UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

THE DIOCESE OF ROCHESTER,

Debtor.

Case No. 19-20905

Chapter 11

OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO DEBTOR'S MOTION TO APPROVE PROPOSED INSURANCE SETTLEMENTS TO FUND SURVIVOR COMPENSATION TRUST

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The Official Committee of Unsecured Creditors (the "**Committee**") of The Diocese of Rochester (the "**Debtor**" or "**Diocese**"), by and through its undersigned counsel, hereby submits its preliminary objection (the "**Objection**") to the *Debtor's Motion to Approve Proposed Insurance Settlements to Fund Survivor Compensation Trust* (the "**9019 Motion**") [Docket No. 1538; Adv. Pro. Docket No. 190]. In support of its Objection, the Committee respectfully states as follows:

Preliminary Statement[1]

1. One year ago, the Court denied the Diocese's attempt to enter into a low-value settlement with two of its insurers. Rather than try to negotiate an appropriate, fair settlement with survivors, the Diocese is doubling down on its efforts to force an unfair, unacceptable resolution of its chapter 11 case on survivors. The Diocese is asking the Court to approve settlements with all of its major insurers.[2] The Court should not approve the settlement agreements because they are too low and do not provide sufficient consideration for the insurers' exposure based on the value of the claims and the amount of available insurance. Not content to present the low insurance settlements by themselves, the Diocese intends to file a plan that adds a woefully inadequate Diocesan contribution to a global settlement fund. The plan would provide a channeling injunction and releases for the benefit of non-debtor DOR Entities without obtaining fair consideration from such entities. The Committee expects, based on consultation with state court counsel representing more than two-thirds of survivors who filed a sexual abuse claim ("**Sexual Abuse Claimants**"), that a plan embodying the terms described in the 9019 Motion and the settlement agreements would be rejected by Sexual Abuse Claimants. Therefore,

[1] Capitalized terms used in this Objection are as defined in the 9019 Motion.

[2] The 9019 Motion does not appear to include The Hartford Financial Services Group, Inc. ("Hartford"), which issued at least one policy to the Diocese for a period of time beginning on June 1, 1978. *See* 9019 Motion at 10 n.7.

any effort to confirm such a plan and impose non-consensual non-debtor releases would be doomed to failure. Rather than allow the Diocese to embark on that course of action, the Court should deny the 9019 Motion.

2. The Court should deny the 9019 Motion as a matter of law because the settlement agreements are a sub-rosa plan. The settlement agreements, along with the 9019 Motion, set forth the key terms of a non-consensual chapter 11 plan, including (a) total consideration, (b) maximum funding available to the primary creditors of the Diocese, (c) identification of the beneficiaries of non-debtor non-consensual releases and a channeling injunction. Approval of the settlement agreements will dictate the terms of a chapter 11 plan that will require cramdown and approval of unlawful non-debtor releases. Thus, contrary to the Diocese's characterization of the agreements as the "first step" in facilitating a reorganization, are the "first step" in a cram-down fight that the Diocese will lose in the face of united survivor opposition. The settlement agreements are a step in the wrong direction. Because the settlement agreements are a blatant sub-rosa plan they cannot be approved pursuant to Rule 9019.

3. The Court should deny the 9019 Motion as premature. The Diocese asks the Court to consider the 9109 Motion as if they were not contingent on confirmation of a chapter 11 plan. To the extent the court considers the settlement agreements, they should only be considered along with confirmation of a plan, at which time the Court and creditors would have the benefit of an actual plan that has been subject to a vote. The Diocese, hoping to gain some momentum with the Court to confirm an unprecedented cram-down plan, nonetheless is pursing the 9019 Motion.

4. The Court should also deny the 9019 Motion on the merits because it falls far short of the standards governing approval of settlements and sales outside the ordinary course of

business. The proposed settlement agreements do not meet any standard of reasonableness because:

a. the settlement agreements are not in creditors' interest;

b. the Debtor's high likelihood of success in litigation against the insurers does not balance with the significant asset the Diocese is selling;

c. the settlement agreements do not avoid the costs and time of litigation;

d. the settlement agreements are subject to the contingency of plan confirmation; and

e. the settlement agreements expose the Diocese and its related entities to litigation risk because Sexual Abuse Claimants and the Committee will look to them to fund the substantial shortfall.

5. Finally, the 9019 Motion also seeks approval under section 363 of the Bankruptcy Code – which requires a finding that the Debtor is exercising its business judgment. If the settlement agreements are approved and enforceable against the Diocese, the Diocese and any party the Diocese seeks to include a released party in a chapter 11 plan will have to fund the shortfall between the insurer payments and a fair settlement necessary for plan confirmation. While the Diocese intends to dictate the amount of the settlement, it will not be able to confirm a plan with the total settlement amount described in the 9019 Motion. As such, the Diocese is not exercising proper business judgment in looking to sell its highest value assets as part of a doomed scheme. As such, the Court should deny the 9019 Motion because the Diocese is not exercising proper business judgment in entering into the settlement agreements.

6. Survivors have clearly and repeatedly stated they will not agree to an inadequate settlement. However, they recognize that there is a benefit to a fair settlement – even if it does

not provide full litigation value to each claimant. In that regard, the Committee, along with state court counsel representing approximately seventy percent (70%) of Sexual Abuse Claimants have attempted to negotiate in good faith through mediation. The Committee's positions consider the facts of the Sexual Abuse Claims, the amount of the Diocese's assets, the amount of assets of non-Diocesan codefendants (including many non-debtor DOR Entities -- such as parishes) and the substantial amount of insurance available to fund a settlement.

7. The Committee remains committed to work to reach a global resolution. However, the Diocese and its insurers decided that it was no longer in their interest to negotiate with survivors because survivors are seeking reasonable compensation for grievous damages. As such, the Diocese negotiated inadequate insurance settlements that are coupled with non-debtor releases that are unattainable absent overwhelming survivor support. The Committee believes that such creditor support is overwhelmingly absent. As such, the Court should stop the Diocese's misguided march down a futile path at the very "first-step" the Diocese chose to take by denying the 9019 Motion.

OBJECTION

I. THE PROPOSED SETTLEMENT SHOULD BE DENIED AS A *SUB ROSA* PLAN

8. Courts will not approve a settlement agreement that is, in fact, a *sub rosa* plan. "A settlement which has the effect of dictating the terms of the debtor's plan of reorganization prior to the confirmation process cannot be approved." *Official Comm. of Unsecured Creditors of Tower Auto. v. Debtors & Debtors in Possession (In re Tower Auto. Inc.)*, 241 F.R.D. 162, 168-169 (S.D.N.Y. 2006) (*citing In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the bankruptcy court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub

rosa . . . ."); *In re Iridium*, 2005 U.S. Dist. LEXIS 5483, 2005 WL 756900 at *7 ("the trustee is not authorized to enter into a settlement if it results into a de facto or sub rosa plan of reorganization."); *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 887 (Bankr. S.D.N.Y. 1990) ("A transaction which would effect a lock-up of the terms of a plan will not be permitted.")). A settlement that circumvents creditors' rights to vote on key provisions -- such as the propriety of non-debtor releases and the principal source of funding for creditors' recovery -- dictates the terms of a plan. *See Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. by & Through Mabey (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 355 (5th Cir. 1997).

9. The settlement agreements are a *sub rosa* plan. They dictate numerous terms of a plan of reorganization and bypass creditors' rights to vote on those terms by inextricably linking the majority of the potential plan funding to those terms. Approval of the settlement agreements requires a finding that the settlement agreements are reasonable. Such a finding would be used by the Diocese and insurers to argue that a cramdown is appropriate and settled law of the case. Creditors have a statutory right to vote on whether the settlement are reasonable and acceptable. They should not have that right taken away. Moreover, critical terms of the settlement agreements, such as non-debtor releases, require creditor approval through a plan vote. They cannot be approved through a settlement agreement. The Committee expects that Sexual Abuse Claimants would vote resoundingly to reject a plan that embodies the terms of the settlement agreements as described in the 9019 Motion.

10. Additionally, the 9019 Motion contains no meaningful disclosure – much less adequate disclosure – regarding the value of the Subject Policies. The Debtor cannot disregard its statutory plan disclosure obligations under the guise of Rule 9019.[3] The massive impact of

[3] These were the same risks of which the Fifth Circuit warned when it observed: "if a debtor were allowed to reorganize the estate in some fundamental fashion pursuant to § 363(b), creditor's rights under, for example, 11

the settlement agreements on the Debtor, the non-debtor DOR Entities, and any plan process clearly demonstrates that the settlement agreements are a *sub rosa* plan.

