

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

**Hearing Date: November 21, 2019**  
**Hearing Time: 11:00 am**

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In re : Chapter 11  
The Diocese of Rochester, : Case No. 19-20905  
Debtor. :  
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**OBJECTION OF THE UNITED STATES TRUSTEE TO  
THE DEBTOR’S MOTION FOR ENTRY OF FINAL ORDER  
AUTHORIZING, BUT NOT DIRECTING, THE DEBTOR TO (I)  
TO CONTINUE USING EXISTING BANK ACCOUNTS,  
BANKING PRACTICES AND BUSINESS FORMS,  
(II) MAINTAIN INVESTMENT PRACTICES AND (III)  
CONTINUE USING CREDIT CARDS**

**TO: THE HONORABLE JUDGE WARREN,  
UNITED STATES BANKRUPTCY JUDGE:**

William K. Harrington, the United States Trustee for Region 2 (the “United States Trustee”), hereby submits this objection to the Motion of The Diocese of Rochester (the “Debtor”) for Entry of an Order Authorizing, but not Directing, the Debtor to (I) Continue Using Existing Bank Accounts, Banking Practices and Business Forms, (II) Maintain Investment Practices and (III) Continue Using Credit Cards (the “Cash Management Motion”), and the Supplemental Memorandum to the Cash Management Motion (the “Supplemental Motion,” together with the Cash Management Motion collectively referred to herein as the “Motion”). ECF. Doc. Nos. 12 and 107, respectively. In support thereof, the United States Trustee respectfully states:

**PRELIMINARY STATEMENT**

The Debtor seeks authority to maintain the investment practices for the Communis and the CGA Investment Account that hold approximately Fifty Seven Million Dollars and Three-

Hundred Thousand Dollars, respectively. In order to continue their investment practice, the Debtor bears the burden of establishing that it is in compliance with the requirements of Section 345 or that cause exists for the Court to waive the requirements of Section 345 of the Bankruptcy Code. The Debtor's justifications for the waiver – that investment practices with respect to Communis and the CGA Investment Account are sophisticated and overseen by independent professional outside financial advisors who ensure that a diversified mix of investments is maintained to achieve moderate targeted growth with minimal exposure to down-side risk in any particular investment – is universally available in every case. If sufficient to justify a waiver, the protection of Section 345 would be rendered ineffective. Accordingly, the Debtor's request should be denied.

## **BACKGROUND**

### **A. General Background**

1. The Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code on September 12, 2019 (the "Petition Date").

2. The Debtor is authorized to continue to operate its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. The Debtor is a Latin Catholic Diocese which maintains a number of administrative offices and ministries, necessary to advance the mission of teaching, sanctifying and serving, including, the Bishop's Office, Chancery, Marriage Tribunal, Finance, Information Technology, Human Resources, Stewardship and Communications, Evangelization and Catechesis, Catholic Schools, Pastoral Services, Safe Environment, Victims Assistance, Clergy Services and Archives. *See* the 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.

ECF Doc. No. 17 at ¶¶ 5 and 7.

**B. First Day Hearing on Motion to Continue Using Existing Bank Accounts, Banking Practices and Maintain Investments**

4. Pursuant to agreed language between the parties, the Interim Order provided: “The Debtor shall have a period of forty-five (45) days from the entry of the Interim Order to come into compliance with the requirements of section 345 (b) of the Bankruptcy Code, without prejudice to the Debtor’s right to seek a further interim modification on a Final Hearing on the Motion.” ECF at 45, ¶ 10.

**C. The Cash Management Motion**

5. Rather than come into compliance with section 345 (b) within the 45 day time period, the Debtor filed a Supplemental Motion on October 22, 2019, seeking a waiver of section 345.

6. On October 24, 2019, the parties agreed to a further extension of thirty (30) days. The Motion currently is set for November 21, 2019.

7. The Debtor is seeking a waiver of the requirements of section 345(b) primarily to address two unique aspects of the Debtor’s cash management and investment practices, namely, the Debtor’s investments maintained with Communis and in the CGA Investment Account<sup>1</sup>.

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<sup>1</sup> By previous order, this Court permitted the debtor to keep approximately \$5 million dollars of estate funds in a non debtor-in-possession account but with an approved depository in the WDNY, M&T Bank. As of today’s date, M&T Bank does not have sufficient collateral posted to protect the amount of funds in the debtor’s accounts. UST employees have reached out to M&T to discuss the need to increase the collateral or obtain a surety bond. If M&T is unwilling to increase the collateral or obtain a surety bond, the UST reserves the right to bring this issue back before the Court.

8. As of June 30, 2019, Communis had approximately \$57,669,749 in Diocesan funds under management, which the Debtor purports that a substantial portion of which are subject to donor-imposed restrictions on use. *See*, the Supplemental Motion, ¶ 11.

9. The CGA Investment Account is an account maintained by the Debtor at Wilmington Trust, which the Debtor purports that the account supports charitable gift annuities in accordance with, and as mandated by Section 1110 of the New York Insurance Law. *Id.* at ¶ 14.

10. The CGA Investment Account has, as of June 30, 2019, an approximate balance of \$304,000. *Id.*

11. The Debtor asserts that the majority of funds invested with Communis, and the entirety of funds in the CGA Investment Account, represent restricted donations which must be used in accordance with donative intent and which therefore are not included within the Debtor's bankruptcy estate pursuant to section 541 of the Bankruptcy Code. *Id.* at ¶ 17.

