

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

The Diocese of Rochester,

Debtor.

Case No. 2-19-20905-PRW

Chapter 11 Case

**NOTICE OF HEARING ON MOTION OF THE CONTINENTAL
INSURANCE COMPANY FOR RELIEF FROM THE AUTOMATIC STAY
TO FILE DECLARATORY JUDGMENT ACTION REGARDING
INSURANCE COVERAGE FOR SEXUAL ABUSE CLAIMS**

PLEASE TAKE NOTICE that a hearing will be held before the Honorable Paul R. Warren, United States Bankruptcy Judge at the United States Bankruptcy Court, Western District of New York (the “Bankruptcy Court”), 100 State Street, Rochester, New York 14614, on **November 21, 2019 at 11:00 a.m.** (prevailing Eastern Time), or as soon as thereafter as counsel may be heard, to consider the *Motion of The Continental Insurance Company for Relief from the Automatic Stay to File Declaratory Judgment Action Regarding Insurance Coverage for Sexual Abuse Claims* (the “Motion”).

PLEASE TAKE FURTHER NOTICE that all responses or objections to the relief requested in the Motion, if any, must comply with the Federal Rules of Bankruptcy Procedure and be filed with the United States Bankruptcy Court Clerk’s Office in Rochester, New York and served upon the undersigned counsel as soon as practicable.

Dated: October 29, 2019

Respectfully submitted,
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**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

The Diocese of Rochester,

Debtor.

Case No. 2-19-20905-PRW
Chapter 11 Case

**MOTION OF THE CONTINENTAL INSURANCE COMPANY FOR RELIEF FROM
THE AUTOMATIC STAY TO FILE DECLARATORY JUDGMENT ACTION
REGARDING INSURANCE COVERAGE FOR SEXUAL ABUSE CLAIMS**

The Continental Insurance Company, successor by merger to Commercial Insurance Company of Newark, New Jersey and Firemen's Insurance Company of Newark, New Jersey ("Continental"), moves this Court, pursuant to section 362 of title 11 of the United States Code (the "Bankruptcy Code"), Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 4001-1 of the Local Rules of Bankruptcy Procedure for the United States Bankruptcy Court for the Western District of New York, for an order granting relief from the automatic stay to commence a declaratory judgment action against the Debtor to determine the availability of coverage for sexual abuse claims under general liability policies Continental issued or may have issued to Debtor. A draft of the declaratory judgment complaint that Continental seeks leave to file is attached hereto as Exhibit A. In support of this Motion, Continental respectfully states:

INTRODUCTION

1. The Debtor commenced this chapter 11 case as a result of multiple claims asserted against it under the "Child Victims Act" ("CVA") that was recently enacted by the New York state legislature. Affidavit of Lisa M. Passero Regarding the Debtor's Assets and Operations In Support of the Chapter 11 Petition and First Day Proceedings, Dkt. #6 ("Passero

Affidavit”), ¶20. The CVA opened a one-year period under which victims of sexual abuse whose claims would otherwise be time barred could assert their claims. The CVA also extended the limitations period for claims not otherwise time barred. In the short time since the statute was enacted, the Debtor has already been named in at least 46 sexual abuse lawsuits and expects more to be filed. *Id.* ¶21.

2. The Debtor is a religious non-profit entity with limited assets available to compensate the sexual abuse claimants or its other creditors. Affidavit of Rev. Daniel J. Condon Regarding Structure and Pre-Filing History of the Debtor and In Support of the Chapter 11 Petition and First Day Pleadings, Dkt. #7 (“Condon Affidavit”), ¶47. The most significant asset potentially available to pay sexual abuse claimants may be coverage under its historical insurance policies. Commercial Insurance Company of Newark, New Jersey (“Commercial Insurance”) and Firemen’s Insurance Company of Newark, New Jersey (“Firemen’s Insurance”), underwriting companies that have since merged into Continental, may have issued a number of those policies (the “Continental Policies”). The Debtor has tendered the existing sexual abuse claims to Continental for defense and indemnity. Declaration of Lisa Wilson In Support of The Continental Insurance Company’s Motion for Relief From the Automatic Stay (attached hereto as Exhibit B) (“Wilson Declaration”) ¶4. Continental and the Debtor have substantial disagreements regarding the existence of certain Continental Policies, as well as competing interpretations and applications of the terms, definitions, conditions, and exclusions in the Continental Policies (to the extent they exist). *Id.* ¶3. As a result of those disagreements, the amount of the coverage available under the Continental Policies, if any, is highly uncertain.

3. The disputes between Continental and the Debtor are governed by state contract and insurance law. Continental files this motion for relief from the automatic stay so that it can

commence a declaratory judgment action to resolve those disputes and eliminate the uncertainty as to the coverage (if any) available to the Debtor under the Continental Policies.

4. In its first day filings, the Debtor stated that its goals with respect to this bankruptcy case are to ensure a fair distribution of its assets to all of its creditors, including sexual abuse claimants, a reorganization of the Debtor, and a quick exit from bankruptcy. Condran Affidavit ¶¶49-50. Until the disputes regarding the Continental Policies are resolved, however, it will be difficult for the Debtor to achieve any of those goals. Without knowing what coverage may be available to pay the sexual abuse claimants, neither the Debtor nor its creditors will know what a fair distribution of its assets looks like, which will make it difficult to formulate and confirm a plan and thereby only serve to prolong the bankruptcy case. Even if consensus can be found on a plan without first resolving the coverage dispute, there is little benefit to the Debtor or its creditors to delaying the resolution of the coverage issues.