11. Further, the settlement agreements are conditioned on a plan that requires third-party releases in favor of not just the Settling Insurers, but also over a hundred parishes and related Catholic entities. 9019 Motion, ¶ 39. The Diocese attempts to side-step the importance of the affected creditors' consent in granting third-party releases. *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-42 (2d Cir. 2005) (ruling that nondebtor releases may "be tolerated if the affected creditors consent," but such releases should be the exception rather than the rule); *see also In re Aegean Marine Petroleum Network, Inc.,* 599 B.R. 717 (Bankr. S.D.N.Y. 2019)(denying confirmation of a chapter 11 plan containing non-consensual third party releases)*; In re Dreier LLP*, 2010 WL 1707737 (Bankr. S.D.N.Y. Apr 28, 2010) (noting that the Second Circuit is skeptical about third party releases); *In re Master Mortg. Inv. Fund, Inc.,* 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994) (ruling that creditor support for proposed releases is considered the "single most important factor"). Consistent with this view, many courts have expressly premised their approval of third-party releases on the affirmative acceptance of affected creditors. *See, e.g., Matter of Specialty Equip. Co., Inc*., 3 F.3d 1043 (7th Cir. 1993) (allowing release if those creditors who rejected the plan or abstained from voting could still pursue claims against third-parties); *In re Washington Mutual, Inc.*, 442 B.R. 314, 354–55 (D. Del. 2011) ("[T]he court concludes that any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases."); *In re*

U.S.C. §§ 1125, 1126, 1129(a)(7), and 1129(b)(2) might become meaningless. Undertaking reorganization piecemeal pursuant to § 363(b) should not deny creditors the protection they would receive if the proposal were first raised in the reorganization plan." *Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc.* (*In re Continental Air Lines, Inc.*), 780 F.2d 1223, 1227-28 (5th Cir. 1986).

Digital Impact, Inc., 223 B.R. 1 (Bankr. N.D. Okla. 1998) (ruling that plan could not be confirmed if any party who would be bound by the release did not vote in favor of the plan); *In re W. Coast Video Enters., Inc*., 174 B.R. 906, 911 (Bankr. E.D. Pa. 1994) ("[E]ach creditor bound by the terms of the release must individually affirm same . . . ."); *Ocean Carriers Ltd*., 251 B.R. 31, 43 (D. Del. 2000) (requiring that the affected class accept the plan by at least the percentages required by section 1126 of the Bankruptcy Code); *In re Flintkote Co*., 04-11300 (MFW), 2015 WL 4762580, at *10 (Bankr. D. Del. Aug. 12, 2015) (finding the plan was overwhelmingly accepted when between 94% and 99% of affected creditors voted in favor of the Plan). Here, the Diocese is disenfranchising creditors by seeking Court approval to inextricably bind significant estate assets to releases for insurers and non-debtors without providing those affected creditors an opportunity to vote on those plan conditions.[4]

12. The Second Circuit also requires that released parties substantially contribute to the estate and for the plan to "otherwise provide[] for the full payment of the enjoined claims." *Metromedia,* 416 F.3d at 142. The Diocese has not disclosed any contributions the non-debtor DOR Entities will make toward the estate in exchange for their liability releases. To the extent the released parties do not make a meaningful contribution, they will effectively be granted a "gift" by the Debtor. As this Court noted, "Courts faced with so-called 'gifts' to the unsecured creditors class in the context of § 363(b) sales have reached different results about whether such gifts create an impermissible sub rosa plan." *In re Flour City Bagels, LLC*, 557 B.R. 53, 83 (Bankr. W.D.N.Y. 2016). Here, the potential "gift" to non-debtor entities related to the Debtor—releases and channeling injunctions—cannot be approved through a 9019 Motion.

[4] To the extent the Diocese argues that the plan has not been proposed yet, that distinction is without difference. The Settlement Agreement dictates the terms of the plan. Indeed, any future litigation or negotiation will be hampered by the terms of the settlement agreements if they are approved.

13. Finally, as the Court noted at the April 27, 2022 hearing, "the legal landscape is changing with respect to channeling injunctions."[5] On December 16, 2021, the United States District Court for the Southern District of New York in the Purdue Pharma bankruptcy reversed the bankruptcy court's order confirming a chapter 11 plan that had over 90% support from creditors affected by the releases the District Court found problematic. *In re Purdue Pharma, L.P.,* 635 B.R. 26 (S.D.N.Y. 2021). Specifically, the district court found that the bankruptcy court lacked subject matter jurisdiction to enter the releases. *Id.* In the 9019 Motion, the Diocese bends itself into a pretzel attempting to distinguish *Purdue Pharma*, but unsuccessfully because both cases are identical as to the important facts: non-debtors are seeking releases of liability and affected creditors are being asked to forfeit potentially valuable claims. The Diocese provides no support for its theory that releases in this case may suffer a different fate because they release negligence rather than intentional or fraudulent transfer claims. *See* 9019 Motion,¶ 66. The only material differences are (1) that the Purdue Pharma plan had overwhelming creditor support and the Debtor's prospective plan will not even garner enough support to get class acceptance, much less the amount needed for a third party injunction and (2) Purdue Pharma identified how much the Sacklers were paying for the release as opposed to this prospective plan which does not disclose the non-debtor DOR Entities' contribution.

14. It is still unknown what the Second Circuit will rule in *Purdue Pharma*. But while the state of the law may be fluid, it is certainly not trending toward **broader** releases or releases that would not be sustained under the current law embodied in *Metromedia*. Once again, the settlement agreements represent an attempt to bypass the Bankruptcy Code's and

[5] *See* **Exhibit A** hereto (4/27/22 Hearing Transcript, 45:3–4).

Second Circuit's requirements for confirmation of a plan, particularly one that contains third-party releases. The settlement agreements are a *sub rosa* plan and should not be approved.

II. THE 9019 MOTION IS PREMATURE

15. The Diocese presents no justification for asking the Court to approve the settlement and sale at this juncture of the case. It is unprecedented in a diocesan bankruptcy for the debtor to seek approval of a settlement with an insurer contingent on a not-yet-filed, hypothetical plan of reorganization over the objection of a committee.[6] The reason this has not previously occurred is obvious: to the extent the insurers will not provide funds unless a plan releasing the insurers and all the Diocese's co-insureds from liability is confirmed, the terms and impact of the settlement are hypothetical until such a plan is filed. *See Chafin v. Chafin,* 568 U.S. 165, 172 (2013) (federal courts cannot "give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'")

16. The Diocese contends that the policies may be decreasing in value. It suggests that one or more of the Settling Insurers may have a diminishing ability to pay but does not identify which of the carriers may be in distress or any evidence supporting such suggestion.

17. The Diocese has also otherwise failed to justify seeking approval of the settlement agreements now, when the money will solely sit in escrow and the parties lack sufficient information to evaluate the settlement in the context of the larger reorganization to which it is contingent. Rather than seeking a premature, advisory ruling from the Court, the Diocese should wait to seek Court approval of the settlement pursuant to Section 1123 as part of a reorganization

[6] With the exception of this Diocese's previous failed attempt.

plan. Given the conditions built into the settlement agreements, there will be no material impact on the case if the Court waits to approve the settlement agreements in conjunction with a plan.[7]

III. THE PROPOSED SETTLEMENT IS UNREASONABLE

18. Bankruptcy Rule 9019(a) provides, in relevant part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). In determining whether to approve a settlement under Rule 9019, the Second Circuit applies seven factors: (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment; (3) the paramount interests of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement; (4) whether other parties in interest support the settlement; (5) the competency and experience of counsel supporting the settlement; (6) the nature and breadth of releases to be obtained by officers and directors; and (7) the extent to which the settlement is the product of arm's length bargaining. *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 462 (2d Cir. 2007) (internal citations and quotations omitted).

19. To obtain approval of the settlement agreements, the Debtor must satisfy, by a preponderance of the evidence, the requirements imposed by Bankruptcy Rule 9019 and *Iridium*.

[7] Recently, in the chapter 11 case of the Boy Scouts of America, the Debtor had to withdraw an insurance settlement agreement after reaching a settlement with sexual abuse survivors. S*ee Debtor's Motion for Entry of an Order, Pursuant to Sections 363(b) and 105(a) of the Bankruptcy Code, (I) Authorizing the Debtors to Enter Into and Perform Under the Restructuring Support Agreement, and (II) Granting Related Relief* at ¶¶ 33-38 [Docket No. 5466], *In re Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343(LSS) (Bankr. D. Del., July 1, 2021). If the Settlement Agreement is approved and a plan is ultimately rejected, there is a risk that the Diocese will be saddled with the inadequate Settlement Agreement and will be unable to confirm a plan. As such, the Court should deny the 9019 Motion rather than risk additional harm to the Diocese and survivors down the road.