12. Further, they argue that to the extent that any of the funds at issue represent property of the Debtor's bankruptcy estate, the Debtor submits there is cause to waive compliance with the investment requirements of section 345(b). *Id.* at ¶ 18.

13. The Debtor and the United States Trustee have discussed the Debtor's requested relief and reviewed documentation provided. However, the United States Trustee has determined that the funds in Communis, and the CGA Investment Account (collectively referred to as the "Investment Accounts") are not in compliance with Section 345 of the Bankruptcy Code.

## OBJECTION

### A. The Statutory Standard

Section 345(b) of the Bankruptcy Code imposes certain requirements as to where estate funds can be held in order to protect the funds for the benefit of all creditors. Unless a deposit or investment is insured or guaranteed by the United States (or a federal department, agency, or instrumentality) or backed by the full faith and credit of the United States, the trustee or debtor in possession must require from an entity with whom estates funds are deposited to post a bond in favor of the United States or, in the alternative, deposit securities of the type specified in section 9303 of title 31 of the United States Code as security for the investment or deposit. *See* 11 U.S.C. § 345(b). *Id.* Section 345(a) of the Bankruptcy Code requires the trustee or a debtor in possession to deposit or invest money of the estate so that it will result in the “maximum reasonable net return. . . [while] taking into account the safety of such deposit or investment.” Section 345(b) requires that estate funds be deposited or invested so as to ensure that the funds are protected for the benefit of creditors. *See* 11 U.S.C. § 345(b). A court may waive the requirements of § 345 upon the showing of “cause.” 11 U.S.C. § 345(b)(2).

Generally, unless the funds are insured, guaranteed, or backed by the full faith and credit of the United States Government or its agencies, the institution holding the estate funds must post a bond in favor of the United States or, in the alternative, deposit securities pursuant to 31 U.S.C. § 9303 as security. To ensure that trustees and debtors in possession meet their responsibilities to safeguard funds in accordance with Section 345, the United States Trustee monitors fiduciaries and depositories, and requires that chapter 11 estate assets be held in debtor-in-possession accounts at “authorized depositories,” *i.e.*, those that have entered into a Uniform Depository Agreement with the United States Trustee. *See* United States Trustee Program Policy

and Practices Manual, Volume 7, “Banking and Bonding,” (“Manual”), § 7-1.1, pp. 1-2, at [https://www.justice.gov/ust/file/volume\\_7\\_banking\\_and\\_bonding.pdf/download](https://www.justice.gov/ust/file/volume_7_banking_and_bonding.pdf/download).

**B. The Debtor Has Not Established Cause**

The Debtor seeks a Final Order that includes, among other things, a provision authorizing the Debtor to continue to use and maintain the Investment Accounts that do not comply with Section 345 of the Bankruptcy Code. The Debtor has not provided evidence to support a finding that cause exists for the waiver of the requirements of Section 345 of the Bankruptcy Code. Because the Debtor has not demonstrated cause for a waiver of the requirements set forth in Section 345, the United States Trustee respectfully objects to the Debtor’s Motion to the extent it seeks entry of a Final Order waiving the requirements of Section 345.

While citing to *In re Serv. Merchandise Co. Inc.*, 240 B.R. 894, 896 (Bankr. M.D. Tenn. 1999) for the factors considered in evaluating cause, the Debtor’s argument for a Section 345 waiver is that the “investment practices with respect to Communis and the CGA Investment Account are sophisticated and overseen by independent professional outside financial advisors who ensure that a diversified mix of investments is maintained to achieve moderate targeted growth with minimal exposure to down-side risk in any particular investment.” *See*, the Supplemental Motion, ¶ 22. Moreover, the Debtor cites that it is a large, financially sophisticated organization that employs a certified public accountant as its Chief Financial Officer who, along with a professional support staff, is devoted to proper oversight and management of the Debtor’s finances. *Id.* The Debtor concludes that it is not seeking to make unnecessarily risky or speculative investments, but merely to deploy its resources consistent with the recommendations of its professional advisors in an organized and diversified manner as most institutions of similar size do in the ordinary course. *Id.* Those arguments are available to virtually every debtor, and, if

sufficient to establish cause in every case, would render the protections contemplated by Section 345 totally ineffective.


While the funds in the Investment Accounts may or may not be property of the estate<sup>2</sup>, the concern of the United States Trustee is that should a failure contemplated by Section 345 occur resulting in the loss of funds in the accounts, the Debtor would still remain liable. Accordingly, the United States Trustee requests that the Court direct the Debtor to ensure that the funds in both Communis and the CGA Investment Account be protected against the loss of such funds in a manner comparable to the requirements set forth in Section 345.

WHEREFORE, the United States Trustee respectfully requests that the Court deny the Motion as set forth herein and grant such other relief as the Court deems fair and just.

Dated: Rochester, New York  
November 14, 2019

Respectfully submitted,

WILLIAM K. HARRINGTON  
UNITED STATES TRUSTEE, Region 2

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<sup>2</sup> The Debtor has not provided sufficient evidence to demonstrate that certain amounts in the Investment Accounts may not be property of the estate. Even if it had, that is a determination to be made by this Court.