Case No. 6:22-cv-06262-CJS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE DIOCESE OF ROCHESTER,

Appellant,

v.

AB 100 DOE, *et al*.[1]

Appellees.

Nature of Proceeding: Appeal from Bankruptcy Court Decision and Order pursuant to 28 U.S.C. § 158 and Rule 8003 of the Federal Rules of Bankruptcy Procedure.

Court Below: Hon. Paul R. Warren, United States Bankruptcy Judge, United States Bankruptcy Court, Western District of New York.

BRIEF OF APPELLANT THE DIOCESE OF ROCHESTER

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[1] A full list of the Defendants in this adversary proceeding is attached as Exhibit A to the Stay Complaint, as that term is defined herein, which has been redacted to protect the privacy interest of the abuse survivors. The Defendants are referred to herein collectively as the "CVA Claimants."

RULE 8012 CORPORATE DISCLOSURE STATEMENT

Appellant The Diocese of Rochester is a New York not-for-profit corporation without capital stock. Appellant has no parent corporation nor is there any publicly held corporation owning 10% or more of its stock.

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JURISDICTIONAL STATEMENT

As the Bankruptcy Court determined in the Decision and Order, the Bankruptcy Court had jurisdiction over the underlying adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158 and Rule 8003 of the Federal Rules of Bankruptcy Procedure. The Diocese appeals from the Bankruptcy Court's Decision and Order, dated May 23, 2022, which constitutes a final order pursuant to 28 U.S.C. § 158(a)(1).

This appeal is timely. The Bankruptcy Court issued the Decision and Order on May 23, 2022. In compliance with Rule 8002 of the Federal Rules of Bankruptcy Procedure, the Diocese filed its Notice of Appeal fourteen (14) days later, on June 6, 2022.

STATEMENT OF ISSUES PRESENTED

1. Whether the Bankruptcy Court erred in holding that state court litigation against non-debtor affiliated entities is not stayed by operation of section 362 of title 11 of the United States Code (11 U.S.C. § 101 et seq., the "Bankruptcy Code").

2. Whether the Bankruptcy Court erred in holding that the Diocese failed to carry its burden of proof to demonstrate that litigation against non-debtor affiliated entities would adversely affect property of the bankruptcy estate without providing the Diocese an opportunity for an evidentiary hearing.

3. Whether the Bankruptcy Court erred in refusing to issue a preliminary injunction pursuant to section 105(a) of the Bankruptcy Code.

4. Whether the Bankruptcy Court erred in dismissing the complaint as moot.

5. Whether the Bankruptcy Court erred in granting prospective litigants an additional period of time to file state court actions.

Applicable Standard(s) of Appellate Review: Each of the above issues implicates legal conclusions reached by the Bankruptcy Court which are to be reviewed *de novo*. *See In re: Bernard L. Madoff Investment Securities, LLC*, 605 B.R. 570, 581-82 (S.D.N.Y. 2019). Factual findings by the Bankruptcy Court are to be reviewed

for clear error. *Id.* The Bankruptcy Court's decision not to issue a preliminary injunction under section 105 of the Bankruptcy Code is reviewed for abuse of discretion. *See PJC Tech., Inc. v. C3 Capital Partners, L.P.*, No. 10-MC-6005, 2010 WL 376412, at *2 (W.D.N.Y. Jan. 27, 2010).

STATEMENT OF THE CASE

The Diocese of Rochester (the "Diocese") brings this appeal to uphold the automatic stay mandated by section 362(a) of the Bankruptcy Code, to preserve the integrity of its bankruptcy estate, and to protect its ability to pursue a successful financial reorganization in accordance with the policy goals of chapter 11 of the Bankruptcy Code. In short, the Diocese seeks to prevent Claimants from subverting the automatic stay by attempting to pursue indirectly claims which the Bankruptcy Code clearly prohibits them from prosecuting directly against the Diocese and its property. Most importantly, the Diocese seeks to avoid wasting valuable time and assets litigating hundreds of separate actions as opposed to focusing the efforts of all parties on formulating a global resolution through a chapter 11 plan that would address abuse claims against the Diocese and non-debtor parishes, schools and other Catholic ministry entities and institutions within the territory of the Diocese (the "Catholic Corporations").[2]

In February 2019, New York State enacted the Child Victims Act (the "CVA"), creating a limited window for previously time-barred claims alleging child sexual abuse to be commenced. Between the August 14, 2019 opening of the CVA window, and September 12, 2019, when the Diocese filed its bankruptcy petition

[2] The Catholic Corporations are also referred to as "Stay Defendants" or "Additional Stay Parties" in some record materials. The Catholic Corporations do not include religious orders and other Catholic entities that are not subject to the canonical supervision of the Bishop of Rochester.

(the "Petition Date"), approximately 60 Claimants commenced 46 abuse-related lawsuits ("CVA Cases") naming the Diocese and certain Catholic Corporations as co-defendants. *See* McDonald Dec. ¶ 4 [A-565]. These early CVA Case complaints did not meaningfully distinguish between the acts of the Diocese and the acts of the Catholic Corporations. *Id*. ¶ 5 [A-565].

Following the Petition Date, Claimants were statutorily prevented from naming the Diocese as a defendant in CVA Cases. 11 U.S.C. § 362(a)(1). However, Claimants continued to commence CVA Cases against Catholic Corporations without naming the Diocese. Those postpetition complaints allege that the Catholic Corporations are under the authority and control of the Bishop of the Diocese, and facts alleged to prove negligence and other causes of action against the Catholic Corporations are identical to the facts needed to prove negligence and other causes of action against the Diocese. McDonald Dec. ¶ 7 [A-565-66]. The Diocese is therefore a target of these postpetition CVA Cases, even if it is not named as a defendant. Illustrative of this fact, the vast majority of Claimants also filed proofs of claim in the Diocese's chapter 11 case based on the same facts and occurrences alleged in their CVA Cases. *Id*. ¶ 8 [A-566]. As the CVA Cases progress, the Diocese will be required to participate as a key party in discovery because the Diocese maintains many of the records that will be sought by Claimants in discovery, and the Bishop and other key diocesan personnel will be deposed or called to testify.

Id. ¶ 10 [A-566]. Moreover, the Diocese will need to actively participate in the CVA Cases in order to protect its own interests and to guard against potential collateral estoppel and *res judicata* issues. *Id*. ¶ 11 [A-567].

Because the CVA Cases seek to vindicate claims against the Diocese, it is clear that the Diocese is the real party defendant and the CVA Cases should be stayed pursuant to section 362(a)(1) and 362(a)(6) of the Bankruptcy Code, regardless of whether the Diocese is a named party to the litigation.

Moreover, to the extent independent causes of action may exist solely against the Catholic Corporations (which the Diocese disputes), prosecution of the CVA Cases will nevertheless deplete valuable resources of the Diocese's bankruptcy estate in several ways. First, the Diocese and the Catholic Corporations are participants in a joint insurance program[3] and are co-insureds under policies that provide a single per-occurrence limit of liability, meaning that any insurance proceeds used to pay liabilities of the Catholic Corporations will reduce coverage

[3] Since at least 1952, the Diocese has maintained insurance policies covering itself and the Catholic Corporations. *See* Murray Dec. ¶¶ 10-16 [A-321-23]. Since 1977, the Diocese has secured insurance coverage through a protected self-insurance program ("PSIP") whereby Catholic Corporations contribute to a fund administered by the Diocese which is used to purchase liability coverage, to fund deductibles and self-insured retention payments, and to cover other shared risk management costs. *See* PSIP Motion [A-44-55]. By order entered on November 8, 2019, the Bankruptcy Court authorized the Diocese to continue to maintain and operate the PSIP in accordance with its prepetition practices. Final PSIP Order [A-78-81].

available for Diocesan liabilities.[4] Second, under the joint insurance program, the Diocese is responsible for advancing defense costs and paying any deductibles or self-insured retentions under the shared insurance policies. Third, the Diocese will be forced to expend estate funds to monitor and participate in the CVA Cases to defend itself against risks of collateral estoppel and *res judicata* implications arising from the CVA Cases. Accordingly, the CVA Cases constitute acts to obtain possession or control of assets of the Diocese's estate, and are therefore subject to the automatic stay pursuant to section 362(a)(3) of the Bankruptcy Code.

Even if the CVA Cases are not subject to the automatic stay, the facts and circumstances present here justify an injunction pursuant to section 105(a) of the Bankruptcy Code because prosecution of the CVA Cases will impede the Diocese's ability to successfully reorganize.

A hallmark of bankruptcy proceedings is that the debtor be given some breathing room, through the automatic stay, to marshal assets, assess liabilities, and implement a reorganization. Recognizing that staying prosecution of the CVA Cases would be beneficial in promoting a successful reorganization, the Diocese and the official committee of unsecured creditors (the "Committee") entered into the *Agreed*

[4] *See* Murray Dec. ¶¶ 20-24 [A-324-26]. The Bankruptcy Court attempted to minimize this impact by prohibiting Claimants from executing against or attempting to gain access to the proceeds of a shared insurance policy without further court order. This prohibition however does not prevent the Catholic Corporations from depleting available coverage by exercising their rights as additional insureds to seek indemnification under the policies.