5. As shown below, the benefits of lifting the stay to allow for the prompt resolution of the coverage dispute outweighs any benefit of maintaining the stay and, under the *Sonnax* factors that apply in the Second Circuit, cause exists to lift the stay. Continental's motion should be granted.

JURISDICTION AND VENUE

6. The United States District Court for the Western District of New York has subject-matter jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. That jurisdiction has been referred to this Court pursuant to 28 U.S.C. § 157 and the Standing Order of Reference Re: Title 11 from the United States District Court for the Western District of New York dated February 29, 2012. This matter (but not the underlying insurance coverage dispute) is a core proceeding within the meaning of 28 U.S.C. § 157(b). This Court may therefore enter a final

order granting this motion consistent with Article III of the United States Constitution. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

7. The Debtor commenced this bankruptcy case on September 12, 2019 (the “Petition Date”) by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Through affidavits filed with the Court, *see* Condon Affidavit and Passero Affidavit, the Debtor explained that the impetus for its bankruptcy filing was New York’s enactment of the Child Victims Act (A.2683/S.2440) (the “CVA”) and the claims that have been (and may yet be) filed against it pursuant to that act. Passero Affidavit ¶¶20-21.

8. The CVA created a one-year period during which victims of child sex abuse whose claims may have been time-barred may commence a civil action. The CVA also extended the statute of limitations for claims that were not time-barred. *Id.* ¶20. The Debtor reported that since the mid-1980’s, the Diocese has settled 44 claims related to child sexual abuse; and that from the opening of the CVA one-year window on August 14, 2019 through the Petition Date, 46 lawsuits involving 61 separate claimants seeking damages as a result of alleged abuse were commenced against the Debtor, and an additional 12 demand letters and notices were received from other claimants. Passero Affidavit ¶21.

9. The Debtor explains in its first day filings that it has limited assets to pay its creditors, but notes that its assets include “limited insurance coverage which may be applicable to claims of persons seeking remedies under the Child Victims Act (“CVA”).” Condon Affidavit ¶47. Commercial Insurance and Firemen’s Insurance may have issued general liability insurance policies to the Debtor providing coverage for various periods between 1952 and 1977 (the “Continental Policies”). Wilson Declaration ¶2. While there are disputes regarding the existence or terms of at least some of these alleged policies, the Debtor has alleged that the

coverage provided includes primary coverage with a duty to defend. *Id.* ¶3-4. The Debtor has tendered numerous lawsuits alleging sexual abuse to Continental. *Id.* Continental has agreed to defend some of these claims under a reservation of rights but has denied others on the basis of various defenses, including late notice, the Debtor’s voluntary payments, and that the claims do not allege bodily injury arising from an accident. *Id.* ¶5.

RELIEF REQUESTED

10. By this Motion, pursuant to section 362 of the Bankruptcy Code, Continental seeks entry of an order lifting the automatic stay to permit Continental to commence a declaratory judgment action with respect to the scope of coverage under the Continental Policies for the sexual abuse claims. A proposed form of order is attached as Exhibit C (the “Proposed Order”).

BASIS FOR RELIEF

11. Section 362(d) of the Bankruptcy Code provides that on the request of a party in interest, and after a notice and a hearing, the court shall grant relief from the automatic stay “for cause.” 11U.S.C. § 362(d)(1). “Cause” is not defined in the statute. The Second Circuit, however, has directed courts assessing whether litigation should be permitted to proceed in a forum outside the bankruptcy case to consider twelve specific factors. *See Sonnax Industries, Inc. v. Tri Component Products Corp. (In re Sonnax Industries, Inc.)*, 907 F. 2d 1280 (2d Cir. 1990). Those factors are:

- 1) whether relief would result in a partial or complete resolution of the issues;
- 2) lack of any connection with or interference with the bankruptcy case;
- 3) whether the other proceeding involves the debtor as a fiduciary;
- 4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- 5) whether the debtor's insurer has assumed full responsibility for defending it;
- 6) whether the action primarily involves third parties;
- 7) whether litigation in another forum would prejudice the interests of other creditors;

- 8) whether the judgment claim arising from the other action is subject to equitable subordination;
- 9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;
- 10) the interests of judicial economy, and the expeditious and economical resolution of litigation;
- 11) whether the parties are ready for trial in the other proceeding; and
- 12) impact of the stay on the parties and the balance of harms.

In re Sonmax, 907 F.2d at 1286.

12. Courts have recognized that not all these factors are relevant in every case. Indeed, in *Sonmax*, the Court focused on just four of the factors. *Id.* Nor must the court give each factor equal weight. See *Continental Cas. Co. v. Pfizer, Inc. (In re Quigley Co., Inc.)*, 361 B.R. 723, 743-744 (Bankr. S.D.N.Y. 2007).

13. Here, Continental is seeking to lift the stay to commence litigation to resolve disputes over coverage under the Continental Policies for the sexual abuse claims. No other proceeding to resolve these disputes is pending, yet the resolution of these claims can only benefit the Debtor's reorganization efforts and is critical to determining the recovery of the sexual abuse claimants. On these facts, the majority of the *Sonmax* factors support lifting the stay. Three factors in particular compel that result: (a) lifting the stay would further the interests of judicial economy and foster the expeditious and economical resolution of the insurance disputes (Factor 10), (b) the litigation in a non-bankruptcy forum would not prejudice the interests of other creditors (Factor 7), and (c) the balance of harms (Factor 12) weighs in favor of lifting the stay.

