continued mediation. The Diocese and the Catholic Family strongly disagree.

B. The Instant Motion

16. As a result of the foregoing, the Diocese is forced to hereby renew its motion for a preliminary injunction to enjoin the prosecution of nearly 800 Abuse Actions.[7]

17. Litigation against the Related Entities will be highly disruptive to the course of mediation, will likely slow the progress of this Case, will be a huge drain on the resources of the

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[5] *See In re Diocese of Rochester*, No. AP 22-02075-PRW, 2022 WL 1638966, at *6 (Bankr. W.D.N.Y. May 23, 2022) ("While obtaining confirmation of a non-consensual plan is not impossible, it makes the likelihood of a successful reorganization much more difficult."); *In re Roman Cath. Diocese of Rockville Ctr., New York*, 651 B.R. 622, 653 (Bankr. S.D.N.Y. 2023) (noting that because the committee and debtor were seeking confirmation of separate and conflicting plans, "[t]he likelihood of a reorganization is, at best, a toss-up at this point"); *In re Roman Cath. Diocese of Rockville Ctr., New York*, No. 20-12345 (MG), 2023 WL 4833307, at *2 (Bankr. S.D.N.Y. July 18, 2023)(" The Court generally assumes that in order to confirm a plan with third-party releases, the Debtor will need to receive "overwhelming" support from creditors under the Second Circuit's decision in *Purdue*").

[6] On October 9, 2020, the Diocese filed a motion [Adv. Docket No. 79] seeking the Court's approval of a stipulation with the Committee (the "Stay Stipulation") consensually staying the Abuse Actions to facilitate productive settlement discussions through mediation (the "Stipulated Stay"). On December 4, 2020, the Court entered order, which was amended on December 7, 2020, approving the Stay Stipulation and making the Stipulated Stay binding on all Abuse Claimants who were served with the Diocese's motions and who did not timely object [Adv. Docket Nos. 92 and 95]. At the request of the Diocese, and with the support of the Committee, the Court has issued several orders enjoining the approximately 49 Abuse Claimants who did object to the Stipulated Stay (all represented by the Lipsitz Green firm), from prosecuting their respective Abuse Actions [Adv. Docket Nos. 155, 182, 261, and 282]. Accordingly, until recently, all of the nearly 800 Abuse Claimants who are defendants in this adversary proceeding have been stayed either by consensual stipulation or by Court order.

[7] Approximately 272 Abuse Actions were filed prior to the Petition Date naming the Diocese as a defendant. Nearly all Abuse Claimants who filed their Abuse Actions after the Petition Date naming one or more Related Entities as defendants also filed a proof of claim in the Diocese's chapter 11 case based upon the same allegations of abuse asserted in their respective Abuse Actions.

Diocese, and will diminish the ability of the Related Entities to contribute to a survivor trust under a chapter 11 plan. *See* Potzler Declaration, ¶¶ 12 and 18.

18. The Committee has suggested that allowing litigation against the Related Entities will help resolve this Case because establishing verdict values will force the Diocese and the Insurers to agree to pay larger sums in settlement. However, even if one were to assume, arguendo, that certain actions against Related Entities will result in high verdicts, the Committee's reasoning is seriously flawed for a number of reasons:

a. First, with respect to the Catholic Family, the Committee's logic fails because the assets that the Diocese and Related Entities have to draw from are finite, and could never satisfy the many multi-million dollar verdicts that plaintiffs' counsel suggest might arise from the population of claims that have been asserted against the Diocese;

b. Second, the Committee's approach ignores the fact that many claimants will have enormous, if not insurmountable hurdles to overcome in actually (a) establishing that the Diocese and the Related Entities are liable for such claims,[8] and (b) obtaining any monetary recovery thereon, including against the Insurers who have asserted numerous defenses to coverage with respect to a substantial majority of such claims;

[8] In the *Diocese of Rockville Centre* chapter 11 case, the court has issued several orders disallowing approximately 140 claims, and thus finding that the Diocese is not liable with respect to such claims. *See, e.g., The Roman Catholic Diocese of Rockville Centre, New York,* Case No. 20-12345 (S.D.N.Y.) (JMG) [Docket Nos. 1949, 2024, and 2334]. In *Rockville Centre*, the debtor diocese filed sixteen different omnibus claim objections on various grounds, including that it had insufficient notice of the alleged abuse to establish negligence, that the alleged abuse occurred at locations purportedly not supervised, controlled, managed, or directed by the diocese, and that certain claims had been previously adjudicated. *See id.* It is possible, if not likely, that a large number of claims in this case could similarly be subject to disallowance.

c. Third, even the Committee must acknowledge that a strategy that relies upon state court litigation will take years to implement. Most of these actions are in their procedural infancy, and it will take many years before a substantial number of them are advanced to the point of a non-appealable final judgment. This will harm survivors by further delaying their recovery and eroding, through the accrual of administrative expenses, assets that would otherwise be available to fund a settlement trust; and

d. Fourth, it is quite possible that state court litigation of certain cases will elicit findings and rulings that would result not only in the denial of the claim being litigated, but that would also prejudice insurance coverage that would otherwise be available to respond to the claims of other survivors.

19. The Diocese respectfully submits that the litigation the Committee has chosen to encourage will be wasteful, expensive, and protracted, will unfairly benefit certain claimants over others, will ultimately result in great harm to the Diocese and its reorganization efforts, as well as survivors generally, and will not create any meaningful increase in settlement amounts.

20. The Diocese filed for relief under chapter 11 of the Bankruptcy Code in order to address abuse claims against the Catholic Family, for the benefit of all survivors, while at the same time allowing the Diocese and the Related Entities to continue to support the religious, charitable and humanitarian mission and good works of the Catholic Church in Western New York.

21. The Diocese continues to believe that an organized chapter 11 process provides the best opportunity for a fair and equitable resolution of abuse claims. To that end, the Diocese sought, early in this case, to confirm that the Bankruptcy Code's automatic stay provisions prevent the Abuse Actions from going forward against the Related Entities by commencing this Stay

Adversary and seeking a preliminary injunction. [Adv. Proc. 20-01016, Docket No. 4]. Over the objection of the Committee and several Abuse Claimants, the Court entered a decision and order in which it observed that section 362(a)(3) of the Bankruptcy Code would apply to stay litigation against non-debtor affiliates of the Diocese "where any recovery will dissipate estate assets." *In re Diocese of Buffalo, N.Y.*, 618 B.R. 400, 407 (Bankr. W.D.N.Y. 2020) (the "Injunction Order"). Specifically, the Court found that actions which would diminish the Diocese's self-insurance fund, or the amount of coverage available on an insurance policy covering the Diocese, implicate the automatic stay of section 362(a)(3). *Id.* Accordingly, the Court issued a 75-day preliminary injunction to allow the Diocese additional time to collect and present evidence of its insurance. *Id.*

22. While the Court's initial preliminary injunction was in effect, the Diocese and the Committee negotiated the Stay Stipulation, which was presented to the Court for approval on October 9, 2020.[9] Several dozen Abuse Claimants, all represented by Lipsitz Green Scime Cambria LLP (the "LG Claimants"), objected to the Stay Stipulation, and on December 7, 2020 the Court entered a decision and order finding that the LG Claimants would not be bound by the

[9] The Committee (and the survivors who comprise its constituency) received significant benefits from the Stay Stipulation. Pursuant to the Stay Stipulation the Diocese and Related Entities voluntarily disclosed thousands of pages of documents and other materials, and the Related Entities committed to provide advance notice of certain asset transfers. *See* comments of counsel for the Committee, Ilan Scharf, at Hr'g Tr. 75:9 – 75:14, 76:2 – 76:8, March 4, 2021, Adv. Proc. 20-01016, Docket No. 137 ("First, as part of our stipulation we negotiated with the parishes. When I say 'parishes,' non-Diocesan entities. They will not transfer assets without notice. . . . they will give us disclosures. They gave us disclosures about asset transfers that may have occurred in the past. . . . we gather information -- financial information about the Diocese, financial information about the parishes, financial information about the foundation, other related entities provided to the Committee, as well as discovery regarding the CVA actions, underlying discovery, secret files pertaining to abusers. We are getting documents related to hundreds of abusers.").

The Stipulated Stay has been extended with the consent of the Committee twelve (12) separate times over the course of this Chapter 11 Case [Adv. Proc. 20-01016, Docket Nos. 103, 143, 156, 158, 160, 179, 199, 215, 246, 261, 267, 269, and 284]. Most recently, on July 20, 2023, approximately six months after Judge NeMoyer's appointment as an additional mediator, the Committee agreed to extend the Stipulated Stay through and including September 30, 2023. Paragraph 7 of the Stay Stipulation provides a forty-five (45) day period, following the occurrence of the Termination Date (as such term is used therein), before any answer, motion to dismiss, or other responsive pleading(s) must be filed by Related Entities in any of the Abuse Actions. Based upon the current September 30, 2023 Termination Date, that 45-day period is set to expire on November 14, 2023, however the Committee has agreed to a further extension through the hearing on this Motion.

Committee's Stipulated Stay. *In re Diocese of Buffalo, N.Y.*, 623 B.R. 354 (Bankr. W.D.N.Y. 2020). Accordingly, the Diocese sought entry of a preliminary injunction staying the LG Claimants from pursuing their Abuse Actions against the Related Entities pursuant to bankruptcy Code sections 362(a) and 105(a).

23. The Committee supported the Diocese's request to stay the LG Claimants' Abuse Actions. *See Statement of Official Committee of Unsecured Creditors in Support of an Order Pursuant to 11 U.S.C. § 105(a) Enjoining the Continued Prosecution of State Court Actions by Certain Litigants Whose Actions are not Subject to Prior Stipulation Staying Further Litigation* [Adv. Docket No. 130] (the "First Committee Injunction Statement"). Specifically, the Committee argued that a stay was necessary to avoid "a chaotic rush to the courthouse[,]" the dissipation of the Diocese's and Related Entities' assets, and inequitable treatment of survivor claims:

> A principal objective of the Committee is to maximize value for all survivors. Value will come from various sources, including Diocesan assets, Diocesan insurance, parishes and other [Related Entities] and their insurance. Some of these assets have finite value. Diocesan and [Related Entities'] non-insurance assets are limited and, in all likelihood, insufficient to compensate all survivors. *If all survivors were to litigate against [the Related Entities] then the first survivors to obtain judgments would likely be first in line to collect from those assets.* In the absence of a stay, survivors would be virtually compelled to rush to the courthouse to preserve their rights to non-Diocesan assets. *However, only the fortunate front runners would likely see those efforts rewarded. That is not fair or equitable.*

Id. at ¶ 10-11 (emphasis added, footnote omitted).

24. The Committee also astutely noted the dangers that state court litigation could pose to available insurance coverage:

> [T]he Lipsitz firm's pleadings all cite a standard of recklessness.
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> And we want to be -- *we are very concerned about what effect a finding of recklessness could have*. We believe there's negligence, extreme negligence. . . .

