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 **Jointly Administered with:**
Jointly Administered with: BISHOP OF THE ROMAN CATHOLIC CHURCH OF THE DIOCESE OF GALLUP, an Arizona corporation sole. This pleading applies to: ☒ All Debtors. ☐ Specified Debtor:	Case No. 13-13677-t11

OBJECTION OF THE CATHOLIC MUTUAL RELIEF SOCIETY OF AMERICA AND THE CATHOLIC RELIEF INSURANCE COMPANY OF AMERICA TO STAY RELIEF MOTIONS

The Catholic Mutual Relief Society of America ("Catholic Mutual") and The Catholic Relief Insurance Company of America ("CRIC") (Catholic Mutual and CRIC collectively referred to as "Catholic Mutual"), hereby object (this "Objection") to the motions for relief from the automatic stay (the "Motions") filed by creditors Jane L.S. Doe [DE 396], Alfred Moya [DE 397], and John M.H. Doe [DE 398] (collectively, the "Movants") and in support thereof state as follows:

I.

INTRODUCTION

Over the last several months, the Debtors and Catholic Mutual have been fully invested in a mediation process. Both parties believe mediation represents the best opportunity

for an expeditious, constructive, and global resolution of this case. It provides the best opportunity of maximizing payouts to *all* claimants while minimizing estate administrative expenses and attorneys' fees. The Official Committee of Unsecured Creditors' ("Committee") Memorandum in Support of Stay Relief Motions ("OCC Memo") fails to describe the extensive preparatory work for mediation undertaken by Catholic Mutual and, we believe, by the Debtor and other insurers. (OCC Memo at 2-3.) Notwithstanding, the Committee pronounced the mediation a "failure" (OCC Memo at 7) after only one day and, instead, elected to promptly proceed with three hand-selected unlikely but available claims that it unilaterally declared ready for immediate trial -- solely for the purpose of gaining a tactical advantage in that mediation.

The Committee hastily declared the mediation a "failure" because, according to the Committee, "the Debtor and its insurance carriers ... did not conduct a fair, independent claims evaluation." (OCC Memo at 7.) According to the Committee, "state court adjudications of these three cases will advance the chapter 11 case because the outcomes will not only provide value for each of these three cases but will serve as guide posts for the other cases, all to the end of reaching a consensual resolution." (OCC Memo at 9.)

It is respectfully submitted that this analysis is utterly divorced from reality. It is true that Catholic Mutual has a different view of the value of the 15 claims implicating its coverage periods than does the Committee; that difference, however, is only soluble through mediation.

It is irresponsible for the Committee to propose dissipating the estate's already desperately short resources simply to try three claims that are either totally uninsured or substantially underinsured, particularly when the assets available from the Debtor itself are virtually non-existent. If the Committee wants to put together a fund for the benefit of all

legitimate claimants, the pending motion is incomprehensible. If the Committee is instead attempting to guaranty that only the claimants whose claims are adequately insured are compensated, the Committee should say so and Court and the parties can address that goal directly.

Granting stay relief to the three Movants will not facilitate the financial compensation of all those harmed. Rather, it raises the possibility of significant prejudice to all 57 claimants, including the three designated claimants.

II.

FACTUAL BACKGROUND

Catholic Mutual[1] first issued Coverage Certificates to RCCDG effective December 1, 1977, and has continued its liability coverage of RCCDG in accordance with or under the Coverage Certificates to this date.

For the period December 1, 1977 through July 1, 1978, and for annual periods commencing on July 1, 1978 and ending on July 1, 1990, Catholic Mutual issued coverage certificates which, subject to all the terms and conditions of such certificates, may provide coverage to RCCDG for liability arising from acts of sexual abuse that occurred during the annual overage period on an occurrence basis ("Occurrence-Based Certificates"). Beginning in

[1] Catholic Mutual was founded in 1889 as a non-profit religious corporation. It is organized and existing under the laws of the State of Nebraska, with its principal place of business in Omaha. Catholic Mutual operates as a self-insurance fund of the Catholic Church in the United States and Canada, counting 111 of the 195 North American dioceses among its members. Its Board of Trustees consists of the bishops and archbishops of 23 dioceses across the United States and Canada. Catholic Mutual issues certificates of coverage to participating members, which provide the members with coverage for certain property and casualty risks. CRIC is an insurance company organized under the laws of the State of Vermont, with its principal place of business in the State of Nebraska. Catholic Mutual wholly owns CRIC.

