

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO**

In re:

ROMAN CATHOLIC CHURCH OF THE  
DIOCESE OF GALLUP, a New Mexico  
corporation sole,

Debtor.

Chapter 11

Case No. 13-13676-t11

**MOTION FOR AN ORDER UNDER 11 U.S.C §§ 105, 363, and 507 AUTHORIZING  
DEBTOR TO CONTINUE TO PAY PRE-PETITION WAGES, COMPENSATION AND  
HONOR EMPLOYEE BENEFIT PLANS AND PROGRAMS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Roman Catholic Church of the Diocese of Gallup, a New Mexico corporation sole, the debtor and debtor-in-possession (“**RCCDG**”) in the above Chapter 11 reorganization case (the “**Reorganization Case**”), by and through its proposed attorneys undersigned, respectfully requests that the Court enter an Order authorizing RCCDG to (1) pay all accrued, unpaid, pre-petition payroll obligations, and (2) continue postpetition to pay or honor certain amounts coming due (including any accrued prepetition amounts) under RCCDG’s employee benefit plans and programs in effect immediately prior to filing this case (the “**Employee Wage and Benefits Motion**”), as more specifically set forth herein.

This Employee Wage and Benefits Motion presents a “core” proceeding under 28 U.S.C. § 157(b)(2) over which this Court has jurisdiction to enter a final order pursuant to 28 U.S.C. § 1334. The statutory predicates of this Motion are 11 U.S.C §§ 105(a), 363(b), and 507(a).

This Employee Wage and Benefits Motion is supported by: (i) the following Memorandum of Points and Authorities; (ii) the “Declaration Of Bishop James Wall In Support Of Chapter 11 Petition And First Day Motions” (the “**Wall Declaration**”); (iii) the “Declaration Of Christopher Linscott In Support Of First Day Motions” (the “**Linscott Declaration**”); the

Exhibits attached hereto which RCCDG is requesting be filed under seal because of the confidential nature of the information contained in the Exhibits;<sup>1</sup> and (iv) the entire record before the Court in this Reorganization Case.

RESPECTFULLY SUBMITTED this 12th day of November, 2013.

/s/ Susan G. Boswell

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<sup>1</sup> RCCDG has filed the “Motion for an Order Under 11 U.S.C. § 107 and Fed.R.Bankr.P. 9018 Authorizing Debtor to File Under Seal Exhibits to Motion for an Order Under 11 U.S.C. §§ 105, 363 and 507 Authorizing Debtor to Continue to Pay Pre-Petition Wages, Compensation and Honor Employee Benefit Plans and Programs” contemporaneously with filing the Employee Wage and Benefit Motion (the “**Exhibit Seal Motion**”).

## MEMORANDUM OF POINTS AND AUTHORITIES

On November 12, 2013 (the “**Petition Date**”), RCCDG commenced this Reorganization Case by filing a voluntary Chapter 11 petition. RCCDG has remained a debtor-in-possession under 11 U.S.C. §§ 1107 and 1108 since the Petition Date.

### **I. BACKGROUND**

#### **The Civil and Ecclesiastical Entities and Organization of the Entities.**

The Debtor in this Reorganization Case is RCCDG which is a New Mexico corporation sole,<sup>2</sup> formed under the laws of the State of New Mexico. RCCDG conducts its business/civil affairs under the laws of New Mexico and the United States and in accordance with the Code of Canon Law (“**Canon Law**”), the ecclesiastical law of the Roman Catholic Church.<sup>3</sup> RCCDG acquires and holds property and conducts its civil affairs for the practice of the Roman Catholic religion in the geographic area that has been decreed as the Diocese. The Bishop of the Diocese has responsibility for the Roman Catholic faithful within the geographic territory of the Diocese and carries out his duties in accordance with Canon Law. The Bishop is also the sole member of RCCDG and the Arizona Entity.

According to Canon Law, a diocese is a geographic territory formed to serve the Catholic faithful and through which the mission and ministry of the Roman Catholic Church in the area

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<sup>2</sup> New Mexico no longer has the corporation sole form of incorporation; however, an entity formed as a corporation sole at the time New Mexico provided for that form of incorporation was not required to re-incorporate as a non-profit corporation, but was allowed to continue its existence as a corporation sole which RCCDG has.

<sup>3</sup> Although there is another civil entity, Bishop of the Roman Catholic Church of the Diocese of Gallup, an Arizona corporation sole (the “**Arizona Entity**”), all of the civil business of the Diocese is conducted through RCCDG and the Arizona Entity does not conduct any business. Moreover, as explained in more detail herein, the ecclesiastical diocese created in 1939 is the Diocese, the territory of which was decreed to include areas in both New Mexico and Arizona.

designated as a diocese is carried out. A diocese is administered by a Bishop who is appointed to serve by the Pope. However, a diocese is not the only Roman Catholic ecclesiastical entity within its geographic territory. Every diocese is divided into distinct parts or parishes which are separate entities under both Canon Law and civil law. There are other Catholic entities, separate from a diocese and parishes that also operate within a diocese such as foundations or schools.<sup>4</sup> The relationship among RCCDG, the Diocese, the Parishes and various other entities within the geographic territory of the Diocese is described in greater detail in the Wall Declaration filed contemporaneously with this Employee Wage and Benefits Motion.