A. Factor 10—Lifting the stay would further the interests of judicial economy, and the expeditious and economical resolution of the disputes regarding coverage under the Continental Policies

14. It is clear that the coverage disputes between the Debtor and Continental must be resolved before the compensation available for valid sexual abuse claims can ultimately be

determined. Whether a plan can be confirmed before that happens is questionable; a resolution of the issues would certainly assist the parties in negotiating a fair and equitable plan. Continental's proposed coverage action is currently the only means by which that resolution will occur. And the progress of litigation may encourage settlement.

15. Continental's proposed declaratory judgment action is a state law contract action that does not invoke any bankruptcy statute or rule.¹ For that reason, courts have almost universally concluded that such actions are "non-core." *See, e.g., Mt. McKinley Ins. Co. v. Corning Inc.*, 399 F.3d 436, 450 (2d Cir. 2005) (vacating stay of asbestos-related coverage litigation, finding that claims raised in declaratory judgment action were not core to the bankruptcy proceeding); *Amatex Corp. v. Aetna Cas. & Sur. Co. (In re Amatex Corp.)*, 107 B.R. 856, 863 (E.D. Pa. 1989) (holding that a Chapter 11 debtor's declaratory judgment action seeking determination of the extent of insurers' liability for asbestos-related claims against debtor was a non-core proceeding), *aff'd*, 908 F.2d 961 (3d Cir. 1990); *U.S. Brass Corp. v. California Union Ins. Co.*, 198 B.R. 940, 945-46 (N.D. Ill. 1996) (holding that a declaratory judgment action concerning the scope of insurance policies was non-core), *aff'd in relevant part, vacated in part*, 110 F.3d 1261 (7th Cir. 1997) (holding that proceedings brought for determination of coverage provided by debtor's insurance policies were non-core proceedings).

B. Factor 10—Lifting the stay would further the interests of judicial economy, and the expeditious and economical resolution of the disputes regarding coverage under the Continental Policies

16. This Court would accordingly lack the statutory or constitutional authority to enter final judgment on this non-bankruptcy claim. 28 U.S.C. § 157(b). At most, if such a declaratory judgment action were to be initiated in this Court, the Court could not "hear and

¹ Under the reasoning of both *Stern v. Marshall*, 564 U.S. 462 (2011), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Continental's proposed coverage action is a state-law contract action, as much a matter of "private right" as the contract action in *Marathon*, or the tort claim in *Stern*.

determine” the matter, but instead would be limited to making proposed findings and conclusions, all of which would be subject to *de novo* review in the district court. 28 U.S.C. § 157(c). Principles of judicial economy therefore favor lifting the stay and allowing the dispute to be heard outside of the bankruptcy court, in a tribunal that can enter final judgment and bring the matter to final resolution.

C. Factor 7—Litigation outside of the bankruptcy court would not prejudice the interests of other creditors

17. The creditors that have an interest in the insurance, if any, provided under the Continental Policies also have an interest in having the coverage disputes resolved as quickly as possible. Because Continental is ready to move forward with the declaratory judgment action now and because, as discussed above, if an action were commenced in this Court, the Court would be limited to making proposed findings and conclusions subject to *de novo* review by the district court, lifting the stay is likely to lead to a quicker resolution of the issues. Nor is the choice of forum disadvantageous to the creditors: Continental’s state law contract claims and defenses are governed by state law regardless of the forum in which they are heard. And whether heard now as a result of the Court lifting the stay or heard after a plan is confirmed when the stay no longer applies, these claims will be heard and determined by a non-bankruptcy court. *See In re Williams*, 144 F.3d 544, 550 (7th Cir. 1998) (no abuse of discretion in lifting stay where “all roads lead to [a non-bankruptcy] court”). There is no prejudice to the creditors from proceeding outside of bankruptcy; instead the creditors will be prejudiced only if there is a delay in obtaining resolution of the coverage issues, resulting in either a delay in confirming a plan or a delay in assets becoming available to the claimants. *Cf. Int’l Bus. Machs. v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731, 736 (7th Cir. 1991) (noting that “debtors-defendants suffer little prejudice when they are sued by plaintiffs who seek

nothing more than declarations of liability that can serve as a predicate for recovery against insurers, sureties, or guarantors”). Finally, the expense of litigation does not constitute prejudice because funds must be expended to resolve the disputes over the Continental Policies in any event. *See Quigley*, 361 B.R. at 745 (noting that “any coverage disputes ... must be resolved ... and the same dollars, must, therefore, be spent ... to resolve it”).

D. Factor 12—The balance of harms favors lifting the stay

18. The continuation of the stay would benefit the Debtor and its bankruptcy estate, if at all, only by putting off the inevitable. While leaving the stay in place to bar the commencement of the declaratory judgment litigation while the bankruptcy case is pending may allow the Debtor and its bankruptcy estate to defer the cost and time of litigating those issues, if the Debtor or its bankruptcy estate wishes to pursue recovery under the policies, those issues will need to be litigated. Delaying that resolution harms the estate far more than any benefit of deferring the costs of the litigation, as it is at least questionable whether a plan can even be confirmed without some understanding of how the coverage issues will be resolved.

E. Other *Sonnax* Factors Also Support Lifting the Stay

19. In addition to the three factors discussed above, several other of the *Sonnax* factors also support lifting the stay.

Factor 1 - Granting relief from the stay would result in a complete resolution of the coverage issues.