See Velde v. First Int'l Bank & Trust (In re Y-Knot Constr., Inc.), 369 B.R. 405, 408 (B.A.P. 8th Cir. 2007). Specifically, "[t]he settling parties must set forth the facts in 'sufficient detail that a reviewing court could distinguish it from mere boilerplate approval of the trustee's suggestions.'" *In re Lion Capital Grp.*, 49 B.R. 163, 175-76 (Bankr. S.D.N.Y. 1985) (quoting *In the Matter of Boston & Providence Railroad Corp.*, 673 F.2d 11, 12 (1st Cir. 1982)). Based on the record established, the bankruptcy court may then use its discretion to permit a settlement above the lowest level of reasonableness. *Id.* "Approval at that level, however, is not required. The court in applying its discretion is not to act '. . . . arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.'" *Id.* (quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931)).

20. The Debtor argues that the *Iridium* factors should be applied to determine "whether the settlement falls below the lowest point in the range of reasonableness." (9019 Motion, ¶ 33). The proposed settlement agreements, however, are not "right and equitable under the circumstances and the law" because (1) the settlements are not in the creditors' best interest, (2) the Diocese is settling low despite its high likelihood of success in litigation, (3) the settlement agreements do not avoid the costs and time of litigation, (4) the settlement agreements do not provide a tangible benefit for the estate, and (5) the settlement agreements include releases with an inappropriate nature and breadth.

A. The Paramount Interest of Creditors Demands Denial of the 9019 Motion

21. The Court should reject the settlement agreements because Sexual Abuse Claimants—the parties who will ultimately receive the settlement funds—uniformly oppose it. "Unsecured creditors are not voluntary investors in the Debtor and their position on the

settlement . . . *is entitled to substantial weight*." *In re Exide Techs.*, 303 B.R. 48, 70 (Bankr. D. Del. 2003) (emphasis added) (notably, the actions that gave rise to sexual abuse survivors' claims against the Diocese are indisputably nonconsensual); *see also In re Matco Elecs. Group, Inc.*, 287 B.R. 68, 77, 79 (Bankr. N.D.N.Y. 2002) (denying Rule 9019 motion based on "serious objections" expressed by unsecured creditors through creditors committee, which had concluded that pursuing adversary proceeding presented best chance for recovery); *Comm. of Unsecured Creditors of Interstate Cigar Co. v. Interstate Cigar Distrib. (In re Interstate Cigar Co.),* 240 B.R. 816, 824-25 (Bankr. E.D.N.Y. 1999) (finding more harm to debtor's largest unsecured creditor than benefit to bankruptcy estate where settlement amount was significantly below potential recovery in pending litigation, and party with most to lose from proposed settlement, debtor's largest unsecured creditor, strongly opposed it). Balanced against the strong opposition of the real parties in interest, the support of a debtor looking for a quick and cheap exit from bankruptcy is entitled to significantly less weight.

22. The Committee has a fiduciary duty to the Survivor Claimants, and is clearly in the best position to understand the interests of sexual abuse survivors. Yet the Diocese has the audacity to allege that it "determined that the interests of survivors in this case would be best served by" settlement amounts that the Committee has explicitly and repeatedly rejected as inequitably low.[8] The Committee, not the Diocese, has first-hand knowledge of the cost to survivors of seeking appropriate justice for the abuse they suffered as children. Moreover, state court counsel representing Committee members also represent approximately seventy percent

[8] The Diocese's efforts to dictate survivors' best interests has been a consistent theme by the Diocese throughout this case. Significantly, the Court has repeatedly noted that the Committee, rather than the Diocese, speaks for survivors. Nevertheless, the Diocese insists on continuing to repeat its empty mantra.

(70%) of all Sexual Abuse Claimant. These survivors do not support the settlements. The group that should be the ultimate beneficiary of insurance proceeds rejects the settlement agreements.

23. The Committee prove that the proposed settlement agreements drastically undervalue the claims and available proceeds under the Subject Policies. The Diocese, in a footnote, justifies the settlements on the basis that the Archdiocese of Santa Fe recently announced a settlement of a comparable per survivor amount. The Committee has repeatedly explained that such comparisons are irrelevant, as bankruptcy settlements generally reflect the assets and circumstances of the dioceses at issue in those cases, not the value of the claims. Although experts will provide testimony on the value of a sexual abuse claim, the Committee could direct the Court to USA Gymnastics' recent bankruptcy settlement of $380 million that averages in excess of $750,000 per claimant.[9] Or, the Diocese of Camden, which ultimately opted to work *with* survivors and focus its litigation efforts on its insurers, settling with the Committee for almost $300,000 per claimant based solely on diocesan and parish contributions, compared to the roughly $86,000 per survivor this Diocese is offering to contribute from its own funds.[10] Or, outside of bankruptcy, the Tonawanda School District recently settled thirty-five CVA lawsuits for $17.5 million ($500,000 per claimant) for claims involving over the clothes fondling.[11] Any party can cherry-pick information, and the Diocese has repeatedly trotted out the same inapplicable valuation comparisons. The Court should not accept them as credible.

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[9] *See* USA Gymnastics' $380 Million Bankruptcy Plan Approval https://news.bloomberglaw.com/bankruptcy-law/usa-gymnastics-380-million-bankruptcy-plan-set-for-approval (last visited June 28, 2022).

[10] [10] Catholic diocese in New Jersey reaches $87.5M settlement with hundreds of sexual abuse victims, CNN, https://www.cnn.com/2022/04/20/us/nj-catholic-diocese-sexual-abuse-settlement/index.html (last visited June 29, 2022).

[11] *See* Ken-Ton to pay $17.5 million to settle sexual abuse claims against retired teacher, https://buffalonews.com/news/local/ken-ton-to-pay-17-5-million-to-settle-sexual-abuse-claims-against-retired-teacher/article_0790d10e-e767-11ec-a6ff-2b70c2def8df.html (last visited June 28, 2022).

24. The only benefit to creditors the Debtor could cite is the undervalued settlement amount—which creditors do not actually receive until a plan is confirmed—and the "advancement" of the case. *See* 9019 Motion, ¶ 52. "Advancement" in a vacuum is a meaningless achievement because the plan does not have survivors' support. Blindly advancing in the wrong direction provides no benefit to creditors.

25. As the Court noted, "the possibility of a successful reorganization" would be "far more difficult and far more remote"[12] without survivors' support and acceptance. Therefore, the settlement agreements do not expedite payment to creditors. Instead, the settlement agreements– along with the treatment outlined in the 9019 Motion – merely provide for a plan that is patently unconfirmable. Such a result is contrary to the interests of all parties. Thus, the settlement agreements should not be approved because they are contrary to the paramount interests of creditors.

B. The Settlements are Unreasonable Due to the High-Likelihood of the Diocese's Success in the Insurance Litigation Compared to Their Minimal Benefit to the Estate

26. In order to justify its decision to enter into the settlements, the Diocese drastically undervalues its insurance assets and overstates the strength of the insurers' defenses against coverage and claims.

[12] *Decision and Order Denying Motion of the Diocese Seeking to Enjoin the Prosecution of State Court Actions Against Independent Catholic Corporations and Dismissing Complaints* (the "**Stay Order**"), The Diocese of Rochester v. AB Coe, et al. (In re The Diocese of Rochester), Adv. No. 22-02075 (Bankr. W.D.N.Y. March 23, 2022) (the "**Stay AVP**") at p. 14.

a. The Diocese Has Substantial Insurance Assets

i. LMI, Underwriters, and Interstate

27. The LMI, Underwriters and Interstate (together, "**LMI/Interstate**") policies provide massive amounts of coverage for the Diocese and its related entities. In particular, from 1978 through 1986, the LMI/Interstate policies generally provided limits of between approximately $10 million and $25 million **per occurrence**, with no aggregate limit of liability.[13] Yet, the Diocese wants to settle these claims for $43,750,000 – less than the coverage available for five occurrences at the $10 million "low" end of available coverage.

ii. CNA

28. From 1952 through 1977, CAN insured the Diocese. It policies have primary limits between $50,000 to $500,000 per occurrence (with amounts increasing over the passage of time). In addition, the Diocese also purchased excess policies of $3 million per occurrence for many of these years.[14] **Notably, these policies do not have aggregate limits and are not eroded by defense costs.** As an example, under CAN's 1976 policies, there is up to $3.5 million of coverage for each occurrence, notwithstanding the cost of defense. Under the same poliicies, each additional occurrence would increase available coverage by an additional $3.5 million. Based on the Diocese's analysis, approximately 370 claims are covered, at least in part, by the CNA policies. The Diocese seeks to settle with CNA for $63,500,000. However, CNA's exposure is multiples of that amount based on the value of the claims and available coverage.