The Diocese is the poorest diocese in the United States. There are no large metropolitan areas within the geographic area of the Diocese which includes significantly poor and underdeveloped areas where there is high unemployment and low income. Approximately sixty percent (60%) of the geographic area served by the Diocese is on Native American reservations. In many of the counties located within the geographic area of the Diocese, approximately forty-three percent (43%) of the people live below the poverty level, and the unemployment rate is approximately forty percent (40%) on the Native American reservations. The Diocese is comprised of more Native Americans than any other diocese in the United States. There are seven distinct tribes within the Diocese: the Acoma, Laguna, Zuni (Pueblo Indians), Jicarilla Apache, White Mountain Apache, Hopi, and Navajo. The remainder of the population of the Diocese is divided among approximately thirty (30) nationalities, with the largest ethnic group being Hispanic.

RCCDG obtains its operating funds from a number of sources. It receives a small portion of the Sunday collections from the Parishes, it receives grants specifically restricted by the

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<sup>4</sup> A school can also be established, owned and operated by a parish or a diocese or can be a separate independent entity under Canon Law and civil law.

grantor for certain programs provided by the Diocese and it receives donations from donors, some of which are restricted for specific purposes as designated by the donor and others which are unrestricted and used by RCCDG to fund its operations and other needs.

There are fifty-four (54) Parishes and thirty-one (31) active Missions within the geographic area of the Diocese. Missions also serve areas within the Diocese. A mission is typically much smaller than a parish. In some cases, a mission may have been a parish at one time but because of a lack of parishioners or other reasons, is no longer a parish and has become a mission. Similarly, a mission may become a parish in the future depending on various circumstances, such as membership.

Notwithstanding the significant poverty and financial challenges of the parishioners and the Parishes, for the most part, Parishes receive sufficient donations and other funding to pay their operating expenses.<sup>5</sup> However, all of the Parishes require outside support, such as through grants, to sustain their programs and physical plant.<sup>6</sup> In addition, RCCDG provides salary subsidies for priests who serve in twelve (12) of the Parishes of between \$250.00 to \$350.00 per month. Also, even Parishes that obtain sufficient donations to pay most of their operating expenses do not generate sufficient funds from donations or other sources to provide substantial support to the Diocese. One Parish, St. Anthony located in McNary, Arizona does not have sufficient funds from collections, donations or other sources, to pay its operating expenses; therefore, consistent with its mission and ministry, RCCDG provides direct administrative support and subsidizes some of the expenses of the St. Anthony Parish.

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<sup>5</sup> The plate collections and donations from parishioners at these Parishes are not substantial and the Parishes operate very leanly.

<sup>6</sup> Grants that are provided from third parties for the benefit of the Parishes are restricted by the grantor for the Parishes (and not for RCCDG) but are administered by RCCDG.

Not every Parish or Mission has a priest, so priests travel and minister among several Parishes or Missions. The services provided by the Diocese support and promote not only the Catholic religion for those within its territory but also support and promote essential services for all people within the geographic area of the Diocese, regardless of religious affiliation. In addition, consistent with its mission and ministry and its obligations under Canon Law, RCCDG provides administrative support for the priests, Parishes and Missions, including procuring and administering insurance programs and grants, providing support services for religious and other programs, recruitment and training of priests and similar services.

**Operations of RCCDG, Gallup School and Retreat Center.**

As part of its mission and ministry, the Diocese has various functions, divisions and programs, the civil affairs of which are administered by RCCDG, some of which are described below.<sup>7</sup>

Gallup Catholic Schools (“**Gallup School**”) operates as a separate entity from RCCDG but is part of RCCDG for civil purposes and part of the Diocese for ecclesiastical purposes.<sup>8</sup> Prior to 2010, the Gallup School was a separate corporation organized under New Mexico law and operated as an independent entity. For a variety of reasons, it was determined that the Gallup School should be owned and operated by RCCDG and on August 4, 2010, the New Mexico Office of the Public Regulation Commission issued a certificate of dissolution for Gallup School, Inc. and the ownership and operation of the Gallup School became part of RCCDG.

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<sup>7</sup> The following is not intended to be an exhaustive description of the activities of RCCDG.

<sup>8</sup> The real and personal property of Gallup School is owned by RCCDG, subject to any donor designated restrictions. There are other Catholic schools within the geographic area of the Diocese; however, these schools are either separate independent entities (not associated with a parish) or part of, owned and operated by a parish, and the real and personal property of those independent entities are owned by those entities (subject to any donor designated restrictions).