Stipulation and Order Pursuant to 11 U.S.C. § 105(a) Staying Continued Prosecution of Certain Lawsuits, which the Bankruptcy Court signed and docketed on March 19, 2020 [A-127-57] (the "Stay Stipulation"). The Stay Stipulation was the result of negotiations between the Diocese and the Committee and was intended to enable parties to concentrate efforts on achieving a global resolution of abuse claims against both the Diocese *and* the Catholic Corporations through the Diocese's chapter 11 plan. The Stay Stipulation was extended by consent eleven times over the course of more than two years while the Diocese engaged in plan negotiations through mediation with the Committee and insurance carriers. [A-158-202].

In March 2022, with mediation still ongoing, the Diocese requested that the Committee consent to a further extension of the Stay Stipulation. In response, the Committee conditioned its consent to any further extension on the Diocese's acceptance of certain settlement demands – effectively signaling an abandonment of the mediation process in favor of an ultimatum that the Diocese must either capitulate to the Committee's terms of settlement or else face a tidal wave of litigation, the intended effect of which would be to establish facts and law in support of claims against the Diocese, as well as to harass, embarrass, and intimidate the Diocese.[5]

[5] Allowing the CVA Cases to go forward will also have the inequitable effect of favoring certain Claimants who are quick to liquidate their claims to judgment over other similarly-situated survivors who do not win the race to the courthouse.

In response, on April 6, 2022, the Diocese commenced this adversary proceeding (the "Stay Action") by filing its *Verified Complaint Seeking Declaratory and Injunctive Relief Pursuant to 11 U.S.C. §§ 105 and 362 or a Preliminary Injunction Pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure* [A-203-53] (the "Complaint") and, separately, filed, *inter alia*, its *Motion for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 362 Enjoining the Continued Prosecution of Certain Lawsuits* [A-254-317] (the "Stay Motion"). In the Stay Motion, the Diocese sought entry of one or more orders (i) confirming that the automatic stay provided by section 362 of the Bankruptcy Code enjoins the prosecution of the CVA Cases, and further (ii) enjoining the prosecution of CVA Cases against the Catholic Corporations pursuant to section 105(a) of the Bankruptcy Code, to the extent such prosecution is not already stayed by operation of the automatic stay.

On April 19, 2022, the Committee moved to intervene in the Stay Action. On April 22, 2022, just three business days before the scheduled hearing before the Bankruptcy Court, the Committee filed its 48-page objection to the Stay Motion. [A-463-521] (the "Committee Objection"). Several firms representing Claimants filed joinders to the Committee's Objection on behalf of their clients, but not a single Claimant filed any substantive response to the Diocese's Stay Motion. Neither the

Claimants nor the Committee ever filed a dispositive motion or an answer to the Complaint.

The Committee Objection in many respects did not contest the basic legal premises upon which the Diocese relies in asserting its right to a stay of the CVA Cases, but rather challenged the sufficiency of the evidentiary record to support the Diocese's requested relief. On April 25, 2022, the Diocese filed an omnibus reply to the objections to its Stay Motion specifically acknowledging the evidentiary concerns raised by the Committee and requesting an evidentiary hearing in the event the Bankruptcy Court felt additional evidence was necessary. Reply ¶ 40 [A-555].

On April 27, 2022, the Bankruptcy Court held a telephonic hearing and heard oral argument on the Stay Motion. [A-658-59]. Following the hearing, the Bankruptcy Court issued a bench order maintaining the *status quo* under the Stay Stipulation while it took the Diocese's Stay Motion under advisement. *Id*.

On May 23, 2022, the Bankruptcy Court issued the *Decision and Order Denying Motion of Diocese Seeking to Enjoin the Prosecution of State Court Actions Against Independent Catholic Corporations and Dismissing Complaint* [A-758-776] (the "Decision") from which this appeal was taken. The Bankruptcy Court committed reversable error by holding that the CVA Cases are not subject to the automatic stay of section 362(a), refusing to extend the stay or issue a preliminary injunction pursuant to section 105(a), dismissing the Complaint without holding an

evidentiary hearing, and purporting to create an additional window for new plaintiffs to file CVA Cases after the time prescribed by New York law to do so has passed.

ARGUMENT SUMMARY

The Diocese respectfully submits the following arguments in support of this appeal:

First, the Bankruptcy Court erred in refusing to stay the CVA Cases pursuant to section 362(a) of the Bankruptcy Code because (i) the Diocese is the real party defendant in such actions and therefore the automatic stay of section 362(a)(1) applies; (ii) such actions will cause the diminution and or depletion of valuable estate assets, including, without limitation, the availability of insurance coverage and funds held by the Diocese for the maintenance and operation of a joint insurance program providing coverage for the Diocese and for the Catholic Corporations and therefore the automatic stay of section 362(a)(3) applies; and (iii) such actions are in reality an attempt to inappropriately harass, embarrass, or otherwise pressure the Diocese to provide more favorable treatment for abuse claimants in this chapter 11 case and therefore constitute an act to collect, assess or recover a claim against the Diocese in violation of section 362(a)(6) of the Bankruptcy Code.

Second, the Bankruptcy Court erred in holding that the Diocese did not carry its burden of proof to show that prosecution of the CVA Cases will impair property of the bankruptcy estate in violation of section 362(a)(3) where the Bankruptcy Court did not allow the Diocese an opportunity for an evidentiary hearing.

Third, the Bankruptcy Court erred in refusing to issue a preliminary injunction pursuant to section 105(a) of the Bankruptcy Code because the CVA Cases threaten to impair the prospect of a successful reorganization and the Diocese otherwise satisfies all of the traditional factors for a preliminary injunction.

Fourth, the Bankruptcy Court erred in *sua sponte* dismissing the Complaint where no motion for summary judgment had been made, the Diocese had no opportunity to offer additional evidence, and the Decision itself makes clear material issues of fact were in dispute.

Fifth, the Bankruptcy Court erred in granting prospective litigants an additional period of time to file CVA Cases against Catholic Corporations after the time prescribed by New York law to do so has passed because (i) the class of litigants the Court purported to protect does not exist and (ii) the Bankruptcy Court does not have the power to *sua sponte* extend a statute of limitations under New York law.

ARGUMENT

The Bankruptcy Court had the authority to enjoin the CVA Cases by: (i) enforcing the automatic stay provisions of section 362(a); and (ii) issuing orders "necessary or appropriate" to carry out the provisions of title 11 pursuant to the authority granted by section 105(a). Indeed, bankruptcy courts in several other diocesan chapter 11 cases, including in the Western District of New York, have issued injunctions preventing abuse claimants from pursuing claims against related non-debtor Catholic entities. *See In re The Diocese of Buffalo, N.Y.*, 633 B.R. 185, 188-89 (Bankr. W.D.N.Y. 2021) (observing that state court litigation affecting a debtor's shared insurance rights is stayed by operation of section 362(a)(3) and that, even in the absence of shared insurance, the threat of contribution and indemnity claims on behalf of parishes and other non-debtor entities justified extension of the stay pursuant to section 105 of the Bankruptcy Code); *In re The Roman Catholic Diocese of Syracuse, New York*, 628 B.R. 571, 578 (Bankr. N.D.N.Y. 2021) (holding that "ongoing state court litigation would continue to diminish the estate's shared insurance resources and would inevitably hamper Debtor's reorganization in violation of the principles elucidated in the Bankruptcy Code"); *The Roman Catholic Diocese of Rockville Centre, New York v. ARK320 Doe, et al.*, Adv. Proc. No. 20-01226 (SCC) [Docket No. 36] (Bankr. S.D.N.Y. November 4, 2020) (granting preliminary injunction pursuant to section 362(a) and 105(a) of the Bankruptcy Code

– later extended multiple times with creditor committee consent); *The Diocese of Camden, New Jersey v. John Doe, et al.*, Adv. Proc. No. 20-01544 (JNP) [Docket No. 22] (Bankr. D.N.J. November 13, 2020) (same); *In re Roman Catholic Diocese of Harrisburg*, Case No. 20-05599 (HWV) [Docket No. 222] (Bankr. M.D. Pa. April 2, 2020) (same).

The Bankruptcy Court committed reversible error by: (1) holding that the CVA Cases are not stayed automatically pursuant to sections 362(a)(1) and (a)(6) merely because the Diocese is not a named party to some of those actions; (2) holding that the Diocese failed to carry its burden of proof to show that the CVA Cases are stayed automatically pursuant to section 362(a)(3) without providing the Diocese with an opportunity for an evidentiary hearing; (3) refusing to invoke section 105(a) to stay the CVA Cases to the extent they are not already automatically stayed by section 362(a); (4) *sua sponte* dismissing the Diocese's complaint; and (5) purporting to grant prospective litigants an additional period of time to file CVA Cases after the window provided under New York law has closed.

POINT I

THE BANKRUPTCY COURT ERRED IN HOLDING THAT THE CVA CASES ARE NOT STAYED AUTOMATICALLY PURSUANT TO SECTIONS 362(A)(1) AND (A)(6)

The automatic stay imposed by section 362 is among the most fundamental protections provided by the Bankruptcy Code for both debtors and creditors, serving

important functions for the bankruptcy process. As Congress explained in enacting the automatic stay:

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

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

In addition to providing debtors with breathing room to address their liabilities, the automatic stay also protects creditors "by avoiding wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate, and by ensuring an equitable distribution of the debtor's estate." *Deutsche Bank Trust Co. Ams. v Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.)*, 818 F.3d 98, 108 (2d Cir. 2016).