1990 and for all subsequent annual periods, Catholic Mutual has provided Limited Sexual Misconduct Coverage to RCCDG on a claims-made basis.

Based upon the information currently known to Catholic Mutual, only 15 claims appear to allege that acts of sexual abuse took place within Catholic Mutual's coverage periods and only one within the claims made period. Therefore, only 15 of the 57 Claimants potentially trigger coverage under any certificates issued by Catholic Mutual. Notwithstanding an unsupported allegation to the contrary (OCC Memo at 10), none of the three claims for which the Creditors seek stay relief are in any way covered by Catholic Mutual.

Catholic Mutual believes approximately 25 of the 57 claims are subject to insurance underwritten by the Home Insurance Company, which is insolvent and undergoing liquidation proceedings in New Hampshire state court. It is true, as the Committee alleges, that Home's obligations are picked up in part by the New Mexico Property and Casualty Guaranty Fund ("NMGF"). The Committee's memo does not, however, advise the Court how extremely limited that relief is.

Indeed, counsel for NMGF represented at the July 17 hearing that "we have coverage issues, and we have policy limit issues, and we have discreet issues that depend on interpretation of a contract, not legal issues." (July 17 Tr. 24:14-17.) Counsel for the NMGF asserts that there is a statutory limit for the Guaranty Association of $100,000 per Claimant." (July 17 Tr. 27:18-19.) However, the NMGF may not be able to pay even that if the NMGF's assertions relating to the limits of the underlying Home Insurance Policy limits are correct ($250,000 aggregate limit for all RCCDG claims for every three-year policy). (July 17 Tr. 34:15-16.) The Home/NMGF claims appear to involve about half of all claims at issue in this proceeding.

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It is hard to comprehend the basis for the Committee's allegation that the problem in this case is an unrealistic valuation of claims rather than a severe lack of available assets, given that 17 claims are uninsured and another 25 claims are insured by a carrier in liquidation.[2] It is even harder to comprehend why the Committee picked, for two thirds of its specimen cases, claims covered only by Home/NMGF. Because RCCDG itself is, as a practical matter, without assets, and for the reasons set forth more fully below, the Court should deny the Motions.

III.

ARGUMENT

A. Cause Does Not Exist to Lift the Stay to Permit Three of the Fifty-Five Pending Claims to Proceed with Discovery and Trial.

Section 362(d)(1) of the Bankruptcy Code authorizes the Court to grant relief from the stay for cause. 11 U.S.C. § 362(d)(1). "Cause" is not defined under the Bankruptcy Code, but rather is determined on a case-by-case basis. *In re Sunland, Inc.*, 508 B.R. 739, 744 (Bankr. D.N.M. 2014) (Thuma, J.).

In determining whether to lift the stay to allow litigation against the debtor to proceed in a non-bankruptcy forum, Bankruptcy courts should consider the effect of stay relief upon a debtor's reorganization efforts and resources, conservation of judicial resources, and prejudice to both the movant and other creditors. To that end, courts generally consider the following factors, first enumerated in *In re Curtis*, and most recently adopted by this Court in its *Sunland* decision (the "*Curtis* Factors"):

(1) Whether the relief would result in a partial or complete resolution of the issues;

(2) the lack of any connection or interference with the bankruptcy case;

[2] There may be some exposure to the Franciscans which is lightly insured by Travelers, but that does not appear to be a source of significant funding.

(3) whether the foreign proceeding involves the debtor as a fiduciary;

(4) whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases;

(5) whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;

(6) whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;

(7) whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties;

(8) whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c);

(9) whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f);

(10) the interest of judicial economy and the expeditious and economical determination of litigation for the parties;

(11) whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and

(12) the impact of the stay on the parties and the "balance of the hurt."

In re Sunland, Inc., 508 B.R. at 743. Most, if not all, of the *Curtis* factors favor allowing the automatic stay to continue in place so that the Debtors, the Committee and all other parties in interest may continue to pursue the global mediation process already underway through to its conclusion. Accordingly, the Court should deny the Movants' Motions.