Gallup School is pre-school through eighth (8th) grade and is dedicated to academic excellence integrating the doctrine and traditions of the Catholic Church. Gallup School's mission is to nurture the spiritual, emotional, intellectual, cultural and physical development of its students. Gallup School is celebrating its centennial year this year. Similar to the Diocese, Gallup School provides a Catholic education to the community notwithstanding the financial challenges of its families. Historically, Gallup School has not been self-sustaining and depended upon RCCDG for additional financial support; however, Gallup School expects to break even this year.

Sacred Heart Retreat Center ("**Retreat Center**"), located near Gallup, is owned by RCCDG and is part of the ministry of the Diocese. The Retreat Center is a place of hospitality, quiet prayerfulness and desert beauty and serves the spiritual needs of those who come through prayer, retreat, and spiritual and educational programs. The Retreat Center is an integral part of the ministry of the Diocese and is open to spiritual, educational, cultural, business and civic groups. The Retreat Center is located on fifteen (15) acres of rugged land, and there are four (4) small hogans, one (1) large hogan, a bedroom hall, conference rooms and a chapel on the grounds of the Retreat Center.

RCCDG also develops and administers various Diocese-wide programs and ministries such as the Office of Native American Ministry and the Office of Religious Education. The Office of Native American Ministry was established by Bishop Wall in 2012 to assess and meet the spiritual needs of the Native American members of the Diocese. The Office of Religious Education oversees and provides administrative support to all Directors of Religious Education throughout the Diocese and helps set standards for catechism requirements, religious classes and related activities. There are other programs and ministries that are offered and supported by

RCCDG and the Diocese that serve the needs of people within the Diocese, a more complete description of which can be found on the Diocese website—[www.dioceseofgallup.org](http://www.dioceseofgallup.org).

**Additional Separate Entities That Support The Diocese’s Mission.**

Among the other separate and independent entities that operate within the geographic territory of the Diocese are the Southwest Indian Foundation (“**SWIF**”), Catholic Peoples Foundation (“**CPF**”) and Catholic Charities of Gallup, Inc. (“**Catholic Charities**”). SWIF is a New Mexico non-profit corporation that was incorporated in 1981. SWIF is governed by a board of directors of which the Bishop is an ex-officio member. SWIF assistance is strictly limited to Native Americans, and its services include: school grants and individual tuition assistance, homes for battered women and children, home repair and wood stove installation, Christmas food baskets for needy families, alcohol counseling, and emergency assistance in the areas of food, clothing, heating fuel, and temporary shelter.

CPF is a New Mexico non-profit corporation that was incorporated in 1998. CPF administers programs and grants that assist in promoting the mission and ministry of the Catholic Church within the geographic area of the Diocese. CPF is governed by a board of directors of which the Bishop is an ex-officio member.

Catholic Charities is also a New Mexico non-profit corporation that was incorporated in 1974. Catholic Charities is governed by a board of directors, and the Bishop does not serve on its board in any capacity. Catholic Charities administers various programs within the area of the Diocese and provides assistance and service to everyone within the geographic area, in particular the poor and vulnerable.

SWIF, CPF and Catholic Charities are self-supporting and do not receive any financial support from RCCDG.

### The Sex Abuse Crisis and the Need for Reorganization.

Over the last half of the twentieth century a tragedy that runs contrary to the every teaching and tradition of the Roman Catholic Church has unfolded which affected the Diocese: priests and other workers in the Roman Catholic Church took advantage of their positions in the community and in their parishes, missions and schools and sexually abused children. In the Diocese, a small number of priests, primarily in the 1950's and 1960's, committed these crimes which have resulted in claims (and in some cases lawsuits) made by adults based upon acts that they assert occurred decades ago (in some cases more than fifty (50) years prior to bringing the claim or lawsuit). There are currently thirteen (13) lawsuits filed which are pending in the Coconino County, Arizona Superior Court. In addition, RCCDG has been made aware of at least another eight (8) claims which have not yet resulted in lawsuits but which are being pressed against RCCDG. Most of these claims (both in and out of active litigation) pertain to periods in which RCCDG does not appear to have been insured. Therefore, not only has RCCDG been bearing the entire cost of defense of these claims, but any settlements had to be funded solely out of Diocesan assets. For any claims that pertain to abuse that occurred between October 1, 1965 and December 1, 1977, RCCDG was insured by The Home Insurance Company which was liquidated pursuant to state receivership proceedings in New Hampshire. As a result, the New Mexico Property and Casualty Insurance Guaranty Fund Association (the "**New Mexico Fund**") provides limited coverage for certain claims that occurred within the Home Insurance Company policy period. For claims arising after December 1, 1977 through the present, RCCDG is insured by Catholic Mutual Relief Society of America Insurance Company ("**Catholic Mutual**"). However, there are very few claims that have been asserted where the abuse occurred within the Catholic Mutual coverage period. RCCDG has not yet determined whether there may be some

basis for broader coverage by Catholic Mutual but intends to do so. In addition, there may be other entities against whom RCCDG may have indemnity, contribution or other claims for the abuse acts that have resulted or may result in claims being asserted against RCCDG. Among other reasons for such claims, the priests who are responsible for the majority of the claims came from one or more dioceses or orders to minister in the Diocese. RCCDG is in the process of investigating the viability of such claims. As of the Petition Date, no other entity has acknowledged potential liability or offered to participate in a resolution of any of the abuse claims.

