UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

In re:	Chapter 11
ROMAN CATHOLIC DIOCESE OF HARRISBURG, Debtor.[1]	Case No. 1:20-bk-00599 (HWV)

ROMAN CATHOLIC DIOCESE OF HARRISBURG'S OBJECTION TO THE OFFICIAL COMMITTEE OF TORT CLAIMANTS' MOTION FOR STANDING AND AUTHORITY TO COMMENCE, PROSECUTE, AND SETTLE CAUSES OF ACTION ON BEHALF OF THE DEBTOR'S BANKRUPTCY ESTATE

The Roman Catholic Diocese of Harrisburg (the "***Debtor***"), by and through its undersigned counsel, files this objection to *The Official Committee of Tort Claimants' Motion for Standing and Authority to Commence, Prosecute, and Settle Causes of Action on Behalf of the Debtor's Bankruptcy Estate* (Dkt. No. 840) (the "***Motion***"). In support of this objection, the Debtor has simultaneously submitted the *Declaration of Reverend William C. Forrey* (the "***Forrey Declaration***"), *Declaration of Donald J. Kaercher* (the "***Kaercher Declaration***"), and *Declaration of Terrence J. Kerwin, Esq.* (the "***Kerwin Declaration***"). In opposition to the Motion, the Debtor respectfully states as follows:

INTRODUCTION

On February 19, 2020 (the "***Petition Date***"), the Debtor commenced this case in order to fairly provide compensation for unresolved claims of survivors of abuse and preserve the ability of the Debtor to continue providing essential ministries and services within the Diocese of Harrisburg. Since the Petition Date, the Debtor has been working toward these goals, negotiating

[1] The last four digits of the Debtor's federal tax identification number are: 4791. The Debtor's principal place of business is located at 4800 Union Deposit Road, Harrisburg, Pennsylvania 17111.

in earnest with the Committee and the Debtor's insurance carriers. During this same time, the Committee has had nearly two years to investigate the Debtor and related entities, the Debtor has produced thousands of pages of documents to the Committee, and the Committee has spent tens of thousands (if not hundreds of thousands) of dollars conducting its investigation of the Debtor and related entities. Notwithstanding the Debtor's transparency with the Committee and the Committee's significant investigation to date, the Committee has wholly failed to demonstrate that colorable claims exist or, to the extent colorable claims exist, that the Debtor has unjustifiably refused to pursue them. Instead, the Committee has made unfounded allegations regarding the Debtor's conduct, ignored documents in the public record or otherwise publicly available, and misstated or otherwise ignored the law as it has existed in Pennsylvania for more than one hundred fifty years. As a result, and as set forth in detail below, the Motion should be denied in its entirety.

RELEVANT BACKGROUND

The following background regarding the Code of Canon Law ("***Canon Law***"), Pennsylvania Law, documentation of the Trusts (as defined below), and the assets and liabilities of the Debtor's estate illustrates why the Committee's claims fail.

I. Canon Law and property ownership.

The manner in which entities within the Roman Catholic Church (the "***Church***") acquire and hold property finds its origins in the time of Christ, when Jesus and his disciples owned only the contents of the purse carried by Judas.[2] During this early time of the Church, the Church was an oppressed Church and was prohibited from owning property—Church property could only be owned by individuals who held title in their own names for the benefit of the Church. *Id.* As a result, in the early days of the Church, the disciples of Christ owned property on behalf of the

[2] *See* Bernard C. Huger, Diocesan Real Estate Transactions—Canon and Civil Law Implications, The Catholic Lawyer, Number 3 Volume 27, Summer 1982, Number 3, at 213.

Church. *Id.* Following the Edict of Constantine around 324 A.D., the Church was permitted to own property; however, given the history of oppression and property ownership through individuals for over three hundred years, the leaders of the Church created the concept that the Church is a separate moral person independent of any state. *Id.* As a result, the Church maintained Church ownership of property through Bishops who held title to the Church's properties for the benefit of the Church, with title passing directly to each respective Bishop's successors. *Id.* at 214.