1. **Granting Stay Relief at This Juncture Would Not Resolve Any Issues But Would Only Complicate the Mediation Process.**

Granting relief from the stay for the Movants' three claims would not facilitate the resolution of any issues in this Bankruptcy Case. Rather, it would only serve to drag out the ongoing mediation process while the litigation is resolved. The global mediation process is under way and represents the best *and likely the only* opportunity for a global resolution of all 57 claims and a consensual plan of reorganization. As the preceding factual discussion illustrates,

the basic issues do not revolve around valuation, they revolve around assets – or more precisely, the lack of them. With respect to the 15 claims arguably covered by Catholic Mutual, the proposed trial of the three specimen claims would not serve as any kind of bellwether. The claims are not only different, but if the Catholic Mutual claims are tried, it then follows that any judgement recovered will be distributed exclusively to the litigant claimant and not distributed as part of a common pot.

2. **Allowing the Movants' Litigation to Proceed Would Disrupt the Global Mediation Process, Interfering with This Bankruptcy Proceeding.**

None of the Movants' state court suits are trial ready and the Committee has supplied no particularized allegations, much less affidavits, to suggest they are. Indeed, even Mr. Moya's suit, which the Committee claims is the most advanced, is currently in discovery and has at least a year and probably much more before it will be ready for trial. The Debtors' bankruptcy case would be unduly delayed if they are required to wait years for the Movants' claims to be liquidated by the state court before they may proceed with the plan process.

And in the event mediation were to ultimately fail, a case such as this, where the principal claims are all unliquidated, is just the sort of case contemplated by Section 502(c) of the Bankruptcy Code, which requires the Court to estimate the value of unliquidated claims if liquidating the claims in the ordinary course would unduly delay the administration of the case. *See, e.g.*, *In re G-I Holdings, Inc.*, 323 B.R. 583, 599 (Bankr. D.N.J. 2005) (allowing debtor to estimate the aggregate value of asbestos personal injury claims against the estate for claim allowance and plan purposes only, but not for distribution purposes).

3. **The Debtors' Insurance Carriers, Including Catholic Mutual, Have Not Assumed Full Financial Responsibility For the Litigation.**

Not only does the Committee admit that the Moya litigation claim is uninsured, but it suggests that case be tried <u>first</u>. Accordingly, the Debtors will be burdened with the full

costs of defending the Moya litigation. *See In re Sunland, Inc.*, 508 B.R. at 743 (denying stay relief based in part on questions regarding insurance coverage for claims).). More to the point, the costs of defending an uninsured claim such as Moya will deplete the extremely limited assets of the Estate, leaving even less than already exists for distribution to other claimants. And if Moya prevails, whatever assets are left will likely be dissipated in their entirety to satisfy just that single claim.

4. **No Purpose Is Served by Putting the Debtor Through the Burden of Trial in Cases with Extremely Low Coverage Limits.**

If stay relief is granted for these three claims, then the cost of litigating those cases, and if necessary, funding any payment on such claims, will rapidly and demonstrably deplete the meager assets available to the estate to fund the remaining claims. Even worse, other claimants are likely to come forward to seek relief from the stay so that their claims may also be liquidated in the state tribunal. It may prove difficult to grant stay relief to the Movants without subsequently granting stay relief to other claimants. This is yet another reason suggesting that all stay relief should be denied. *In re Saint Vincent's Catholic Med. Centers of New York*, No. 11 CIV. 9431 ER, 2012 WL 4462030, at *4 (S.D.N.Y. Sept. 27, 2012) (denying relief from automatic stay to one claimant similarly situated with many others).

5. **Stay Relief Would Not Promote Judicial Economy or the Expeditious Resolution of This Case, and the Litigation Has Not Progressed to the Point Where the Parties Are Ready for Trial.**

The Committee acknowledges that none of the Movants' cases are ready for trial. Despite that, they argue that stay relief is appropriate because the litigation is in an "advanced stage," citing *In re Fernstrom Storage & Van Co.*, 938 F.2d 731, 737 (7th Cir. 1991). However, an examination of what the *Fernstrom* court meant by "advanced stage" litigation suggests that the Creditors' Committee is substantially overstating its claim.