As previously stated, the Diocese is the poorest diocese in the United States. RCCDG is simply not able to continue to shoulder the cost of defending these claims or to respond to any judgment that will likely be entered on some of the pending lawsuits. Moreover, it is clear that the universe of claims has not yet been identified or asserted. Accordingly, RCCDG filed this Reorganization Case to help focus its efforts and limited financial resources to bring healing to those who were abused, parishioners and others affected by the past acts of sexual abuse committed by clergy and others associated with the Diocese or who ministered within the geographic area of the Diocese. It is through the Reorganization Case that the Diocese seeks to finally and comprehensively address the issues resulting from the abuse crisis that has caused great harm to those who have been abused, plunged an already financially-strapped Diocese into a severe financial crisis, and affected the Catholic Church's traditional ministries in the communities within the Diocese. RCCDG seeks to accomplish these goals by reorganizing its financial affairs pursuant to a plan of reorganization that will, among other things, fairly, justly, and equitably compensate those who were damaged because of sexual abuse by clergy, while allowing the Diocese to continue its ministry and mission, including providing counseling and

other services to those who have been harmed and serving an underserved area and population with needed services.

**Plan of Reorganization.**

It is the hope and desire of RCCDG and the Diocese that all constituencies can come together quickly and confirm a plan of reorganization for RCCDG. RCCDG will be challenged just to pay the costs of administration of the Reorganization Case and its normal operating expenses, without regard to funding a plan to compensate those who have been abused; therefore, RCCDG intends to make every effort to bring the Reorganization Case to as early a conclusion as possible to minimize costs of administration. RCCDG will file a motion for the Court to set a bar date for claims as soon as feasible after the Petition Date. RCCDG also intends to request appointment of an unknown claims representative to represent the interests of claimants who will not have filed claims but for whom a statute of limitations may not yet have run as of the claims bar date or confirmation of a plan of reorganization. RCCDG does not believe that appointment of a minors' representative is necessary in this Reorganization Case because RCCDG is not aware of any abuse that occurred for which any such claimants may still be minors.

It is the desire and intent of RCCDG to work in a collaborative and cooperative manner with all constituencies, and it is in everyone's best interests to move the Reorganization Case expeditiously to conclusion with a minimal amount of litigation. Otherwise, estate assets will be consumed with costs of administration, including professional fees as opposed to being primarily used to compensate those who have been harmed. In that regard, RCCDG would not be opposed to commencing mediation very early in the Reorganization Case as a way to minimize professional fees and move the Reorganization Case to an early successful conclusion.

## **II. EMPLOYEE PAYROLL OBLIGATIONS**

RCCDG employs approximately fifty people (six of which are part-time employees, that is, employees who work less than twenty-eight hours per week) who work at the administrative offices for the Diocese (the "**Chancery**"), the Retreat Center, and the Gallup School. RCCDG's payroll period begins on the first and sixteenth days of each month (each a "**Payroll Period**") and is paid in arrears; however, not all employees are paid at each Payroll Period. All employees, except clergymen, are paid during every Payroll Period, and clergymen, including seminarians, priests, and Bishop Wall, are paid only once a month at the beginning of the month.

Therefore, as of the Petition Date, RCCDG has accrued payroll obligations for the Payroll Period between October 16, 2013, and October 31, 2013 (the "**October 16 Payroll Period**") for lay employees, and payroll obligations for all employees (including clergymen) between November 1, 2013, and the Petition Date. In order to ensure that employees are paid timely if the Court approves this Employee Wage and Benefits Motion, prior to the filing of the Reorganization Case, RCCDG obtained cashier's checks for all employees to be paid wages for the October 16 Payroll Period on November 15, 2013 and is holding those checks (the "**Employee Cashier's Checks**"). Accordingly, the funds necessary to pay the employees were debited against RCCDG's funds pre-petition. However, the withholding and other deductions from the employees' wages for the October 16 Payroll Period will not have been remitted to the appropriate payees entitled to those amounts. In addition, the Employee Cashier's Checks were not delivered to the employees prior to filing the Reorganization Case. If the Court approves this Employee Wage and Benefits Motion, RCCDG will distribute the Employee Cashier's Checks to the employees and will fund or pay the Withholding Obligations (defined below) which relate to

the October 16th Payroll Period.<sup>9</sup> The employees who receive the Employee Cashier's Checks for the October 16th Payroll Period are the same employees, and the amounts of the Employee Cashier's Checks for each employee is approximately the same amount, as stated in Exhibit "A" to this Employee Wage and Benefit Motion which is the subject of the Exhibit Seal Motion.