The Bankruptcy Court erred when it held that the CVA Cases are not automatically stayed by sections 362(a)(1) and (a)(6) under the record in this case.

A. All CVA Cases where the Diocese is a named defendant are automatically stayed by section 362(a)(1).

Prior to the Petition Date, approximately 60 plaintiffs commenced 46 CVA Cases naming the Diocese as a co-defendant with one or more Catholic Corporations. McDonald Dec. ¶ 4 [A-565]. Pursuant to the unambiguous decision issued recently by the Court of Appeals for the Second Circuit in *Bayview Loan Servicing LLC v. Fogarty (In re Fogarty)*, 39 F.4th 62 (2d Cir. 2022), each of these CVA Cases naming the Diocese as a defendant must be stayed pursuant to section 362(a)(1). *Id.* at 76 (articulating a "bright-line rule" whereby "if the debtor is a named party in a proceeding or action, then the automatic stay . . . applies to the continuation of such a proceeding or action, under Section 362(a)(1)"). While the Decision provides that "[l]itigation against the Diocese or the Bishop is not permitted to proceed in state court [] absent further order of this Court." (Decision at 3 n.2) [A-760], under the Second Circuit's bright-line rule, all CVA Cases in which the Diocese is a named defendant are automatically stayed, with respect to all parties, pursuant to section 362(a)(1). Accordingly, to the extent the Decision does not completely stay all cases in which the Diocese is a named defendant, it must be reversed.

B. The CVA Cases are stayed by sections 362(a)(1) and (a)(6).

The Bankruptcy Court should further have found the remaining CVA Cases are stayed by sections 362(a)(1) and 362(a)(6) because the Diocese is the real party defendant in such actions.

Sections 362(a)(1) and (a)(6) automatically stay:

> (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [title 11], or to recover a claim against the debtor that arose before the commencement of the case under [title 11];
>
> * * *
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under [title 11]; . . .

11 U.S.C. § 362(a)(1) and (a)(6).

The Bankruptcy Court held that, because sections 362(a)(1) and (a)(6) by their terms stay actions and prohibit efforts to collect claims *against the debtor*, and because the Catholic Corporations are separate legal entities, "sections 362(a)(1) and (a)(6) do not *extend* the bankruptcy automatic stay to the Catholic Corporations." Decision at 9 (emphasis added) [A-766]. This determination was error.

Initially, to the extent the CVA Cases fall within the scope of actions stayed by sections 362(a)(1) and (a)(6), such stay arises automatically by operation of

statute and does not need to be *extended*; it simply applies.[6] The Second Circuit has recognized that "the automatic stay can apply to non-debtors" under appropriate circumstances such as "when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate[,]" including in "actions where there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant." *Queenie, Ltd. v Nygard Intl.*, 321 F.3d 282, 287 (2d Cir. 2003) (quoting *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986)). Moreover, under *A.H. Robbins*, cited approvingly by the Second Circuit in *Queenie*, the debtor is the "real party defendant" where "a judgment against the third-party defendant will in effect be a *judgment or finding* against the debtor." 788 F.2d at 999 (emphasis added); *see also In re Global Indus. Tech., Inc.*, 303 B.R. 753 (Bankr. W.D. Pa. 2004) (where judgment in third party action would affect debtor's rights under shared insurance, debtor was "a necessary real party in interest" and action was thus stayed pursuant to section 362(a)(1)).

[6] Courts addressing the scope of section 362(a) as it applies to actions against non-debtors have often conflated the automatic nature of that section with the equitable powers of bankruptcy courts under section 105(a) of the Bankruptcy Code to *extend* a stay to enjoin actions that would otherwise be outside the scope of section 362(a). *See In re LTL Management, LLC*, 638 B.R. 291, 300 (Bankr. D. N.J. 2022) ("many courts have used some iteration of the phrases 'extension of the stay' and 'injunctive relief' interchangeably when discussing whether to permit actions against nondebtor third parties to proceed."); *In re Philadelphia Newspapers, LLC*, 407 B.R. 606, 611 (E.D. Pa. 2009) (observing that the conflation of the two concepts has "led to confusion."); *accord In re Brier Creek Corp. Center. Assoc. Ltd.*, 486 B.R. 681, 693 (Bankr. 2013)("The 'unusual circumstances exception to 362(a)(1) and an injunction pursuant to the court's powers under §105, are two separate and distinct grounds on which the court can stay non-debtor litigation.

Further, as recently emphasized in *Fogarty*, section 362(a)(1) applies to automatically stay both "actions against the debtor" and actions "to recover a claim against the debtor." 39 F. 4th at 72. The Second Circuit has explained that "the latter category – to recover a claim against the debtor – must encompass cases in which the debtor is not a defendant; it would otherwise be totally duplicative of the former category and pure surplusage." *Id*. citing *In re Colonial Realty Co.*, 980 F.2d 125, 131 (2d Cir. 1992) (internal quotations omitted); *see also A.H. Robins*, 788 F.2d at 999 ("Clearly the debtor's protection [under section 362(a)(1)] must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate, and this is so whether the debtor is a party or not.") (internal quotations omitted); *In re Kaiser Aluminum Corp.*, 315 B.R. 655, 658 (D. Del. 2004) ("The protection of the automatic stay extends to any action or proceeding against an interest of the debtor. The scope of this protection is not determined solely by whom a party chose to name in the proceeding, but rather, by who is the party with a real interest in the litigation."); *In re Klarcheck*, 508 B.R. 386, 394 (Bankr. N.D. Ill. 2014)("[H]olding [] strictly to who the named parties are [in evaluating the applicability of section 362(a)(1),] is elevating form over substance.").

The Diocese and the Catholic Corporations share such a strong identity of interest in the CVA Cases that it is clear that the Diocese is a real party defendant and that the automatic stay applies under controlling Second Circuit precedent.

Queenie, 321 F.3d at 288. The Catholic Corporations, although separately incorporated, are an integral part of the larger Catholic mission in Western New York, and they rely heavily upon the Diocese for administrative support and religious guidance. *See* Condon Aff. ¶¶ 5-45 [A-31-41]. In accordance with Catholic doctrine, the responsibility for assigning clergy is a function of the Diocesan Bishop. Accordingly, it is the alleged actions or inactions of the Diocese with respect to the assignment or retention of alleged perpetrators of abuse that lies at the core of the dispute in the CVA Cases. *See* McDonald Dec. ¶¶ 5, 7 [A-565-66]. Importantly, claims asserted against the Catholic Corporations in the CVA Cases are so closely intertwined with parallel claims against the Diocese that the Diocese may be exposed to collateral estoppel, adverse precedent, vicarious liability, or imputed admissions if litigation goes forward.[7] In these circumstances, the Diocese will have no choice but to participate in the litigation of the CVA Cases, diverting significant resources from the pursuit of a plan of reorganization and vitiating the efficacy of the Bankruptcy Code's automatic stay. *Id*. ¶¶ 10-11 [A-566-67].

Moreover, as discussed below, statements from the Committee and Claimants' counsel reveal that the primary purpose in terminating the Stay

[7] All or nearly all Claimants have filed proofs of claim in the Diocese's chapter 11 case based upon substantially the same alleged facts and circumstances, and seek damages for the same injuries asserted in their CVA Cases. McDonald Dec. at ¶ 8 [A-566].

Stipulation was to create risk for the Diocese and thereby force a more favorable outcome for Claimants collectively in this chapter 11 case. Accordingly, attempts to prosecute the CVA Cases are clearly "continuation[s] . . . of a judicial . . . action or proceeding . . . to recover a claim against the debtor" in violation of section 362(a)(1).

Under similar facts where plaintiffs sought to pursue tort claims against non-debtors which "involve the same products, same time periods, same alleged injuries, and same evidence as claims against [the debtor,]" where that litigation "would liquidate pending tort claims, as well as indemnification claims, against [the debtor] outside of chapter 11[,]" and where risks of collateral estoppel, *res judicata*, and record taint threatened to adversely impact the debtor, the bankruptcy court in *LTL Management* recently held that section 362(a)(1) applies to stay claims against the debtor's non-debtor affiliates.[8] *In re LTL Management, LLC*, 638 B.R. 291, 306-07, 314-17, 323 (Bankr. D. N.J. 2022) (direct appeal to Third Circuit pending [Case No. 22-8015]); *see also In re Jefferson County, Ala.*, 491 B.R. 277 (Bankr. N.D. Ala.

[8] The bankruptcy court in *LTL Management* acknowledged that the Second Circuit, in *Queenie*, denied a request to apply the automatic stay to a non-debtor "where the basis for doing so was premised 'solely' on the apprehension of later use against the debtor of offensive collateral estoppel or the precedential effect of an adverse decision." The court distinguished the case before it however, finding that the rationale for a stay was "not bottomed 'solely' on collateral estoppel concerns" but that continued litigation against non-debtor defendants also risked depleting insurance coverage, diverting the debtor's funds and resources toward defense costs, complicating mediation efforts and estimation proceedings, and establishing new indemnification claims against the debtor. 638 B.R. at 315.