20. Lifting the stay to permit Continental to commence the declaratory judgment action would allow the parties to resolve all the disputed issues regarding the availability of insurance under the Continental Policies with respect to sexual abuse claims. Resolution of those issues will allow a determination of the funds available to compensate the sexual abuse

claimants. This will assist in formulating a fair and equitable plan or will avoid unnecessary delay in making compensation available to the claimants.

Factor 2 - lack of any connection with or interference with the bankruptcy case.

21. While it cannot be said that the coverage litigation that Continental desires to commence has no connection to the bankruptcy case, the litigation is not dependent in anyway upon any bankruptcy issue. In addition, there is little risk that the litigation will interfere with the Debtor's bankruptcy case or its reorganizational efforts—instead, resolution of the issues should aid in the Debtor's reorganization efforts. While the Debtor may argue that moving forward with the litigation will distract it from focusing on developing a confirmable plan, it is typical (both inside and outside of bankruptcy) for a debtor to have separate insurance counsel. Thus, bankruptcy counsel would be left free to focus on the bankruptcy-specific issues, minimizing any distraction.² In any event, however, resolution of the issues affecting the recovery of the Debtor's single largest group of creditors can hardly be avoided because it is a "distraction." To the extent that the Debtor is able to confirm a plan prior to the resolution of the coverage issues, then the declaratory judgment action clearly would not interfere with the bankruptcy case. *See Quigley*, 361 B.R. at 744-45 ("Quigley insists that it can confirm the Plan without first resolving the insurance coverage issue.... If Quigley ... [is] right, the coverage dispute can move at its own pace without disturbing the administration of the case."). Commencing the declaratory judgment action sooner rather than later, however, will benefit the claimants, who will presumably benefit from any coverage that is determined to be available or any settlement fostered by the progress of litigation.

Factor 4 - whether a specialized tribunal with the necessary expertise has been established to hear the cause of action.

² The Debtor has in fact already filed an application for retention of special insurance counsel. *See Ex Parte Application for Order Appointing Blank Rome, LLP as Special Insurance Counsel to the Debtor*, Dkt. #85.

22. While there is no specialized tribunal established to hear state law insurance coverage disputes, insurance law is a specialized and state specific body of law. A non-bankruptcy court is likely to be able to consider such a dispute skillfully and efficiently. And New York state courts provide a “commercial division” with experience in resolving insurance coverage disputes of this type.

Factor 6 - whether the action primarily involves third parties.

23. Admittedly, the action Continental proposes to commence is against the Debtor—it is not directed against third parties. Thus, this factor, considered in isolation, weighs against lifting the stay. The fact that an action is against the Debtor certainly does not prohibit a bankruptcy court from modifying the stay to allow a litigation to proceed when resolution of the issues is important to the recovery of creditors and concerns of judicial efficiency weigh in favor of allowing the litigation to go forward in a non-bankruptcy forum.

Factor 11 - whether the parties are ready for trial in the other proceeding.

24. Given that no action has yet been commenced, this factor is not relevant. Continental is, however, prepared to commence an action immediately after an order lifting the stay becomes effective in order to obtain a resolution of the parties’ rights and obligations, if any, under the Continental Policies.³

NOTICE

³ The other *Sonnax* factors are largely inapplicable here, but, to the extent relevant would weigh in favor of lifting the stay. Factor 3 – whether the other proceeding involves the debtor as a fiduciary—could be said to weigh against lifting the stay since the litigation that Continental proposes to commence against the Debtor does not involve the Debtor in a fiduciary capacity and thus may affect property of the estate. Factor 5 – whether the debtor's insurer has assumed full responsibility for defending it—is inapplicable here. Factors 8 and 9 – whether the judgment claim arising from the other action is subject to equitable subordination or whether success in the action would result in an avoidable judicial lien—support the lifting of the stay because any judgment in the proposed coverage action will apply in full force and effect notwithstanding any principle of bankruptcy law, unlike a judgment that would be subject to equitable subordination or result in an avoidable judicial lien.

25. Notice of this Motion will be given to (i) the Debtor, (ii) the United States Trustee for the Western District of New York, (iii) the Official Committee of Unsecured Creditors, (iv) all persons requesting special notice under Fed. R. Bankr. P. 2002.

NO PRIOR REQUEST

26. Continental has not previously sought the relief requested herein from this or any court.

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit C, granting the relief requested herein and granting such other and further relief as the Court deems appropriate.

Dated: October 29, 2019

Respectfully submitted,
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Counsel to The Continental Insurance Company

EXHIBIT A

Draft Complaint

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE**

The Continental Insurance Company,)	
)	
Plaintiff)	
)	
v.)	INDEX NO. _____
)	
The Diocese of Rochester,)	
Debtor In Possession,)	
)	
Defendant.)	

[PROPOSED] COMPLAINT

Plaintiff The Continental Insurance Company, successor by merger to (1) Commercial Insurance Company of Newark, New Jersey and (2) Firemen’s Insurance Company of Newark, New Jersey (“Continental”), brings this Complaint for declaratory judgment against Defendant, The Diocese of Rochester (the “Diocese”), a debtor in possession.

The Parties

1. Commercial Insurance Company of Newark, New Jersey (“Commercial Insurance”) and Firemen’s Insurance Company of Newark, New Jersey (“Firemen’s Insurance”) were underwriting companies that have been merged into Continental. Continental is a corporation organized and existing under the laws of the state of Pennsylvania, with its principal place of business located in Chicago, Illinois.

2. Upon information and belief, Defendant Diocese is a Roman Catholic diocese established and headquartered in Rochester, New York, with its principal office located at 1150 Buffalo Rd., Rochester, NY 14624.