The foregoing theory of ownership of Church property is codified in Canon Law. Under Canon Law, entities that participate in the spiritual and religious mission of the Church (i.e., a parish or diocese) are referred to as "juridic persons." Canon 113, § 2. All temporal goods which belong to the universal Church, the Apostolic See, or other public juridic persons in the Church are "ecclesiastical goods." Canon 1257, § 1. "By virtue of his primacy of governance, the Roman Pontiff is the supreme administrator and steward of all ecclesiastical goods." Canon 1273. Subject to, among others, Canon 1273, a diocesan bishop,[3] referred to as the "ordinary" in Canon Law, is entrusted with the care and administration of ecclesiastical goods of the public juridic persons subject to him. Canon 1276, § 1.

While the foregoing is not necessarily on "all fours" with Pennsylvania civil law, Pennsylvania law has recognized for well over a century that "the canons of the Roman Catholic Church provide and require that the title to the property of the Roman Catholic congregation which is under the jurisdiction of the Roman Catholic Bishop of the diocese in which the congregation has its place of worship, must be in the ordinary, or in the present case, in the bishop of the diocese." *Krauczunas v. Hoban*, 70 A. 740, 742, 744 (Pa. 1908) (referring to the findings of the trial court as "entirely adequate to an intelligent understanding of the case" and "see[ing] no reason

[3] Bishops to whom the care of a diocese is entrusted are called diocesan bishops. Canon 376.

to question the correctness of any of them"); *see also St. Peter's Roman Catholic Parish v. Urban Redevelopment Authority*, 146 A.2d 724, 726 (Pa. 1958) (addressing parish property, stating: "The bishop owns the property, in trust for the parish, and alone may dispose of it in accordance with the canons of the Roman Catholic Church."); *St. Matthew's Slovak Roman Catholic Congregation v. Wuerl*, 106 F. App'x 761, 766 (3d Cir. 2004) (referring to 10 P.S. § 81 as vesting control of religious property in the Bishop). This is further confirmed by the various limitations imposed upon Bishops and pastors—namely, their roles are solely to administer property within their territorial sphere (i.e., a diocese or a parish, respectively) for the benefit of the Church and subject to the Pope's supreme authority. *See, e.g.*, Canon 1292, §§ 1–2 (requiring permission to alienate ecclesiastical property); Canon 1293 (imposing requirements upon alienation of property); Canon 1295 (imposing limitations upon all transactions that could "worsen the patrimonial condition of a juridic person"). Accordingly, under Canon Law, while a juridic person may acquire property, any such acquisition is done on behalf of or for the benefit of the Church and, in the case of a diocese, such property is entrusted to the applicable diocesan bishop subject to the restrictions and dictates of Canon Law. Canon 1276, § 1.

II. Historical evolution of the law in Pennsylvania regarding property ownership by unincorporated religious organizations.

Pennsylvania law as it existed before the Debtor was created in 1868, and how that law has evolved since, is similarly informative, bearing stark parallels to the origins and evolution of Canon Law with respect to property ownership by religious entities like the Debtor. As set forth below, until 2013, an unincorporated association like the Debtor could not legally hold property (with one exception noted below). And, within the one exception, the ability of religious entities to hold property was limited.

A. Until enactment of the Unincorporated Association Act, the general rule was unincorporated entities could not hold title to property.

As recognized by the Pennsylvania Supreme Court in 1995:

> Absent express statutory authority, however, an unincorporated association is not a legal entity; it has no legal existence separate and apart from that of its individuals. In turn, only an entity with a recognized legal existence may own and possess property. Accordingly, property ownership by an unincorporated association, which has no cognizable legal existence, is impossible absent statutory authority to the contrary; **rather, an unincorporated association's trustees take legal title to the property for the benefit of the association**.
>
> **Since no Pennsylvania statute authorizes an unincorporated association to take title to property in its own name, it would be patently unreasonable to conclude that a Pennsylvania unincorporated association could nonetheless be considered the "owner" of property merely because the association's name appears on the document by which property is conveyed.**

Krumbine v. Leb. Cnty Tax Claim Bureau, 663 A.2d 158, 160 (Pa. 1995) (emphasis added). *Cf.* 10 P.S. § 21 (permitting religious societies to purchase, take, receive, and hold by deed, gift, grant, or otherwise, lands or tenements for limited purposes); *see also* 1 Doing Business in the United States § 9.03 (2021) (recognizing 10 P.S. § 21 as one of several statutes in the United States permitting unincorporated entities to hold property in statutory trusts);[4] 1 Powell on Real Property § 7.01 (same). This was the law in Pennsylvania until passage of the "Pennsylvania Uniform Unincorporated Nonprofit Association Law (15 Pa.C.S. §§ 9111 *et seq*.) ("***PUUNAL***"), which became **effective July 9, 2013**. Accordingly, prior to July 9, 2013, an unincorporated association like the Debtor **could not legally own property**, except as permitted by statutes regarding property held by religious organizations.