2013) (finding section 362(a)(1) applicable to stay actions that would otherwise raise preclusion concerns for debtor); *In re Ionosphere Clubs, Inc.*, 111 B.R. 423 (1990) (same); *In re Aldrich Pump LLC*, 2021 WL 3729335 at *30-31 (Bankr. W.D. N.C., Aug. 20, 2021) (same); *In re DBMP LLC*, 2021 WL 3552350 at * 27 (Bankr. W.D. N.C., Aug. 10, 2021) (same); *In re Family Health Serv., Inc.*, 105 B.R. 937, 942-43 (Bankr. C.D. Cal. 1989) (where "[a] judgment against a non-debtor defendant will trigger a claim against the debtor for indemnification, . . . the debtor is the 'real party defendant'").

Applying section 362(a)(1) to enjoin prosecution of the CVA Cases under these circumstances promotes the policies underlying the automatic stay where (as here) the Diocese is the true target of litigation, litigation against the Catholic Corporations will be functionally indistinguishable from litigating the actions against the Diocese, and where the avowed purpose of Claimants in prosecuting their claims is to assist and amplify their recovery against the Diocese. Here, the automatic stay would be effectively nullified by allowing the CVA Cases to proceed. *See In re United Health Care Org.,* 210 B.R. 228, 233-35 (S.D.N.Y. 1997) (affirming stay of litigation against non-debtor defendant and noting that "Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code.") (citing *Variable-Parameter Fixture Development Corp. v. Morpheus Lights, Inc.*, 945 F. Supp. 603, 608

(S.D.N.Y. 1996) (quoting *A.H. Robbins Co.*, 788 F.2d at 999)); *Rossetta Res. Operating LP v. Pogo Producing Co. (In re Calpine Corp.)*, Adv. No. 06-1757 (BRL), 2007 Bankr. LEXIS 2025 (Bankr. S.D.N.Y., April 30, 2007) (same).

Even if the court finds that the Diocese is not the real party defendant, or that the CVA Cases are not actions to recover claims against the Diocese, the CVA Cases should nevertheless be stayed because they are an attempt to collect, assess, or recover a prepetition claim against the Diocese in violation of section 362(a)(6) of the Bankruptcy Code.

Section 362(a)(6) prohibits any action to collect, assess, or recover a prepetition claim against a debtor, even if it is merely a preliminary step toward establishing liability. *See In re Ebadi*, 448 B.R. 308, 314-15 (Bankr. E.D.N.Y. 2011) (foreclosure sale of property where debtor guaranteed the debt being foreclosed but had no ownership interest in foreclosed property violated section 362(a)(6) because the sale represented "a substantial step in a process that could lead to recovery of a deficiency judgment from [the debtor]" and therefore "falls within the contours of any act to collect, assess, or recover a claim against the debtor.") (internal quotations omitted). Here, Claimants seek to establish factual and legal predicates which will then be used offensively to establish liability on behalf of the Diocese and seek to set high verdict values for abuse claims against the Diocese.

Moreover, section 362(a)(6) prohibits creditors "from employing pressure tactics or coercion in attempting to collect prepetition debts." *Divane v. A and C Elec. Co., Inc.*, 193 B.R. 856, 860-61 (N.D. Ill. 1996). Here, the Committee and Claimants propose to coordinate efforts in pursuit of the Catholic Corporations, with the hope of establishing factual findings and jury verdict values that can be used against the Diocese, as well as the expectation that the continued harassment, turmoil, and expense of monitoring and protecting the Diocese's interests in litigation will coerce the Diocese to provide more favorable treatment in a chapter 11 plan than what claimants might otherwise be able to recover.

As the Committee emphasized in its objection to the Stay Motion:

> **Discovery in and trials of the CVA Cases will establish the strength and value of the Survivors' claims**. . . . [D]iscovery will aid settlement negotiations by providing the facts and transparency necessary for successful mediation.

Committee Objection ¶ 95 (emphasis added) [A-515].

To the extent any ambiguity remained that the Committee and Claimants intend and expect prosecution of the CVA Cases against the Catholic Corporations to advance, improve, and even liquidate abuse claims against the Diocese, and to impose settlement pressure on the Diocese, that uncertainty was eradicated at oral argument:

> **Mr. Scharf [Committee Counsel]:** . . . **The Diocese is the tortfeasor here . . . It is the central figure that caused these problems.**
>
> * * *
>
> And, your Honor, at this point having continued the stay of the non-debtor litigation for a number of years, it is time to let that litigation go forward. . . . it is clear that we do not have a meeting of the minds on a settlement.
>
> * * *
>
> . . . **[L]itigation, including the litigation against non-Diocesan entities, will help mediation and will help to resolve this case, create risk.**
>
> * * *
>
> [E]ven if a judgment is obtained, that will not create havoc. **It will change circumstances of a negotiation . . . .**
>
> * * *
>
> **Why is the Diocese concerned here? The Diocese is concerned here because, frankly, Judge, these cases do not get better for the defendants with, with – as they progress. They get much worse for the defendants when they progress. It's when evidence comes out. It's when the potential risk of liability comes out. The potential risk, frankly, of what is a case worth . . . .**
>
> * * *
>
> And as we noted in our papers in the Diocese of Wilmington, there's been a consensual stay that was lifted . . . . that resulted in a judgment against the parish. The Committee and the debtor of that case negotiated a consensual plan . . . **and it was resolved very shortly after that judgment was obtained.**

Hr'g. Transcript at 55:3-57:17, 63:25-64:6, 70:17-25 (emphasis added) [A-721-36].

Clearly, the Committee and many of the Claimants view litigation against the Catholic Corporations as a key point of leverage to extract a higher settlement value for prepetition claims against the Diocese through mediation in the chapter 11 case. *Id.* Counsel for 175 Claimants confirmed at oral argument that the push to litigate in state court is not actually an attempt to vindicate independent causes of action, but instead is part of a coordinated plan to collectively apply pressure against the Diocese:

> **Mr. Anderson:** . . . [W]e are confident that we can continue to operate in a cooperative and **coordinated way to serve the interest of resolution of all the cases** with economy and efficiency.
>
> * * *
>
> [T]he experience that we had in Wilmington . . . is very instructive. . . . **[W]e were in mediation where we were involved [] for a little over two years. No progress.** Finally, the Court allowed a relief from stay in a case against a parish to proceed to verdict . . . . **Shortly after that verdict, the survivors and the Diocese and the parishes reached a resolution.**

Hr'g. Transcript at 79:21-80:3, 81:24-82:8 (emphasis added) [A-745-48].

Clearly the Committee and Claimants are tying a direct link between potential verdicts against parishes and settlement pressure on the Diocese. This is exactly the kind of indirect attack that 362(a)(1) and (a)(6) were intended to prevent. *See In re Marine Pollution Serv., Inc.*, 99 B.R. 210 (1989) (article 78 proceeding in which debtor was not named as a party, the purpose of which "was to bolster [creditor's]

defense of the instant adversary proceeding and to enhance its position as a creditor" violated the automatic stay.).

If the true purpose of pursuing CVA Cases was to establish independent causes of action on behalf of individual survivors solely against the Catholic Corporations, there would be no need or benefit for coordination of efforts, and the Committee (which is supposed to represent the collective interest of creditors of the Diocese only), would have no reason to support such piecemeal and individualized litigation because pursuing truly independent causes of action against Catholic Corporations would do nothing to resolve abuse claims against the Diocese. Instead, the Committee and Claimants hope to coerce a higher settlement value for prepetition abuse claims in this chapter 11 case. This is a clear violation of section 362(a)(6).

Accordingly, the Bankruptcy Court's finding that the CVA Cases are not stayed by sections 362(a)(1) and (a)(6) should be vacated and remanded with directions to conduct the appropriate legal and factual analysis with respect to the applicability of those sections under the facts and circumstances of this case.

POINT II

THE BANKRUPTCY COURT ERRED IN HOLDING THAT THE DIOCESE FAILED TO CARRY ITS BURDEN OF PROOF UNDER SECTION 362(A)(3) WITHOUT FIRST HOLDING AN EVIDENTIARY HEARING

A. The Diocese has established a colorable claim that the CVA Cases threaten shared insurance assets.

Bankruptcy Code section 362(a)(3) automatically stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." *See* 11 U.S.C. § 362(a)(3).

Courts have consistently held that proceeds of shared insurance are, for purposes of the automatic stay, property of the debtor's estate. *See In re The Diocese of Buffalo, N.Y.,* 618 B.R. at 405 ("Numerous courts have determined that a debtor's insurance policies are property of the estate, subject to the bankruptcy court's jurisdiction.") (quoting *Macarthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir. 1988)); *Syracuse*, 628 B.R. at 578 (same); *In re Quigley Co.*, 676 F.3d 45, 56 (2d Cir. 2012) ("'a bankruptcy court . . . has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.'") (quoting *Johns-Manville Corp. v. Chubb Indemn. Ins. Co. (In re Johns Manville)*, 517 F.3d 52, 66 (2d Cir. 2008); *ACandS, Inc. v. Travelers Cas. & Sur. Co.,* 435 F.3d 252, 260 (3d Cir. 2006) ("The possession or control language of Section 362(a)(3) has consistently been interpreted to prevent acts that diminish future recoveries from a

debtor's insurance policies."); *see also A.H. Robins*, 788 F.2d 994, 1001 ("actions . . . against officers or employees of the debtor who may be entitled to indemnification under such [corporate liability insurance] policy or who qualify as additional insureds under the policies are to be stayed under section 362(a)(3)").