> But if somebody goes out there and gets a finding of recklessness by a jury, the insurance companies are going to take that verdict, hold it in our faces and say your claims aren't covered.
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> So, Your Honor, *there is an extreme danger that the cases [being] pursued in the manner they are being pursued will destroy value for all survivors* and Your Honor should put a stop to that right now.

Hr'g Tr. 82:10 – 23, March 4, 2021, Adv. Proc. 20-01016, Docket No. 137 (emphasis added).

25. On March 31, 2021, the Court entered a decision and order granting a preliminary injunction against the LG Claimants to preserve the *status quo* through October 1, 2021, observing that:

> [T]he distraction of state court litigation for the benefit of a few will endanger the prospects of an outcome for the benefit of everyone. Thus, on the serious issue of allowing prosecution of claims against parishes and affiliates, the balance of hardships tips decidedly toward the Diocese. We cannot guarantee that the bankruptcy process will succeed, but interference with that process will surely risk irreparable harm to the Diocese and its creditors.

In re The Diocese of Buffalo, N.Y., 626 B.R. 866, 870 (Bankr. W.D.N.Y. 2021).

26. In late 2021, the Diocese sought to extend the preliminary injunction of the LG Claimants, again with the Committee's support. *See Statement of Official Committee of Unsecured Creditors in Support of an Order Pursuant to 11 U.S.C. § 105(a) Enjoining the Continued Prosecution of State Court Actions by Certain Litigants Whose Actions Are Not Subject to Prior Stipulation Staying Further Litigation* [Adv. Docket No. 167] (the "Second Committee Injunction Statement"). On October 21, 2021, the Court entered another decision and order invoking its general equitable powers under section 105(a) of the Bankruptcy Code to "issue any order . . . necessary or appropriate to carry out the provisions of [the Bankruptcy Code]" to stay the LG Claimants, including several whose claims did not appear to directly implicate an identified policy of insurance covering the Diocese through August 31, 2022. *In re Diocese of Buffalo, N.Y.*, 633

B.R. 185 (Bankr. W.D.N.Y. 2021). In that decision, the Court recognized the negative impact that state court litigation against the Related Entities would have on the Diocese's reorganization process, noting:

> The bar date of August 14, 2021, applied to all creditors in this case, and was not limited to claimants under the Child Victims Act. As of that date, 392 proofs of claim were also filed on behalf of Catholic parishes, abbeys, cemeteries, schools and other affiliates. . . . In their proofs of claim, each of these affiliates has asserted a right to indemnification and contribution from the Diocese for any damages that may be assessed against them.
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> * * *
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> In the present instance, the automatic stay may not necessarily apply to those actions against affiliates that do not implicate insurance or other property interests of the Diocese. Even in such instances, however, the contribution and indemnity rights of parishes and affiliates will operate like a circular whirlpool of claims that the Diocese must still address. By reason of their claims for indemnification or contribution, parishes and affiliates have prospectively converted any judgment against them into a claim against the Diocese. Consequently, the prosecution of actions against parishes will ultimately require the parties to revisit the same dispute when in this proceeding, the Diocese proposes a plan to deal with contribution or indemnity rights. Under these circumstances, a stay under 11 U.S.C. § 105 is appropriate and necessary to fulfill the purpose of section 362.
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> * * *
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> The claims against parishes and other affiliates are not extraneous disputes, but ones that will ultimately define the unliquidated claims of those same affiliates. Litigation in state court would achieve not a separate resolution of claims, but the duplication of a dispute that the bankruptcy process must still address in the context of claims for contribution and indemnity. For these reasons, the separate prosecution of the 36 actions would become an inherent distraction that promises to complicate negotiations. Accordingly, the Court finds good cause for an extension of the current stay.

27. On August 11, 2022, the Court once again extended the preliminary injunction enjoining the LG Claimants through May 31, 2023, finding that "[t]he request to extend the current

injunction must be considered in the context of the Court's subsequent directive for mediation." *In re Diocese of Buffalo, N.Y.*, 642 B.R. 350, 352 (Bankr. W.D.N.Y. 2022). The Court noted that formal mediation began only in mid-2022 and went on to observe that "[n]o one has suggested bad faith or procrastination by the debtor or other parties in this attempt to achieve settlement. . . . Having recognized the benefit of mediation in this difficult and complex case, we must allow that process to continue for a reasonable time without the distraction of state court litigation." *Id.*

28. While the Diocese is not at liberty to discuss the substance of the parties' respective positions in mediation, the Diocese respectfully submits that the Catholic Family has not in any way procrastinated or attempted to delay the settlement process. To the contrary, the Catholic Family has participated in the mediation earnestly and in the utmost good faith, and has made vigorous attempts to advance negotiations among the parties toward a reasonable and mutually acceptable resolution. Accordingly, the Diocese respectfully submits that there has been no change in circumstances that would justify the Committee's complete reversal from the position it previously took in arguing to the Court against piecemeal litigation going forward in the Lipsitz cases.

29. Notwithstanding the progress that the Diocese has made in mediation, the Committee has now refused to extend the Stipulated Stay, ostensibly because the Committee believes allowing litigation to move forward against the Related Entities will create pressure on the Catholic Family and the Insurers to put more settlement money on the negotiating table.

30. The Committee will likely assert that the prospect of hundreds of cases going forward to trial at the same time is unlikely, and perhaps even that a formal or informal agreement exists between the state court counsel who represent Committee members and a majority of Abuse Claimants generally to coordinate their efforts to concentrate on a few dozen cases specifically

selected as being "high value" targets. Indeed, earlier this year the Committee requested that the Diocese agree to such an approach as a condition for the Committee's consent to extend the Stipulated Stay with respect to all other Abuse Actions. Thus, while it may turn out that the Diocese and Related Entities will not be required to actively defend all of the almost 800 Abuse Actions simultaneously, it is clear that, in the absence of a stay, the approximately 49 LG Claimants who have fought at every turn to pursue state court remedies will not stand down. Accordingly, even in a best-case scenario, the Diocese and Related Entities would be facing as many as 70 to 80 active cases which will still overwhelm the Diocesan insurance program's limited resources and the ability of the Diocese and Related Entities to mount a competent defense. Moreover, as the Committee has previously argued to the Court, and as discussed more fully below, this approach is patently unfair to those Abuse Claimants who are not among the chosen few who will benefit from serving as early test cases.[10]

31. The Committee's suggestion to move forward with a smaller number of cases signals that the Committee has effectively abandoned its previous position that all survivors should be treated equally in this chapter 11 case, instead favoring some over others. This is essentially the same misconceived tactic the committee appointed in The Diocese of Rochester's chapter 11 case pursued in June, 2021 when that committee[11] unsuccessfully championed twenty-one motions

[10] The Diocese also has serious questions regarding the ability of counsel who represent multiple survivors with claims against the Catholic Family (including several who represent dozens or even hundreds of survivors), to actively push litigation in certain cases while not pursuing others in a manner that is consistent with their duty to zealously represent each client under applicable rules of professional conduct. *See In re Diocese of Camden, New Jersey*, 653 B.R. 309, 361 (Bankr. D.N.J. 2023) (recognizing that a bankruptcy court's "authority to supervise and regulate the ethics and contingency fees of members of the bar extends to those admitted pro hac vice"); *see also generally,* N.Y. COMP. CODES R. & REGS. TIT. 22, § 1200.0, Rule 1.7 ("a lawyer shall not represent a client if a reasonable lawyer would conclude . . . representation will involve the lawyer in representing differing interests. . . .").

[11] That committee was also represented by Pachulski Stang Ziehl & Jones LLP, and many of the same state court counsel involved in *Rochester* also represent multiple survivors in this chapter 11 case.

seeking relief from the automatic stay to litigate against the diocese and certain non-debtor related Catholic entities in state court.[12]

32. With the Committee no longer willing to extend the Stipulated Stay by consent, the Diocese now seeks the Court's assistance in the form of a preliminary injunction in aid of the Diocese's continued reorganization and mediation efforts.

33. By this Motion, the Diocese seeks entry of one or more orders (i) confirming that the automatic stay provided by Section 362(a) of the Bankruptcy Code enjoins the prosecution of the Abuse Actions that name the Diocese as a party, consistent with the Second Circuit's recent binding decision in *In re Fogarty*, 39 F.4th 62, 71 (2d Cir. 2022) and Abuse Actions that threaten to diminish, recover against, collect, or to obtain possession or control of, any property of the

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[12] In *Rochester*, Judge Warren held that "[u]sing the pressure of state court litigation as leverage in settlement discussions in bankruptcy court is not cause necessary to support stay relief." *In re The Diocese of Rochester*, Case No. 19-20905 [Docket No. 1245], Hr'g Tr. 50:5 – 50:8, July 9, 2021. In denying stay relief, Judge Warren specifically found:

> [I]nvolving the state court to try to a jury verdicts [sic] in a small sample of the nearly 500 abuse claims in this case will certainly interfere with this case and the Court to move toward a consensual and confirmable plan.
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> * * *
>
> Will litigation in the state court prejudice the interests of other creditors? The Court finds that the short answer to that question is yes. . . . allowing 21 of the nearly 500 abuse victims to seek and possibly obtain judgments would place them in an advantageous position over the other abused victims.
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> * * *
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> Will the interest of judicial economy and expeditious and economical resolution of the litigation be promoted by stay relief? In this court's opinion, the answer is no. Not only would the trial of abuse claims in state court stall this Chapter 11 case, it will be costly and it will dissipate estate assets.

Id. at Hr'g Tr. 52:24 – 53:3, 53:17 – 24, and 54:2 – 7.

In addition, this Court has also previously held that "piecemeal litigation against some parishes will further entangle an already knotty situation and threatens to impair efforts to achieve a global resolution of claims for child abuse" and that "[a]s long as the debtor shows a continuing effort to address these complexities in good faith, we ought to avoid needless impediments to the development of a confirmable plan." *In re Diocese of Buffalo, N.Y.*, 633 B.R. 185, 189 (Bankr. W.D.N.Y. 2021).

Diocese's bankruptcy estate (including, without limitation, any rights to insurance coverage), and further (ii) enjoining the prosecution of all Abuse Actions against the Related Entities in aid of the Diocese's restructuring efforts pursuant to section 105(a) of the Bankruptcy Code, to the extent such prosecution is not already stayed by operation of the automatic stay.

34. Although the Diocese respectfully submits that section 362(a) stays most, if not all of the Abuse Actions automatically, the Diocese is seeking only a preliminary injunction through April 15, 2024 at this time, subject to further extension requests. Essentially, the Diocese is seeking to continue the litigation standstill previously achieved on a consensual basis via the Stipulated Stay, and pursuant to the Court's preliminary injunction orders staying the LG Claimants, to avoid the negative consequences previously highlighted by the Committee that litigation of the Abuse Actions in state court would have upon fairness to survivors, as well as the Diocese's estate and its ability to reorganize.

35. The Diocese can show, through an evidentiary hearing, if necessary, that each of the Abuse Actions, if allowed to continue, will negatively impact property of the Diocese's estate and/or reduce the Diocese's chance for a successful reorganization.