[4] "The courts have traditionally held that an unincorporated group is not an entity and hence that a deed to such a group, in its collective name, is a nullity. . . . Thus, the social necessity for a permissible form of collective ownership by unincorporated associations has most frequently been met by allowing the officers of any such group to take title as trustees for the group." 1 Doing Business in the United States § 9.03 (2021) (citing, among others, 10 P.S. § 21).

B. Pennsylvania law regarding property held by religious organizations at the time of creation of the Diocese of Harrisburg.

On March 3, 1868, Pope Pius IX, accepting the recommendation of the Bishops of the Second Plenary Council of "the United States of North America" and having consulted the Cardinals of the Congregation of the Propagation of the Faith, decreed:

> Wherefore, in keeping with the counsel of the afore-mentioned Cardinals, and exercising our Full Apostolic Authority, we hereby establish and constitute in the City of Harrisburg a new Episcopal see, under the care of its own Bishop, to be known henceforth as the "Diocese of Harrisburg."

At that time an unincorporated association like the Debtor could not own property (as noted above); however, "under the Act of 1855 church property was held subject to the control and disposition of lay members, but it could not be diverted from the purposes, uses and trusts imposed through its dedication for religious purposes." *Canovaro v. Brothers of Order of Hermits*, 191 A. 140, 144 (Pa. 1937).[5] The fulfillment of the trust was to be accomplished under the rules and laws of the church as governing and controlling. *Id*. (citations omitted). This concept has been visited and explained several times by the Supreme Court of Pennsylvania. *See Krauczunas*, 70 at 745–746 (concluding the defendant, the then diocesan bishop of the Diocese of Scranton, was the trustee of the legal title to the property for the exclusive use of a particular congregation, but subject to removal by the congregation); *Ryan v. Dunzilla*, 86 A. 1089, 1090 (Pa. 1913) (recognizing ownership of church property was placed in the lay members of the congregation); *Zernosky v.*

[5] "Prior to the Act of 1855 property held or acquired by a voluntary association as a religious sect, denomination or congregation to be used for religious worship or education, governed by the doctrines of any particular church, faith or denomination, was subject to the control and disposition of the congregation according to the church rules and regulations. The control vested in the lay members. It had long been a settled rule in Pennsylvania where land is conveyed for the use of a religious society, ***even though the conveyance be in trust***, that the transfer operates to vest absolute legal title in the congregation, subject to the limitation that the property may not be diverted from the uses for which it had been lawfully dedicated. This rule was predicated on the Act of February 6, 1731, 1 Sm. L. 192, Sec. 2, which conferred upon religious societies the legal capacity to hold land." *Canovaro*, 191 A. at 147 (emphasis added).

Kluchinsky, 122 A. 262, 263 (Pa. 1923) (interpreting Act of 1855 to mean church property is held by lay trustees in the manner indicated by the statute); *MacEirinas v. Chesna*, 149 A. 94, 96 (Pa. 1930) (explaining the congregation, as trustees, are active trustees in the management of the church property); *St. Peter's*, 146 A.2d at 726 (stating the bishop owns property, in trust, and "his ownership as trustee is settled by the Act of June 20, 1935, P.L. 353; 10 P.S. § 81"). This was the law in the Commonwealth of Pennsylvania until the enactment of 10 P.S. § 81 in 1935—also known as the Act of 1935.[6]

C. The Act of June 20, 1935 vested ownership and control of property in church officials.

The long-established and deeply embedded policy of entrusting church property to the laity was uprooted by the Act of June 20, 1935, which provided in relevant part:

> Whensoever any property, real or personal, has heretofore been or shall hereafter be bequeathed, devised, or conveyed to any ecclesiastical corporation, bishop, ecclesiastic, or other person, for the use of any church, congregation, or religious society, for or in trust for religious worship or sepulture, or for use by said church, congregation, or religious society, for a school, educational institution, convent, rectory, parsonage, hall, auditorium, or the maintenance of any of these, the same shall be taken and held subject to the control and disposition of such officers or authorities of such church, congregation, or religious society, having a controlling power according to the rules, regulations, usages, or corporate requirements of such church, congregation, or religious society, which control and disposition shall be exercised in accordance with and subject to the rules and regulations, usages, canons, discipline and requirements of the religious body, denomination or organization to which such church, congregation, or religious society shall belong, but nothing herein contained shall authorize the diversion of any property from the purposes, uses, and trusts to which it may have been heretofore lawfully dedicated, or to which it may hereafter, consistently herewith, be lawfully dedicated.