The record before the Bankruptcy Court included significant factual detail regarding the shared insurance assets of the Diocese and the Catholic Corporations, and the ways in which such assets will be depleted by defense costs and judgments if the CVA Cases are allowed to go forward. *See* Passero Dec. ¶¶ 38-46 [A-19-22]; PSIP Motion [A-44-55]; Final PSIP Order [A-78-81]; Murray Dec. [A-318-452]; Wilson Dec. (attached as exhibit to Continental Stay Relief Motion) [A-119-20]. Accordingly, the Bankruptcy Court erred in failing to find that litigation in the CVA Cases is a direct act to obtain possession of, or exercise control over, property of the Diocese's estate, and that any effort to pursue such claims therefore violates the automatic stay and should be enjoined pursuant to section 362(a)(3) to avoid adverse consequences for the Diocese's estate. *Queenie,* 321 F.3d at 287-288.

B. The Bankruptcy Court imposed an impermissibly high burden on the Diocese and did not afford an opportunity for an evidentiary hearing.

The Second Circuit has held for decades that, "[o]n a motion for a preliminary injunction, where 'essential facts are in dispute, there must be a hearing . . . and appropriate findings of fact must be made.'" *Fengler v. Numismatic Americana,*

Inc., 832 F.2d 745, 747 (2d Cir. 1987) (remanding case where "'essential facts' were unquestionably in dispute" but the court held only oral argument on the injunctive motion, not an evidentiary hearing) (quoting *Visual Sciences, Inc. v. Integrated Comms., Inc.*, 660 F.2d 56, 58 (2d Cir. 1981)); *see Juergensen Defense Corp. v. Carleton Tech., Inc.*, No. 08-CV-959A, 2009 WL 2163181, at *4 (W.D.N.Y. July 20, 2009) (citing Fengler and holding that "factual disputes . . . require a hearing for resolution" of a motion for a preliminary injunction). The Bankruptcy Court erred in failing to conduct an evidentiary hearing.

The Bankruptcy Court denied the Diocese's motion for a preliminary injunction notwithstanding that "essential facts" remained in dispute. The Bankruptcy Court's own Decision confirms as much. In holding that the Diocese failed to "carry its burden of proof under Section 362(a)(3) to demonstrate that litigation against the Catholic Corporations would adversely affect property of the estate," the Bankruptcy Court offered the following reasoning:

> Here, the Diocese made no effort to provide evidence showing that a *specific* CVA case would have a materially adverse impact on the per-occurrence limits of a *specific* policy of insurance. Instead, the Diocese invites the court to make a leap of faith and find that *any* state court litigation by *any* Abuse Survivor against *any* Catholic Corporation will necessarily adversely affect property of the Diocese's Estate. The Court declines that invitation.
>
> The Court holds that the Diocese has failed to carry its burden of proving that a specific CVA case would materially erode coverage under a specific policy of insurance. As a consequence, the Court is

> not convinced that section 362(a)(3) stays litigation by Abuse Survivors against non-debtor Catholic Corporations.

Decision at 10-11 (emphasis in original) [A-767-68].

In other words, the Bankruptcy Court identified "essential facts" that remained in dispute, namely whether and to what extent each of several hundred CVA Cases would impact shared insurance policies. In so doing, the Bankruptcy Court provided a clear roadmap to the evidentiary proof the Diocese could introduce at an evidentiary hearing in support of its Stay Motion. The Bankruptcy Court never held such a hearing, however, instead affording the parties only oral argument by counsel.

The Bankruptcy Court's failure to hold an evidentiary hearing is all the more confounding because the Diocese expressly requested such a hearing. In its reply brief in further support of the Stay Motion, the Diocese requested that, if the Bankruptcy Court concluded it required additional evidence, the Court "schedule a full evidentiary hearing to allow for a full exposition of the relevant facts." Reply ¶ 40 [A-555].

The Bankruptcy Court's failure to hold an evidentiary hearing constitutes reversable error. *See Fengler*, 832 F.2d at 747.

C. The Bankruptcy Court's attempt to preserve the Diocese's insurance assets is insufficient.

Notwithstanding its decision that the Diocese had not established the applicability of section 362(a)(3), the Bankruptcy Court took the opportunity to "mold its decree to meet the exigencies of th[is] particular case" by "*prohibiting* any Abuse Survivor from attempting to execute against or gain access to the proceeds of any insurance policy naming the Diocese as a co-insured, without the express permission of this Court. . . ." Decision at 11 [A-768]. This prohibition is too limited in scope to be effective and is not a suitable alternative to the broad protections the Diocese is entitled to under section 362(a)(3).

First, this prohibition, by its terms, applies only to survivors seeking to enforce judgments obtained in CVA Cases. It does not prevent the Catholic Corporations, each of whom is an additional insured with the same indemnification rights under the policies as the Diocese, from seeking to obtain coverage directly from an insurer to cover any liability with respect to a judgment.

Second, prosecution of the CVA Cases will result in the dissipation of shared PSIP funds held by the Diocese which will go to pay defense costs and to satisfy deductibles and self-insured retention payments on behalf of the Catholic Corporations. *See* Final PSIP Order ¶ 4 [A-79]. The Diocese will also need to access PSIP funds to pay its own costs related to monitoring and participating in the CVA

Cases to protect against adverse effects from collateral estoppel, *res judicata* and record taint.

Accordingly, the Bankruptcy Court's attempt to protect the Diocese's insurance assets falls far short of the statutory protections of the automatic stay to which the Diocese is entitled.

POINT III

THE BANKRUPTCY COURT ERRED IN REFUSING TO STAY THE CVA CASES PURSUANT TO ITS EQUITABLE POWERS UNDER SECTION 105(A)

In addition to the automatic stay, the Bankruptcy Court could have, and should have, stayed the CVA Cases under section 105(a) of the Bankruptcy Code which authorizes the issuance of "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11]." 11 U.S.C. § 105(a). Although "[c]ourts have not uniformly adopted a standard analytic approach in determining whether a § 105 injunction should issue to stay a proceeding against a non-debtor[,]"[9] the Bankruptcy Court failed to consider controlling Second Circuit precedent which teaches that a section 105(a) injunction should be issued where third party litigation threatens to negatively impact the bankruptcy estate. Moreover, the Bankruptcy Court made legal and factual errors in attempting to apply the traditional four-factor preliminary injunction test.

[9] *United Health Care*, 210 B.R. at 233.

A. The CVA Cases should be stayed pursuant to section 105(a) because they will impede the Diocese's reorganization and adversely affect its bankruptcy estate.

To the extent the CVA Cases are not already subject to the automatic stay of section 362(a), Second Circuit case law is clear that the Bankruptcy Court has the authority under section 105(a) to enjoin actions against non-debtors where such actions could have an adverse impact on the Diocese's bankruptcy estate. *In re Quigley Co*., 676 F.3d 45, 56-57 (2d Cir. 2012) (affirming stay of litigation against non-debtor based on shared insurance, explaining that "[b]ankruptcy jurisdiction is appropriate over third party non-debtor claims that directly affect the *res* of the bankruptcy estate" and reaffirming that "[t]he test for determining whether litigation has a significant connection with a pending bankruptcy sufficient to confer bankruptcy jurisdiction is whether its outcome might have any conceivable effect on the bankruptcy estate.") (internal citations and quotations omitted).

Section 105(a) grants bankruptcy courts the power to enjoin actions pending against non-debtors that threaten the integrity of a debtor's bankruptcy estate. *Manville Corp. v Equity Sec. Holders Comm. (In re Johns-Manville Corp.)*, 801 F.2d 60, 63 (2d Cir. 1986) ("Injunctions are authorized under [section 105], which empowers the bankruptcy court to issue any order necessary or appropriate to carry out the provisions of the Code, including orders restraining actions pending elsewhere."); *In re Davis*, 730 F.2d 176, 183-84 (5th Cir. 1984) ("[Section 105]

includes the authority to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate."); *In re Caesars Entm't Operating Co.*, 808 F.3d 1186, 1189 (7th Cir. 2015) (same); *Caesars Entm't Operating Co. v. BOKF, N.A.*, 561 B.R. 441, 453-454 (Bankr. N.D. Ill. 2016) (staying litigation against non-debtor to allow parties an opportunity to negotiate a global settlement because "[c]ases that settle on the courthouse steps settle on the way in to the courthouse, not on the way out.").