[13] For the first year of the LMI program period, June 1, 1977 – June 1, 1978, the limits appear lower, but are still significant. As noted above, the limits increase substantially beginning in 1978. Also, during the July 1, 1985 – July 1, 1986 period, one excess policy was issued by Colonial Penn, a non-LMI/Interstate insurer.

[14] *See Declaration of Attorney James R. Murray Regarding Insurance Coverage* [Docket No. 8] ("**Murray Decl.**"), ¶ 10 & 9010 Motion, ¶ 17.

b. Under New York Law and the Subject Policies, Multiple Claims Bring High Coverage

29. New York law provides that each act of abuse constitutes a separate occurrence. Thus, a claim that involves ten separate acts of abuse would trigger ten covered occurrences. Insurance coverage is not limited to a single occurrence per claim. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. The Roman Catholic Diocese of Brooklyn,* 2017 WL 748834, at *7 (N.Y. Sup. Ct. Feb. 27, 2017) ("[T]he incidents of abuse suffered by each of the claimants constituted multiple occurrences and there was at least one 'occurrence' per claimant per policy period because the injuries suffered by each claimant were unique to that claimant in a given policy year and caused by separate incidents."); *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*., 21 N.Y.3d 139, 149, 991 N.E.2d 666, 672 (2013) (concluding that a priest's alleged sexual abuse of the same child taking place over a six-year period constituted multiple occurrences). At a minimum, a separate occurrence is triggered by abuse that occurs under each policy period. *Safeguard Ins. Co. v. Angel Guardian Home*, 946 F. Supp. 221, 231 (E.D.N.Y. 1996) (determining that number of occurrences under liability insurance policies was equivalent to number of policy periods during which insured's actions led to exposure of the foster children to the sexually abusive conditions).

30. As a result, even under a conservative analysis of the "number of occurrences" issue, there is still more than enough coverage available to fund an adequate settlement for claims that occurred under the LMI\Interstate Policies between 1978 and 1986.[15] Yet, the Diocese wants to settle for only $43.75 million with LMI\Interstate, less than the amount

[15] Given this massive number, LMI's position that their liability should be reduced because their subscription to certain policies is "only 80% or 90%" and because there were some insolvent LMI, (*see* 9019 Motion, ¶ 32), does not reduce the available insurance coverage anywhere close to the settlement amount proposed in the 9019 Motion.

available to cover a handful of occurrences, much less the approximately 140 to 173 claims covered by the LMI/Interstate Policies.

31. Under the CNA Policies, there are no self-insured retentions. Thus, there are cases where there are extremely high amounts of insurance available. For example, a claim with ten occurrences in December 1976 (where there was $3.5 million of coverage per occurrence), could, depending on the particular facts of the claim, have as much as *$35 million* of available coverage if each distinct act of abuse constitutes a covered occurrence. And, even under a conservative analysis of the "number of occurrences" issue, substantial coverage would exist for any claim that spans multiple policy periods. Thus, a claim that may be "worth" $1 million would have more than enough insurance to be paid in full. Nevertheless, the Diocese seeks to settle the CNA exposure for a mere $63.5 million for 370 claims (comprising 335 timely and 25 late claims). *See* 9019 Motion at ¶ 25. That is an average of only $189,552.24 – far too low given CNA's exposure and the claims that fall within its coverage period.

32. The Committee will present evidence at trial of the total available coverage and the value of the covered claims.

c. The Diocese Has a High Likelihood of Success in the Insurance Litigation

33. The Diocese tries to justify the settlement by overstating coverage defenses available to the Settling Insurers. However, the 9019 Motion is bereft of any real discussion of the likelihood that the Debtor will prevail against the Settling Insurers' alleged defenses. That is not surprising because the Diocese has a high likelihood of success against the Settling Insurers in the insurance litigation. Rather than comprehensively analyzing the available coverage and defenses, the 9019 Motion simply presents a list defenses and makes conclusory statements regarding litigation risk.

34. The Debtor focuses primarily on three purported coverage limitations that it contends justifies settling its insurance claims against the Settling Insurers for a fraction of the available coverage: (1) the contention that the Diocese would have to pay "tens of millions of dollars to satisfy the [self-insured retention (or "SIR")]" under the LMI policies; (2) the insurers' "expected or intended" defense; and (3) that the Diocese did not provide the insurers with timely notice.[16] None of the arguments have merit.

i. An insolvent insured cannot be required to satisfy an SIR as a condition to payment of insurance proceeds

35. First, the Debtor argues that it would "potentially have to pay tens of millions of dollars to satisfy the SIRs" under the LMI Policies. However, under New York law, an insolvent insured cannot be required to satisfy an SIR as a condition to payment of insurance proceeds. In fact, LMI recently conceded pointn the chapter 11 case of the Diocese of Rockville Centre, New York by stating that … **LMI cannot require an insolvent debtor to pay its SIRs**."[17] LMI explained further that:

> New York courts hold N.Y. Ins. Law § 3420(a)(1) supersedes the requirement that an insured pay its SIRs. *Admiral Ins. Co. v. Grace Indus., Inc.*, 409 B.R. 275, 281 (E.D.N.Y. 2009) ("the failure of a bankrupt to fund a self-insured retention does not relieve the insurer of the obligation to pay claims under the policy"); *Rollo v. Servico New York, Inc.*, 914 N.Y.S.2d 811, 813–14 (N.Y.A.D. 4th 2010) (insurer must pay damages for injuries or losses covered under the policy exceeding defendants' SIR obligation); *Horsehead Corp. v. Shinski*, 2010 WL 1781596, at *4 (N.D.N.Y. Apr. 30, 2010) (holding insurer "is not required to cover the SIR").
>
> **Once the Debtor's liability is fixed, LMI must pay valid, covered claims exceeding the Debtor's SIRs**. Therefore, the "pay first" requirement, which was the key factor in *U.S. Lines*, is absent and *U.S. Lines* is inapplicable.[18]

[16] 9019 Motion, ¶¶ 32-36.

[17] *See The Roman Catholic Diocese of Rockville Centre, New York v. Arrowood Indemnity Company et. al.,* Adv. Pro No. 20-01227-scc, Docket No. 32, *Reply in Support of LMI's Motion to Withdraw the Reference*, at 6-7 (emphasis added).

[18] *Id.* at 4 (emphasis added).

Thus, as LMI admits, it cannot require an insolvent debtor to pay its SIRs, and the assertion that the Diocese would "potentially have to pay tens of millions of dollars to satisfy the SIRs" is a red-herring. The misplaced conclusions over potential SIR payments provides no basis to approve the settlement agreements.

ii. The "expected or intended" defense should be given little weight

36. Second, the insurers' "expected or intended" defense should be given little, if any, weight and certainly does not justify the substantial discount embodied in the settlement agreements. There is no basis to support the contention that the Diocese *intended* or *expected* its parishioners to be sexually abused, assaulted, or to sustain injury sufficient to defeat insurance coverage. Moreover, the expected or intended defense has to be applied on a claim by claim basis. The insurers and the Diocese have clearly made no attempt to do so before negotiating the settlement agreements, and instead rely on generalized averments that the defense may apply to cases where a perpetrator abused multiple survivors.

37. Notably, the underlying Child Victims Act ("**CVA**") claims against the Diocese and non-debtor DOR Entities are based in negligence—*i.e.,* a failure to protect children—not on an intent by the Diocese to harm children. New York law is clear that such allegations are insured notwithstanding an insurers arguments that the injury was expected or intended. In *RJC Realty Holding Corp. v. Republic Franklin Insurance Co.*, the New York Court of Appeals specifically held that allegations of negligence in hiring or retaining an employee who commits a sexual assault constitute an "occurrence" that is not barred by an "expected or intended" exclusion. 2 N.Y.3d 158, 164-65 (2004); *see also NYAT Operating Corp. v. GAN National Insurance Co.*, 46 A.D.3d 287, 287 (1st Dept. 2007) ("[B]ecause [policyholder's] liability in the underlying action was based on its negligent hiring and retention of the employee, not respondeat

superior, the sexual assault was a covered 'accident' within the meaning of the policy, and the exclusion for injuries expected or intended from the standpoint of the insured does not apply.") (internal citations omitted).