[6] The Amendatory Act of May 20, 1913, P.L. 442 made minor amendments to the Act of 1855 none of which are relevant to the Motion or this objection.

10 P.S. § 81. As the *Canovaro* court explained, "the Act is comprehensive enough to include all property, real or personal, of churches, congregations or religious societies acquired by gift, purchase, grant or devise." *Canovaro*, 191 A. at 146. The *Canovaro* court further explained that "by its express terms it applies to all property acquired by churches either prior or subsequent to its enactment." *Id.* Assessing the constitutionality of 10 P.S. § 81 because of its retroactive effect, the *Canovaro* court reviewed decisions of the Supreme Court of Pennsylvania under the predecessors to 10 P.S. § 81 and noted:

> The question arises as to what is meant by the expressions "fee simple," "absolute ownership," "grant to the society itself," "title," and others of a similar nature, which appear throughout the cases in describing the interest of the congregation in church property. Do they mean that the lay members took the property free of all restraints? Obviously not, since such interpretation would lose sight of the fact that they are limited in the use of the property to the purposes for which it was dedicated. All the acts, including that of 1935, prohibit "the diversion of any property from the purposes, uses and trusts to which it may have been heretofore lawfully dedicated, or to which it may hereafter be lawfully dedicated. . . ." **It is quite apparent that in effect the lay members held title merely as trustees in a limited sense** and were vested with the power of control and disposition of the church property solely in that capacity.

191 A. at 148 (emphasis added).

Having concluded the lay members of a church were vested by the Act of 1855 with an interest in church property merely as trustees, the *Canovaro* court concluded the retroactive nature of 10 P.S. § 81 was constitutional:

> Furthermore it is fair to assume that where a gift is made to a religious society with knowledge that under an existing statute the property will be controlled by the congregation as "trustees," the donor intends that in the future the right of control is to be subject to the will of the legislature in the absence of the expression of any intent to the contrary.

Canovaro, 191 A. at 150. Accordingly, the *Canovaro* court concluded the Pennsylvania General Assembly was well within its right to amend the Act of 1855 to modify who served as "trustee" over church property. Therefore, upon enactment of the 10 P.S. § 81, all property of the Debtor which theretofore had been held in trust by the laypersons constituting the Debtor was thereafter held in trust by the competent and appropriate church officials—namely, the then diocesan bishop.

D. Effect of the PUUNAL on the Charities and Welfare Act.

Upon passage of the PUUNAL, unincorporated associations were, going forward, entitled to own property; however, nothing within the PUUNAL forced an unincorporated association to change how it had structured property ownership prior to its enactment. In addition, as it relates to nonprofit associations organized for charitable purposes, the PUUNAL contains two key provisions as it relates to the Motion. First, 15 Pa.C.S. § 9115(c) provides:

> Every nonprofit association organized for a charitable purpose or purposes may take, receive and hold real and personal property as may be given, devised to or otherwise vested in the nonprofit association, in trust, for the purpose or purposes set forth in its governing principles. The managers of the nonprofit association shall, as trustees of the property, be held to the same degree of responsibility and accountability as other trustees, unless a lesser degree or a particular degree of responsibility and accountability is prescribed in the trust instrument, or unless the managers remain under the control of the members of the nonprofit association or third persons who retain the right to direct, and do direct, the actions of the managers as to the use of the trust property from time to time.

And 15 Pa.C.S. § 9115(d) fortifies the foregoing power by providing that "property of a nonprofit association committed to charitable purposes shall not, by any proceeding under Chapter 3 (relating to entity transactions) **or otherwise**, be diverted from the objects to which it was donated, granted or devised, unless and until the nonprofit association obtains from the court an order under 20 PaC.S. Ch. 77 (relating to trusts) specifying the disposition of the property." 15 Pa.C.S.