Section 105(a) can and has been used by courts to enjoin third party actions beyond the scope of what is automatically stayed under section 362(a). *See Queenie*, 321 at 288 (observing that section 105 "grants broader authority" to stay litigation against non-debtors); *In re Baldwin-United Corp. Litig.,* 765 F.2d 343, 348 (2d Cir. 1985) ("Even if . . . the automatic stay under section 362 does not apply to [plaintiff's] third-party complaint, the Bankruptcy Court has authority under section 105 broader than the automatic stay provisions of section 362 and may use its equitable powers to assure the orderly conduct of the reorganization proceedings."); *Nevada Power Co. v Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 409, n. 20 (Bankr. S.D.N.Y. 2007) ("Courts consistently have found that section 105 may be used to stay actions against non-debtors even where section 362 otherwise would not provide such relief . . ."); *1031 Tax Grp., LLC v. Alvarez (In re 1031 Tax Grp., LLC)*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008); ("Section 105 authorizes a

bankruptcy court to exercise power outside the bounds of the automatic stay."); *Internal Revenue Serv. v. Kaplan (In re Kaplan)*, 104 F.3d 589, 595 (3d Cir. 1997) ("the bankruptcy court has the power under section 105 to enjoin creditors from proceeding in a state court against third parties where failure to enjoin would affect the bankruptcy estate"); *Paragon Litig. Tr. v. Noble Corp. PLC* (*In re Paragon Offshore PLC*), 588 B.R. 735, 760 (Bankr. D. Del. 2018) (bankruptcy court's powers under section 105(a) "extend to enjoining proceedings in other fora against non-debtors, at least as it is 'necessary to carry out the provisions of the Bankruptcy Code'"); *W.R. Grace & Co. v. Chakarian* (*In re W.R. Grace & Co.*), 386 B.R. 17, 30 (Bankr. D. Del. 2008) (expanding preliminary injunction to cover non-debtors pursuant to section 105(a)).

The Second Circuit has instructed that section 105(a) "is to be 'construed liberally to enjoin suits that might impede the reorganization process'" and that the equitable powers conferred by that section are "properly used to enjoin creditors' lawsuits against third parties where 'the injunction plays an important part in the debtor's reorganization plan.'" *Lautenberg Found. v. Picard (In re Bernard L. Madoff Inv. Sec., LLC)*, 512 F. App'x 18, 20 (2d Cir. 2013) (quoting *Macarthur Co. v. Johns-Manville Corp.*, 837 F.2d at 93 and *S.E.C. v. Drexel Burnham Lambert Grp., Inc.*, 960 F. 2d 285, 293 (2d Cir. 1992)). Indeed, in *Buffalo* the Court recently held that the ability to issue any order "necessary or appropriate to carry out the

provisions of [Title 11]" under section 105(a) includes the power to enjoin third party litigation where doing so would assist the debtor in complying with its obligation under section 1106(a)(6) to file a plan of reorganization as soon as practicable. *Buffalo* 633 B.R. at 189.

A section 105 injunction is necessary in this case to preserve estate resources and to eliminate the distractions and expenses of litigating in state court the same issues the Diocese seeks to resolve through this chapter 11 case. Moreover, because most, if not all, of the CVA Cases are already subject to section 362(a) as outlined above, staying the few, if any, CVA Cases which may fall outside the broad ambit of the automatic stay pursuant to section 105(a) is also fundamentally necessary to ensure all abuse survivors are treated fairly and equitably as part of this chapter 11 case.

Courts have utilized section 105 to enjoin actions against third parties where the third party's alleged liability is dependent upon facts and circumstances that are intertwined with the debtor's potential liability. As an example, in *Purdue*, the Southern District of New York recently affirmed the bankruptcy court's imposition of an injunction staying litigation against a non-debtor third party alleged to be a co-tortfeasor with the debtor on the basis of "strong interconnections between the third party action and the bankruptcy" where "a finding of liability against Dr. Sackler arising from his work on behalf of Purdue is equivalent to finding that Purdue itself

is liable . . . " and where "because the claims against Dr. Sackler and Purdue arise from their interrelated conduct, it is at the very lease conceivable that a proceeding against Dr. Sackler could result in his asserting a claim for contribution or indemnification against Purdue – which is to say, against the Debtors' estate." *In re Purdue Pharmaceuticals L.P.*, 619 B.R. 38, 49-50 (S.D.N.Y. 2020). Similarly here, the facts and circumstances necessary to establish liability against the Catholic Corporations have substantial overlap and connection with the facts and circumstances that claimants would be required to prove in order to establish liability against the Diocese, and the Catholic Corporations have asserted that the Diocese is obligated to indemnify them for any liability they may have in the CVA Cases. Accordingly, a stay of the CVA Cases pursuant to section 105 is necessary and appropriate to avoid having the Diocese's liability for abuse claims in this chapter 11 case determined vicariously through third party litigation in the CVA Cases where the Diocese is not a party.

While the Bankruptcy Court's Decision purports to consider an injunction under section 105(a), it does not engage with, or apply the facts of this case to, the substantial body of Second Circuit case law supporting the issuance of an injunction under section 105(a) when litigation against a third party threatens the integrity of a bankruptcy estate or when pausing such litigation will enhance the prospects of a successful reorganization, and instead analyzes the question solely under the four-

factor test traditionally applied by courts when considering preliminary injunctions outside of the bankruptcy context. *See* Decision at 11-15 [A-768-72]. Accordingly, the Decision should be vacated and remanded for further findings consistent with applicable Second Circuit case law addressing the issuance of preliminary injunctions under section 105(a) of the Bankruptcy Code.

B. The Bankruptcy Court also erred in its application of the traditional four-factor preliminary injunction test.

Even though, as stated above, the Bankruptcy Court erred in relying solely upon the "traditional" preliminary injunction test, the Bankruptcy Court did not properly apply that test. Under the "traditional" preliminary injunction test, courts consider (1) the debtor's reasonable likelihood of success; (2) the risk of irreparable harm to the debtor in the absence of an injunction; (3) the balance of hardships between the debtor and its creditors; and (4) the public interest in an injunction. *Hawaii Structural Ironworkers Pension Trust Fund v Calpine Corp.*, 2006 US Dist. LEXIS 92499, at *12-14, 2006 WL 3755175 (S.D.N.Y. Dec. 20, 2006); *In re United Health Care Org.,* 210 B.R. 228, 233-35 (S.D.N.Y. 1997). Applying these factors to the facts of this case, it is clear that the Bankruptcy Court erred in failing to enjoin the CVA Cases.

(i) Likelihood of a successful reorganization

In the bankruptcy context, the "likelihood of success" factor has been understood to require consideration of the debtor's ability to successfully reorganize.

Lyondell Chem. Co. v. CenterPoint Energy Gas Servs., Inc. (In re Lyondell Chem. Co.), 402 B.R. 571, 589 (Bankr. S.D.N.Y 2009); *Alert Holdings, Inc. v. Interstate Protective Servs., Inc.,* 148 B.R. 194, 200 (Bankr. S.D.N.Y. 1992). A demonstration that the debtor is "proceeding on track" will satisfy the first factor. *See Lyondell*, 402 B.R. at 590; *see also In re Soundview Elite Ltd.*, 543 B.R. 78, 119 (Bankr. S.D.N.Y. 2016) ("Courts do not demand certainty of a successful reorganization; they expect only reasonable prospects of such."). In the Decision, the Bankruptcy Court recognized that the Diocese has achieved several milestones on its way to reorganization – suggesting that the Diocese is in fact "proceeding on track" within the meaning of *Lyondell*.

However, the Bankruptcy Court erroneously seized on the possibility that the Diocese might pursue a plan of reorganization over the objection of some subset of abuse survivors, as an indication that the Diocese will not be able to successfully reorganize. Congress enacted the cramdown provisions of Bankruptcy Code section 1129(b) specifically to allow for non-consensual confirmation of a plan in a scenario where the debtor is faced with an unreasonable and intransigent class of creditors demanding a recovery in excess of what is otherwise fair and equitable. It simply cannot be the case that the Diocese's potential need to avail itself of these provisions in order to address objections or resistance from one or more classes of creditors is sufficient to support a finding that the Diocese is unlikely to successfully reorganize.

Accordingly, the Bankruptcy Court erred when it found that this factor weighs against the issuance of a preliminary injunction.

(ii) Irreparable harm

In the context of a bankruptcy case, the irreparable harm factor is satisfied where "the action sought to be enjoined would embarrass, burden, delay or otherwise impede the reorganization proceeding, or if a stay is necessary to preserve or protect the Diocese's estate and reorganization prospects." *Alert Holdings, Inc. v. Interstate Protective Servs., Inc. (In re Alert Holdings, Inc.)*, 148 B.R. 194, 200 (Bankr. S.D.N.Y. 1992); *see also In re Calpine Corp.*, 365 B.R. at 412 (noting that preliminary injunction is appropriate "where the action to be enjoined is one that threatens the reorganization process").