In *Fernstrom*, the movant sought relief from the stay to continue litigation it had brought nominally against the debtor to collect from the debtor's insurer. The bankruptcy court granted stay relief, noting in part that the case was in an "advanced stage" because it had proceeded for six years and the parties were attending a hearing to schedule trial when the debtor informed the movant and the court for the first time that it had filed for bankruptcy eight years prior. *Id.* at 733.

Mr. Moya's case, the most advanced of the three cases, still has substantial and material expert and non-expert discovery outstanding. (OCC Memo at 3-4.). A close examination of the Committee's argument that "the Debtor's litigation costs in the cases, including the Hageman case, should be minimal" (OCC Memo at 12) reveals that it rests on the assumption that the Diocese will not contest liability. The fact is, there are numerous issues involving liability that would need to be litigated, including statute of limitations issues and whether the Diocese itself was actually "negligent" in its supervision of the perpetrator. Mr. Moya's case is unlikely to be ready for trial for at least a year, probably much longer. It is certainly not in an "advanced stage" similar to the litigation at issue in *Fernstrom*.

6. **The State Court Is Not a Specialized Tribunal with Special Expertise on These Matters.**

The Committee admits that the state court is not a specialized tribunal and lacks any special expertise on these matters. (OCC Memo at 10.) Therefore, this factor weighs against granting stay relief here.

7. **The Balance of Harms Favors Allowing the Global Claim Mediation Process to Play Out.**

Catholic Mutual does not dispute the trauma suffered by victims of sexual abuse. Catholic Mutual certainly agrees that the "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." (OCC Memo at 16 (citing *Ashcroft v.*

Free Speech Coal, 535 U.S. 234, 244-45 (2002).) We all recognize that survivors of sexual abuse have a need for healing and compensation. This bankruptcy case was filed by the poorest diocese in the United States for the very purpose of efficiently and fairly facilitating the financial compensation of all those harmed. (Decl. of Bishop Wall [DE 19] at 14.)

But granting stay relief to the three Movants does not facilitate the financial compensation of all those harmed. As discussed above, there is no basis for lifting the stay to allow the three Movants hand-picked by the Committee to go forward and liquidate their claims without also allowing the remaining 54 claimants the same opportunity. The majority of those claimants have claims that are not covered by insurance. Opening the door to 57 separate actions will create an overwhelming drain on the estate's resources that will materially reduce the total pool of available assets from which the claimants will receive financial compensation.

B. Permissive Abstention Does Not, Standing Alone, Provide Cause for Relief from the Automatic Stay.

The Committee's invocation of the doctrine of permissive abstention is entirely misplaced. Whether or not this Court ultimately decides to abstain from deciding the issues underlying the Movants' state-court litigation, that decision has no bearing on whether the automatic stay should be lifted at this time.

Under the doctrine of abstention, a bankruptcy court may decline to exercise jurisdiction in core or non-core proceedings where the interests of justice would be better served for those proceedings to be decided in a non-bankruptcy forum. *In re Tres Hermanos Dairy, LLC*, No. 11-10-14240-TR, 2014 WL 176772, at *4 (Bankr. D.N.M. Jan. 16, 2014) (Thuma, J.) (denying request for permissive abstention). Abstention is either mandatory or permissive. Abstention is mandatory under 28 U.S.C. § 1334(c)(2) if (i) the proceeding is not a core proceeding, (ii) there is no independent basis of federal jurisdiction other than the bankruptcy

filing, and (iii) the proceeding has been commenced in state court and can be timely adjudicated there. 2014 WL 176772, at *4. Abstention is permissive under 28 U.S.C. § 1334(c)(1), regardless of whether the proceeding is a core proceeding or a non-core proceeding that is not subject to mandatory abstention, if the bankruptcy court determines that abstention would best serve the interests of justice and comity. *Id.*; *In re Gober*, 100 F.3d 1195, 1206 (5th Cir. 1996).