38. The Diocese's generalized knowledge of the risk that pedophiles could abuse children is insufficient to establish an expected or intended defense. *See Union Carbide Corp. v. Affiliated FM Ins. Co.*, 955 N.Y.S.2d 572 (N.Y. App. Div. 2012) (holding that the insured's calculated risk in selling asbestos products despite its awareness of possible injuries and claims did not trigger the exclusion); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 723 (Cal. Ct. App. 1996) (holding that evidence of the insured's general knowledge of the dangers of asbestos was insufficient to apply the exclusion).

39. Moreover, an insurer must prove that there was, in fact, intentional conduct committed by the insured to sustain an argument that an injury was caused by "intentional conduct." *City of Johnstown, N.Y. v. Bankers Standard Insurance Co.*, 877 F.2d 1146 (2d Cir. 1989) (interpreting New York law). The Second Circuit, applying New York law in *Johnstown*, held that:

> In general, what make injuries or damages expected or intended rather than accidental are *the knowledge and intent of the insured*. It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, "intended" by the insured because the insured knew that the damages would flow directly and immediately from its intentional act.

Id. at 1150 (citations omitted, emphasis added); *see also Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.,* 882 F.3d 952, 960, 962 (10th Cir. 2018) (quoting *Cont'l Cas. Co. v. Rapid–Am. Corp.*, 80 N.Y.2d 640, 649 (1993)) ("The New York Court of Appeals has held that damages are accidental so long as they are 'unexpected and unintentional'" and New York law construes "expected or

intended" coverage terms "narrowly as barring coverage 'only when the insured intended the damages'"); *Cont'l Ins. Co. v. Colangione*, 484 N.Y.S.2d 929, 931 (3d Dept. 1985) (citations omitted) ("Ordinary negligence does not constitute an intention to cause damage; neither does a calculated risk amount to an expectation of damage. To deny coverage, then, the fact finder must find that the insured intended to cause damage."); *McGroarty v. Great Am. Ins. Co*., 36 N.Y.2d 358, 363 (1975) ("Certainly one may intend to run a red light, but not intend that the catastrophic result of collision with another car occur. Calculated risks can result in accidents.").

40. In New York, an insurer must prove that the insured **subjectively** intended to cause property damage or bodily injury in order to sustain an "expected or intended" coverage defense. *See Agoado Realty Corp. v. United Int'l Ins. Co.,* 95 N.Y.2d 141, 145 (2000)("[I]n deciding whether a loss is the result of an accident, it must be determined, *from the point of view of the insured*, whether the loss was unexpected, unusual and unforeseen.") (emphasis in original); *see also Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Cas. Co.,* 905 F.3d 84, 93 (2d Cir. 2018) (applying Connecticut law and distinguishing *Diocese of Winona v. Interstate Fire & Casualty Company*, 89 F.3d 1386 (8th Cir. 1996), in which the Eighth Circuit applied an objective standard in accordance with Minnesota law – noted to be an "outlier" standard). As such, a perpetrator's actions cannot be imputed to a negligent insured for the purposes of determining whether a given act was expected or intended. *See RJC Realty Holding Corp.*, 2 N.Y.3d at 165 (2004) (holding that a masseur's intention to assault a client could not be attributed to his employer, the insured); *Agoado Realty Corp.*, 95 N.Y.2d at 146 (2000) ("Indeed, although the murder is, for liability purposes, intentional from the standpoint of the assailant, its cause as set forth in the underlying complaint constitutes an accident from the standpoint of the insured, *i.e*., negligent security."). Notably, "negligence implies an unintentional or unexpected

event," and therefore **allegations of negligence inherently do not fall within expected or intended exclusions**." *See, e.g., Auto. Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 138 (2006); *see also Miller v. Cont. Ins. Co.*, 40 N.Y.2d 675, 677 (1976) (ruling a heroin overdose an "accident" when no evidence indicated an intent for the injection to have fatal consequences: "'He [may have] used bad judgment, he [may have been] reckless, [but everything points to the fact that] he did not want to bring bereavement and sadness to his mother.'") (citations omitted; alterations in original). Thus, based on the allegations in the underlying CVA actions (which sound in negligence), binding New York law (which requires the insured's subjective intent to cause harm), as well as the facts adduced to date, the insurers' "expected or intended" defense provide no basis for the 9019 Motion's significant forfeiture of insurance assets.

iii. The Diocese gave its insurers timely notice

41. The Diocese can demonstrate the reasonableness of the timing of its notice to its insurers. Under New York law, notice delays are excusable if the insured "can demonstrate 'that the insured either lacked knowledge of the occurrence or had a **reasonable belief of nonliability**.'"[19] The Committee is unaware of any late-notice decisions involving the revival of previously barred claims—such as the CVA claims at issue here—but there are numerous analogous examples in which late notice was allowed due to the insured's reasonable belief of non-liability:

a. Insured adoption agency had reasonable belief that it would not be held liable for events relating to abuse of child placed in foster home by insured, and thus, insured's delay in providing notice to insurer could be excused when—even though insured had received a phone call stating that the adoptive mother's boyfriend had sexually abused the child—insured's notes of conversation with the biological mother revealed "no foreshadowing of a lawsuit or of the theories of

[19] *Indian Harbor Ins. Co.*, 972 F.Supp.2d at 64 (internal citations omitted); *see also Sparacino v. Pawtucket Mut. Ins. Co.*, 50 F.3d 141, 144 (2d Cir. 1995) ("[A] reasonable belief in nonliability constitutes a valid excuse for failure of or delay in notification.").

liability" that were eventually alleged in case regarding abusive adopted parents, and the insured engaged in "active efforts" to "remedy the situation and remove the children from the abusive environment with appropriate speed."[20]

b. A policyholder provided timely notice where it notified insurers shortly after former foster child filed lawsuit, even though the plaintiff did not file his lawsuit until he reached the age of maturity—five years after the occurrence.[21] Because the policyholder paid all medical expenses of the child and the child indicated no intention to sue at the time of the incident, the court affirmed the determination that the policyholder provided notice "as soon as practicable" under the policy.[22]

c. Insured dentist provided timely notice when—even though dentist was "aware long before [patient's] lawsuit" that the propriety of his conduct was at issue—dentist had "no knowledge that any civil claim would be brought against him until he was served with process by [patient]" accusing dentist of sexual abuse.[23]

d. Baking equipment manufacturer also provided timely notice upon filing of lawsuit based on employee of buyer catching his arm in the manufacturer's equipment. Although manufacturer learned of injury sustained by employee a few days after the occurrence, buyer only asked manufacturer to check the reassembly of the machine and did not alert manufacturer to employee's potential claim of liability.[24]

42. In each of these examples, the courts examined whether the insured had knowledge that it was going to be held liable for the incident. The courts did not examine whether the insured merely had knowledge that an incident had occurred. In most instances in which the Diocese had knowledge of the abuse prior to the CVA's passage, the Diocese gained such knowledge after the claims had become time-barred. The Diocese, therefore, reasonably believed it would not be held liable for the incident and had no obligation to provide notice to the insurers at that time:

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[20] *Safeguard Ins. Co. v. Angel Guardian Home*, 946 F. Supp. 221, 228 (E.D.N.Y. 1996).

[21] *Merchants Mut. Ins. Co. v. Hoffman*, 56 N.Y.2d 799, 801, 437 N.E.2d 1155, 1156 (1982).

[22] *Id.*

[23] *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 397, 425 N.E.2d 810, 813 (1981).

[24] *Greater New York Mut. Ins. Co. v. I. Kalfus Co*., 45 A.D.2d 574, 577, 360 N.Y.S.2d 28, 31 (1974).

> The cases excusing an insured's failure to notify an insurer of an occurrence based on a good faith belief of non-liability are supported by the rationale that if insureds were required to notify insurers of every incident that poses even a remote possibility of liability, insurers would soon be swamped with notice of minor incidents that pose little danger of resulting even in an action by the injured party against the insured, let alone a claim by the insured against the insurer.[25]

43. Furthermore, even in instances in which the statute of limitations had not expired when the Diocese learned of the abuse decades ago, the Diocese reasonably assumed non-liability at the time because, until the 2000s, there had been only a handful of sexual abuse lawsuits filed against any Catholic diocese, and even fewer six or seven figure payouts.[26] Therefore, the Diocese had a reasonable belief that these incidents would not lead to liability for which the insurers would have to provide coverage and the insurers are unlikely to prevail on their late-notice defense.