Jurisdiction and Venue

3. On September 12, 2019, the Diocese filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, leading to an automatic stay of cases brought against the Diocese, in accordance with 11 U.S.C. § 362.

4. On [x], 2019, the U.S. Bankruptcy Court for the Northern District of New York granted leave from the Bankruptcy Code's automatic stay, permitting Continental to file this declaratory judgment action

5. The Court has jurisdiction pursuant to C.P.L.R. § 301, because the Diocese's principal place of business is located in New York State.

6. Venue is proper pursuant to C.P.L.R. § 503, because the Diocese's principal place of business is located in Monroe County.

The Alleged Insurance Policies

7. The Diocese has alleged that from 1950 to 1978, Commercial Insurance and Firemen's Insurance issued insurance policies to the Diocese that are listed in Exhibit A to this Complaint (the "Policies").

8. As of the date of the filing of this Complaint, neither Continental nor the Diocese has been able to locate copies of the policies allegedly issued to the Diocese before 1969 (the "Pre-1969 Policies"), but Continental possesses certain secondary evidence.

9. It is the Diocese's burden to establish the existence, terms, and conditions of each alleged Policy.

10. Based on the secondary evidence, the Pre-1969 Policies, if issued, appear to provide coverage only for liability that arises at a specified handful of geographic locations within the Diocese.

11. Based on the secondary evidence, the Pre-1969 Policies, if issued, appear to provide coverage for damages because of bodily injury, only to the extent the bodily injury was caused by an “accident”.

12. On information and belief, the Pre-1969 Policies, if issued, would each state: “When an accident occurs written notice shall be given by or on behalf of the insured to the company or any one of its authorized agents as soon as practicable.... If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.”

13. On information and belief, the Pre-1969 Policies, if issued, would each state: “The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident”.

14. With the exception of alleged Policy No. LX 2675182, Continental has located copies or partial copies of the policies referenced in Exhibit A that were issued to the Diocese from 1969 to 1976.

15. On information and belief, Primary Policy Nos. VBP 5346801 (06/01/1969 to 06/01/1972), VBP 5346812 (06/01/1972 to 06/01/1975) and VBP 5346818 (06/01/1975 to 06/01/1977) (collectively, the “Post-1969 Primary Policies”) each states: “The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence”.

16. On information and belief, each of the Post-1969 Primary Policies defines “occurrence” as “an accident . . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”

17. On information and belief, each of the Post-1969 Primary Policies contains the following provisions:

- “In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable. . . .”
- “If a claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.
- “The insured shall cooperate with the Company and, upon the Company’s request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution and indemnity against any person or organization who may be liable to the insured because of . . . injury or . . . damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.”

18. On information and belief, the excess policies issued by Continental to the Diocese in 1969 and 1976 (Policy Nos. LX 1216325 and No. LX 6538036) contain substantially similar notice, voluntary payments, and “occurrence” provisions as the Post-1969 Primary Policies.

The Lawsuits And Claims

19. In January 2019, the New York State Legislature passed a bill, signed by the New York State Governor in February 2019, which is commonly called, the “Child Victims Act” (the “CVA”). The CVA reopens statutes of limitations with respect to certain claims interposed by

alleged child victims of sexual abuse. The CVA's one-year "window" to bring otherwise expired claims opened on August 14, 2019.

20. According to the Diocese's bankruptcy filing -- in the period between August 14, 2019, the date when the CVA's one-year "window" to bring expired claims opened, and the date of the Diocese's bankruptcy filing -- plaintiffs filed 46 lawsuits involving 61 separate claimants against the Diocese with respect to sexual abuse allegations (the "Lawsuits").

21. The Diocese has provided notice to -- and seeks insurance coverage from -- Continental with respect to some of the Lawsuits.

22. Continental has agreed to participate in the defense of the Diocese with respect to certain of the Lawsuits, subject to a full reservation of rights, and without any admission by Continental that it has a legal obligation to do so.

23. Certain of the Lawsuits allege that the Diocese engaged in intentional bad acts with respect to alleged sexual abuse. For example:

- "At this point [1962-63], it is clear that the Holy See and its agents, including the Diocese, knew they had a widespread problem of clergy sexually molesting minors, and they participated in the creation and operation of facilities in the United States where sexually offending clergy could be sent before they were moved to another parish to work and potentially abuse again" *See J.O. v. The Diocese of Rochester, et al.* (Supreme Court of Monroe County, Index. No. E2019008210), filed on August 28, 2019.
- "The Diocese was aware of Gormley's abuse of children; his 'compulsion' well before he abused the Plaintiff." *See Fessenden v. The Diocese of Rochester, et al.* (Supreme Court of Monroe County, Index. No. E2019007745), filed on August 14, 2019.
- "[B]y the time O'Connor abused the Plaintiff, the Diocese and its officials and/or agents knew O'Connor engaged in inappropriate or abusive conduct with children." *See Ruth v. The Diocese of Rochester, et al.* (Supreme Court of Monroe County, Index. No. E2019008258), filed on August 29, 2019.

- “The policies and practices of the Diocese designed to conceal sexual abuse by clergy and protect it from scandal and liability included the following:
 - (a) transfer and reassignment of clergy known or suspected to abuse minors to deflect attention from reports or allegations of child sexual abuse;
 - (b) concealing from parishioners and even other clergy that a priest reassigned to their parish posed a danger of sexual abuse to children;
 - (c) failing to alert parishioners from the Priest’s prior assignments that their children were exposed to a known or suspected child molester;
 - (d) failing to report sexual abuse to criminal authorities; and
 - (e) otherwise protecting and fostering the interests of abusive clergy to the detriment of the victims and community, for the purpose of avoiding scandal and public scrutiny.