RCCDG's payroll obligations include the employees' gross hourly wages or salaries, payroll withholding taxes, and other withholding obligations (the "**Withholding Obligations**"). To pay the Withholding Obligations, RCCDG transmits all amounts owed for payroll to RCCDG's payroll company, Interlogic Outsourcing, Inc. ("**IOI**"). IOI is responsible for remittance of the Withholding Obligations and: (i) remittance of appropriate amounts to various federal and state taxing agencies for federal and state taxes, Social Security, and Medicare; (ii) remittance of withheld amounts to the 403(b) plan administrator or to others for whose benefit the Withholding Obligation is withheld;<sup>10</sup> and (iii) issuance of paychecks or ACH transactions containing each employee's net payroll funds to each employee. Once the funds are transferred from RCCDG to IOI (which is accomplished by a draw upon RCCDG's payroll accounts by IOI) such funds are no longer property of the estate. Therefore, any pre-petition paychecks that have not cleared IOI's bank as of the Petition Date are not implicated by the Reorganization Case because the funds necessary to pay those payroll checks are not property of RCCDG.

A categorized summary of the pre-petition obligations to employees which RCCDG is seeking approval to pay or fund by this Employee Wage and Benefit Motion is set forth in Exhibit "A," and confirms that the amount to be paid to each employee does not exceed \$12,275 as to any

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<sup>9</sup> The amount to be funded which is shown on Exhibit "A" will include the employer portion of any employment-related taxes.

<sup>10</sup> For example, if there are child support obligations that are withheld from an employee's wages, those amounts are withheld and remitted by IOI to the appropriate person or agency.

one employee, so each wage claim of each employee is a priority claim provided in 11 U.S.C. § 507(a)(4).

### **III. EMPLOYEE BENEFIT PROGRAMS**

RCCDG provides certain benefits to its full-time employees, which differ depending on whether the employee is (i) a clergyman, or (ii) a lay employee working in (a) the Chancery or (b) the Gallup School. RCCDG desires to keep these benefits in place postpetition, in the ordinary course of RCCDG's operations and to honor payment for any such benefits which accrued pre-petition and which are paid by RCCDG. Such benefits can broadly be characterized as insurance-related or retirement-related benefits that recur regularly, and employee leave-related benefits that do not recur on a predictable or regular basis. Collectively, all such benefits are referred to herein as the "**Employee Benefits.**"

#### **A. Regularly-Recurring Benefits.**

The first category of benefits recurs regularly. The cost of such benefits is, in some instances, divided between RCCDG and its employees. The percentage of the costs paid by RCCDG are set forth in Exhibit "B" which is the subject of the Exhibit Seal Motion. These are on-going benefit programs that include medical insurance, dental insurance, term life and accidental death and dismemberment insurance, long-term disability insurance, workers' compensation insurance, and retirement plans.<sup>11</sup> In addition to offering these programs to RCCDG employees, employees of the Parishes, St. Joseph School in San Fidel, New Mexico, and CPF may also participate in the medical and related insurance. However, the costs for these employees are paid in whole by the applicable Parish, St. Joseph's School, or CPF, and/or the applicable employee. RCCDG does not fund any portion of those costs for the Parishes, St. Joseph's School or any other

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<sup>11</sup> The costs which are funded by the employees from their wages are part of the Withholding Obligations discussed above.

schools (other than Gallup School), CPF, or their employees. RCCDG, therefore, requests the Court allow it to continue such employee benefit programs in effect and authorize RCCDG to pay any pre-petition amounts funded by RCCDG to keep the benefit programs in effect.<sup>12</sup>

**B. Other Benefits: Vacation Time and Sick Time.**

In addition to the foregoing, RCCDG provides its employees with certain paid leave, a benefit that does not necessarily recur regularly for each pay period, but rather is used as necessary by the employee or at the employees' discretion. For clergymen and the other employees who work at the Chancery, RCCDG implements certain leave policies that are different from those applicable to employees who work at the Gallup School.

**1. Policies Applicable to Employees Working at the Chancery.**

The employees who work at the Chancery receive sick leave and vacation time. Each clergyman and lay employee receives his or her annual allocation of vacation time on the first day of January each year. Those who have worked at RCCDG for five years or less receive ten days of vacation time per year. Those who have worked more than five years but less than ten receive fifteen days of vacation time per year. Clergymen and employees who have worked at RCCDG more than ten years receive twenty days of vacation time each year. Vacation time does not roll over from year to year. Each clergyman or lay employee must use his or her allotted time before the end of the year, or lose it. If a clergyman or lay employee terminates employment on or before December 31, the clergyman or lay employee will receive any vacation time remaining to him or her as a cash payment.