§ 9115(d) (emphasis added). Together, these provisions reflect Pennsylvania case law's very high standard for termination of a trust:

> Where an effort is made to terminate a trust because its purposes are not being carried out . . ., the burden of proving such noncompliance by clear evidence is on the moving party. There must be a persistent and consistent failure, and one that shows an utter, willful disregard of the purposes.

In re Patterson's Estate, 3 A.2d 320, 321 (Pa. 1939).

Second, 15 Pa.C.S. § 9136 expressly recognizes Canon Law and subordinates the provisions of the PUUNAL to it:

> If and to the extent canon law or similar principles applicable to a nonprofit association organized for religious purposes sets forth provisions relating to the government and regulation of the affairs of the nonprofit association that are inconsistent with the provisions of this chapter on the same subject, the provisions of canon law or similar principles shall control except to the extent prohibited by the Constitution of the United States or the Constitution of Pennsylvania.

III. Documentation of the Real Estate Trust.

The Roman Catholic Diocese of Harrisburg Real Estate Trust (the "***Real Estate Trust***") was documented by declaration of trust, on November 13, 2009. A true and correct copy of the declaration of trust for the Real Estate Trust is attached to the Kaercher Declaration as **Exhibit N** and is incorporated in this objection by reference. Consistent with Canon Law and Pennsylvania law the declaration of trust for the Real Estate Trust explains: (a) prior to the written declaration of the Real Estate Trust, the Diocesan Bishop held certain real and other property in trust for the benefit of the Roman Catholic Church, pursuant to the ecclesiastical laws of the Roman Catholic Church; and (b) the declaration of trust was intended to assure the ecclesiastical laws of the Roman Catholic Church were recognized pursuant to civil law (i.e., Pennsylvania law):

> WHEREAS, heretofore certain real property and other property of the people of God of the Roman Catholic Diocese of Harrisburg has

> been entrusted to the Diocesan Bishop, in keeping with the ecclesiastical laws of the Roman Catholic Church, for the exclusive use and benefit of the Roman Catholic Church in the Diocese of Harrisburg; and
>
> WHEREAS, the ecclesiastical laws of the Roman Catholic Church, as authoritatively interpreted and construed by the Holy See, must, in all circumstances, guide and control the disposition of the property held in trust by the Diocesan Bishop; and
>
> WHEREAS, the ecclesiastical laws of the Roman Catholic Church, as authoritatively interpreted and construed by the Holy See, must likewise, in all circumstances, assign, guide and control the rights and responsibilities of the faithful clergy, religious and lay members of the Roman Catholic Church in the Diocese of Harrisburg with respect to the property held in trust for the benefit of the Church; and
>
> WHEREAS, the ecclesiastical laws of the Roman Catholic Church, as authoritatively interpreted and construed by the Holy See, reflect and implement profound doctrinal and ecclesiastical principles rooted in and derived from the teachings of Christ, and have been established and developed over centuries of Church practice; and
>
> WHEREAS, the ability of the Church to abide by its ecclesiastical laws, as authoritatively interpreted and construed by the Holy See, is essential to the practice of the Roman Catholic faith, and is therefore essential to the exercise of its religious freedom; and
>
> WHEREAS, it is the intent of this Trust instrument that the ecclesiastical laws of the Roman Catholic Church, as authoritatively interpreted and construed by the Holy See, shall be given full effect and shall control in all cases in which those ecclesiastical laws may conflict with civil law;
>
> NOW THEREFORE, the Most Reverend Kevin C. Rhoades, Bishop of the Roman Catholic Diocese of Harrisburg, does hereby declare that he holds as Trustee all assets of the Trust . . . upon the following terms[.]

(Exh. A, at 1–2.). In other words, the written declaration of the Real Estate Trust **did not effectuate or otherwise result in a transfer of any property** from the Debtor to the Real Estate Trust; but, rather, it merely recognized in written form the trust relationship created by state statute that historically had existed since the Debtor was in existence—i.e., property was initially held in trust

by laypersons and, thereafter, by the diocesan bishop. Indeed, based upon Pennsylvania law at the time the Real Estate Trust was documented, other than as authorized by 10 P.S. § 81 and its predecessors, the Debtor **could not have owned** the property the Committee alleges was transferred to the Real Estate Trust. *See Krumbine*, 663 A.2d at 160.