See J.O. v. The Diocese of Rochester, et al. (Supreme Court of Monroe County, Index. No. E2019008210), filed on August 28, 2019.

24. Certain of the Lawsuits allege that the Diocese may have known before the subject abuse took place that certain priests had: (i) engaged in prior sexual abuse of children; (ii) posed dangers to children; and (iii) a propensity to commit sexual abuse. *See, e.g., AB 103 v. The Diocese of Rochester, et al.* (Supreme Court of Monroe County, Index. No. E2019007705), filed on August 14, 2019.

25. The Diocese has also advised Continental of numerous other claims or potential claims involving alleged sexual abuse that do not involve any lawsuit (the “Claims”).

26. The Diocese has advised Continental of and seeks insurance coverage from Continental with respect to the Claims.

27. Continental has reserved all rights with respect to the Lawsuits and Claims, including its right to deny coverage based on the absence of any “accident” giving rise to coverage under the Policies.

28. In connection with several of the Lawsuits and Claims, the Diocese became aware of the allegations of the subject abuse months or years ago, but first notified Continental of such allegations only recently.

29. In addition, through its Independent Reconciliation and Compensation Program, the Diocese has voluntarily paid settlements to certain claimants, without first providing notice to Continental or obtaining Continental’s consent.

Actual Controversy

30. An actual controversy exists between Continental and the Diocese concerning the question whether Continental has any obligation to provide any form of insurance coverage to the Diocese with the respect to the Lawsuits or Claims.

31. To qualify for any coverage, the Diocese must meet its burden to prove the existence and substantive provisions of the alleged Policies.

32. Under the Policies, to the extent they exist, Continental has no obligation to provide insurance coverage to the Diocese for any liability that was not caused by an “accident”.

33. Under the Policies, to the extent they exist, Continental has no obligation to provide insurance coverage to the Diocese for any liability, to the extent that bodily injury was expected or intended from the standpoint of the Diocese or to the extent that the Diocese could have expected the subject bodily injury.

34. Continental has no obligation to provide insurance coverage to the Diocese with respect to any sexual abuse claim, to the extent that the Diocese knew prior to the abuse that the

relevant priest had: (i) engaged in earlier sexual abuse; (ii) posed a danger to children; or (iii) a propensity to commit sexual abuse.

35. Continental has no obligation to provide insurance coverage to the Diocese with respect to any sexual abuse claim, to the extent that -- prior to the subject abuse -- the Diocese had created a system of protecting, transferring, and obscuring the identities of pedophilic priests.

36. Continental has no obligation to provide insurance coverage to the Diocese with respect to any sexual abuse claim, to the extent that -- prior to the subject abuse -- the Diocese knew that there was a specific risk that children interacting with priests in the Diocese would be in danger of sexual abuse.

37. Continental has no obligation to provide insurance coverage to the Diocese with respect to any sexual abuse claim, to the extent that the Diocese failed to provide timely notice to Continental of any accident, occurrence, claim and/or suit. .

38. Continental has no obligation to provide insurance coverage to the Diocese with respect to any sexual abuse claim, to the extent that -- without obtaining Continental's consent -- the Diocese voluntarily paid any form of compensation or expenses with respect to such claim.

39. Continental has no obligation to provide insurance coverage to the Diocese with respect to any sexual abuse claim, to the extent that the Diocese was aware of such claim prior to applying for coverage from Continental.

COUNT I: Declaratory Judgment – No Obligation To Defend The Diocese

40. Continental repeats and hereby incorporates the allegations contained in Paragraphs 1 through 39 above.

41. Continental has no obligation to provide insurance coverage to the Diocese with respect to the Lawsuits and Claims unless the Diocese proves the existence, terms and conditions of the Policies.

42. The Policies, to the extent they exist, do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that liability was not caused by an “an accident” which (1) resulted in bodily injury “neither expected nor intended from the standpoint” of the Diocese, or (2) resulted in bodily injury that could not have been expected by the Diocese.

43. The Court should declare that -- with respect to certain Lawsuits and Claims involving liability not caused by an “an accident” which (1) resulted in bodily injury “neither expected nor intended from the standpoint” of the Diocese, or (2) resulted in bodily injury that could not have been expected by the Diocese -- Continental is not required to defend the Diocese.

44. The Policies, to the extent they exist, do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that the Diocese did not provide timely notice of any accident, occurrence, claim and/or suit to Continental.

45. The Court should declare that -- in connection with certain Lawsuits and Claims, with respect to which the Diocese did not provide timely notice -- Continental is not required to defend the Diocese.

46. The Policies, to the extent they exist, do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that the Diocese issued voluntary payments in connection with such Lawsuits and Claims.

47. The Court should declare that -- in connection with certain Lawsuits and Claims with respect to which the Diocese issued voluntary payments -- Continental is not required to defend the Diocese.

48. The Pre-1969 Policies do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that the Pre-1969 Policies limit coverage to liability arising at specified geographic locations not implicated by the Lawsuit and Claims.

49. The Court should declare that -- in connection with certain Lawsuits and Claims that do not allege liability arising from geographic locations specified for coverage in the Pre-1969 Policies -- Continental is not required to defend the Diocese.