RELIEF REQUESTED

36. By this Motion, the Diocese seeks a temporary pause of litigation in the Abuse Actions through the issuance of a preliminary injunction staying the Abuse Actions through and including April 15, 2024.

POINT I

THE PROSECUTION OF MOST, IF NOT ALL OF THE ABUSE ACTIONS IS ALREADY STAYED PURSUANT TO SECTION 362 OF THE BANKRUPTCY CODE

A. At least 272 of the Abuse Actions are Stayed Pursuant to Section 362(a)(1)

37. Pursuant to section 362(a) of the Bankruptcy Code, the filing of a petition for bankruptcy protection automatically stays all litigation against a debtor as well as any attempts by creditors to obtain the debtor's property. The protection of the automatic stay is provided to a debtor and the debtor's property automatically, by operation of law. *See In re Colonial Realty Co.*, 980 F.2d 125, 137 (2d Cir. 1992) (holding that "the automatic stay is imposed by Congressional mandate and not court order" so no action by the debtor is needed for the automatic stay to become effective). Further "[t]he automatic stay is 'one of the fundamental debtor protections provided by bankruptcy laws, designed to relieve the financial pressures that drove debtors into bankruptcy.'" *In re Fogarty*, 39 F.4th 62, 71 (2d Cir. 2022) (quoting *In re Eastern Refractories Co. Inc. v. Forty Eight Insulations Inc.*, 157 F.3d 169, 172 (2d Cir. 1998)). As Congress explained in enacting the automatic stay:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 95-595, at 340-41 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97; *see also Weber v SEFCU (In re Weber)*, 719 F.3d 72, 76, n. 5 (2d Cir. 2013) (quoting legislative history); *In re AP Indus., Inc.*, 117 BR 789, 798-799 (Bankr. S.D.N.Y. 1990).

38. In addition to providing debtors with breathing room to address their liabilities, the automatic stay also protects creditors. *Deutsche Bank Trust Co. Ams. v Large Private Beneficial*

Owners (In re Tribune Co. Fraudulent Conveyance Litig.), 818 F.3d 98, 108 (2d Cir. 2016); *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 790 F.2d 206, 207 (2d Cir. 1986) (per curiam). The automatic stay protects creditors "by avoiding wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate, and by ensuring an equitable distribution of the debtor's estate." *Deutsche Bank Trust Co. Ams.*, 818 F.3d at 108; *see also In re McMullen*, 386 F.3d 320, 324 (1st Cir. 2004) (noting that Section 362(a)(1), among other things, "safeguard[s] the debtor estate from piecemeal dissipation . . . ensur[ing] that the assets remain within the exclusive jurisdiction of the bankruptcy court pending their orderly and equitable distribution among the creditors"); *see also* H.R. Rep. No. 95-595, at 340-41 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97 ("The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors.").

39. Recent controlling guidance from the Second Circuit in *Fogarty* makes clear that section 362(a)(1) provides a "bright-line rule" that automatically stays any action or proceeding in which the debtor is named as a defendant. *See Fogarty*, 39 F.4th at 76.

40. Notwithstanding the automatic and self-effectuating nature of the stay arising under section 362, prior to *Fogarty*, some courts held that, absent a showing of harm to a debtor's bankruptcy estate, section 362(a) of the Bankruptcy Code was limited in its application to claims asserted against the debtor directly, and that it therefore did not stay proceedings against non-debtor co-defendants in the same action. *In re Diocese of Rochester*, No. AP 22-02075-PRW, 2022 WL 1638966, at *4 (Bankr. W.D.N.Y. May 23, 2022) (holding that section 362(a)(1) only applies to actions *against* the debtor and not non-debtor co-defendants); *In re Abreu*, 527 B.R. 570,

578 (Bankr. E.D.N.Y. 2015) (holding that the "automatic stay only applies when the action is 'against' the debtor").

41. In *Fogarty* the Second Circuit explicitly rejected this type of functional analysis, and instead made clear that section 362(a)(1) applies, in any action or proceeding where the debtor is a named party, to automatically stay the action or proceeding *in its entirety* and not just with respect to those aspects of an action or proceeding that a court might perceive to adversely affect the debtor or its estate:

> In short, we reject Bayview's contention that, even if the debtor is a named party, the precise contours of and reasons for the debtor's status in an action or proceeding affect whether the automatic stay imposed by Section 362(a)(1) or (a)(2) applies. Instead, *our holding effects a bright-line rule: if the debtor is a named party in a proceeding or action, then the automatic stay imposed by those subsections applies to the continuation of such a proceeding or action, under Section 362(a)(1)*, and to the enforcement of an earlier judgment in that proceeding or action, under Section 362(a)(2).

Fogarty, 39 F.4th at 76 (emphasis added). Moreover, the Second Circuit made clear that, once the automatic stay imposed by section 362(a)(1) applies to an action, a litigant that wishes to proceed against a non-debtor party must first seek relief from the bankruptcy court under section 362(d) to modify or lift the stay:

> Once the stay was in place, Bayview's recourse, if it wanted to proceed with the Sale, was to follow the Bankruptcy Code's procedures for seeking relief in the bankruptcy court.
>
> * * *
>
> Bankruptcy courts may take measures that grant relief from the automatic stay, including terminating, annulling, modifying, or conditioning the stay, and they have the plastic powers to modify or condition an automatic stay so as to fashion the appropriate scope of relief.
>
> * * *
>
> A party is required to move for stay relief if it wishes to enforce its rights against a Debtor protected by the United States Code and the federal bankruptcy laws, and it cannot bypass [the bankruptcy

> court's] jurisdiction merely because in their opinion cause exists to lift the stay.

Id. at 76-77 (internal citations and quotations omitted).

42. The Diocese is a named defendant in at least 272 out of the nearly 800 pending Abuse Actions. In all of these actions, a Related Entity is a co-defendant and the plaintiffs are seeking to establish liability against the Diocese and the Related Entity arising from or relating to allegations of child sexual abuse.

43. The Diocese respectfully submits that, under the Second Circuit's explicit mandate as set forth in *Fogarty*, upon the commencement of the Diocese's Case, and still now as of the date of this Motion, all 272 Abuse Actions where the Diocese is named as a defendant are stayed by operation of section 362(a)(1).

44. Even if Abuse Claimants who named the Diocese as a party in their Abuse Actions sought to now sever the Diocese as a party in a transparent attempt to circumvent the automatic stay, the Diocese is a necessary party in all such cases, and any such effort would be futile and fundamentally inequitable to other survivors.

45. New York State law provides that "[p]arties necessary to a proceeding are classified as those who ought to be joined if complete relief is to be accorded between those who are parties *and those who might be inequitably affected by a judgment in the proceeding.*" *Dawn Joy Fashions Inc. v. Comm'r of Lab. of State of N.Y.*, 181 A.D.2d 968, 969 (3d Dept 1992) (holding that the Commissioner of Labor could be inequitably affected by the preclusive effect of judgment thereby making him a necessary party.); N.Y.C.P.L.R. § 1001(a). Because the Diocese will be subjected to contribution and indemnity claims, as well as preclusive effects as discussed below, it would be

inequitable to allow Abuse Actions to proceed without the Diocese.[13] The compulsory joinder mandated by CPLR section 1001(a) is designed "to avoid a multiplicity of actions *and to protect the non-parties whose rights should not be jeopardized if they have a material interest in the subject matter*." *Joanne S. v. Carey*, 115 A.D.2d 4, 7 (1st Dept. 1986) (emphasis added). The Diocese respectfully submits that it is a necessary party even in those Abuse Actions filed postpetition for the same reason. But for the automatic stay, the Diocese would be compelled to intervene to protect its own interests.

46. In order to prevent the Diocese's rights from being jeopardized in Abuse Actions, and to prevent the Diocese from being compelled to actively participate in such Abuse Actions during the pendency of this Case, these Abuse Actions should be stayed temporarily, to continue working toward a global resolution in bankruptcy. Such a result avoids litigation costs for the Abuse Claimants as well as the Diocese, and prevents unequal treatment and inconsistent judgments at the state court level. Such a result correctly harmonizes CPLR section 1001 and section 362(a) of the Bankruptcy Code to prevent the Diocese's rights from being jeopardized in these Abuse Actions where it is not currently joined as a party due to the automatic stay.

[13] The Diocese acknowledges that in some cases joint tortfeasors have been deemed not to be necessary parties because each can be held to be independently liable. However, the relationship between the Diocese and Related Entities is much more than one of mere joint tortfeasors. The Related Entities share common members and trustees with the Diocese, their business operations are interdependent with the Diocese's, and they are designed, as a matter of New York statutory law, to adhere to the hierarchical command and control structure of the Catholic Church dictated by canon law. Indeed, as a matter of both canon law and practice, clerical assignments are uniquely the province of the Diocesan bishop and the Related Entities have little or no say in priest assignment. Given this close-knit and hierarchical relationship, there is a real risk that litigation against Related Entities will have preclusive effect with respect to claims against the Diocese based on the same acts of alleged abuse. In other words, while the Diocese may not be a necessary party simply because it is allegedly a joint tortfeasor, the fact that the Diocese may be a joint tortfeasor does not disqualify it from being a necessary party in cases like this where adjudication of an issue in the absence of Diocesan participation would negatively and inequitably impact the Diocese's interests.

B. The Abuse Actions are Stayed Pursuant to Section 362(a)(3)

47. Section 362(a)(3) stays litigation against third parties where a debtor's shared insurance rights are at issue. *In re The Diocese of Buffalo, N.Y.*, 618 B.R 400, 406-07 (Bankr. W.D.N.Y. 2021) ("The Diocese is correct in suggesting a possibility that the stay of 11 U.S.C. § 362(a)(3) may apply . . . where any recovery will dissipate estate assets."); *In re Quigley Co.*, 676 F.3d 45, 56 (2d Cir. 2012) ("'a bankruptcy court . . . has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.'") (quoting *Johns-Manville Corp. v. Chubb Indemn. Ins. Co. (In re Johns Manville)*, 517 F.3d 52, 66 (2d Cir. 2008); *ACandS, Inc. v. Travelers Cas. & Sur. Co.,* 435 F.3d 252, 260 (3d Cir. 2006) ("The possession or control language of Section 362(a)(3) has consistently been interpreted to prevent acts that diminish future recoveries from a debtor's insurance policies.").

48. It is well settled that the "property of a bankruptcy estate can include the insurance policies of a debtor." *In re The Diocese of Buffalo, N.Y.*, 626 B.R. at 870 (quoting *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 92 (2d Cir. 1988)); *In re Quigley Co.*, 676 F.3d 45, 56 (2d Cir. 2012) ("'a bankruptcy court . . . has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.'") (quoting *Johns-Manville Corp. v. Chubb Indemn. Ins. Co. (In re Johns Manville)*, 517 F.3d 52, 66 (2d Cir. 2008); *ACandS, Inc. v. Travelers Cas. & Sur. Co.,* 435 F.3d 252, 260 (3d Cir. 2006) ("The possession or control language of Section 362(a)(3) has consistently been interpreted to prevent acts that diminish future recoveries from a debtor's insurance policies."). Where recovery against a non-debtor entity will dissipate estate assets, the automatic stay pursuant to section 362(a)(3) operates to stay any such litigation. *In re Diocese of Buffalo, N.Y.,* 618 B.R. 400, 406 (Bankr. W.D.N.Y. 2020).