Consistent with the language in the declaration of trust, and consistent with Pennsylvania law as it relates to the ability of the Debtor to own property, the deeds to the properties in the Real Estate Trust reflect they are variably held "as trustee" or "in trust" by the then-serving diocesan bishop. (*See generally* Kerwin Dec.) The language in these deeds—a matter of public record—confirm the language of the Real Estate Trust: all property within the territory of the Diocese of Harrisburg was held in trust. Accordingly, the Debtor has **never** had an ownership interest in **any** of the real property held within the Real Estate Trust.[7]

IV. Documentation of the Charitable Trust.

The Roman Catholic Diocese of Harrisburg Charitable Trust (the "***Charitable Trust***" and together with the Real Estate Trust, the "***Trusts***") was documented by declaration of trust, on November 13, 2009. A true and correct copy of the declaration of trust for the Charitable Trust is attached to the Kaercher Declaration as **Exhibit O** and incorporated in this objection by reference. Consistent with Canon Law and Pennsylvania law, the declaration of trust for the Charitable Trust explains: (a) prior to the written declaration of the Charitable Trust, the Diocesan Bishop held certain property in trust for the benefit of the Roman Catholic Church, pursuant to the ecclesiastical laws of the Roman Catholic Church; and (b) the declaration of trust was intended to assure the ecclesiastical laws of the Roman Catholic Church were recognized pursuant to civil law (i.e., Pennsylvania law):

[7] This is also reflected in the properties the Debtor disclosed in Exhibit 11.21.1 to the Debtor's Statement of Financial Affairs. (Dkt. No. 143 at 45.)

> WHEREAS, heretofore certain property of the people of God of the Roman Catholic Diocese of Harrisburg has been entrusted to the Diocesan Bishop, in keeping with the ecclesiastical laws of the Roman Catholic Church, for the exclusive use and benefit of the Roman Catholic Church in the Diocese of Harrisburg; and
>
> WHEREAS, the ecclesiastical laws of the Roman Catholic Church, as authoritatively interpreted and construed by the Holy See, must, in all circumstances, guide and control the disposition of the property held in trust by the Diocesan Bishop; and
>
> WHEREAS, the ecclesiastical laws of the Roman Catholic Church, as authoritatively interpreted and construed by the Holy See, must likewise, in all circumstances, assign, guide and control the rights and responsibilities of the faithful clergy, religious and lay members of the Roman Catholic Church in the Diocese of Harrisburg with respect to the property held in trust for the benefit of the Church; and
>
> WHEREAS, the ecclesiastical laws of the Roman Catholic Church, as authoritatively interpreted and construed by the Holy See, reflect and implement profound doctrinal and ecclesiastical principles rooted in and derived from the teachings of Christ, and have been established and developed over centuries of Church practice; and
>
> WHEREAS, the ability of the Church to abide by its ecclesiastical laws, as authoritatively interpreted and construed by the Holy See, is essential to the practice of the Roman Catholic faith, and is therefore essential to the exercise of its religious freedoms; and
>
> WHEREAS, it is the intent of this Trust instrument that the ecclesiastical laws of the Roman Catholic Church, as authoritatively interpreted and construed by the Holy See, shall be given full effect and shall control in all cases in which those ecclesiastical laws may conflict with civil law;
>
> NOW, THEREFORE, the Most Reverend Kevin C. Rhoades, Bishop of the Roman Catholic Diocese of Harrisburg, does hereby declare that he holds as Trustee all assets of the Trust . . . upon the following trust terms[.]

(Exh. B, at 1–2.) In other words, the written declaration of the Charitable Trust **did not effectuate or otherwise result in a transfer of any property** from the Debtor to the Charitable Trust; but, rather, it merely recognized in written form the trust relationship created by state statute that

historically existed since the Debtor was in existence—i.e., property was initially held in trust by laypersons and, thereafter, by the diocesan bishop. Indeed, at the time the Charitable Trust was documented, other than as authorized by 10 P.S. § 81 and its predecessors, the Debtor **could not have owned** the property the Committee alleges was transferred to the Charitable Trust. *See Krumbine*, 663 A.2d at 160.