44. The Diocese ignores that, for the insurers' late notice defense to prevail, a court would have to reach the conclusion that introduction of the CVA by the New York State Legislature was a pointless exercise in legislation. While no outcome is without some risk, for the purposes of analyzing which party has a high likelihood of success in litigating late notice, the purpose behind the CVA cannot be ignored.

d. The Settlement Agreements Erroneously Assume That One-Third of Covered Claims Have Little to No Value

45. The Diocese also erroneously undervalues its insurance assets because it unquestioningly accepts the insurers' contention that approximately one-quarter to one-third of

[25] *Safeguard Ins. Co. v. Angel Guardian Home*, 946 F. Supp. 221, 227 (E.D.N.Y. 1996); *see also 875 Forest Ave. Corp. v. Aetna Cas. & Sur. Co.*, 37 A.D.2d 11, 13, 322 N.Y.S.2d 53, 55 (1971) ("[M]ere knowledge that an accident has occurred does not always give rise to a duty upon the insured to report such accident to his insurer.").

[26] *See, e.g., Angel Guardian Home*, 946 F. Supp. at 227 ("A reasonable belief in non-liability may stem from a belief in immunity from suit, but it may also be supported by a reasonable, good faith belief that a claim is unlikely). *See, e.g.,* Master List of Settlements and Awards in Chronological Order, Bishop Accountability, *available at* http://www.bishop-accountability.org/settlements/#list.

the Sexual Abuse Claims are "low- or no- value claims." The most serious of these (affecting the largest number of claims) are assertions that the claims (i) were not timely filed; (ii) allege abuse perpetrated by individuals over whom the Diocese does not exercise control; (iii) allege abuse at facilities over which the Diocese does not exercise control; (iv) allege abuse at churches that are not affiliated with the Diocese or the Catholic Church; and (v) allege abuse by third parties associated with non-Diocesan entities. 9019 Motion, ¶ 26. The assumption that such claims are to be discounted entirely or significantly is without merit. Notably, not a single pleading filed by the Diocese undertakes any attempt to analyze the insurers' contentions and appears to accept them on their face. As discussed below, the insurers' denials of liability do not stand up to scrutiny. Nor should the Diocese's self-interested agreement that it is not liable for certain cases be given any credibility.

i. Late-filed claims may still be insured claims against non-debtors

46. The Diocese and the insurers appear to discount late-filed claims to zero. However, assuming that all fifty-eight late-filed claims are entitled to no recovery is not appropriate. First, such claimants may be able to demonstrate excusable neglect. Second, a bar date in this chapter 11 case would only apply to bar claims against the Debtor; this Court's bar date order did not, and indeed could not, limit survivors rights to assert a CVA claim against a non-debtor DOR Entity in state court. From the carriers' perspective, any claim against the non-debtor insured cannot be ignored. There is no basis to give insurers and, under a plan, non-debtor defendants a free pass on their liability based on a bar date applicable only to the Debtor.

ii. The Diocese is liable for abuse committed by religious order members

47. The Diocese and the insurers appear to argue that the Diocese is not liable for abuse of minors by members of religious orders operating within the Diocese. This is not

correct. The Diocese is liable for abuse of minors by members of religious orders operating within the Diocese as well as abuse of minors by non-priest employees or volunteers at parishes, schools, and other institutions within the Diocese. The Diocese's liability is based on its own negligence, vicarious liability, respondeat superior, and the Diocese's duties under canon law.

48. The Diocese is liable to survivors of child sexual abuse because the Diocese was negligent. There was "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Solomon v. City of New York, 66 NY2d 1026, 1027 (1985); see Davis v. South Nassau Communities Hosp.,* 26 NY3d 563 (2015); *Tenuto v. Lederle Lab.*, 90 NY2d 606 (1997); *Doe v. Diocese of Rockville Ctr.,* 2020 NY Misc. LEXIS 1964 at *21, Index No. 900010/2019, Dkt. No. 145 at 16 (Nassau County) (May 11, 2020) (holding CVA plaintiff adequately plead negligent supervision claim against diocese); *Gallagher-Smith v. Diocese of Rockville Centre*, Index No. 611155/2019, Dkt. No. 74 at 16 (Nassau County) (entered May 19, 2020). The Diocese is negligent because it has a duty to protect its parishioners and students from predators. The Bishop is responsible for supervising all Religious priests and schools operating within the Diocese's territory.

49. The Diocese is vicariously liable for the acts and omissions of its employees and/or agents who failed to protect minors from being sexually abused by members of religious orders. *See Kenneth R. v. R.C. Diocese of Brooklyn*, 229 AD2d 159, 160-61 [2d Dept 1997] (Second Department concluded the defendants could be held directly liable if they knew or should have known that the priest posed a danger to children). An employer can be held liable under theories of negligent hiring, negligent retention, and negligent supervision, even where the employer is not vicariously liable. *Id*. (citing *Hall v. Smathers*, 240 NY 486; Restatement (Second) of Torts § 317). The Court noted that "[r]eligious entities have some duty to prevent

injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct." *Id.* at 165.

50. Moreover, the Diocese can be liable for exposing a minor to a dangerous person. *See* Restatement (Second) of Torts § 302B (1965). As stated in Comment to Restatement (Second) of Torts § 302B (1965), this rule reflects that there are "situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise…where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account." For example, liability may exist "[w]here the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct." *Id.* Similarly, liability may exist "[w]here the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others." *Id.*

51. New York law is clear that the Diocese had a duty to protect minors from foreseeable harm when there was a minor in its care, custody, or control, regardless of whether the person who sexually abused the minor was one of its employees or agents. For example, in *Garcia v. City of New York*, 222 A.D.2d 192, 195 (1996), a jury found in favor of a kindergarten student who was sent to the bathroom alone and unsupervised, where she was then sexually assaulted by another student. The Court of Appeals held that liability can attach when the school was aware of the generalized risk of sexual assault to "unescorted students" under the school's care. *Id*. at 197. Given the plaintiff presented evidence that the school had security guidelines that acknowledged the danger, and the school's principal was aware of the danger, the Court

concluded a "jury could reasonably have come to the conclusion that the danger of the assault which occurred was foreseeable and preventable by proper supervision." *Id*.

52. Similarly, in *Logan v. City of New York*, 148 A.D.2d 167 (1989), a student was raped in a school stairway after being sent, alone, to a classroom two floors above without supervision. Refusing to dismiss the plaintiff's claims, the court held that it could not be found that the defendant acted as a reasonably prudent parent would under the circumstances. To the contrary, the Court concluded the strict security measures implemented by the school indicated an awareness by the school that a child was at risk of attack if left unescorted. *Id*. at 171-72. The Court held that the question was "whether the [defendant] had notice, actual or constructive, that a child was at risk of attack if left unescorted to travel the stairwells of this school at a time other than the scheduled change-of-class intervals." *Id.*

53. There are a myriad of relationships between dioceses, schools and religious orders that are fact specific. Given that there has been no formal discovery of these issues in depth, there is a likelihood that evidence of employer-employee, principal-agent or other relationships will emerge regarding the control of the Diocese over religious orders and their members within the Diocese as well as the Diocese control over staff and volunteers at parishes and schools.

54. In sum, under New York law, parishes and other insureds are liable for abuse perpetrated by their employees or agents. As insured entities, the Settling Insurers indemnify claims involving employees or agents of the parishes even if they are not employees or agents of the Diocese. In addition, given the Diocese's liability on account of religious order members and institutions operating in the Diocese, the Court cannot accept the Diocese's conclusory position that such claims have little to no value.[27]

[27] There are different relationships that the Diocese has with religious orders. For example, religious order priests clearly operated in churches and parishes of the Diocese. *See, e.g*.,

iii. The Diocese is liable for abuse regardless of whether it occurred on Diocesan property

55. Numerous New York cases make clear that abuse need not occur on premises owned by a defendant for liability to attach. *Jones by Jones v. Trane*, 153 Misc 2d 822, 830-31 [NY Sup Ct 1992] (concluding the Diocese could be held liable for priest abusing child at an athletic facility if Diocese knew priest posed a danger to children and "placed or continued him in a setting in which such abuse occurred"); *Krystal G. v. R.C. Diocese of Brooklyn*, 34 Misc 3d 531, 539 [Kings Cty Sup Ct 2011] (ruling argument that tortious conduct must be committed on the defendant's property is "unpersuasive"); *Doe v. Whitney*, 8 AD3d 610, 611- 12 [2d Dept 2004] (sexual abuse that occurred off-premises was reasonably foreseeable in light of warning signs); *Jones ex rel. Jones v. R.C. Sisters of New York*, 29 Misc 3d 1213(A), 5 [NY Sup Ct 2010] (same); *Johansmeyer* v. *New York City Dept, of Educ.,* 165 A.D.3d 634 [2nd Dept 2018] (finding that when abuse off premises was preceded by inappropriate behavior on the premises, a question of fact is presented for the jury).