49. Based on this undisputed principle, all Abuse Actions that implicate one or more insurance policies that cover the Diocese – whether or not the Diocese is a named defendant in such Case – should be stayed pursuant to section 362(a)(3). As this Court astutely observed, "[f]or many instances of alleged abuse, both the Diocese and its affiliates may look for coverage to the same policies." *In re Diocese of Buffalo, N.Y.*, 633 B.R. at 189. Litigation in any such Abuse Actions would constitute a direct act to obtain possession of, or exercise control over, property of the Diocese's estate in violation of the automatic stay. *In re Diocese of Buffalo, N.Y.,* 618 B.R. at 405; *see also In re The Roman Catholic Diocese of Syracuse, New York*, 628 B.R. 571, 578 (Bankr. N.D.N.Y. 2021) ("ongoing state court litigation would continue to diminish the estate's shared insurance resources and would inevitably hamper the Debtor's reorganization in violation of the principles elucidated in the Bankruptcy Code.").

50. Recently, in the *Diocese of Rockville Centre* case, Judge Glenn found that "insurance proceeds constitute property of the estate," but held, based on the record before him, that actions against non-debtor related entities did not rise to the level of "actions to obtain control over this estate property." *In re Roman Catholic Diocese of Rockville Centre, New York*, 651 B.R. 622, 644 (Bankr. S.D.N.Y. 2023). Judge Glenn further clarified that, under his analysis, a threat of depletion of insurance assets could justify a protective injunction under section 105(a), but for section 362(a)(3) to apply, an actual depletion of insurance assets is necessary. *Id.*

51. The Diocese respectfully submits that the facts before this Court are distinguishable from the *Rockville Centre* case. In *Rockville Centre*, Judge Glenn found that shared insurance assets would be dissipated, if at all, only after a judgment was entered against a non-debtor entity and that non-debtor entity sought indemnification coverage from a responding insurance policy. Here, in contrast, as a matter of longstanding practice, the Diocese, through its insurance office,

collects funds from Related Entities which are then pooled and earmarked specifically for (i) the purchase of joint policies of insurance covering the Diocese and the Related Entities as co-insureds and (ii) the payment of any defense costs and claims for losses that are subject to a deductible or self-insured retention before coverage under the shared insurance policies becomes available. *See* Scholl Declaration, ¶ 9; *see also* Potzler Declaration, at ¶ 16. The Diocese currently holds approximately $10.9 million in pooled reserves to satisfy this obligation. With respect to general liability coverage that would respond to the Abuse Actions the Committee and plaintiffs seek to prosecute, the Related Entities thus have a legitimate expectation that the Diocese will expend the earmarked funds it has collected from the Related Entities to pay deductibles and self-insured retentions ranging from $10,000 to as much as $250,000 *per occurrence* before these joint insurance policies provide coverage. *Id.* Accordingly, unlike in *Rockville Centre*, prosecution of Abuse Actions against non-debtor Related Entities here will result in an immediate dissipation of this shared pool of assets dedicated to provide the initial layer of risk management coverage for both the Diocese and all Related Entities.

52. Moreover, as this Court has previously recognized, the Related Entities have asserted claims against the Diocese for contribution and indemnification. Litigation of the Abuse Actions will thus require the Diocese to expend insurance program funds to address and resolve these additional claims.

53. Any judgments against the Related Entities, even if the judgments are held in abeyance, could have a negative impact on efforts to reach a settlement in the bankruptcy. Specifically, such judgments may make the insurers potentially liable for the judgments reluctant to contribute funds to a settlement. This is because the judgment may require the potentially liable

insurers to reserve funds to pay the judgment in the event that it takes effect, thus restricting funds that would otherwise be available to contribute to a settlement.

54. Accordingly, the Diocese respectfully submits that continuation of the Abuse Actions would dissipate insurance and other estate assets in violation of section 362(a)(3) and the Court should accordingly grant the preliminary injunction sought by this Motion.

Hundreds of Abuse Actions implicate joint insurance.

55. As the Court has previously observed, the Diocese and other parties have "made considerable progress in clarifying the nature and character of [insurance] coverage." *In re Diocese of Buffalo, N.Y.*, 633 B.R. at 187. In addition to the detailed historical insurance information set forth in the 2021 Murray Declaration, the Diocese, with the aid of special insurance counsel and its insurance archeologist, has located policy information and secondary evidence for several thousand insurance policies issued to parishes that the Diocese and Committee believe afford coverage to the Diocese as an additional insured. According to the 2023 Murray Declaration, at least 276 Abuse Actions directly implicate one or more Diocesan insurance policies, while at least of additional 282 Abuse Actions implicate pre-1973 parish policies that also likely provide coverage to the Diocese. *See* 2023 Murray Declaration, ¶¶ 27, 29, and 31. Of these Abuse Actions, five (5) Abuse Claimants filed Abuse Actions against the Diocese and Related Entities alleging abuse during 1973 or after 1973, thus implicating the post July 1, 1973 Diocese-wide policies, but did not submit proofs of claim. Additionally, eleven (11) Abuse Claimants filed Abuse Actions against the Diocese and Related Entities alleging abuse during 1973 and prior to 1973, implicating the parish policies, but did not submit proofs of claim.[14] *See id.*

[14] Allowing continuing litigation against Related Entities with respect to any of the pending Abuse Actions could become an obstacle to reaching a settlement with all the insurers in the bankruptcy. In the event that a judgment is secured against a Related Entity, it may make the insurers responsible for covering the judgment reluctant to participate in a settlement in the bankruptcy. This is true, even if the judgment is held in abeyance, because the insurer

56. This evidence has been provided to the Committee and to the relevant Insurers. Each of these Abuse Actions seek recovery against an asset of the Diocese's estate – insurance policies. The Diocese and the Related Entities have a shared interest in these insurance assets which will be depleted by defense costs and by any judgments entered against Related Entities if the Abuse Actions are allowed to go forward. As such, these Abuse Actions should be stayed pursuant to section 362(a)(3), regardless of whether the Diocese itself is named as a defendant.

57. While the Committee may argue that some of these insurance policies are non-wasting in that they do not have aggregate coverage limits and, in some cases, defense costs are outside of per-occurrence limits, the Diocese's interest in these insurance policies will still be negatively impacted by litigation against the Related Entities. For example, if an Abuse Claimant alleges that they were abused on two occasions in 1974, his or her claim would implicate a policy issued by Commercial Insurance of Newark, NJ, which provides coverage subject to a limit of $500,000 per occurrence and $250,000 per person. Under established New York law, two occurrence limits would be triggered. *See Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 21 N.Y.3d 139 (2013) (each incident of sexual abuse constitutes a separate occurrence).[15] Based on this precedent, the Diocese would contend that the per person sublimits apply on a per occurrence basis, thus two per person sublimits apply. However, the insurer may contend that the $250,000 per person sublimit restricts coverage to $250,000, no matter how many insureds claim coverage under the policy and regardless of whether the survivor was subject to multiple occurrences of abuse. Therefore, if a $1 million judgment is entered against a parish that is alleged to be jointly and severally liable with the Diocese and the insurers' coverage

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will likely have to set aside funds to the pay the judgment in the event that the judgment is permitted to take effect. *See* 2023 Murray Declaration, ¶ 32.

[15] *See infra* paragraphs 75 and 76 for additional discussion of the number of occurrences.

position prevails, the entirety of the available policy proceeds would be used to satisfy (and even then, only partially) the parish's liability, exhausting the limits of coverage and leaving the Diocese effectively uninsured with respect to its own liability to the same Abuse Claimant arising out of the same occurrence(s) of abuse.

Contested insurance coverage has settlement value which will be diminished through litigation of the Abuse Actions

58. Certain Insurers have issued reservations of rights with regard to coverage, but the ultimate question of whether their Insurance Policies provide coverage for abuse claims against the Diocese and its Related Entities remains a contested issue in the Insurance Adversary Proceedings. The Diocese respectfully submits, however, that this Court need not fully resolve the Insurance Adversary Proceedings in order to find that allowing the Abuse Actions to move forward would have an adverse effect upon the settlement value of insurance coverage of the Diocese that is being disputed by the Insurers.

59. Prosecuting the insurance adversary is one way to resolve disputes in this Chapter 11 Case, but as the Supreme Court has recognized, when "administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims . . . ." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 300 U.S. 414, 424 (1969).

60. In a recent bankruptcy case involving tens of thousands of abuse claims, the Delaware bankruptcy court approved billions of dollars in settlements with numerous insurance carriers without first determining whether any of the insurers were ultimately required to provide coverage under their policies. *See In re Boy Scouts of America and Delaware BSA, LLC*, 642 B.R. 504, 562 (Bankr. D. Del. 2022) (noting that the debtor's bankruptcy plan was funded through settlements with insurance companies Hartford, Chubb, Zurich, and Clarendon totaling

$1,656,000,000). Similar insurance settlements have been relied upon by many other Dioceses to fund a survivor trust. *See, e.g.*, *In re Roman Catholic Church of the Archdiocese of Santa Fe*, Case No. 18-13027 (Bankr. D. N.M., Dec. 30, 2022) [Docket No. 1220]. Like the *Boy Scouts* debtors, the Diocese is a target of claims by many survivors, alleging responsibility for past abuse under several different theories, which could result in massive potential liabilities. The Diocese has accordingly made claims against its insurers for coverage of defense costs and, potentially, indemnity related to these claims. The Diocese has reason to believe that its insurers will pay many millions of dollars (perhaps even hundreds of millions of dollars) to settle their potential coverage exposure. Allowing the Abuse Actions to move forward risks findings that could support Insurer defenses to coverage and therefore impair or even eliminate the possibility of any such future settlements.

61. In the event that the Abuse Actions are not enjoined, it is quite possible that the potential settlement value of some or all insurance policies will be reduced.

62. In cases where there is an aggregate policy limit, forcing an insurer to begin defending a claim, and therefore incurring defense costs, will erode the overall policy limit leaving less available for payment of either a verdict or a settlement. The ultimate settlement value of insurance policies may also be reduced through adverse findings or decisions made by state court judges in the Abuse Actions. As explained above, the Diocese is a necessary party in the Abuse Actions, because, among other things, the Abuse Claimants' primary allegations focus on the Diocese's conduct. Accordingly, any discovery in the Abuse Actions will primarily be directed at facts necessary to establish liability against the Diocese. Additionally, the record in the Abuse Actions may have preclusive effects against the Diocese.[16] For these reasons, any continued

[16] For example, both the Bishop and Vicar-General of the Diocese are, by law, trustees of each of the parishes within the Diocese. In the event a state court were to find in an Abuse Action against a parish that one or both of them, in

prosecution of the Abuse Actions could result in a decision being rendered by a state court judge which has an unintended effect of directly reducing the insurance settlement value to the Diocese by strengthening an insurance company's arguments against providing coverage or even finding that no coverage is available.