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<sup>12</sup> RCCDG will provide the detail of the monthly cost to RCCDG of each program funded in whole or in part by RCCDG at or prior to the hearing on the Employee Wage and Benefit Motion and the pre-petition amounts which RCCDG is requesting it be allowed to pay to keep such programs in effect.

With respect to sick leave, sick leave is earned at the rate of seven hours per month for all clergymen and lay employees of RCCDG's administrative offices regardless of years of service. Sick leave hours do roll over from year to year, and may be accumulated indefinitely up to termination of employment. Sick time may not, however, be "cashed out" if employment is terminated.

Currently, clergymen and lay employees who work at the Chancery are owed approximately a total of \$18,820.98 of accrued vacation and sick leave, which can be used (but not, with respect to sick leave, "cashed out"). Such obligations are set forth by employee on Exhibit "C" hereto which is also the subject of the Exhibit Seal Motion. The accrued vacation and sick leave of each employee (including any pre-petition payroll obligations to be paid to an employee if this Employee Wage and Benefit Motion is granted) does not exceed \$12,275, so any amounts to be paid to such employee including any accrued vacation time would be a priority claim as set forth in 11 U.S.C. § 507(a)(4).

## **2. Policies Applicable to Employees of the Gallup School.**

Full-time employees of the Gallup School receive five days of paid "personal time" per school year instead of sick or vacation leave. In the event a Gallup School employee requires additional time off, such time is unpaid and teachers must reimburse the school \$50 per day for such time to defray the cost of a substitute teacher. Use of such time is counted in increments of whole days and half days. For example, if an employee is gone for an hour or two, the absence is counted as a half day absence. The five days of personal time accrue at the beginning of the school year and do not roll over from year to year. If a Gallup School employee terminates employment prior to the end of the school year, the employee will not receive any unused personal leave time as a cash payment.

Currently, the Gallup School employees are owed approximately \$7,618.60 of accrued personal time, which can be used but not “cashed out.” Such obligations are set forth by employee on Exhibit “C” hereto which is the subject of the Exhibit Seal Motion. The accrued personal time of each employee, together with such employee’s pre-petition wages and benefits for which RCCDG seeks authority to pay or honor does not exceed \$12,275 per employee, so each claim of each employee would be a priority claim as set forth in 11 U.S.C. § 507(a)(4).

#### **IV. RELIEF REQUESTED**

##### **A. Emergency Relief Requested**

By this Employee Wage and Benefits Motion, pursuant to 11 U.S.C. §§ 105(a) and 363(b), and 507(a), RCCDG seeks entry of an Order on an emergency basis:

- a) Authorizing RCCDG to deliver the Employee Cashier’s Checks to each employee entitled to receive same;
- b) Authorizing RCCDG to transmit to IOI the Withholding Obligations related to such Payroll Period for which the Employee Cashier’s Checks have been issued if not previously remitted to IOI;
- c) Authorizing, but not directing, RCCDG to pay the pre-petition wage obligations set forth in sealed Exhibit “A” hereto;
- d) Authorizing, but not directing, RCCDG to pay the Withholding Obligations related to the pre-petition wage obligations set forth in sealed Exhibit “A;”
- e) Authorizing, but not directing, RCCDG to honor the pre-petition employee benefit program obligations set forth on sealed Exhibit “B” hereto and pay any unpaid costs related thereto and to continue to offer its pre-petition employee benefit programs post-petition;

- f) Authorizing, but not directing, RCCDG to honor the pre-petition accrued employee sick and vacation benefits to employees who work at the Chancery and the pre-petition personal time to the employees who work at Gallup School in accordance with the programs described herein as set forth on sealed Exhibit “C” hereto;
- g) Authorizing, but not directing or requiring, RCCDG to effectuate the payments and other obligations set forth herein, and allowing RCCDG to retain all discretion pursuant to its business judgment to make or not make such payments, and in all instances subject to the condition that funds are available to make such payments;
- h) Granting such relief as is necessary or appropriate so that any pre-petition paychecks and other remittances issued by IOI will be honored because the funds in IOI’s accounts are not property of the estate and therefore the automatic stay does not apply to such funds; and
- i) Granting related relief.

Such relief is sought on an emergency basis because, among other things, RCCDG’s employees are essential to its operations and ability to successfully reorganize. RCCDG’s employees are also essential to the community of Gallup and other communities in which they minister because many of them provide vital social services, teach school children whose school year would be interrupted if their teachers could not be paid or receive benefits, or act as liaisons for tort claimants. If RCCDG fails to pay its employees for the nearly three weeks of pre-petition wages they have accumulated, its employees’ ability to pay their day-to-day living expenses and other bills would be disrupted, and the employees would likely be forced to seek other employment. Therefore, RCCDG requests the emergency relief herein so as not to

interrupt its employees' ability to be paid the pre-petition wages and paid the post-petition benefits they have earned.