V. There are limited tort claims in this Bankruptcy Case.

On May 6, 2020, this Court entered the *Order (I) Establishing Deadlines for Filing Proofs of Claim; (II) Approving Sexual Abuse Claim Form; (III) Approving Form and Manner of Notice; and (IV) Approving Confidentiality Procedures* (Dkt. No. 291) (the "***Bar Date Order***"), establishing, among other things, November 13, 2020 (the "***Bar Date***") as the last day for any creditor that is not a governmental unit to file a proof of claim in this bankruptcy case. (Dkt. No. 291, at 2, ¶ 4.)[8] As of November 13, 2020, the Debtor had received fifty-nine (59) unique proofs of claim relating to or arising out of childhood sexual abuse (collectively, the "***Timely-Filed Survivor Claims***"). Since November 13, 2020, the Debtor has received an additional seven (7) unique proofs of claim relating to or arising out of childhood sexual abuse (collectively, the "***Late-Filed Survivor Claims***" and together with the Timely-Filed Survivor Claims, the "***Survivor Claims***"). Out of the fifty-nine (59) Timely-Filed Survivor Claims:

(a) one (1) asserts a claim to recover a donation made by a deceased individual and, therefore, is not a Survivor Claim;

(b) one (1) asserts a claim on behalf of a deceased individual and, therefore, is not a valid Survivor Claim;

(c) at least four (4) assert claims against individuals with no relationship to the Debtor and, therefore, are not Survivor Claims against the Debtor;

[8] The Bar Date Order also provided for a robust constructive notice regime, with which the Debtor has complied. In addition, at the Committee's request, the Debtor undertook additional and other constructive notice. (Dkt. Nos. 307, 326, 910; Forrey Dec.)

(d) one (1) asserts a claim regarding conduct occurring wholly outside of the geographic territory of the Debtor;

(e) one (1) asserts a claim regarding conduct between two adults and, therefore, is not a Survivor Claim; and

(f) one (1) is asserted by an individual who previously entered into a settlement agreement with the Debtor and, therefore, is not a Survivor Claim.

In addition, one of the Late-Filed Survivor Claims has been withdrawn. While the Debtor has refrained from objecting to the foregoing Timely-Filed Survivor Claims to date, the result of the foregoing is there are fifty (50) Timely-Filed Survivor Claims and six (6) Late-Filed Survivor Claims—fifty-six (56) Survivor Claims in total—in this bankruptcy case.

VI. Substantially all of the Survivor Claims are barred by Pennsylvania law.

Under Pennsylvania law, the limitations period for claims of childhood sexual abuse has been amended a number of times, including most recently in 2019. Before 1984, minority tolling did not exist in Pennsylvania. *See Dalrymple v. Brown*, 701 A.2d 164, 166 n.3 (Pa. 1997). Thus sexual abuse claims had to be brought within the applicable limitations period (essentially, within two years), regardless of the person's age. In 1984, "infancy" was specifically added to 42 Pa.C.S. § 5533 as a tolling provision for minors, providing in relevant part:

> (b) Infancy.--If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter. As used in this subsection the term "minor" shall mean any individual who has not yet attained the age of 18.

P.L. 337, No. 67, § 1 (May 30, 1984). Section 5533 remained unchanged until 2002, when it was amended to be an independent statute of limitations, in part, providing a majority-plus-12 years limitations period for a minor to bring a civil action "arising from childhood sexual abuse":

> If an individual entitled to bring a civil action arising from childhood sexual abuse is under 18 years of age at the time the cause of action accrues, the individual shall have a period of 12 years after attaining 18 years of age in which to commence an action for damages regardless of whether the individual files a criminal complaint regarding the childhood sexual abuse.

P.L. 518, No. 86, § 1 (June 28, 2002) (SB 212, PN 2153).[9] Finally, in 2019, the limitations period in Section 5533 was amended again, giving survivors of sexual abuse until age fifty-five (55) to bring claims that accrued while they were under the age of 18:

> If an individual entitled to bring a civil action arising from sexual abuse is under 18 years of age at the time the cause of action accrues, the individual shall have a period of 37 years after attaining 18 years of age in which to commence an action for damages regardless of whether the individual files a criminal complaint regarding the sexual abuse.