63. The Diocese respectfully submits that to preserve the settlement value of its insurance policies, which are an asset of the estate, the Court should temporarily enjoin all Abuse Actions from going forward, as requested herein.

Even litigation of uninsured actions threatens to adversely impact the Diocese's insurance interests

64. The Second Circuit recently reaffirmed its long-held position that, "even when the debtor is not a named party in an action, '[i]f action taken against the nonbankrupt party would inevitably have an adverse impact upon property of the bankrupt estate, then such action should be barred by the automatic stay.'" *See Fogarty* 39 F.4th at 75 (citing *48th St. Steakhouse*, 835 F.2d 427, 431 (2d Cir. 1987)); *see also Queenie, Ltd. V. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003) ("The automatic stay can apply to non-debtors, but normally does so only when a claim against a non-debtor will have an immediate adverse economic consequence for the debtor's estate.").

65. Although a particular Abuse Action may not directly implicate coverage under an insurance policy, it may still adversely impact the Diocese's interest in insurance assets. Even if an Abuse Action is uninsured, the Diocese's rights could likely be inequitably affected by a judgment of liability against other members of the Catholic Family. Importantly, the claims asserted against the Related Entities in the Abuse Actions are so closely intertwined with parallel

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their capacities as parish trustees, had notice of an abuser's proclivity to commit abuse, that notice could serve as the basis for an insurer to raise an "expected or intended" defense to coverage. There is a very real risk that the insurer would seek to use such a state court finding to deny coverage to the Diocese also and would argue that the close relationship between the Diocese and its parishes, and the fact that the same two individuals are fiduciaries for both, prevent the Diocese from relitigating the issue of notice.

claims asserted against the Diocese that the Diocese may be exposed to collateral estoppel, adverse precedent, vicarious liability, or imputed admissions if litigation goes forward.[17] Here, even one instance of adverse state court precedent could bolster an Insurer's expected or intended defense to coverage with respect to multiple claims. *See In re Roman Cath. Diocese of Syracuse, New York*, 628 B.R. 571, 581 (Bankr. N.D.N.Y. 2021) ("An insurance coverage defense found in any of the actions that proceed will adversely impact not only the Debtor and the Affiliated Entity named in the action but could also disqualify coverage for other victims whose claims fall under the same insurance policy"); *In re Johns-Manville Corp.*, 26 B.R. 420, 429 (Bankr. S.D.N.Y. 1983), aff'd, 40 B.R. 219 (S.D.N.Y. 1984) (holding that the debtor "could be collaterally estopped in subsequent suits from relitigating issues determined against its officers and directors").

66. The Committee will likely argue there is no risk of collateral estoppel in Abuse Actions where the Diocese is not a party. However, there is precedent for collateral estoppel to apply against a non-party who in is in privity with a named party. *See Buechel v. Bain*, 97 N.Y.2d 295, 304, 766 N.E.2d 914, 919 (N.Y. 2001) (holding that "litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party."); *see also D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664, 564 N.E.2d 634, 637 (1990) ("a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation."). The Diocese respectfully submits that its relationship with the Related Entities makes it likely that a court could deem it to be in privity with them with respect to the allegations to be

[17] All or nearly all Abuse Claimants have filed proofs of claim in the Diocese's Chapter 11 Case based upon substantially the same alleged facts and damages asserted in their Abuse Actions.

adjudicated in the Abuse Actions, regardless of whether the Diocese is a party to such actions. *See Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277, 265 N.E.2d 739, 743 (1970) (holding that a party in privity "includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action").

67. Additionally, the Committee has already conceded earlier in this case that collateral estoppel represents a real risk of harm to the Diocese with respect to the LG Abuse Claimants. *See* Hr'g Tr. 65:6 – 65:12, March 4, 2021, Adv. Proc. Docket No. 137 ("Judge Silverstein specifically in her ruling on irreparable harm found that the threats of adverse precedent, collateral estoppel, imputed liability, that those were grounds for finding a threat of irreparable harm. I submit that we have those exact same factors here."). This threat of irreparable harm acknowledged by the Committee has not faded with the passage of time, the Diocese still faces the same threat of harm now.

68. Even if a claim of collateral estoppel or vicarious liability is ultimately defeated, the looming possibility that these doctrines might prejudice the Diocese's rights leaves it with little choice but to actively participate in the Abuse Actions to effectively protect its own interests. *See In re Lomas Financial Corp.*, 117 B.R. 64, 66-67 (S.D.N.Y. 1990) (it is not possible for the debtor "to be a bystander to a suit which may have a $20 million issue preclusion effect against it"); *In re Johns-Manville Corp.*, 26 B.R. at 429 (noting that debtor company could be confronted with deposition or trial testimony of its senior executives without having the benefit of cross examination if it did not intervene). The existence of a bona fide possibility of preclusion on factual issues related to the Diocese's liability for alleged abuse, and entitlement to insurance coverage, establishes a basis to extend the stay. *See In re Johns-Manville Corp.*, 40 B.R. at 219

(affirming decision to stay actions against debtor's insurance carriers partly because of concerns about issue preclusion); *In re American Film Techs. v. Taritero (In re American Film Techs.),* 175 B.R. 847, 850 (Bankr. D. Del. 1994); *Sudbury, Inc. v. Escott (In re Sudbury)*, 140 B.R. 461, 463 (Bankr. N.D. Ohio 1992) (debtor's liability "may be determined on collateral estoppel principles in Plaintiffs' actions" against non-debtors); *SN Liquid., Inc. v. Icon Int'l, Inc. (In re SN Liquid., Inc.),* 388 B.R. 579, 585 (Bankr. D. Del. 2008) (finding action against non-debtor subject to the automatic stay where the risk of the preclusive effects of such action would otherwise compel the debtors to participate); *Majestic Star Casino, LLC v. City of Gary (In re Majestic Star Casino, LLC)*, Adv. No. 10-50841 (KG), 2010 Bankr. LEXIS 1874, at *5 (Bankr. D. Del. Apr. 28, 2010) (Mem. Order.) (extending automatic stay to claims against non-debtors where, among other things, "adverse rulings in the [non-debtor litigation] may have a preclusive effect on the Debtors' case against the City"); *W.R. Grace I*, 386 B.R. at 35 (expanding preliminary injunction and taking into account "risks of collateral estoppel and record taint"); *Am. Film Techs., Inc. v. Taritero (In re Am. Film Techs., Inc.*), 175 B.R. 847, 849-55 (Bankr. D. Del. 1994) (finding that collateral estoppel applied in bankruptcy cases against debtor and extending automatic stay to claims against debtor's directors and officers because of likely effect of collateral estoppel).

69. As Judge Cangilos-Ruiz observed in *The Roman Catholic Diocese of Syracuse, New York*, an "insurance coverage defense found in any of the actions that proceed will adversely impact not only the Debtor and the Affiliated Entity named in the action but could also disqualify coverage for other survivors whose claims fall under the same insurance policy." *In re Roman Cath. Diocese of Syracuse, New York*, 628 B.R. at 581. Judge Cangilos-Ruiz further found that "this would require engagement by the Debtor in the action even though it is not a named party" in order to safeguard against such a result. *Id.*

70. In light of the foregoing, the Diocese respectfully submits that sections 362(a)(1) and 362(a)(3) automatically stay a substantial number, if not all, of the Abuse Actions without further order of this Court. Moreover, as demonstrated below, allowing any Abuse Actions not otherwise stayed pursuant to section 362(a) of the Bankruptcy Code to move forward in state court will not materially advance the Chapter 11 Case toward a consensual plan of reorganization, but instead will irreparably harm the Diocese and the reorganization process.

POINT II

ANY ABUSE ACTIONS NOT ALREADY SUBJECT TO THE AUTOMATIC STAY SHOULD BE ENJOINED PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE

71. This Court has the authority pursuant to section 105(a) of the Bankruptcy Code to enjoin Abuse Actions against non-debtor Related Entities in aid of the chapter 11 process. *In re The Diocese of Buffalo, N.Y.*, 633 B.R. 185, 189 (Bankr. W.D.N.Y. 2021) (granting an injunction pursuant to section 105(a) of the Bankruptcy Code because "[l]itigation in state court would achieve not a separate resolution of claims, but the duplication of a dispute that the bankruptcy process must still address in the context of claims for contribution and indemnity.").

72. Section 105(a) of the Bankruptcy Code grants broad authority to this Court to issue "any order, process or judgment that is necessary or appropriate" to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a). "Though section 105(a) does not give the bankruptcy court carte blanche—the court cannot, for example, take an action prohibited by another provision of the Bankruptcy Code—it grants the extensive equitable powers that bankruptcy courts need in order to be able to perform their statutory duties." *In re Caesars Entertainment Operating Co., Inc.*, 808 F.3d 1186, 1188 (7th Cir. 2015) (internal citations omitted). "Section 105 authorizes a

bankruptcy court to exercise power outside the bounds of the automatic stay." *In re McHale v. Alvarez (In re 1031 Tax Group, LLC)*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008).

73. A court may issue an injunction pursuant to section 105 whether or not the traditional Federal Rule 65 factors have been met. *See id.* (citing *In re Ionosphere Clubs, Inc.*, 111 B.R. 423, 431 (Bankr. S.D.N.Y. 1990), *aff'd in part sub nom. In re Ionosphere Clubs Inc.*, 124 B.R. 635 (S.D.N.Y. 1991)). A section 105 injunction is appropriate where the actions at issue "'threaten to thwart or frustrate the debtor's reorganization efforts,' and [where] the injunction is 'important' for effective reorganization." *See id.* (citing *In re Granite Partners, L.P.*, 194 B.R. 318, 337 (Bankr. S.D.N.Y. 1996) and *In re Johns–Manville Corp.*, 837 F.2d 89, 93–94 (2d Cir.1988)).

74. In determining whether to issue a section 105 injunction staying actions against non-debtors, courts should consider "whether the suits would (i) threaten the debtor's insurance coverage, (ii) increase the debtor's indemnification liability, (iii) result in inconsistent judgments, (iv) expose the debtor to risks of collateral estoppel or *res judicata*, and (v) burden and distract the debtor's management by diverting its manpower from reorganization to defending litigation." *In re Roman Cath. Diocese of Rockville Ctr., New York*, 651 B.R. 622, 637 (Bankr. S.D.N.Y. 2023).

A. Prosecution of the Abuse Actions Would Threaten the Diocese's Insurance Coverage

75. It is well settled within the Second Circuit that insurance policies held by the debtor are property of the debtor's estate. *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir. 1988); *In re First Cent. Fin. Corp.*, 238 B.R. 9, 15 (Bankr. E.D.N.Y. 1999). Accordingly, when insurance coverage that would otherwise be available to the debtor is placed in jeopardy, courts routinely extend the automatic stay—or hold that the stay applies—to actions against non-debtor co-insureds. *See, e.g., A.H. Robins*, 788 F.2d at 1001 (staying actions against non-debtor

parties "who may be entitled to indemnification under [an insurance] policy or who qualify as additional insureds under the policy"); *In re The 1031 Tax Grp., LLC*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008) (finding that "the Debtors face a very real possibility that insurance proceeds would be at risk if the [actions] are permitted to continue."); *In re Circle K Corp.*, 121 B.R. 257, 261 (Bankr. D. Ariz. 1990); *In re Minoco Grp. of Companies, Ltd.*, 799 F.2d 517, 518 (9th Cir. 1986).