Here, despite the Bankruptcy Court's attempt to insulate the Diocese's insurance assets while the CVA Cases progress, its limited decree prohibiting judgment creditors from executing against insurance is not sufficient to prevent attorneys' fees and insurance claims by Catholic Corporations from depleting assets that are essential to the Diocese's reorganization and the equitable treatment of all survivors. Moreover, litigation in any given CVA Case could result in determinations of law or fact common across claimants, defendants or insurance policies, that could adversely impact the availability of insurance coverage with respect to abuse claims asserted by other survivors both in their respective CVA

Cases and in this chapter 11 case. *See Syracuse*, 628 B.R. at 581 ("Any ongoing state court litigation will result in an imminent depletion of the very assets intended to fund the plan and impede a swift and effective global settlement. An insurance coverage defense found in any of the actions that proceed will adversely impact not only the Debtor and the Affiliated Entity named in the action but could also disqualify coverage for other victims whose claims fall under the same insurance policy. Perforce, this would require engagement by the Debtor in the action even though it is not a named party and prove a distraction.). The Bankruptcy Court's error in failing to perceive the threats to the Diocese's insurance assets was compounded in this case by its failure to hold an evidentiary hearing to develop a full record as discussed above.

The Bankruptcy Court further erred when it failed to make any factual findings as to the substantial risks of collateral estoppel, *res judicata*, record taint, and evidentiary prejudice posed by the CVA Cases.

The Bankruptcy Court improperly assumed that the CVA Cases will not cause a distraction from the Diocese's reorganization efforts merely because this case has been pending for some time. Notwithstanding the statements of counsel for 175 Claimants at oral argument assuring the Bankruptcy Court that Claimants will proceed in an organized and coordinated fashion,[10] litigating hundreds of CVA

[10] *See* Hr'g Transcript at 79:21-80:3, 82:16-83:21 [A-745-49].

Cases simultaneously will almost certainly sow chaos and frustrate the Diocese's efforts to seek a global resolution of all abuse claims and CVA Cases within the confines of its bankruptcy proceeding.[11] Moreover, the Diocese will be required to play an active and substantial role in the litigation of each of the CVA Cases. Monitoring and participating in so many cases, to say nothing of responding to individual discovery demands, will certainly tax the limited personnel resources of the Diocese, notwithstanding that the typical post-filing scramble to assemble information relating to the chapter 11 process is now complete. *See In re Calpine Corp.*, 365 B.R. at 412 (enjoining actions against a non-debtor where the debtor's employee was "key to the restructuring and to the business and that both would suffer irreparable harm if he were distracted from his responsibilities in order to participate in the [ongoing third-party] litigation"); *In re Johns-Manville Corp.* 26 B.R. at 426 ("[t]he massive drain on [key debtor officers' and employees'] time and energy at this crucial hour of mediation and plan formulation in either defending themselves or in responding to discovery requests could frustrate if not doom their vital efforts at formulating a fair and equitable plan of reorganization.").

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[11] Indeed, in supporting a stay of litigation against parishes in the *Buffalo* chapter 11 case under nearly identical facts, counsel for the creditors' committee (who also represents the Committee in this case) argued that "having four, five, 600 people, survivors pursuing claims against all of these other entities will lead to chaos, confusion and, frankly, will deplete the assets of those entities and of insurance available to all survivors and will result in a much lower recovery for everybody." *Buffalo* Hr'g Transcript March 4, 2021, Bankr. W.D.N.Y. Adv. Pro. No. 20-01016(CLB) [Docket No. 137].

The Bankruptcy Court also appears to have erroneously interpreted the standard for irreparable harm to require a showing of an "*immediate and irreparable economic consequence"* for a preliminary injunction to issue. *See* Decision at 13 [A-770]. This conflates the irreparable harm standard with dicta from *Queenie* where the Second Circuit opined that the automatic stay of section 362(a) "normally" only applies to stay third-party actions "when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Queenie*, 321 F. 3d at 287. The language of *Queenie*, however, did not create a bright line requirement of immediate adverse economic consequence, it merely identified such consequences as a common feature in many cases where the automatic stay will apply to actions against third parties. Moreover, the "immediacy" that concerned the Second Circuit in *Queenie* was not the amount of time that might pass before the debtor's estate would suffer an adverse consequence, but the degree of correlation or abstraction between third-party litigation and the anticipated adverse consequences. In other words, the extent to which the third-party litigation could be deemed to be a predictable and proximate cause of an undesirable consequence for the debtor's estate. *See Id.* (finding section 362(a) inapplicable to action against unrelated co-defendants where the perceived harm to the debtor was limited solely to an apprehended later use of offensive collateral estoppel and precedential

concerns, but noting that section 105 grants broader authority to stay third party actions).

Accordingly, the Bankruptcy Court's failure to find irreparable harm because (i) it believed there would be no negative impact on insurance assets, (ii) it failed to engage in a factual inquiry as to the preclusive implications for the Diocese if the CVA Cases go forward, (iii) it underestimated the amount of time and effort litigating the CVA Cases will require of Diocesan personnel, and (iv) the CVA Cases are only in their early stages and trial is not imminent, was error and the Decision must be vacated and remanded.

(iii) Balance of harms

The Bankruptcy Court's holding with respect to the balance of harms fails to analyze the harms to the Diocese and to balance them against the harms that would be suffered by abuse survivors if the status quo is maintained. Moreover, while the Diocese has established significant harms if the CVA Cases proceed, and was (and is) ready to supplement that record at an evidentiary hearing, the Bankruptcy Court's speculation in its Decision as to potential harms to abuse survivors was made without the benefit of an admissible evidentiary record. Accordingly, the Bankruptcy Court's findings with respect to the balance of harms must be vacated and remanded.

(iv) The public interest

In finding that the public interest favors denial of a preliminary injunction, the Bankruptcy Court frames the issue as a question of whether there is greater public interest in the Catholic Corporations receiving a stay of actions against them as a collateral effect of a preliminary injunction when they could alternatively file for bankruptcy protection themselves, contrasted against the public interest served by allowing abuse survivors to vindicate their claims in state court. In doing so, however, the Bankruptcy Court overlooked the public interest as it pertains to a key party in interest in this case: the Diocese.

The overriding purpose of Congress in enacting chapter 11 was to promote the successful reorganization of debtors by providing them with a fresh start so long as they can provide creditors with a recovery at least equal to what would be obtained in a chapter 7 liquidation. Courts have found that the "unquestioned public interest in promoting a viable reorganization of the debtor can be said to outweigh any contrary hardship to the plaintiffs." *A.H. Robins*, 788 F.2d at 1008; *see also Rickel Home Ctrs. v. Baffa (In re Rickel Home Ctrs.)*, 199 B.R. 498, 501 (Bankr D. Del. 1996) ("[T]here is a strong public interest in promoting a successful Chapter 11 reorganization."); *In re Am. Film Techs.*, 175 B.R. 847, 849 (Bankr. D. Del. 1994) ("It is one of the paramount interests of this court to assist the Debtor in its reorganization efforts." (quotations omitted)). The primary purpose behind the

preliminary injunction the Diocese is seeking is to do just that, promote the successful reorganization of the Diocese so it can provide fair and equitable recompense for abuse survivors and continue on as a charitable institution and valuable member of the Western New York community. The fact that an injunction would also temporarily halt state court claims against the Catholic Corporations as the Diocese works to craft a global plan of reorganization may be an ancillary effect, but it should not have factored negatively into the Bankruptcy Court's public interest analysis.

Moreover, contrary to the characterization of the Diocese's position in the Bankruptcy Court's Decision, the Diocese does not suggest that the public interest is in its favor solely as a result of the good works it conducts as a charitable organization, nor does the Diocese deny that there is a valid public interest in allowing personal injury plaintiffs to have their day in court. The Diocese merely suggests that the strong public interest inherent in promoting the reorganization of any debtor in chapter 11 is even stronger in cases, such as this, where the whole purpose of the debtor's existence is to support charitable, humanitarian and religious causes.

For all the reasons described above, the Bankruptcy Court erred in applying the law and facts and in refusing to issue a preliminary injunction of the CVA Cases under the traditional four-factor test.

POINT IV

THE BANKRUPTCY COURT ERRED IN DISMISSING THE COMPLAINT

The Bankruptcy Court's decision to *sua sponte* dismiss the Diocese's Complaint also constitutes reversable error. In so doing, the Bankruptcy Court effectively converted the Committee Objection into a motion for summary judgment and, without affording the Diocese notice or any evidentiary hearing, granted same. The Bankruptcy Court lacked the authority to take such unilateral action and the Bankruptcy Court's dismissal of the Diocese's Complaint must be reversed.

Courts "have the power to enter summary judgment *sua sponte* only if 'the losing party was on notice that [it] had to come forward with all of [its] evidence,'" and "it is clear that all of the evidentiary material a party might submit is before the court and no material issue of fact exists." *Pugh v. Goord*, 345 F.3d 121, 124-25 (2d Cir. 2003) (quoting *First Financial Ins. Co. v. Allstate Interior Demolition Corp.*, 193 F.3d 109, 114 (2d Cir. 1999)). Where, as here, "no party has moved for summary judgment and no notice was given by the court, a *sua sponte* grant of summary judgment is never appropriate." *Pugh*, 345 F.3d at 125 (citing *First Financial Ins. Co.*, 193 F.3d at 115); *see* Fed. R. Civ. P. 56 (permitting court to grant summary judgment for a nonmovant only "[a]fter giving notice and a reasonable time to respond").