56. Control over the tortfeasor is "just one way to establish a duty . . . a duty may also exist where 'there is a relationship. . . that requires [the] defendant to protect [the] plaintiff from the conduct of others." *Stephanie L. v. House of the Good Shepherd*, 186 A.D.3d 1009, 1012, 129 N.Y.S.3d 570, 575, *reargument denied*, 189 A.D.3d 2171, 134 N.Y.S.3d 917 (2020) (*quoting Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 233, 750 N.E.2d 1055, 1061). "The

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https://www.democratandchronicle.com/story/news/local/rocroots/2015/01/23/whatever-happened-st-patricks/22177125/ (last visited July 2, 2021). Certain parish schools within the Diocese appear to have been staffed by members of religious orders. In addition, the Diocese allows schools operated by religious order to operate within the Diocese and at this time promotes those schools on its website. *See, e.g.*, https://www.dorschools.org/our-schools (last visited July 2, 2021). Before the Court can accept any assertion that the Diocese is not liable for abuse at these schools, it must consider the facts regarding the relationships between them and the Diocese.

key . . . is that the defendant's relationship *with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm*." *Id.* (emphasis in original).

57. In *Stephanie L.*, the Court held that a foster care administrator owed a duty to the biological child of the foster parents to prevent harm to her by a foster child with a history of animal abuse and sexually inappropriate behavior. *Id.* The Defendant argued that it did not control the foster child and he had been out of its custody for four years. *Id.* The Court held that the duty was based on the administrator's ability to protect the biological child, not the administrator's ability to control the foster child. *Id.* In other words, the "calculus is such that [courts] assign the responsibility of care to the person or entity that can most effectively fulfill th[e] obligation [of protecting against the risk of harm] at the lowest cost." *Id.* (quoting *Davis v. S. Nassau Cmtys. Hosp.*, 2015 NY Slip Op 09229, ¶ 4, 26 N.Y.3d 563, 572, 46 N.E.3d 614, 618).

58. The Diocese bestowed its priests with honored status in Catholic communities, signaling to families that these individuals were upstanding citizens and "men of God." The Diocese, therefore, was best positioned to protect children from abusive priests, regardless of whether that abuse occurred on Church property or children met the priest through Church activities.

59. Thus, the Diocese is clearly wrong in asserting that such a large portion of claims have little to no value. Given the amount of available insurance under the Subject Policies and considering the weakness of the coverage and claim defenses put forward by the Settling Insurers and the high likelihood that the Diocese would prevail in the insurance litigation, the 9019 Motion should be denied and the Diocese and its insurers should compensate the survivors appropriately for the terrible injuries that they have suffered.

C. The Settlement Agreements Provide No Tangible Benefit for the Estate

60. In exchange for its fire-sale of substantially all its insurance assets and adding the significant additional burden such sale places on the non-insurance assets of the estate and non-debtor DOR Entities, the settlement agreements do not provide the estate with any tangible benefit. The Debtor repeatedly cites to the avoidance of expensive and protracted litigation, but it is not avoiding such litigation. It is merely opting to litigate against survivors instead of insurers, all while limiting its right to recover attorneys' fees and coverage for liability beyond the amount of the insurance settlements. The Committee will strive to make such litigation as expeditious and efficient as possible, but survivors will not be bullied into an unfair settlement just to avoid a fight. Nor will survivors be dissuaded from pursuing their own liability claims against non-debtor defendants or litigating the liquidated value of their claims in order to establish whether the non-debtor releases embedded in the insurance settlements are appropriate under applicable law. Rather than litigating against its handful of contractually-obligated insurers, the Diocese is shifting its litigation efforts to its hundreds of victims.

61. Detracting further from the Diocese's claim that the settlement agreements will avoid the expense of litigation, by choosing to litigate against the Committee instead of its insurers, the Diocese has opted for an adversary whose expenses are also borne by the estate. Therefore the estate will have to fund both sides of the litigation regarding the 9019 Motion as well as any inevitable litigation required by the non-consensual plan that the 9019 Motion outlines, and upon which the settlement agreements are dependent.[28] And, as discussed in Sections I and II above, the Diocese has chosen a litigation path in which it has a *very high*

[28] While the Committee finds it unfortunate that it must undertake litigation to enforce survivors' rights to a reasonable settlement, the Committee believes that there is substantially more value available from the insurers, the Diocese and the non-debtor DOR Entities to fund a proper settlement.

likelihood of failure, wasting all of the time and expense required, rather than pursuing its strong claims against the insurers.

62. Finally, the settlement agreements do not provide any tangible benefit to the estate or expedite payments to survivors because no funds will be exchanged until a yet-to-be filed plan is confirmed. The settlement agreements' perverse effect is to bind the Diocese to a low-value payment from the Settling Insurers now, leaving all other parties (including the Diocese and its parishes) responsible for making up the difference. The amount proposed by the Diocese to fund a chapter 11 plan is wholly inadequate in light of the value of the claims and the assets available to fund a proper settlement. As a result the settlement agreements provide a tangible burden to the estate.

D. The Nature and Breadth of Releases in the Settlement Agreements is Inappropriate and Cannot be Approved in a Vacuum

63. The settlement agreements are predicated on confirmation of a plan that will grant a discharge to the Diocese, along with releases to the related entities such as parishes and other entities responsible for sexual abuse of children. The settlement agreements provide that there will be a contribution made by those entities in exchange for such releases. Clearly, any such contribution is a material term of the settlement. Yet, the Diocese does not disclose which parties are contributing which portion of the wholly inadequate proposed amount of $40.5 million. As discussed in Section I above, the Debtor cannot confirm a plan with broad third-party releases without overwhelming creditor support, nor without a substantial contribution from the releases.

64. The Diocese cannot meet its burden of proving the reasonableness of its settlements. The Diocese makes no attempt to offer any analysis supporting its conclusion that the risk of litigation is too high, and it erroneously writes off one-quarter to one-third of all

claims. The settlement agreements vastly undervalue the extensive insurance coverage available and include inappropriate releases. Most importantly, the survivors on whose behalf the Diocese is allegedly acting oppose the settlement agreements. Therefore, the Committee respectfully requests the Court deny the 9019 Motion and find the settlement agreements unreasonable.

IV. THE DEBTOR HAS NOT PROPERLY EXERCISED ITS BUSINESS JUDGMENT PURSUANT TO SECTION 363 OR OTHERWISE

65. A sale of the Subject Policies is only appropriate if the Court finds that the transaction represents a reasonable exercise of business judgment on the part of the debtor. 9019 Motion, ¶ 59 (citing *In re Chateaugay Corp*., 973 F.2d 141 (2d Cir. 1992); *Comm. of Equity Sec. Holders v. Lionel Corp (In re Lionel Corp.)*, 772 F.2d 1063, 1071 (2d Cir. 1983). However, the Debtor fails to satisfy the requirement of the business judgment rule in entering into the Settlement Agreement. "The business judgment rule's presumption shields corporate decision makers and their decisions from judicial second-guessing only when the following elements are present: (i) a business decision, (ii) disinterestedness, (iii) due care, (iv) good faith, and (v) according to some courts and commentators, no abuse of discretion or waste of corporate assets." *See In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (emphasis added).

66. The Debtor presents three arguments to support its contention that it satisfies the business judgment rule. First, that the estate will receive $107.25 million. This argument fails because the $107.25 million is inadequate. Selling an asset for a fraction of its value is not an exercise of reasonable business judgment. The Diocese has presented no admissible evidence regarding the value of abuse claims and the value of the Subject Insurance Agreements. The Committee expects to present evidence at trial of the substantial value of the Sexual Abuse Claims and the substantial amount of insurance available to pay those claims. Second, the Diocese argues that the insurers' ability to pay claims could decrease over time. This is rank

speculation. The Diocese and the Settling Insurers have provided no financial information to back up this claim.[29] Third, that coverage litigation carries risk, involves delay and will have a cost. The Committee addressed this issue above. The Diocese is simply trading litigation with one party for litigation with another.

67. The Debtor also failed to exercise due care with respect to the proposed settlement. Indeed, the 9019 Motion speaks only of the Debtor's **beliefs** concerning the alleged benefits of the agreement and the values of potential claims, but provides no indication – much less evidence – that the Debtor actually analyzed the basis of those beliefs. Critically, the 9019 Motion contains **no discussion** of the appropriateness of the value of Sexual Abuse Claims under the settlement agreements.