76. As set forth in the 2023 Murray Declaration, many of the Abuse Actions implicate the insurance coverage available to the Diocese. *See* 2023 Murray Declaration, at ¶¶ 27-31.

77. Under New York law, the number of occurrences covered under an insurance policy is determined based on the number of instances of alleged abuse. *See Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 21 N.Y.3d 139 (2013) (each incident of sexual abuse constitutes a separate occurrence).

78. Most, if not all, of the Diocese's insurance policies have per occurrence limits. Thus, the number of covered occurrences in turn determines the policy limits that are available to pay a claim. Where a claim alleges one act of abuse, one per occurrence limit would be available; where a claim alleges two acts of abuse, two per occurrence limits would be available; and so on. However, the insurers will likely contend that the number of insureds seeking coverage for the same occurrence of alleged abuse pursuant to the same policy does not increase the number of available per occurrence limits. For example, if a CVA complaint alleges one act of abuse and both the Diocese and a parish are held liable, one per occurrence limit would be available to provide coverage for both the Diocese and the parish. In other words, the insureds would have to share the per occurrence limit. Accordingly, if an Abuse Action that implicates a policy with per occurrence limits is permitted to go forward, even without the Diocese, the result would be a

depletion of the available coverage under the per occurrence limit, which means less coverage would be available for the defense of the Diocese, and ultimately, for distributions to the Abuse Claimants.

79. In several policies, even pre-judgment defense costs, such as attorneys' fees, expended in connection with the defense of covered claims, erode the per occurrence limits. Thus, the Related Entities' cost of merely defending Abuse Actions would reduce, or even exhaust, the insurance coverage available to the Diocese, irrespective of any settlements or judgments entered against the Related Entities. *See* 2023 Murray Declaration, ¶ 28.

B. Prosecution of the Abuse Actions Will Increase the Diocese's Contribution and Indemnity Obligations

80. Where continuation of a state court action against a non-debtor will result in increased indemnification claims against the debtor, the Court is well within its jurisdiction to enjoin the action. *In re Purdue Pharms. L.P.*, 619 B.R. 38, 51 (S.D.N.Y. 2020) (enjoining actions against non-debtors, because, among other reason, continuation of such actions would result in indemnification claims against the debtor); *see also In re SunEdison, Inc.*, 576 B.R. 453, 462–63 (Bankr. S.D.N.Y. 2017) ("Where a third party claim may give rise to a potential indemnification or contribution claim against the estate, the third party claim will have a conceivable effect on the estate, and accordingly, the Court has the jurisdiction to enjoin it.").

81. As this Court has observed, "[p]arishes and affiliates have themselves asserted claims against the Diocese for contribution and indemnity." *In re Diocese of Buffalo, N.Y.*, 642 B.R. 350, 352 (Bankr. W.D.N.Y. 2022).

82. Any judgments obtained in Abuse Actions against the Related Entities increase the likelihood of a judgment or other finding of liability against the Diocese either directly or through claims of contribution/indemnity by the Related Entities. As this Court previously found:

> the contribution and indemnity rights of parishes and affiliates will operate like a circular whirlpool of claims that the Diocese must still address. By reason of their claims for indemnification or contribution, parishes and affiliates have prospectively converted any judgment against them into a claim against the Diocese. Consequently, the prosecution of actions against parishes will ultimately require the parties to revisit the same dispute when in this proceeding, the Diocese proposes a plan to deal with contribution or indemnity rights.

Buffalo, 633 B.R. at 188

83. Judgments against parishes will thus only result in further indemnity and contribution claims against the Diocese which are directly harmful to the Diocese's estate and to the Diocese's prospects of a successful reorganization. The Committee previously acknowledged how harmful such claims could be to the reorganization effort. *See* Hr'g Tr. 83:22 – 84:3 ("[T]he indemnification problem is real. If we start getting verdicts against parishes, they're going to assert indemnification claims against the Diocese for their legal fees, for the verdicts themselves, and for anything that's not insured. And those indemnification claims are going to be a problem for us when we're negotiating a Chapter 11 Plan . . . .").

84. Accordingly, the threat of such additional indemnity claims here weighs in favor of granting a preliminary injunction, as has been recognized by this Court and numerous other courts. *See, e.g., Ionosphere Clubs, Inc.*, 111 B.R. 423, 435 (Bankr. S.D.N.Y. 1990) (granting an injunction pursuant to section 105(a) where litigation against the non-debtor would have a direct impact against the debtor's estate, including, but not limited to, indemnification obligations of the debtor).

C. Continued Prosecution of the Abuse Actions Will Result in Inconsistent Outcomes for Survivors

85. Where continuation of third-party actions could result in inconsistent judgments, cause exists to enjoin such actions under section 105(a). *In re AP Indus., Inc.*, 117 B.R. 789, 802

(Bankr. S.D.N.Y. 1990) (holding that "the possibility of inconsistent judgments warrants the issuance of an injunction enjoining Defendants from further prosecution of the New York Actions"); *Allstate Ins. Co. v. Elzanaty*, 929 F. Supp. 2d 199, 220 (E.D.N.Y. 2013) (holding that a "stay is the most appropriate solution [ ] in order to avoid the large volume of arbitrations and inconsistent judgments that are gradually culminating in a procedural and substantive train wreck.").

86. The risk of inconsistent judgments is particularly high where multiple actions all involve common questions of fact and law that are more effectively resolved in in the context of a bankruptcy proceeding through a chapter 11 plan. *See, e.g.*, *Drennen v. Certain Underwriters at Lloyd's of London (In re Residential Capital, LLC)*, 563 B.R. 756, 775 (Bankr. S.D.N.Y. 2016) (granting stay of proceeding against non-debtors where there was a risk of inconsistent judgments); *In re The 1031 Tax Grp., LLC*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008) ("The courts have recognized that a stay should be provided to codefendants when the claims . . . are 'inextricably interwoven, presenting common questions of law and fact, which can be resolved in one proceeding.'") (quoting *Ionosphere Clubs*, 111 B.R. at 434).

87. Here, because most, if not all of the Abuse Actions assert common questions of law and fact against the Diocese and the Related Entities, there is a significant risk that inconsistent judgments may be rendered if the Court does not enjoin the Abuse Actions.

88. Additionally, without the injunction sought in this Motion, some survivors will gain an unfair advantage over others. Claimants who sued the Diocese along with other Related Entities will remain subject to the automatic stay, while others who sued only Related Entities engage in a race to the courthouse in an attempt to obtain judgments. This will create an unfair and inconsistent dynamic between Abuse Claimants with respect to claims that are otherwise similarly situated,

and will unduly favor those lucky claimants who are able to first secure judgments. Accordingly, the Court should enjoin the Abuse Actions pursuant to section 105(a) to prevent inconsistent results for survivors.

D. Continued Prosecution of the Abuse Actions Will Expose the Diocese to Risks of Collateral Estoppel and Res Judicata

89. Many postpetition Abuse Actions filed by Abuse Claimants do not name the Diocese as a party. However, such Abuse Actions almost universally have a companion claim filed in this Case seeking redress for the same injury based upon the same alleged facts and circumstances.

90. Regardless of whether the Diocese is a named party in the Abuse Actions, the Abuse Claimants' primary allegations focus on the Diocese's conduct. The allegations often do not distinguish between the alleged tortious acts of the Diocese compared to other named defendants. Thus, any discovery taking place in the Abuse Actions will be directed mainly at facts necessary to establish liability against the Diocese.

91. Additionally and perhaps most importantly, because of the significant overlap of questions of law and fact in many of the Abuse Actions, a finding in an Abuse Action that an insured party acted recklessly as opposed to simply negligently, or had prior knowledge of a perpetrator's propensity for abuse, could be grounds for Insurers to deny coverage not only in that particular Abuse Action, but also with respect to claims of other survivors who were abused by the same perpetrator. *See, e.g., Roman Cath. Diocese of Rockville Ctr., New York v. Arrowood Indem. Co.*, No. 20-CV-11011 (VEC), 2022 WL 558182, at *6 (S.D.N.Y. Feb. 23, 2022) (finding diocese may have "expected" additional sexual abuse within the meaning of coverage exclusion for "expected" or "intended" injuries based upon allegations involving conduct and knowledge that occurred prior to or concurrently with alleged abuse). Accordingly, the Court should enjoin

the Abuse Actions pursuant to section 105(a) to prevent harmful collateral estoppel and *res judicata* effects on the Diocese.

E. Prosecution Of the Abuse Actions Would Burden and Distract the Diocese's Management by Diverting Personnel from Reorganization to Defending Litigation

92. As this Court held previously, "piecemeal litigation against some parishes will further entangle an already knotty situation and threatens to impair efforts to achieve a global resolution of claims for child abuse." *In re Diocese of Buffalo, N.Y.*, 633 B.R. at 189. Counsel for the Committee previously warned of the dangers that would result from piecemeal litigation:

> "having four, five, 600 people, survivors pursuing claims against all of these other entities will lead to chaos, confusion and, frankly, will deplete the assets of those entities and of insurance available to all survivors and will result in a much lower recovery for everybody.

Hr'g Tr. 73:17 – 73:21, March 4, 2021, Adv. Proc. 20-01016, Docket No. 137.

93. As this Court has previously observed, litigating the Abuse Actions will divert critical resources and distract key personnel from the Diocese's reorganization efforts. *Buffalo,* 626 B.R. at 870 ("Without a stay, the debtor must divert its attention and resources to the defense of state court litigation, rather than to focus on the negotiation of acceptable plan provisions."); *see also In re Calpine Corp.*, 365 B.R. at 412 (enjoining actions against a non-debtor where the debtor's employee was "key to the restructuring and to the business and that both would suffer irreparable harm if he were distracted from his responsibilities in order to participate in the [ongoing third-party] litigation"); *In re Johns-Manville Corp.* 26 B.R. at 426 ("[t]he massive drain on [key debtor officers' and employees'] time and energy at this crucial hour of mediation and plan formulation in either defending themselves or in responding to discovery requests could frustrate if not doom their vital efforts at formulating a fair and equitable plan of reorganization.").

94. Given the concerns regarding preclusion, and Diocese's insurance program obligations, the Diocese will be required to play an active and substantial role in the litigation of each of the Abuse Actions. As such, should the Abuse Actions be permitted to go forward, the Diocese will be forced to monitor and participate in such litigation, depleting insurance program funds and diverting the time, effort, and energy of key personnel that would otherwise be spent on advancing this Chapter 11 Case and working toward an expedient and consensual global resolution of the abuse claims which form the overwhelming majority of the Diocese's liabilities and which are also the subject of the Abuse Actions.