The procedural posture of the underlying proceeding at the time the Bankruptcy Court dismissed the Complaint highlights the error in that dismissal. On April 6, 2022, the Diocese filed its Complaint, which sought (i) "a declaration that the CVA Cases, as those actions relate to the Catholic Corporations, should be and are stayed pursuant to Section 362(a) of the Bankruptcy Code"; (ii) alternatively, an injunction pursuant to sections 105(a) and 362(a) of the Bankruptcy Code; and (iii) alternatively, a preliminary injunction pursuant to Bankruptcy Rule 7065. [A-222-23]. That same day, the Diocese separately filed its Stay Motion. [A-254-317].

The Committee objected to the Stay Motion and certain Claimants joined in that objection. [A-463-532, 645-57]. On April 25, 2022, the Diocese filed a reply in further support of the Stay Motion. [A-533-63]. In its reply, the Diocese expressly requested that, if the Bankruptcy Court concluded it required additional evidence, the Court "schedule a full evidentiary hearing to allow for a full exposition of the relevant facts." Reply ¶ 40 [A-555]. Two days later, the Bankruptcy Court held oral argument on the Diocese's injunction motion and, at the conclusion of oral argument, announced that it was taking the matter under advisement and reserving its decision. [A-754]. The Bankruptcy Court neither held an evidentiary hearing nor gave notice to the Diocese that it intended to treat the Committee Objection as a motion for summary judgment.

Neither the Committee nor any of the Claimants ever filed an answer in response to the Diocese's Complaint or moved to dismiss the Complaint, let alone moving for summary judgment. Yet, the Bankruptcy Court held, in summary fashion that, "because the relief sought by the Diocese in its motion is identical to the relief requested in the complaint in this adversary proceeding, which relief has been denied, the complaint is **DISMISSED, as MOOT**." Decision at 16 (emphasis in original) [A-773].

The Bankruptcy Court's dismissal of the Complaint at this early juncture, particularly without notice to the Diocese, constitutes error requiring reversal. *See, e.g.*, *Pugh*, 345 F.3d at 125; *Perez v. Ortiz*, 849 F.2d 793, 797 (2d Cir. 1988) (reversing *sua sponte* dismissal as, "at best, premature" where, *inter alia*, "the claims were dismissed before defendants filed their answers") (internal quotation marks and citation omitted).

Moreover, even where a party is given adequate notice – which the Diocese was not – a court may only enter summary judgment *sua sponte* where "it is clear that all of the evidentiary material a party might submit is before the court and no material issue of fact exists." *Pugh*, 345 F.3d at 124-25. Once again, the Bankruptcy Court's own reasoning makes clear that neither of these requisite elements, let alone both, was met here.

While the Bankruptcy Court held that sections 362(a)(1) and (a)(6) did not apply to the CVA Cases as a matter of law – a conclusion that, as established above, was in error – the Bankruptcy Court reached no such conclusion with respect to the applicability of section 362(a)(3). To the contrary, the Bankruptcy Court held that the Diocese failed to "carry its burden of proof under Section 362(a)(3) to demonstrate that litigation against the Catholic Corporations would adversely affect property of the estate." Decision at 10 [A-767]. However, in reaching this conclusion, the Bankruptcy Court made clear that all evidence the Diocese could submit was not before the Court, including evidence regarding whether and to what extent specific CVA Cases would impact specific insurance policies. See supra § Point II.B. (citing Decision at 10-11) [A-767-68].

In other words, the Bankruptcy Court did not conclude that the Diocese was precluded as a matter of law from establishing that the CVA Cases must be stayed pursuant to section 362(a)(3). Rather, the Bankruptcy Court held that the Diocese had failed to meet its evidentiary burden on a motion for a preliminary injunction, and the Court outlined precisely the type of evidence the Diocese could subsequently provide at an evidentiary hearing or an eventual trial to establish the applicability of section 362(a)(3) in support of the Diocese's underlying Complaint. This holding confirms both that the Bankruptcy Court did not have before it all relevant evidentiary material, and that material questions of fact remained, at the time the

Bankruptcy Court *sua sponte* dismissed the Complaint. Accordingly, the Bankruptcy Court's dismissal of the Complaint must be reversed.

POINT V

THE BANKRUPTCY COURT ERRED IN GRANTING PROSPECTIVE LITIGANTS AN ADDITIONAL PERIOD OF TIME TO FILE STATE COURT ACTIONS

In the "Conclusion" section of the Decision, the Bankruptcy Court held that "Abuse Survivors whose claims against a non-debtor Catholic Corporation were not yet prosecuted, because of the standstill agreement issued in connection with this bankruptcy case, are permitted to file a CVA complaint in state court within 30 days of the date of this decision." Decision at 16 [A-773]. This erroneous *sua sponte* determination by the Bankruptcy Court must be reversed for two reasons: (i) no alleged abuse survivor was prohibited from commencing a CVA Case against any Catholic Corporation during the pendency of the Stay Stipulation; and (ii) in any event, the Bankruptcy Court had no authority to revive the expired limitations period and to permit the filing of such state court actions against non-debtors.

First, no alleged abuse survivor was prohibited from commencing a CVA Case against any Catholic Corporation during the pendency of the Stay Stipulation, and therefore the relief granted by the Bankruptcy Court was both unnecessary and misplaced. Paragraph 4 of that agreement provides:

> The stay imposed by this Stipulation and Order shall not prohibit or enjoin the filing of a complaint for purposes of commencing a CVA

> Action against, or service of a complaint related to any CVA Action upon, any of the Stay Defendants . . . . Any stay pursuant to this Stipulation and Order or 11 U.S.C. § 362 (to the extent applicable) is hereby lifted to the limited extent necessary to (i) allow any person to file and serve a CVA Action against a Stay Defendant. . . .

Stay Stipulation ¶ 4 [A-129]. The Stay Stipulation very plainly did not enjoin the filing of new CVA complaints against the Catholic Corporations. Moreover, it explicitly lifted the automatic stay to allow such actions to be filed thereby clearly avoiding any prejudice to potential plaintiffs. *Id*.

Accordingly, the very subset of survivors the Bankruptcy Court purported to assist by affording an additional opportunity to file suit – those whose claims against an Catholic Corporation "were not yet prosecuted, because of the standstill agreement" – is nonexistent. Yet, multiple individuals who had not commenced timely CVA Cases against Catholic Corporations despite the lack of any prohibition against doing so, took advantage of the Bankruptcy Court's revival of the limitations period imposed by state law and commenced late CVA Cases in state court against non-debtors during the thirty (30)-day window provided by the Bankruptcy Court.

Second, more fundamentally, even if there were individuals whose claims against Catholic Corporations were not prosecuted because of the Stay Stipulation, the Bankruptcy Court did not have the power to afford such claimants additional time to file such CVA Case(s).

It is axiomatic in New York that courts "have no inherent power to extend a period of limitations in the interest of justice." *Ali v. Moss*, 35 A.D.3d 640, 641 (2d Dep't 2006) (collecting cases); *see Tavares v. New York City Health and Hospitals Corp.*, 2015 WL 158863, at *9 (S.D.N.Y. Jan. 13, 2015) ("In New York, courts may not toll statutes of limitations in the interest of justice, except under explicit statutory authority."); *Magat v. County of Rockland*, 265 A.D.2d 483, 483-84 (2d Dep't 1999) (affirming dismissal of plaintiff's complaint "as untimely because [it was] commenced . . . one day after the four-month Statue of Limitations had expired," and affirming that "the Supreme Court was without authority to extend the Statute of Limitations"); *Lennox v. Rhodes*, 39 A.D.2d 801, 801-02 (3d Dep't 1972) (finding lower court's grant of extension to plaintiff to file untimely complaint "clearly improper" and granting defendant's cross-motion to dismiss). This axiom is codified in Rule 201 of the New York Civil Practice Law and Rules, which expressly states that "[n]o court shall extend the time limited by law for the commencement of an action." N.Y. C.P.L.R. § 201.

As the Court of Claims of New York has held, "the revival statute for CVA claims" – codified at N.Y. C.P.L.R. § 214-g – "is a statute of limitations." *M.C. v. State*, 74 Misc.3d 682, 701 (N.Y. Ct. Claims 2022). As the Bankruptcy Court acknowledged, the statute of limitations created by the CVA expired on August 14, 2021. Decision at 4 n.3 [A-761]. As such, by purportedly allowing parties to file

new actions as late as thirty (30) days from May 23, 2022, the Bankruptcy Court erroneously and improperly extended the applicable statute of limitations. Under settled New York law, however, the Bankruptcy Court had no authority to extend the CVA statute of limitations, and its unlawful extension of same is a nullity. *See, e.g.*, *Ali*, 35 A.D.3d at 641 (reversing lower court's grant of plaintiff's motion to file untimely complaint because the court had no power to extend the applicable period of limitations, and granting motion to dismiss complaint as time-barred). Indeed, the above-reference provision in the Stay Stipulation permitting the filing of CVA Cases during the pendency of the agreed-upon stay reflects the Bankruptcy Court's inability to extend the state limitations period.

Accordingly, the Bankruptcy Court was expressly prohibited from extending the CVA statute of limitations, and its purported grant of permission to file late CVA Cases within thirty (30) days of the date of the Decision must be reversed.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Rule 8015(h) of the Federal Rules of Bankruptcy Procedure that this Brief complies with the type-volume limitation set forth in 8015(a)(7)(B), as follows:

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