50. The Court should declare that, to the extent Continental is not required to defend the Diocese with respect to any Lawsuit or Claim, Continental is entitled to recoupment of any costs expended by Continental in connection with the defense of such Lawsuit or Claim.

51. The Court should declare that, to the extent Continental is not required to defend the Diocese with respect to any Lawsuit or Claim, Continental is entitled to recoupment of any costs expended by Continental in connection with the defense of such Lawsuit or Claim.

52. This dispute constitutes an actual ripe and justiciable controversy between the parties, and Continental is entitled to a declaration in its favor.

COUNT II: Declaratory Judgment – No Obligation To Indemnify The Diocese

53. Continental repeats and hereby incorporates the allegations contained in Paragraphs 1 through 52 above.

54. Continental has no obligation to provide insurance coverage to the Diocese with respect to the Lawsuits and Claims unless the Diocese proves the existence, terms and conditions of the Policies.

55. The Policies, to the extent they exist, do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that liability was not caused by an “an accident” which (1) resulted in bodily injury “neither expected nor intended from the standpoint” of the Diocese, or (2) resulted in bodily injury that could not have been expected by the Diocese.

56. The Court should declare that -- with respect to certain Lawsuits and Claims involving liability not caused by an “an accident”, which (1) resulted in bodily injury “neither expected nor intended from the standpoint” of the Diocese or (2) resulted in bodily injury that could not have been expected by the Diocese -- Continental is not required to indemnify the Diocese.

57. The Policies, to the extent they exist, do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that the Diocese did not provide timely notice to Continental of any accident, occurrence, claim, and/or suit.

58. The Court should declare that -- in connection with certain Lawsuits and Claims with respect to which Continental did not receive timely notice of the alleged abuse -- Continental is not required to indemnify the Diocese.

59. The Policies, to the extent they exist, do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that the Diocese issued voluntary payments in connection with such Lawsuits and Claims.

60. The Court should declare that -- in connection with certain Lawsuits and Claims with respect to which the Diocese issued voluntary payments -- Continental is not required to indemnify the Diocese.

61. The Policies do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that the Diocese was aware of the subject abuse prior to applying for coverage from Continental.

62. The Court should declare that -- in connection with certain Lawsuits and Claims with respect to which the Diocese was aware of the alleged abuse prior to the Diocese's submission of its applications for insurance to Continental -- Continental is not required to indemnify the Diocese.

63. The Pre-1969 Policies, to the extent they exist, do not obligate Continental to provide insurance coverage to the Diocese with respect to Lawsuits and Claims, to the extent that the Pre-1969 Policies limit coverage to liability arising at specified geographic locations not implicated by the Lawsuit and Claims.

64. The Court should declare that -- in connection with certain Lawsuits and Claims that do not allege liability arising from geographic locations specified for coverage in the Pre-1969 Policies -- Continental is not required to indemnify the Diocese.

65. This dispute constitutes an actual ripe and justiciable controversy between the parties, and Continental is entitled to a declaration in its favor.

**COUNT III – Declaratory Judgment – Other Coverage Issues
To The Extent The Court Finds A Duty To Defend**

66. Continental repeats and hereby incorporates the allegations contained in Paragraphs 1 through 65 above.

67. To the extent the Court concludes that Continental has a duty to defend the Diocese with respect to any Lawsuit or Claim, Continental seeks a declaration regarding other issues that may affect Continental's obligations under the Policies in connection with the relevant Lawsuit or Claim, including, among other issues: whether coverage is triggered under the Policies; the number of occurrences covered under the Policies; and the correct method of allocation of indemnity and/or expense with respect to the Policies.

68. This dispute constitutes an actual ripe and justiciable controversy between the parties, and Continental is entitled to a declaration in its favor.

**COUNT IV – Declaratory Judgment – Other Coverage Issues
To The Extent The Court Finds A Duty To Indemnify**

69. Continental repeats and hereby incorporates the allegations contained in Paragraphs 1 through 68 above.

70. To the extent the Court concludes that Continental has a duty to indemnify the Diocese with respect to any Lawsuit or Claim, Continental seeks a declaration regarding other issues that may affect Continental's obligations under the Policies in connection with the relevant Lawsuit or Claim, including, among other issues: whether coverage is triggered under the Policies; the number of occurrences covered under the Policies; and the correct method of allocation of indemnity and/or expense with respect to the Policies.

71. This dispute constitutes an actual ripe and justiciable controversy between the parties, and Continental is entitled to a declaration in its favor.

PRAYER FOR RELIEF

WHEREFORE, Continental respectfully requests that the Court enter a judgment in its favor declaring that: (1) with respect to certain Lawsuits and Claims involving liability not caused by an "an accident" which (a) resulted in bodily injury "neither expected nor intended

from the standpoint” of the Diocese, or (b) resulted in bodily injury that could not have been expected by the Diocese -- Continental is not required defend or indemnify the Diocese; (2) in connection with certain Lawsuits and Claims with respect to which Continental did not receive timely notice of the alleged abuse, Continental is not required to defend or indemnify the Diocese; and (3) in connection with certain Lawsuits and Claims with respect to which the Diocese issued voluntary payments, Continental is not required to defend or indemnify the Diocese. And, to the extent the Court concludes that Continental has a duty to defend or indemnify the Diocese with respect to any Lawsuit or Claim, Continental seeks a declaration concerning other potentially pertinent issues related to possible coverage. Continental further requests that the Court grant such other and further relief as may be just and appropriate in the circumstances.

