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*Proposed Counsel to the Official Committee
of Tort Claimant Creditors*

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

In re:

THE DIOCESE OF CAMDEN, NEW JERSEY,

Debtor.

Chapter 11

Case No.: 20-21257 (JNP)

Honorable Jerrold N. Poslusny, Jr.

Requested Hearing Date:
November 25, 2020 at 10:00 a.m.

**NOTICE OF MOTION OF THE OFFICIAL COMMITTEE OF TORT
CLAIMANT CREDITORS FOR THE ENTRY OF AN ORDER
AUTHORIZING THE RETENTION OF EXPERTS**

PLEASE TAKE NOTICE that at **10:00 a.m. on November 25, 2020**, or as soon thereafter as counsel may be heard, the Official Committee of Tort Claimant Creditors (the "Committee") of the Diocese of Camden, New Jersey (the "Debtor") will move before the Honorable Jerrold N. Poslusny, Jr., Judge, at the United States Bankruptcy Court for the District of New Jersey, 400 Cooper Street, Court Room 4C, Camden, New Jersey, for the entry of an order authorizing the retention of certain experts pursuant to sections 105 and 327 of the United States Bankruptcy Code (the "Motion").

PLEASE TAKE FURTHER NOTICE that the Committee shall rely upon the brief submitted in support of the Motion, argument of counsel, and any other matters presented at the hearing.

PLEASE TAKE FURTHER NOTICE that objections, if any, must be submitted to the chambers' email address, chambers_of_jnp@njb.uscourts.gov, and served upon the undersigned counsel so as to be received on or before five (5) days prior to the hearing date.

PLEASE TAKE FURTHER NOTICE that in the event no objections are filed, the Court may grant the relief requested in the Motion without further notice or hearing.

Dated: November 13, 2020

Respectfully submitted,

LOWENSTEIN SANDLER LLP

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

In re:	Chapter 11
THE DIOCESE OF CAMDEN, NEW JERSEY,	Case No.: 20-21257 (JNP)
Debtor.	Requested Hearing Date: November 25, 2020 at 10:00 am

**MOTION OF THE OFFICIAL COMMITTEE OF TORT CLAIMANT CREDITORS
FOR THE ENTRY OF AN ORDER AUTHORIZING THE RETENTION OF EXPERTS**

The Official Committee of Tort Claimant Creditors (the “Committee”) of the Diocese of Camden, New Jersey (the “Debtor”) requests, in an abundance of caution, entry of an order authorizing it to retain experts (the “Experts”) and have such experts paid directly by the Debtor’s estate, and in support thereof, respectfully states as follows:

I. PRELIMINARY STATEMENT

1. Experts are not “professionals” whose retention requires this Court’s approval under section 327 of title 11 of the United States Code (the “Bankruptcy Code”). Accordingly, while the Committee does not believe the relief sought herein is required, it files this motion in

an abundance of caution to make clear that it is authorized to retain any Experts it may need to use in this case without requiring the submission of separate retention applications for each expert. The Committee also requests that such Experts not be required to file fee applications for approval of their fees and expenses. Rather, as is universally the case, the Debtor's estate should be directly liable for the fees and expenses incurred by the Experts, and these charges, including any retainers requested by the Experts, should be passed through to the Debtor's estate as disbursements on counsel's fee applications.

2. The Committee is compelled to file this motion at this time because it is confronted with at least one motion which will require expert testimony. By way of background, prior to the Committee's formation, the Debtor filed multiple motions to set the pace and destination for this case; two in particular require specific mention. The first, a motion to set a claims bar date and the second, a motion to establish procedures for the resolution of claims. While the Committee has implored the Debtor to hold the motions in abeyance to allow the Committee to educate itself and express its views on how the procedural course of this case should be charted, the Debtor, contrary to its stated goals, has established an unprecedented timetable for this case, the pace of which benefits only itself. These motions are currently being mediated before the Honorable Michael B. Kaplan. Should the parties be unable to resolve their differences though, this Court is scheduled to hear the motions on December 23rd and the Committee is required to file its objections to the motions by December 9th.

3. Given the limited amount of time to prepare for a contested hearing, and the vital need for the Committee to adequately educate this Court on the unique nature of the issues before it, the Committee files this motion now so that it is prepared to mount a proper defense to the motions should mediation be unsuccessful.

II. JURISDICTION

4. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The statutory bases for the relief requested herein are sections 105(a) and 327(a) of the Bankruptcy Code.