## V. LEGAL ARGUMENT

RCCDG seeks authority to continue to provide the Employee Benefits in existence prior to the Petition Date and to pay all amounts due as such amounts come due in the ordinary course, including amounts accrued on account of prepetition employee service. The relief sought is authorized by 11 U.S.C. §§ 105(a), 363(b), and 507(a).

### A. Continuation of the Employee Benefits is Justified to Preserve the Estate

11 U.S.C. § 363(b) provides, in relevant part: “The trustee, after notice and a hearing may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). The proposed use, sale, or lease of property of the estate may be approved under 11 U.S.C. § 363(b) if it is supported by the sound business judgment of a debtor’s management. *See Comm. of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991). Although established in the context of a proposed sale, the “business judgment” standard has been applied in nonsale situations. *See, e.g., Institutional Creditors of Cont’l Air Lines v. Cont’l Air Lines (In re Cont’l Airlines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (applying “business judgment” standard in context of proposed “use” of estate property); *In re Bethlehem Steel Corp.*, 2003 U.S. Dist. LEXIS 12909, at \*37 - \*44 (S.D.N.Y. July 28, 2003) (applying “business judgment” standard in context of proposed reimbursement of employees under a collective bargaining agreement). “The ‘business judgment rule’ is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” *In re Integrated Res., Inc.*, 147 B.R. 650, 656

(S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)). Decisions made by a debtor's management in the exercise of its business judgment ordinarily should not be second guessed by a reviewing court. See *In re Curlew Valley Assoc.*, 14 B.R. 506, 511 (Bankr. Utah 1981).

Courts have also found that a debtor may pay pre-petition obligations to employees post-petition, and continue post-petition the employee benefits programs it had in place pre-petition, under the doctrine of necessity. Pursuant to section 105(a) of the Bankruptcy Code, “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Under the doctrine of necessity, a bankruptcy court may exercise its equitable powers under section 105(a) to authorize a debtor to pay certain critical prepetition claims, even though such payment is not explicitly authorized under the Bankruptcy Code. See, e.g., *In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) (bankruptcy courts may exercise equitable powers to authorize payment of prepetition debt where such payment is necessary to preserve a debtor's business); *In re CoServ, L.L.C.*, 273 B.R. 487, 492 n.7 (Bankr. N.D. Tex. 2002) (necessity of payment rule “is a rule of payment not of priority” which allows “trustees to pay prepetition debts . . . in order to obtain continued supplies or services essential to the continued operation of the debtor's business”); *In re Equalnet Commc'n Corp.*, 258 B.R. 368, 370 (Bankr. S. D. Tex. 2000) (noting the importance of continuing to pay employee wages and benefits post petition in order to retain employees as a matter of “simple common sense”).

To the extent there has been reluctance to rely solely on section 105(a) or the doctrine of necessity, several courts have authorized payment of critical prepetition claims, or implied that such authority would be granted, by relying on section 105(a) in conjunction with other sections

of the Bankruptcy Code. *See, e.g., In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 19-20 (Bankr. M.D. Fla. 2005) (acknowledging that in certain circumstances section 363(b)(1) might authorize payment of prepetition claims if it was shown that such payment would “enable a successful reorganization and make even the disfavored creditors better off”); *CoServ*, 273 B.R. at 497 (noting that the preplan satisfaction of prepetition claims may be necessary to satisfy a debtor’s fiduciary duties under sections 1106 and 1107 of the Bankruptcy Code).

As a debtor-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code, RCCDG is a fiduciary, entitled to operate its business as a debtor-in-possession, with a “duty to maximize the value of the bankruptcy estate.” *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003). “The debtor-in-possession’s fiduciary duty to maximize includes the ‘duty to protect and conserve property in its possession for the benefit of creditors.’” *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir. 2004) (citing *In re Marvel Entm’t Grp., Inc.*, 140 F.3d 463, 474 (3d Cir. 1998)). Some courts have noted that there are instances in which a debtor can fulfill this fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *CoServ*, 273 B.R. at 497. In *CoServ*, the court specifically noted that the preplan satisfaction of prepetition claims would be a valid exercise of the debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate . . . .” *Id.*

RCCDG submits that, as illustrated below, payment of the wages, Withholding Obligations, and employee benefits earned or accrued by RCCDG's employees, pre-petition, is wholly warranted in this Bankruptcy Case. The Bankruptcy Court for this District has previously authorized payment of prepetition employee compensation and benefits under similar circumstances. *See, e.g., In re Furr’s Supermarket, Inc.*, Case No. 01-10779 (JSS) (Bankr.

D.N.M. Feb. 9, 2001). The same principles cited above apply to RCCDG and the Reorganization Case. RCCDG's ability to fairly and equitably compensate victims of abuse by clergy, to continue to work to prevent future abuse, and to continue its ministry, depends on its employees.