Respectfully submitted,

THE CONTINENTAL INSURANCE
COMPANY

By its counsel,

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Date: October [x], 2019

Exhibit A

Policy No.	Underwriting Company	Effective Dates
Policy No. LZ 15353	Commercial Casualty Insurance Company of Newark, NJ	08/04/1950 to 08/04/1951
Policy No. LZ 18051	Commercial Insurance Company of Newark, NJ	03/01/1952 to 03/01/1955
Policy No. LZ 19348	Commercial Insurance Company of Newark, NJ	03/01/1955 to 03/01/1956
Policy No. LZ 24003	Commercial Insurance Company of Newark, NJ	03/01/1956 to 03/01/1957
Policy No. LZ 24008	Commercial Insurance Company of Newark, NJ	03/01/1957 to 03/01/1958
Policy No. LZ 24018	Commercial Insurance Company of Newark, NJ	03/01/1958 to 03/01/1959
Policy No. LZ 24028	Commercial Insurance Company of Newark, NJ	03/01/1959 to 03/01/1960
Policy No. LZ 32604	Commercial Insurance Company of Newark, NJ	03/01/1960 - 03/01/1961
Policy No. LZ 32617	Commercial Insurance Company of Newark, NJ	03/01/1961 to 03/01/1962
Policy No. LZ 47272	Commercial Insurance Company of Newark, NJ	03/01/1962 to 03/01/1963
Policy No. LZ 48500	Commercial Insurance Company of Newark, NJ	03/01/1963 to 03/01/1964
Policy No. LAZ 32300	Firemen's Insurance Company of Newark, NJ	03/01/1965 to 03/01/1966
Policy No. L 0955400	Firemen's Insurance Company of Newark, NJ	03/01/1967 to 03/01/1968
Policy No. L 1239300	Firemen's Insurance Company of Newark, NJ	03/01/1968 to 06/01/1969

Policy No. VBP 5346801	Commercial Insurance Company of Newark, NJ	06/01/1969 to 06/01/1972
Policy No. VBP 5346812	Commercial Insurance Company of Newark, NJ	06/01/1972 to 06/01/1975
Policy No. VBP 5346818	Commercial Insurance Company of Newark, NJ	06/01/1975 to 06/01/1978 (cancelled effective 06/01/1977)
Policy No. LX 1216325	Firemen's Insurance Company of Newark, NJ	06/01/1969 to 06/01/1972
Policy No. LX 2675182	Firemen's Insurance Company of Newark, NJ	06/01/1975 to 06/01/1976
Policy No. LX 6538036	Firemen's Insurance Company of Newark, NJ	06/01/1976 to 06/01/1977

EXHIBIT B

Declaration of Lisa Wilson

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

The Diocese of Rochester,

Case No.: 19-20905

Chapter 11 Case

Debtor,

**DECLARATION OF LISA WILSON IN SUPPORT OF THE CONTINENTAL
INSURANCE COMPANY'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

I, Lisa Wilson, declare as follows:

1. I am employed by Continental Casualty Company as Assistant Vice President, Environmental Mass Tort Claims. My responsibilities include overseeing claims related to insurance companies operating under the "CNA" service mark, including Continental Insurance Company. I make this declaration in support of the Motion of The Continental Insurance Company for Relief from the Automatic Stay to File Declaratory Judgment Action Regarding Insurance Coverage for Sexual Abuse Claims.
2. Commercial Insurance Company of Newark, New Jersey ("Commercial Insurance") and Firemen's Insurance Company of Newark, New Jersey ("Firemen's Insurance") were underwriting companies that have been merged into The Continental Insurance Company ("Continental"). Commercial Insurance and Firemen's Insurance may have issued general liability insurance policies to the Debtor providing coverage for various periods between 1952 and 1977 (the "Continental Policies").
3. Continental and the Debtor have substantial disagreements regarding the existence of certain Continental Policies, as well as competing interpretations and applications of


the terms, definitions, conditions, and exclusions in the Continental Policies (to the extent they exist).

4. While there are disputes regarding the existence and terms of at least some of the Continental Policies, the Debtor has alleged that the coverage provided includes primary coverage with a duty to defend. The Debtor has tendered numerous lawsuits alleging sexual abuse to Continental.

5. Continental has agreed to defend some of these claims under a reservation of rights but has denied others on the basis of various defenses, including late notice, the Debtor's voluntary payments, and that the claims do not allege bodily injury arising from an accident.

This declaration is filed pursuant to 28 U.S.C. § 1746(2). I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: October 29, 2019



Lisa Wilson

EXHIBIT C

Proposed Order

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

The Diocese of Rochester,

Debtor.

Case No. 2-19-20905-PRW
Chapter 11 Case

**ORDER GRANTING MOTION OF THE CONTINENTAL
INSURANCE COMPANY FOR RELIEF FROM THE AUTOMATIC STAY**

Upon the Motion of The Continental Insurance Company (“Continental”) For Relief from the Automatic Stay to File Declaratory Judgment Action Regarding Insurance Coverage for Sexual Abuse Claims (the “Motion”); it appearing that this Court has jurisdiction to consider the Motion and the relief requested therein; due notice of the Motion having been given under the circumstances; upon all the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby:

ORDERED, that the Motion is granted in all respects; and it is further

ORDERED, that Continental is granted relief from the stay to commence a declaratory judgment action against the Debtor to determine the availability of coverage under insurance policies Continental issued or is alleged to have issued to the Debtor; and it is further

ORDERED, that this Court shall retain jurisdiction to determine all matters arising from implementation of this Order.

Dated: _____, 2019

Hon. Paul R. Warren
United States Bankruptcy Judge