III. BACKGROUND

6. On October 1, 2020 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in this Court. No trustee or examiner has been appointed in this case.

7. On October 23, 2020, the Office of the United States Trustee appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code. The Committee is comprised of the following nine members: (i) Dr. James Reuter; (ii) Mr. Jack Lechner; (iii) Ms. Jennifer Wydra; (iv) Mr. Paul Harrington; (v) Mr. Robert Polt; (vi) Mr. Edward Henkel; (vii) Dr. Patrick Lloyd; (viii) Mr. John Collins; and (ix) Mr. Andrew Napoli. *See* Docket No. 111.

8. On October 24, 2020, the Committee selected Lowenstein Sandler LLP to serve as its counsel.

IV. THE EXPERTS ARE NOT “PROFESSIONALS” UNDER SECTION 327(A) OF THE BANKRUPTCY CODE

9. Section 327(a) of the Bankruptcy Code provides that “the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee’s duties under this title.” 11 U.S.C. § 327(a). The term “professional person” is not defined by the Bankruptcy

Code. As a result, courts have fashioned two tests to determine whether a party engaged by a debtor's estate is a "professional person" pursuant to section 327(a) of the Bankruptcy Code: (1) the more commonly used "central role" test; and (2) the "degree of autonomy" test. The Experts retained and/or to be retained by the Committee are not professionals under either test.

A. The "Central Role" Test

10. The seminal case interpreting the term "professional" states that:

[p]ersons in occupations ordinarily considered professions are not necessarily professionals whose retention by the estate requires court approval. For the purposes of section 327(a), "professional person" is limited to persons in those occupations which play a central role in the administration of the debtor proceedings.

In re Seatrain Lines, Inc., 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981). "Administration of the estate entails the progress of the Chapter 11 case through the bankruptcy court from filing of the petition to confirmation of the plan." *In re Ne. Dairy Coop. Fed'n, Inc.*, 74 B.R. 149, 153 (Bankr. N.D.N.Y. 1987). Duties considered central to the administration of the estate include obtaining postpetition financing, negotiating creditor claims, formulating a plan of reorganization, disposing of assets of the estate, and acquiring assets on behalf of the estate. *See In re Napoleon*, 233 B.R. 910, 913 (Bankr. D.N.J. 1999); *In re Sieling Assocs. Ltd. P'ship*, 128 B.R. 721, 723 (Bankr. E.D. Va. 1991).

11. Courts have generally found that "pure" consultants, as opposed to management consultants, are not "professionals." For example, in *In re Sieling*, 128 B.R. 721 (Bankr. E.D. Va. 1991), the debtor hired a toxicology consultant to test water for contamination. The court held that "[n]otwithstanding the fact that [the consultant's] retention may be necessary for the Debtor to comply with Maryland law, [he] is not assisting the Debtor with its plan, with the sale or purchase of assets or with negotiating with creditors." *Id.* at 723. Accordingly, the consultant was not a professional person as used in section 327(a) of the Bankruptcy Code.

12. In another case, an accounting firm was hired as an expert witness in an intellectual property action brought on behalf of the chapter 11 debtor by special counsel. The court held that “an accountant who is retained solely to testify as an expert witness in collateral litigation does not assume a ‘central role in the administration of the bankruptcy.’” *In re That’s Ent. Mktg. Grp., Inc.*, 168 B.R. 226, 230 (N.D. Cal. 1994). The court declined to consider the expert witness a professional person pursuant to section 327(a) of the Bankruptcy Code because an expert witness is not in the position to formulate strategy or to manage the estate and the estate’s liabilities. *Id.* The court further noted that “[a]lthough the litigation itself could be considered central to the administration of the estate, the attorney controls the litigation—the expert witness merely offers evidence in that case.” *Id.* at n.4. *See also, In re Babcock Dairy Co. of Ohio Inc.*, 70 B.R. 691 (Bankr. N.D. Ohio 1987) (court similarly reasoned that expert witnesses should not be deemed “professionals” under section 327 because of their tangential relationship to the administration of the estate).

13. Courts in this circuit determine whether an expert is a professional within the meaning of section 327 of the Bankruptcy Code using a test that considers the following qualitative and quantitative factors:

- (1) whether the [expert] controls, manages, administers, invests, purchases or sells assets that are significant to the debtor’s reorganization,
- (2) whether the [expert] is involved in negotiating the terms of a Plan of Reorganization,
- (3) whether the [retention] is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor’s business operations;
- (4) whether the [expert] is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor’s estate, i.e. the qualitative approach,
- (5) the extent of the [expert]’s involvement in the administration of the debtor’s estate, i.e. the quantitative approach; and
- (6) whether the [expert]’s services involve some degree of special knowledge or skill, such that the [expert] can be considered a ‘professional’ within the ordinary meaning of the term.