Accordingly, RCCDG should be allowed to continue to honor the Employee Benefits. Approving the policies as set forth herein will put RCCDG in a position that encourages the retention of those employees and continued provisions of valuable services, at very little cost to the estate. Accordingly, continuing to honor the Employee Benefits is in RCCDG's sound business judgment, and is crucial to RCCDG's reorganization, its ability to fairly compensate victims, and its ongoing programs and ministries.

**B. Fed.R.Bankr.P. 6003 Does Not Apply**

"Except to the extent that relief is necessary to avoid immediate and irreparable harm," Fed.R.Bankr.P. 6003 ordinarily precludes the Court from entering an order granting "a motion to use . . . property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition" before the day that is 21 days after the bankruptcy petition was filed. Fed.R.Bankr.P. 6003(b). The instant Employee Wage and Benefits Motion is filed on an emergency basis because immediate relief is necessary to avoid immediate and irreparable harm. As stated above, RCCDG cannot operate without its employees. In the event RCCDG's employees are not timely paid, they will likely seek other employment. The Gallup School would likely be shut down, resulting in harm to the students and their families, who would have to arrange for child care and/or another means of educating their children. Not least, RCCDG's employees, who have living expenses to pay, would suffer immediate and irreparable harm if they are not paid. Finally, the expenses sought to be paid are priority claims. Such claims must, as a matter of law, be paid prior to general unsecured claims pursuant to 11 U.S.C. § 507.

Therefore, the payment priority mandated by the Bankruptcy Code will not be upset if the Wage Obligations are paid immediately. Under such circumstances, the Court may enter immediate relief to avoid immediate and irreparable harm, without running afoul of Fed.R.Bankr.P. 6003.

## **VI. CONCLUSION**

For the reasons set forth above, RCCDG respectfully asks the Court to enter an Order:

- a) Granting the Employee Wage and Benefits Motion in its entirety;
- b) Authorizing RCCDG to deliver the Employee Cashier's Checks to each employee entitled to receive same;
- c) Authorizing RCCDG to transmit to IOI the Withholding Obligations related to the October 16 Payroll Period (for which the Employee Cashier's Checks have been issued) if not previously remitted to IOI;
- d) Authorizing, but not directing, RCCDG to pay the pre-petition wage obligations set forth in sealed Exhibit "A" hereto;
- e) Authorizing, but not directing, RCCDG to pay the Withholding Obligations related to the pre-petition wage obligations set forth in Exhibit "A;"
- f) Authorizing, but not directing, RCCDG to honor the pre-petition employee benefit program obligations set forth on sealed Exhibit "B" hereto and pay any unpaid costs related thereto and to continue to offer its pre-petition employee benefit programs post-petition;
- g) Authorizing, but not directing, RCCDG to honor the pre-petition accrued employee sick and vacation benefits to employees who work at the Chancery and the pre-petition personal time to the employees who work at Gallup School in accordance with the programs described herein as set forth on Exhibit "C" hereto;

- h) Authorizing, but not directing or requiring, RCCDG to effectuate the payments and other obligations set forth herein, and allowing RCCDG to retain all discretion pursuant to its business judgment to make or not make such payments, and in all instances subject to the condition that funds are available to make such payments;
- i) Granting such relief as is necessary or appropriate so that any pre-petition paychecks or other remittances issued by IOI will be honored because the funds in IOI's accounts are not property of the estate and therefore the automatic stay does not apply to such funds;
- j) Preventing any person from having personal liability or becoming personally liable for any amounts authorized for payment herein;
- k) Preserving RCCDG's right to dispute the validity of any claim against RCCDG, and preventing any approval or assumption of any agreement or contract under Section 365 of the Bankruptcy Code as a result of the entry of such Order;
- l) Retaining jurisdiction with respect to all matters arising from or related to the implementation and interpretation of such Order; and
- m) Granting such other and further relief as the Court deems just and proper under the circumstances.

RESPECTFULLY SUBMITTED this 12th day of November, 2013.

/s/ Susan G. Boswell

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**CERTIFICATE OF SERVICE**

Pursuant to F.R.C.P. 5(b)(3), F.R.B.P. 9036 and NM LBR 9036-1(b), I hereby certify that service of the foregoing “Motion for an Order Under 11 U.S.C. §§ 105, 363 and 507 Authorizing Debtor to Continue to Pay Pre-Petition Wages, Compensation and Honor Employee Benefit Plans and Programs” was made on November 12, 2013 via e-mail, U.S. Mail or via the notice transmission facilities of the Bankruptcy Court’s case management and electronic filing system on the following parties:

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/s/ Susan G. Boswell  
Susan G. Boswell

# **EXHIBIT "A"**

**MOTION PENDING  
TO FILE EXHIBIT  
UNDER SEAL**

# **EXHIBIT "B"**

**MOTION PENDING  
TO FILE EXHIBIT  
UNDER SEAL**

# **EXHIBIT "C"**

**MOTION PENDING  
TO FILE EXHIBIT  
UNDER SEAL**