95. Time, efforts, and resources spent litigating the Abuse Actions will not further this Case in any meaningful manner, and will do nothing to resolve the companion claims in bankruptcy.

96. For all of the foregoing reasons the Diocese respectfully submits that this Court should enjoin the Abuse Actions pursuant to section 105(a) of the Bankruptcy Code so that the parties can remain focused on reaching a consensual resolution in mediation.

POINT III

THE TRADITIONAL ELEMENTS WARRANTING PRELIMINARY INJUNCTIVE RELIEF ARE SATISFIED

97. A preliminary injunction is also warranted under the traditional elements for injunctive relief. This Court has previously issued preliminary injunctive relief to preserve the status quo among the parties, and to ensure ultimate fairness among all of the survivors. *See Buffalo*, 633 B.R. at 187; *see also Buffalo*, 642 B.R. at 353.

98. In determining whether injunctive relief is appropriate, courts weigh the following factors: (1) the debtor's reasonable likelihood of success; (2) the risk of irreparable harm to the debtor in the absence of an injunction; (3) the balance of hardships between the debtor and its

creditors; and (4) the public interest in an injunction. *Hawaii Structural Ironworkers Pension Trust Fund v Calpine Corp.*, 2006 US Dist. LEXIS 92499, at *12-14, 2006 WL 3755175 (S.D.N.Y. Dec. 20, 2006); *In re United Health Care Org.,* 210 B.R. 228, 233-35 (S.D.N.Y. 1997). In its Injunction Order, the Court observed that the controlling standard for issuing injunctive relief in the Second Circuit requires the Diocese to demonstrate "(1) *either* a likelihood that [it] will succeed on the merits of [its] claim, *or* that the merits present serious questions for litigation and the balance of hardships tips decidedly toward the [Diocese] and (2) that without the injunction, the Diocese will likely suffer irreparable harm before the court can rule upon [its] claim." 626 B.R. at 870 (emphasis in original) (citing *Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 122 (2d Cir. 1994)). Application of these factors to the facts of this case justifies a further extension of the preliminary injunction.

A. Likelihood of success and serious question for litigation

99. The Diocese respectfully submits that it has demonstrated a likelihood of success. In the bankruptcy context, the "likelihood of success" factor has been understood to require consideration of the debtor's ability to successfully reorganize. *Lyondell*, 402 B.R. at 589; *Alert Holdings, Inc. v. Interstate Protective Servs., Inc. (In re Alert Holdings, Inc.),* 148 B.R. 194, 200 (Bankr. S.D.N.Y. 1992). A bankruptcy case has a likelihood of success when its "proceeding on track and [the debtor has] met the challenges they have faced so far, that is sufficient." *Lyondell*, 402 B.R. at 590 (internal quotation omitted); *Union Tr. Phila., LLC v. Singer Equip. Co. (In re Union Tr. Phila., LLC)*, 460 B.R. 644, 660 (E.D. Pa. 2011) (affirming preliminary injunction where "prospects for a successful reorganization remain viable"); *In re PTI Holding Corp.*, 346 B.R. 820, 831 (Bankr. D. Nev. 2006) (preliminary injunction granted where debtor was a "good candidate for reorganization" and had demonstrated "an aggressive, proactive history while in bankruptcy");

Saxby's Coffee Worldwide, LLC v. Larson (In re Saxby's Coffee Worldwide, LLC), 440 B.R. 369, 381 (Bankr. E.D. Pa. 2009) (granting preliminary injunction upon a finding of "sufficient indicia that the [d]ebtor has a reasonable prospect of reorganizing.").

100. As this Court has acknowledged, progress has been made in this Chapter 11 Case, including the "considerable progress in clarifying the nature and character of coverage." 633 B.R. 185, at 187. In a prior extension of a preliminary injunction in this Case, the Court found that "the Diocese and the Committee were reasonable in suggesting mediation as an appropriate method for achieving" an "expeditious resolution of claims." 642 B.R. 350, at 353.

101. Progress is also being made in mediation with the assistance of Judge NeMoyer. While the specifics of the mediation are confidential, the Diocese remains optimistic that the good faith the Diocese has shown during the mediation process will ultimately result in settlement. Further, the commitment of the Catholic Family to provide $100 million to fund a settlement trust demonstrates that the Diocese and the entire Catholic Family is serious about resolving this Case. The Diocese has further mediation scheduled with its Insurers at the end of October, and with the Committee in November.

102. The Diocese respectfully submits that it has met every challenge thus far, with hard work, diligence and the utmost good faith. To date, the Diocese has, among other things, (i) secured a claims bar date; and a supplemental bar date—both of which have now passed, and the Diocese and its professionals identified the universe of claims against the Diocese and completed an extensive claims analysis, including mapping claims to the appropriate insurance policy or policies, (ii) initiated two adversary proceedings in order to confirm the Diocese's right to insurance coverage, (iii) produced voluminous discovery in response to requests for documents and information from the Committee and the Insurers, and (iv) participated in good faith in many

formal and informal mediation sessions, which are still ongoing. Accordingly, despite continuing disputes over the total amount of insurance available to fund abuse claims, and the value to be ascribed to those claims, there is every reason to expect that the Diocese will be able to address its liabilities and propose a confirmable plan to successfully emerge from bankruptcy.

103. Therefore, the Diocese believes that a successful reorganization is attainable and should occur in this Case. Accordingly, the Diocese has demonstrated a likelihood of success that warrants a continued stay of the Abuse Actions.

104. Although the Diocese respectfully submits that the progress to date in this Case satisfies the standard for a likelihood of success, it additionally notes, and the Court's Injunction Order also found, (i) that the merits of this action present serious questions for litigation, and (ii) as addressed in detail below, the balance of harms decidedly tips in the Diocese's favor as the Diocese will likely suffer irreparable harm through interference with the bankruptcy process if the Abuse Actions are not stayed.

105. In the Injunction Order, the Court noted that the question of whether the section 362(a)(3) automatic stay applies to enjoin prosecution of the Abuse Actions depends, in part, on the availability of insurance coverage. The Court further determined that it could not definitively make that determination until it had resolved the Diocese's insurance coverage claims:

> Whether insurance exists is an issue of fact that this Court can resolve only in an adversary proceeding in which the insurers are named as necessary party defendants. For this reason, the Court cannot decide the merits of Adversary Proceeding 20-1016 until after a resolution of both the Adversary Proceeding of February 28, 2020, and the Adversary Proceeding of January 19, 2021.

626 B.R. at 870.

106. The Court went on to observe that "the availability of insurance is a critical and necessary factor in the development of a reorganization plan for The Diocese of Buffalo." *Id.* at

870-71. Accordingly, as the Court has previously recognized, the availability of insurance, and the detrimental impact that litigation of Abuse Actions would have on the Diocese's insurance rights, represent serious questions for litigation sufficient to merit a continued stay of the Abuse Actions.

B. Absent continued injunctive relief, the Diocese and some survivors will be irreparably harmed

107. The Diocese and those Abuse Claimants with Abuse Actions that are clearly subject to the automatic stay will suffer immediate, irreparable harm if other Abuse Actions are allowed to proceed with litigation at this time. The irreparable harm factor is satisfied where "the action sought to be enjoined would embarrass, burden, delay or otherwise impede the reorganization proceeding, or if a stay is necessary to preserve or protect the debtor's estate and reorganization prospects." *In re Alert Holdings, Inc.*, 148 B.R. at 200; *see also Nev. Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 412 (S.D.N.Y. 2007) (noting that preliminary injunction is appropriate "where the action to be enjoined is one that threatens the reorganization process").

108. This Court has previously found that the reorganization process will be adversely impacted by continued piecemeal litigation of the Abuse Actions, noting that the "distraction of state court litigation for the benefit of a few will endanger the prospects of an outcome for the benefit of everyone." *Buffalo*, 626 B.R. at 870. The Court further held that "litigation in state court would achieve not a separate resolution of claims, but the duplication of a dispute that the bankruptcy process must still address in the context of claims for contribution and indemnity" and that litigation of some Abuse Actions "would become an inherent distraction that promises to complicate negotiations." *Buffalo*, 639 B.R. at 189.

109. Most recently, the Court recognized that the "distraction of state court litigation" would disrupt the mediation process. 642 B.R. at 352. As set forth in greater detail above, the parties in interest in this Chapter 11 Case conducted recent in-person mediation sessions in July, August, and September, and upcoming sessions are scheduled to take place in October and November. These negotiations should be allowed to continue without the distraction and pressure of ongoing state court litigation in the Abuse Actions. Permitting prosecution of the Abuse Actions at this juncture would undoubtedly cause irreparable harm to the Diocese's reorganization effort, threaten to negatively impact much of the progress achieved to this point, and also to divert critical resources away from the Diocese's mediation efforts. Should the Abuse Actions be permitted to go forward, the Diocese will be forced to be actively engaged in such litigation, diverting the time, effort, and energy of key personnel that would otherwise be spent working toward a global resolution of abuse claims through mediation.

110. The Committee previously acknowledged if unstayed Abuse Actions move forward in state court, they would risk depleting assets of the Related Entities that might otherwise be available to contribute to a global settlement for the benefit of all survivors. *See* Hr'g Tr. 44:24 – 45:2, March 4, 2021, Adv. Proc. Docket No. 137 ("[T]hese actions going forward would be a complete disruption and distraction and depletion of parish resources, you know, in addition to the Diocese."). The Diocese expects the non-debtor members of the Catholic Family to compromise their valuable insurance rights as well as to make a substantial monetary contribution to a settlement trust to obtain the benefit of a channeling injunction in this Case. Litigation that impairs those insurance rights and dissipates other assets of the Related Entities will directly harm the Diocese's ability to arrange and fund a chapter 11 plan that meets the expectations of the Committee, by lowering, or in some cases fully eliminating the ability of Related Entities to make

this substantial contribution. Such a shortfall could lead to an inability to successfully reorganize the Diocese, which would be a disaster for survivors and the Western New York community as a whole.

111. In addition to the harm suffered by the Diocese, piecemeal litigation will also harm survivors. As the Committee previously acknowledged when it supported the Diocese's earlier request to enjoin the Lipsitz plaintiffs:

> In the absence of a stay, survivors would be virtually compelled to rush to the courthouse to preserve their rights to non-Diocesan assets. However, only the fortunate front runners would likely see those efforts rewarded. That is not fair or equitable.

Statement of Official Committee of Unsecured Creditors in Support of an Order Pursuant to 11 U.S.C. § 105(a) Enjoining the Continued Prosecution of State Court Actions by Certain Litigants Whose Actions are not Subject to Prior Stipulation Staying Further Litigation [Adv. Proc. 20-01016, Docket No. 130, ¶ 5].

112. In light of the forgoing, the Diocese respectfully submits that the irreparable harm factor weighs in favor of enjoining the Abuse Actions.