In re First Merchs. Acceptance Corp., 1997 WL 873551, *3 (D. Del. 1997). No one factor above is dispositive and each should be weighed against the other and considered in toto. *Id.*

14. Like the consultants and experts in the above cases, the Experts to be retained by the Committee will not be in a position to control the strategy affecting the management or administration of this case or the negotiation of a plan of reorganization. While the Experts' advice may be helpful to the claims estimation/liquidation proceedings, pending adversary proceedings and other proceedings herein, such advice is tangential to the administration of the estate. Accordingly, the Experts are not "professionals" under the central role test.

B. The "Degree of Autonomy" Test

15. Under the "degree of autonomy" test, courts consider whether the party is to be given discretion or autonomy in some part of the administration of the debtor's estate. *In re Fretheim*, 102 B.R. 298, 299 (Bankr. D. Conn. 1989). If a party hired by the estate has complete discretion, independent ability and complete financial management authority over the operation of the estate, the party is considered a "professional" for purposes of section 327(a). *In re Frederick Petroleum Corp.*, 75 B.R. 774, 780 (Bankr. S.D. Ohio 1987).

16. A person or entity performing only routine administrative functions and services, without more, is not a professional because such party's role is confined to events in the ordinary course of the debtor's business which are not essential either to the bankruptcy proceedings or to major policy decisions. *In re Leslie Oil & Gas Co., Inc.*, 98 B.R. 774, 776 (Bankr. S.D. Ohio 1989). In *Leslie Oil*, the debtor assigned prepetition voting rights in its stock to Pride Petroleum Inc. ("Pride"). While Pride was incorporated for the sole purpose of managing the debtor's business pursuant to a management contract, the debtor and Pride had an agreement specifically prohibiting Pride from performing management duties or participating in business decisions

regarding, *inter alia*, financial, legal, securities and reorganization matters. *Id.* at 776. Thus, despite the central nature of its management role, Pride was not considered to be a “professional” because it did not possess the necessary degree of discretion or autonomy.

17. The “degree of autonomy” cases reason that the primary purpose of section 327(a) of the Bankruptcy Code is to prevent conflicts of interest which “erode the confidence of other parties in the administration of that estate to say nothing of public confidence in the administration of justice in bankruptcy courts.” *In re Intech Cap. Corp.*, 87 B.R. 232, 236 (Bankr. D. Conn. 1988). The prohibition against appointment of an interested person is to prevent placing such a party in a sufficiently autonomous position such that he or she has discretion to impact activities that could benefit an adverse interest. *In re Frederick*, 75 B.R. at 780.¹

18. While testifying Experts here may render independent opinions, such opinions do not empower them with discretion or autonomy over the administration of the Debtor’s estate, such as the purchase and sale of assets or the strategy to be used to reorganize, manage, and liquidate estate assets. Accordingly, the Experts do not meet the “degree of autonomy” test.

V. RETENTION OF THE EXPERTS SHOULD BE ALLOWED INDEPENDENT FROM SECTION 327(A)

19. Based on the legal analysis set forth above, Experts who will serve as non-testifying experts or as expert witnesses in adversary proceedings and contested matters in this bankruptcy are not professionals under section 327(a) of the Bankruptcy Code. Therefore, Court approval of their retention is not required.

20. However, out of an abundance of caution, the Committee seeks an order authorizing the Committee to retain Experts without the need to file separate retention

applications for each Expert. The Committee also requests authority for the Debtor's estate to pay fees and reimburse expenses incurred by Experts without the need for the Experts to file fee applications or for a party engaging Experts to identify such persons, to provide itemized invoices for their services, or otherwise to reveal their work product (except as may be required by the discovery rules in a particular proceeding).