68. The Diocese admitted at the outset of the case that it has no in-house expertise for valuing sexual abuse claims. *See* **Exhibit B** hereto (341 Transcript, 28:20–21) (testimony of the Diocese's CFO regarding the amount of the Diocese's liabilities: "I don't know how to quantify the claims. In excess of a hundred million.").[30] The Diocese has presented the Court with no evidence justifying that it exercised proper business judgment by agreeing to the settlement agreements nor that the settlement agreements are within the range of reasonableness.

69. The Diocese only retained an expert to value the Sexual Abuse Claims five weeks prior to filing the 9019 Motion.[31] Given the time necessary after a deal is reached to negotiate

[29] Among the factors the Second Circuit has instructed bankruptcy courts to consider while determining whether a debtor has "good business reason" for a sale under section 363 of the Bankruptcy Code, the "most important[]" is "whether the asset is increasing or decreasing in value." *Ind. State Police Pension Tr. v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 114 (2d Cir. 2009) (quoting *In re Lionel Corp*., 722 F.2d 1063, 1071 (2d Cir. 1983)).[29] The Debtor simply is trying to tag one of the bases for approval of a sale. Without evidence, it is simply "out."

[30] Notably, this testimony was provided well before the Bar Date, when only 73 claims were asserted against the Diocese. *See Affidavit of Lisa M. Passero Regardng the Debtor's Assets and Operations in Support of the Chapter 11 Petition and First Day Pleadings* at ¶ 21 [Docket No. 6].

[31] *Application to Employ Gnarus Advisors LLC as Claims Valuation Expert* [Docket No. 1466]

the terms of settlement agreements and draft motions, it is evident that Diocese retained its expert to *ex post facto* justify the number already selected by the parties in the settlement agreements. Clearly, the Diocese did not exercise due care when it reached settlement agreements without any in-house or outside expertise. The Diocese had no basis to form a business judgment that the settlement agreements are appropriate.

70. Although the Diocese attempts to offer an amount the non-debtor DOR Entities will contribute to a plan, if the settlement agreements are approved, the Diocese is exposing itself (and its related entities) to funding the shortfall between an appropriate global settlement and the amount to be paid by the Settling Insurers, and $40.5 million is far short of an appropriate number for that shortfall. Unless the non-debtor DOR Entities have the ability to make up this shortfall, the Diocese is not properly exercising its business judgment by exposing itself (and its parishes and other entities) to fund the shortfall.

71. As discussed above, the Diocese also accepts at face value that it has little to no liability for approximately one-quarter to one-third of the claims. Thus, it appears to discount these claims to, at best, a *de minimis* amount. The Diocese is recklessly gambling that it does not have such liability. If it is wrong, it will have waived many millions of dollars of coverage (even at the deflated amounts of the settlement agreements) that it will be liable to pay. That reckless behavior falls far short of the business judgment standard.

CONCLUSION

72. The Diocese has no justification for entering into the settlement agreements. The settlement agreements are a *sub rosa* plan that inappropriately attempts to bypass creditors' rights to disclosure and voting, particularly in relation to the third-party releases required by the settlement agreements. The settlement agreements are not in the creditors' best interest and are

opposed by an overwhelming majority of affected creditors. The settlement agreements relinquish valuable insurance assets, providing massive discounts for defenses the Diocese could overcome. The settlement agreements do not eliminate the expense of litigation. Instead, the settlement agreements drastically increase the estate's and parishes' exposure and create "execution risk" that they will have insufficient assets to secure the releases. All in exchange for a payment contingent on a patently unconfirmable plan.

73. Therefore, the Committee respectfully requests that the Court deny the 9019 Motion.

RESERVATION OF RIGHTS

74. The Committee reserves the right to make any argument, present any facts, and oppose any argument or evidence with respect to the 9019 Motion, including as a result of the Second Circuit's decision in the *Perdue Pharma* case.

WHEREFORE, for the reasons set forth above, on evidence presented at trial, and in any further briefing on the 9019 Motion, the Committee respectfully requests that the Court deny the 9019 Motion and grant such other and further relief in favor of the Committee that the Court deems just and proper.

Dated: June 30, 2022

Respectfully submitted,

PACHULSKI STANG ZIEHL & JONES LLP

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:	2-19-20905(PRW)
	Chapter 11
The Diocese of Rochester aka The Roman Catholic Diocese of Rochester	
	April 27, 2022
	Rochester, New York
The Dioces of Rochester, Plaintiff, vs. The Continental Insurance Company, et al., Defendants.	A.P. No.: 19-02021(PRW)
The Dioces of Rochester, Plaintiff, vs. AB 100 Doe, et al., Defendants.	A.P. No.: 22-02075(PRW)

TELEPHONIC STATUS CONFERENCE

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL R. WARREN
UNITED STATES BANKRUPTCY JUDGE

FOR DEBTOR: (Via telephone)	BOND SCHOENECK & KING PLLC BY: STEPHEN DONATO, ESQ. 350 Linden Oaks, Suite 310 Rochester, New York 14625
FOR CREDITORS COMMITTEE: (Via telephone)	PACHULSKI STANG ZIEHL & JONES LLP BY: ILAN SCHARF, ESQ. Suite 1300 10100 Santa Monica Boulevard Los Angeles, California 90067
U.S. TRUSTEE: (Via telephone)	OFFICE OF THE UNITED STATES TRUSTEE BY: RICHARD MORRISSEY, ESQ.
TRANSCRIBER:	Diane S. Martens dimartens55@gmail.com

Day Orders last September of 2019, I believe the Bishop held a press conference and announced that was the plan.

The legal landscape is changing with respect to channeling injunctions. And not only the Southern District but the District Court in the Eastern District of Virginia, in Richmond, I believe, issued a very recent decision citing the Southern District's decision not only reversing the bankruptcy court's issuing of a channeling injunction but directing that bankruptcies were no longer to be sent to the Richmond Division because the judges there were routinely giving channeling injunctions.

So, let's just guess at the end of the day, if a channeling injunction is not permitted and the third-parties here, the schools -- let's just call them the parishes for lack of a better description -- don't get a release. Is the answer, then, that the CVA victims go back into state court and pursue litigation against the parishes? And if they do, won't the Diocese in its plan have exhausted the insurance coverage?

MR. DONATO: I have to respond to that, your Honor.

THE COURT: Please.

MR. DONATO: There's a lot there.

THE COURT: That's the understatement of the century. There's a lot --

MR. DONATO: Yes.

EXHIBIT B

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF NEW YORK

In re:

The Diocese of Rochester,

Debtor.

Transcript of Audio File of 341 Meeting

other than the debtor?

BISHOP MATANO: No.

MS. SCHMITT: No, okay. Has the debtor taken out any loans in the last three years?

MS. PASSERO: No.

BISHOP MATANO: No.

MS. SCHMITT: So I'm going to talk briefly about the financial information of the debtor, but these are just going to be kind of overviews. Can you provide me with an estimate of the debtor's total assets?

MS. PASSERO: 68 million, approximately.

MS. SCHMITT: And an estimate of its liabilities?

MS. PASSERO: They are noted on the schedules. I don't know how to --

MR. DONATO: Do you mind if Lisa looks at the schedules?

MS. SCHMITT: That's fine.

MS. PASSERO: I don't know how to quantify the claims. In excess of a hundred million.

MS. SCHMITT: Has the debtor loaned money to or repaid loans to officers, directors, or similar titled persons in the last year?

MS. PASSERO: No.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

THE DIOCESE OF ROCHESTER,

Debtor.

Case No. 19-20905

Chapter 11

CERTIFICATE OF SERVICE

I, La Asia S. Canty, am over the age of eighteen years, am employed by Pachulski Stang Ziehl & Jones LLP. I am not a party to the within action; my business address is 780 Third Avenue, 34th Floor, New York, New York 10017-2024.

Pursuant to the Court's Amended Administrative Procedures, on June 30, 2022, in addition to service via the Court's ECF system, I caused a true and correct copy of *Official Committee of Unsecured Creditors' Objection to Debtor's Motion to Approve Proposed Insurance Settlements to Fund Survivor Compensation Trust* to be served via electronic mail upon the parties set forth on the service list annexed hereto as **Exhibit 1** and via First Class US Mail upon the parties set forth on the service list annexed hereto as **Exhibit 2.**

I declare under penalty of perjury, under the laws of the State of New York and the United States of America that the foregoing is true and correct.

Dated: June 30, 2022

/s/ La Asia S. Canty
La Asia S. Canty

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