C. The irreparable harm the Diocese would suffer absent an injunction outweighs any harm parties would suffer as a result of a preliminary injunction

113. As the Court previously found:

> At a time when the vast majority of interested parties are working to find a way for the debtor to reorganize, the distraction of state court litigation for the benefit of a few will endanger the prospects of an outcome for the benefit of everyone. Thus, on the serious issue of allowing prosecution of claims against parishes and affiliates, the balance of hardships tips decidedly toward the Diocese.

Buffalo, 626 B.R. at 870. The Diocese submits that these distractions will be even more disruptive if all Abuse Claimants are allowed to proceed in a free for all fashion. While the number of Abuse Claimants subject to the preliminary injunction sought by the Diocese has expanded since the

Court made these observations, the analysis remains the same. The additional pause sought by the Diocese will provide an opportunity for a global resolution and will not materially disadvantage the Abuse Claimants, because each Abuse Claimant will be treated equally and fairly. Indeed, the Diocese seeks to reach an equitable and just resolution in mediation on behalf of *all* survivors, rather than allowing the certain aggressive Abuse Claimants to seek an advantage over other similarly situated creditors. If the requested injunction is granted, all Abuse Claimants will stand on equal footing through April 15, 2024.

114. The Diocese is not seeking to permanently enjoin the Abuse Actions or to modify any rights the Abuse Claimants may have against the Related Entities. Rather, the Diocese seeks a preliminary injunction that will protect the legitimate interests of all Abuse Claimants, by ensuring a uniform and fair process to resolve their claims through the Diocese's Chapter 11 Case. Ultimately, the Diocese anticipates that its plan of reorganization will provide for a full resolution of all claims against the Related Entities through their substantial contribution to the settlement trust established by the Diocese's plan of reorganization.

115. Permitting any number of the Abuse Actions to go forward, let alone all of them, will undoubtedly deplete the Catholic Family's assets and resources and irreparably harm the Diocese's prospects of a successful global reorganization. Notwithstanding the temporary pause that an injunction imposes upon Abuse Claimants, they will suffer no substantive prejudice from the continued imposition of a stay because, in the unlikely event the Diocese is not able to successfully reorganize, or if the Abuse Claimants' claims are not addressed through a channeling injunction as part of a confirmed chapter 11 plan, each of the Abuse Claimants will be able to resume the prosecution of their Abuse Actions. Such temporary delay is significantly outweighed by the irreparable harm that the Diocese and survivors will suffer if injunctive relief is not granted.

D. The public interest favors granting the requested injunctive relief

116. The public interest supports extending the requested injunctive relief. Courts have noted that the "unquestioned public interest in promoting a viable reorganization of the debtor can be said to outweigh any contrary hardship to the plaintiffs." *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1008 (4th Cir. 1986); *see also Rickel Home Ctrs. v. Baffa (In re Rickel Home Ctrs.)*, 199 B.R. 498, 501 (Bankr. D. Del. 1996) ("[T]here is a strong public interest in promoting a successful Chapter 11 reorganization."); *Am. Film Techs. v. Taritero (In re Am. Film Techs.)*, 175 B.R. 847, 849 (Bankr. D. Del. 1994) ("It is one of the paramount interests of this court to assist the [d]ebtor in its reorganization efforts." (quotations omitted)).

117. A successful reorganization is the only hope to fairly and adequately compensate survivors, which is consistent with the legislative intent animating the Child Victims Act. Moreover, in light of the important impact that the Diocese's religious, charitable, and humanitarian efforts and good works have on the lives of Western New York Catholics and non-Catholics alike, there is also a strong community interest in fostering a successful reorganization of this debtor in particular. *See Syracuse*, 628 B.R. at 583. Accordingly, the public interest favors an injunction that will allow the Diocese to continue the ongoing mediation and settlement discussions in furtherance of a global resolution acceptable to all parties in this Case.

E. This Case is distinguishable from the *Rochester* and *Rockville Centre* cases

118. The facts before the Court are distinguishable from those Judge Warren confronted in the *Diocese of Rochester* case where a request for a preliminary injunction was denied. Notably, in *Rochester*, the parties had been engaged in substantive mediation for more than two years without reaching a global settlement, and that diocese was seeking approval of insurance settlement agreements opposed by the committee, and was threatening to pursue confirmation of

a cram-down plan over the objection of the committee. Substantive mediation in this Case began in earnest less than nine months ago. The Diocese here has not filed a cram-down plan. There is no impasse in mediation that would leave the Diocese no alternative but to pursue a cram-down plan, nor could an impasse in mediation even be alleged at this juncture. Mediation is presently proceeding with in-person sessions being scheduled by Judge NeMoyer and the mediation parties at regular intervals.

119. The Diocese further respectfully submits that the *Rochester* court's decision declining to issue a preliminary injunction contains several legal errors. *See* The Diocese of Rochester's Appellant Brief, *The Diocese of Rochester v. AB 100 Doe, et al.*, Case No. 22-cv-06262 (W.D.N.Y.) [Docket No. 23]. First, without the benefit of the Second Circuit's guidance in *Fogarty* which was not issued until a few weeks after the *Rochester* decision, the *Rochester* court presumed that the automatic stay of section 362(a)(1) did not apply to stay state court lawsuits against parishes and other codefendants sued along with the debtor diocese. *In re Diocese of Rochester*, 2022 WL 1638966, at *5 (Bankr. W.D.N.Y. May 23, 2022). Second, the *Rochester* court found that the diocese had not carried its burden of proof to show that the automatic stay of 362(a)(3) applied, and on that basis denied the requested injunction and dismissed the diocese's adversary proceeding, without affording the diocese the opportunity to conduct an evidentiary hearing to establish the impact of state court litigation on its insurance interests. *See id.* Third, the *Rochester* court failed to engage with the substantial body of Second Circuit case law supporting the issuance of an injunction under section 105 of the Bankruptcy Code when litigation against third parties threatens the integrity of a bankruptcy estate and when pausing such litigation will enhance the prospects of a successful reorganization. *See id.*, at *1-8. Fourth, the *Rochester* court fundamentally misapplied the traditional four-factor preliminary injunction test by (i) finding

a lack of likelihood of a successful reorganization solely because the diocese in that case was proposing a plan opposed by the committee, (ii) failing to recognize the irreparable harm that would befall the diocese as a result of uncontrolled litigation and applying an overly restrictive standard for finding irreparable harm, *See id.*, at *6, (iii) improperly engaging in speculation not supported by an evidentiary record in balancing the potential harms to litigants against the concrete harms to the diocese, and (iv) improperly framing the public interest inquiry by ignoring the public interest in promoting a successful reorganization of the diocese. *See id.*, at *6-8.

120. Judge Glenn's decision declining to issue a preliminary injunction in *Rockville Centre* was also issued against a very different factual backdrop. *See In re Roman Cath. Diocese of Rockville Ctr., New York*, 651 B.R. 622 (Bankr. S.D.N.Y. 2023). For example, the highly contentious litigation that has defined that case clearly suggests a relationship between that diocese and the committee representing survivors that is severely acrimonious and bordering on dysfunctional. *See, e.g., In re Roman Cath. Diocese of Rockville Ctr., New York*, 2023 WL 4833307, at *1 (Bankr. S.D.N.Y. July 18, 2023) (denying committee's motion to dismiss case). The *Rockville Centre* committee refused to extend a consensual stay of state court litigation against parishes and other Catholic entities at a time when the diocese and the committee were pursuing competing chapter 11 plans, the diocese's being a non-consensual cram-down plan. Judge Glenn noted that the court was "doubtful about the chances of reorganization simply based on how far apart the Debtor and Committee are in their proposed plans." *Id.* at 653. Also concerning to Judge Glenn was the fact that the committee "filed a motion to dismiss the Debtor's case because of the lack of progress." *Id.* Notwithstanding these concerning facts, which are nothing like the state of affairs before the Court in this Case, Judge Glenn held that the likelihood of reorganization factor was still "at best, a toss-up at this point." *Id.* at 654.

121. Other than the fact that the Committee has arbitrarily determined that it will no longer agree to extend the voluntary stay to allow the parties to focus on mediation, the facts of this Case bear no resemblance to those of *Rochester* or *Rockville Centre*, and there is no reason to expect that the Diocese will not be able to successfully reorganize.

122. To the contrary of both *Rochester* and *Rockville Centre*, mediation is still in its relative infancy and is productively continuing with active participation from the Committee, the Diocese, the Related Entities, and the Insurers. While the particulars of mediation are confidential, the Diocese can represent to the Court that it is optimistic based upon the discussions to date, that a consensual plan is possible through further mediation. In other words, the parties are not at an impasse, and mediation continues to yield productive discussions.

123. For all the reasons set forth above, issuance of a preliminary injunction staying prosecution of the Abuse Actions is necessary to facilitate further mediation and the successful reorganization of the Diocese.

POINT IV

THE MAJORITY OF THE ABUSE CLAIMANTS ARE CURRENTLY IN DEFAULT

124. The Diocese commenced the above-captioned adversary proceeding on May 2, 2020, and amended its Complaint on March 11, 2021 [Adv. Proc. 20-01016, Docket No. 138] and again on July 13, 2022 [Adv. Proc. 20-01016, Docket No. 251]. Accordingly, pursuant to Bankruptcy Rule 7012, each defendant was required to file an answer by, at the latest, August 3, 2022. Despite this fact, the vast majority of Abuse Claimants have not, as of yet, filed an answer to the Complaint.

125. Failure of any Abuse Claimant to file such an answer should allow the Court to enter a default judgment with respect to those such Abuse Claimants. Accordingly, as against each

defendant who has not yet filed an answer, the Diocese respectfully requests an order granting the declaratory relief sought in the Diocese's Complaint by default. If the Court is not inclined to enter such a default order, it should direct that all defendants who have not previously done so must file an answer within ten (10) days.

REQUEST FOR EVIDENTIARY HEARING

126. To the extent that the Court determines that additional evidence beyond what is already in the record is required, the Diocese respectfully requests that the Court enter a bridge order, preserving the *status quo* until such time as discovery can be conducted and an evidentiary hearing can be scheduled, held, and a decision on the Motion issued.

RESERVATION OF RIGHTS

127. Nothing in this Motion is intended or should be construed as an admission as to the validity of any claim against the Diocese or any of the Related Entities or a waiver of any right of the Diocese or any Related Entities to dispute any claim, and the Diocese and each of the Related Entities expressly reserve their rights with respect thereto.

NOTICE

128. Notice of this Motion will be given to (i) the Office of the United States Trustee for the Western District of New York, (ii) counsel to the Committee, (iii) each of the Abuse Claimants, or if applicable, counsel to each of the Abuse Claimants who is represented. In light of the nature of the relief requested herein, the Diocese submits that no other or further notice is necessary or required.

WHEREFORE, for the reasons set forth above, the Diocese respectfully requests that this Court enter an order in substantially the form attached hereto as ***Exhibit C***, issuing a preliminary injunction enjoining the further prosecution of any Abuse Actions at least through and including

April 15, 2024, setting a deadline to answer the Diocese's complaint in this action, and providing such other and further relief as the Court may deem just and proper.

Dated: October 23, 2023

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