21. The Committee proposes that it be authorized to retain Experts, and to compensate such Experts at reasonable and customary rates in the ordinary course of business. Under this proposal, (1) the Debtor's estate will be directly liable for fees and expenses incurred by the Experts, (2) the Committee will be responsible for scrutinizing the Experts' work and invoices to make sure their work is appropriate and cost-effective, and (3) counsel will pass the Experts' fees and expenses, including any retainers requested by the Experts, through to the Debtor's estate as disbursements on monthly fee applications filed and served in compliance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Rules of the United States Bankruptcy Court for the District of New Jersey, the U.S. Trustee Guidelines, and any orders of the Court respecting compensation of professionals. The Debtor's estate would be directly liable for the Experts' fees and expenses, and counsel's only responsibility with respect thereto will be to pass through the Experts' billing for fees and expenses to the Debtor's estate and to remit payment to the Experts upon receipt of payment from the Debtor's estate. Similar relief has been granted in other large bankruptcy cases involving mass tort liability. *See* Order Authorizing Retention of Experts, *In re W.R. Grace & Co.*, Case No. 01-1139 (JJF) (Bankr. D. Del. June 22, 2001) [No. 564], a copy of which is annexed hereto as **Exhibit A**.

¹ Of course, the Committee will analyze conflict of interest issues relating to the Experts under applicable standards prior to their retention.

WHEREFORE, the Committee respectfully requests that the Court (i) authorize the Committee to retain Experts without the need for filing retention applications or fee applications; (ii) direct the Debtor's estate to pay the fees and expenses incurred by the Experts; and (iii) grant such other and further relief as is just and proper.

Dated: November 13, 2020

Respectfully submitted,

LOWENSTEIN SANDLER LLP

/s/ Jeffrey D. Prol

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*Proposed Counsel to the Official Committee of Tort
Claimant Creditors*

Exhibit A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
)
W. R. GRACE & CO., et al.,¹) Case No. 01-1139 (JJF)
) (Jointly Administered)
)
Debtors.)

ORDER AUTHORIZING THE RETENTION OF EXPERTS

Upon the Motion² of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), seeking the entry of an order authorizing the retention of Experts and it appearing that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors and other parties in interest; and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157; and after due deliberation and cause appearing therefore; it is hereby

FOUND that this Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334(b) and 157; and it is further

FOUND that this Court has authority to grant the relief requested in the Motion pursuant to 11 U.S.C. § 105(a) and 327(a); and it is further

FOUND that notice of the Motion is sufficient and appropriate and in accordance with the Bankruptcy Rules, Local Rules, and Orders of this court; and it is further

FOUND that in connection with the litigation of threshold tort liability issues and with proceedings concerning the allowance/disallowance, estimation and liquidation of claims certain areas require the services of Experts. The specific areas identified include, without limitation, the following:

- a. **Medical diagnosis and disease causation, including:**
 - (1) **Epidemiology;**
 - (2) **Pathology;**
 - (3) **Pulmonology and lung function; and**
 - (4) **Oncology.**
- b. **Analysis of exposures, including:**
 - (1) **Industrial hygiene;**
 - (2) **Dose estimation and reconstruction.**
- c. **State of the Art;**
- d. **Analysis, modeling and estimation of current and future asbestos personal-injury claims; and**
- e. **Claims facility management and procedure;**

and it is further

FOUND that the Experts are not professionals under section 327(a) of the Bankruptcy Code. It is therefore,

ORDERED that Court approval for the retention of Experts is not required as such Experts are not professionals under section 327(a) of the Bankruptcy Code; and it is further

ORDERED that the Debtors and the Committees are authorized to employ and compensate the Experts effective *nunc pro tunc* as the Petition Date and such other Experts as the Debtors or the Committees may need to employ in the future for estimation, claims liquidation or any other area requiring consulting expertise; it is further

ORDERED that the party retaining the Expert shall review the billing statements submitted by the Expert and determine the reasonableness of such billing statements. The party shall pay reasonable fees and expenses incurred by the Expert monthly, or upon such other terms as are customary, and include such fees and expenses with the party's monthly fee applications or otherwise in compliance with that certain Administrative Order Under 11 U.S.C. §§ 105(a) and 331 Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Official Committee Members dated May 3, 2001; and it is further

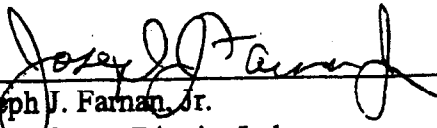
ORDERED that the Debtors and the Committees are authorized and empowered to take all actions and execute such other documents as may be necessary to implement the relief granted herein; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters

arising from the implementation of this Order.