Whether the Court will ultimately decide to abstain from deciding the Movants' claims is a fundamentally different question from *when* the Movants should be allowed to pursue their claims in the non-bankruptcy forum. Courts frequently recognize that the decision to abstain, standing alone, does not constitute cause for relief from the automatic stay. *See, e.g.*, *Pursifull v. Eakin*, 814 F.2d 1501, 1505 (10th Cir. 1987) ("Even where the court has abstained pursuant to § 1334(c), the stay granted under § 362 must be modified in order to allow the resolution of claims other than in the court with jurisdiction over the bankruptcy."); *see also In re Conejo Enterprises, Inc.*, 96 F.3d 346, 352 (9th Cir. 1996) ("[A] finding that mandatory abstention applies to the underlying state action does not preclude denial of relief from § 362's automatic stay.").

The single Ninth-Circuit case cited by the Committee (*In re Tucson Estates*, 912, F.2d 1162, 1166 (9th Cir. 1990)) simply is not relevant to the question of whether relief from the stay is appropriate here. In that case, the debtor filed its bankruptcy petition immediately before the state-court trial at issue was scheduled to begin, but only after summary judgment had been granted against the debtor on the issue of the nature of the debtor's property interest in certain of its real estate holdings under state law. The bankruptcy court eventually imposed a stay—rejecting the plaintiffs' request that it abstain—because the bankruptcy court believed that it should have an opportunity to review the state court's pre-petition summary judgment decision

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determining the estate's interest in the real estate at issue. The district court and the Ninth Circuit both rejected the bankruptcy court's rationale and held that refusing to abstain on this basis was an abuse of discretion because the bankruptcy court had no power to overrule the state court's summary judgment decision, which already had preclusive effect. *In re Tuscon Estates*, 912 F.2d at 1167.

Here, none of the Movants' cases are anywhere near being ready for trial. Nor did any of the claimants obtain a pre-petition summary judgment. The Moya case, which the Committee claims is the case closest to being ready for trial, is still in the middle of discovery and has substantial and material expert and non-expert discovery still outstanding.

As this Court recognized in its opinion in *In re Tres Hermanos Dairy LLC*, the driving principle behind permissive abstention is comity between courts—not whether the non-debtor should be allowed to pursue its claim now rather than later. 2014 WL 176772, at *4. The factors that courts generally consider when deciding to abstain reflect this focus on comity. [3] Several of the relevant factors overlap with those considered by courts in deciding to lift the stay. For the reasons discussed above, those factors do not counsel in favor of granting stay relief. More importantly, the unique abstention factors simply are not relevant to the determination of whether stay relief is appropriate at this stage in the case. Theoretical discussions regarding the difficultly of the relevant state law issues; the federal jurisdictional basis for a claim; whether a

[3] Those factors include: "1) the effect that abstention would have on the efficient administration of bankruptcy estate; 2) the extent to which state law issues predominate; 3) the difficulty or unsettled nature of applicable state law; 4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; 5) the federal jurisdictional basis of the proceeding; 6) the degree of relatedness of the proceeding to the main bankruptcy case; 7) the substance of asserted "core" proceeding; 8) the feasibility of severing the state law claims; 9) the burden the proceeding places on the bankruptcy court's docket; 10) the likelihood that commencement of the proceeding in bankruptcy court involves forum shopping by one of parties; 11) the existence of a right to jury trial; and 12) the presence of non-debtor parties in the proceeding." *In re Tres Hermanos Dairy LLC*, 2014 WL 176772, at *5.

dispute is core or non-core; and the non-debtor's ultimate right to a jury trial, while appropriate for a discussion on comity between courts, do not bear on whether it is necessary to resolve a dispute now rather than later.

IV.

CONCLUSION

Catholic Mutual requests the Court to reject the Creditors' Committee's tactical maneuver out of hand. Granting relief from the automatic stay would materially inflate the administrative cost of this bankruptcy case, especially at the expense of the majority of claimants whose claims are not insured and would severely delay, if not eliminate, any chance of the parties reaching a global resolution of claims.

Respectfully submitted

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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 "Objection of the Catholic Mutual Relief Society of America and the Catholic Relief Insurance Company of America to Stay Relief Motions" was made on August 3, 2015 via email and the notice transmission facilities of the Bankruptcy Court's case management and electronic filing system on the below listed parties, and via U.S. Mail to all additional parties on the Debtors' Limited Notice List.

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