Wilmington, Delaware

Dated: *Jan 20* 2001



Joseph J. Farnan, Jr.
United States District Judge

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
Caption in Compliance with D.N.J. LBR 9004-1(b)	
Jeffrey D. Prol, Esq. Brent Weisenberg, Esq. (Admitted <i>pro hac vice</i>) Michael A. Kaplan, Esq. LOWENSTEIN SANDLER, LLP One Lowenstein Drive Roseland, New Jersey 07068 Telephone: (973) 597-2500 Facsimile: (973) 597-2400 E-mail: jprol@lowenstein.com E-mail: bweisenberg@lowenstein.com E-mail: mkaplan@lowenstein.com <i>Proposed Counsel to the Official Committee of Tort Claimant Creditors</i>	
In Re:	Case No. 20-21257 (JNP)
THE DIOCESE OF CAMDEN, NEW JERSEY,	Chapter 11
Debtor.	Honorable Jerrold N. Poslusny, Jr.

**ORDER AUTHORIZING THE OFFICIAL COMMITTEE OF TORT
CLAIMANT CREDITORS' RETENTION OF EXPERTS**

The relief set forth on the following pages, numbered two (2) through four (4), is hereby

ORDERED.

Upon the motion of the Official Committee of Tort Claimant Creditors (the “Committee”) appointed in the Chapter 11 Case (the “Chapter 11 Case”) of the above-captioned debtor and debtor-in-possession (the “Debtor”) seeking the entry of an order authorizing the retention of certain experts (the “Motion”), and it appearing that the relief requested in the Motion is in the best interests of the Debtor’s estate, its creditors and other parties in interest; and it further appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157; and after due deliberation and cause appearing therefore; it is hereby

FOUND that this Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334(b) and 157; and it is further

FOUND that this Court has authority to grant the relief requested in the Motion pursuant to 11 U.S.C. § 105(a) and 327(a); and it is further

FOUND that notice of the Motion was sufficient and appropriate and in accordance with Federal Rules of Bankruptcy Procedure, the Local Rules of the United States Bankruptcy Court for the District of New Jersey, and Orders of this Court; and it is further

FOUND that in connection with the litigation of certain contested matters and adversary proceedings herein, the Committee may require the services of certain experts as consultants and/or as testifying witnesses (the “Experts”); and it is further

FOUND that the Experts are not professionals under section 327(a) of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Court approval for the retention of Experts is not required as the Experts are not professionals under section 327(a) of the Bankruptcy Code.

2. The Committee is authorized to employ and compensate Experts at reasonable and customary rates in accordance with the terms hereof.

3. The Committee shall not be obligated to disclose the identity of its Experts except in accordance with applicable Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure.

4. The Debtor's estate shall be directly liable for all fees and expenses incurred by the Experts, and the Committee's counsel shall not have any personal liability for the Experts' fees or expenses.

5. Counsel for the Committee shall review the billing statements submitted by the Expert and determine the reasonableness of such billing statements. Counsel for the Committee shall include fees and expenses for the Experts, including any retainer requested by any Expert, as disbursements on counsel's monthly fee applications in compliance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Rules of the United States Bankruptcy Court for the District of New Jersey, the U.S. Trustee Guidelines, and any orders of the Court respecting compensation of professionals, but shall not be required to submit a detailed statement or invoices with respect to services rendered or expenses sought by any Expert. Counsel shall also identify the adversary proceeding or contested matter for which each Expert has been retained.

6. To the extent that a party-in-interest objects to the payment of an Expert, it shall provide written notice thereof to all parties-in-interest and the Office of the United States Trustee. The parties shall immediately meet and confer in order to resolve the objections to the payment of the Expert. In the event the Office of the United States Trustee so requests, it shall be entitled to review any billing statements submitted by the Expert to the party seeking payment

provided that the United States Trustee agrees that it will receive such statements on a confidential basis and not disclose same to any other party unless ordered to do so by the Court. To the extent that the parties are unable to resolve the objection through the meet and confer process, the Court shall conduct an in camera review of the issues and shall render a final order resolving the dispute. An objection to payment of an Expert hereunder shall not delay payment of the balance of the fees and expenses requested in the fee application of the Committee's counsel.

7. The Experts shall have specialized knowledge and expertise reasonably related to the subject matters of pending or anticipated adversary proceedings or contested matters. Such subject matters shall include the bar date, claims noticing process and procedures, the form of sexual abuse proof of claim, and other contested matters and adversary proceedings matters that may arise in this Chapter 11 Case, without limitation, review, analysis, and consultation in connection with reports prepared experts retained by the Debtor and deposition and expert testimony in connection with those matters. Experts may act solely in a consulting capacity, or may serve as testifying experts for purposes of particular litigated matters.

Dated: November ____, 2020

Honorable Jerrold N. Poslusny, Jr.
United States Bankruptcy Judge