See 42 Pa.C.S. § 5533(b)(2)(i) (effective Nov. 26, 2019); *see also* P.L. 641, No. 87, § 2 (Nov. 26, 2019) (HB 962, PN 2938). Importantly, for an individual's claim to be brought within any of the foregoing amendments, such claim had to be timely (i.e., not already time-barred) **as of the effective date of the amendment**. *See* P.L. 518, No. 86, § 3 ("The amendment of 42 Pa.C.S. § 5533(b) shall not be applied to revive an action which has been barred by an existing statute of limitations on the effective date of this act.");[10] P.L. 641, No. 87, § 10(1) ("The amendment or addition of 42 Pa.C.S. §§ 5533(b)(2), 5551(7) and 5552(b.1) and (c)(3) and (3.1) shall not be applied to revive an action which has been barred by an existing statute of limitations on the effective date of this section.").[11] Accordingly, anyone who was over the age of thirty (30)—i.e., age of majority plus twelve—as of November 26, 2019 did not receive the benefit of the amended

[9] When reviewing this provision in 2015, the Third Circuit specifically concluded it was not, in fact, a "tolling provision," but was "an entirely separate period of limitations for claims of childhood sexual abuse." *See Stephens v. Clash*, 796 F.3d 281, 290 (3d Cir. 2015). The Court so concluded because rather than excluding a period of time from the otherwise applicable two-year statute of limitations, Section 5533(b)(2)(i) established an entirely new period and supplanted the existing period. *See id.*

[10] *Available at* https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2002&sessInd=0&act=86.

[11] *Available at* https://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2019&sessInd=0&act=87.

statute of limitations. As a result, unless an individual had otherwise filed a timely cause of action prior to the Petition Date, anyone born before November 26, 1989 and asserting a Survivor Claim holds a time-barred Survivor Claim disallowable pursuant to section 502(b)(1). **While the Debtor has refrained from objecting to Survivor Claims on this basis, the Debtor has not waived any defenses to the Survivor Claims, including those defenses premised upon the statute of limitations.**

VII. Settlements Involving Survivor Claims Within Pennsylvania.

Immediately prior to and since the Petition Date, at least one thousand seventy-six (1,076) claims arising from childhood sexual abuse have been settled for the aggregate amount of $145,424,743 by Catholic dioceses across the Commonwealth of Pennsylvania. As a result, the average settlement value for claims within the Commonwealth of Pennsylvania has been **$135,153.11** outside of the bankruptcy process.[12] And this includes the one hundred eleven (111) claims settled by the Debtor for the aggregate amount of $12,784,450, which resulted in an average settlement value of **$115,175** for claims within the territorial confines of the Diocese of Harrisburg. Notably, substantially all of these state-wide settlements, if not all, were reached prior to the Supreme Court of Pennsylvania reversing the decision in *Rice v. Altoona-Johnstown* and during the time in which it seemed inevitable a constitutional amendment was forthcoming, purporting to remove any limitations period relating to Survivor Claims.[13] Accordingly, based upon the average settlement values within Pennsylvania—and without providing any discount for the reversal of *Rice* or subsequent changes in the status of any constitutional amendment—the likely settlement

[12] A chart summarizing the claims settled by diocese is attached to this objection as **Exhibit A** and incorporated here by reference.
[13] The constitutionality and effect of any such amendment is not conceded by the Debtor.

value of the claims asserted in the Debtor's case is **$6,449,800** to **$7,568,574.16**, assuming that all late-filed claims are deemed timely filed (which the Debtor does not concede).

VIII. The Debtor maintains, and has maintained, significant insurance coverage for Survivor Claims.

Since November 1, 1964, the Debtor has maintained significant insurance coverage for various liabilities, including liability like that asserted in the Survivor Claims. In particular, the Debtor believes it maintained insurance coverage pertinent to the Survivor Claims as follows:

Policy Period	Coverage Limits
Nov. 1, 1964–Nov. 1, 1972	$100,000/$300,000
Nov. 1, 1972–Nov. 1, 1973	$1,100,000
Nov. 1, 1973–July 25, 1978	$5,000,000
July 25, 1978–July 25, 1987	in excess of $10,000,000
July 25, 1987–July 25, 1988	$900,000
July 25, 1988–July 28, 1998	$750,000
July 25, 1998–July, 25, 2000	$1,750,000
July 25, 2000-July 25, 2011	$2,750,000
July 25, 2011-present	$4,980,000

Of all Timely-Filed Survivor Claims, no more than ten (10) fall within years where the Debtor did not maintain insurance coverage. As is evidenced by the foregoing, the Debtor maintained and continues to maintain significant insurance coverage with respect to liabilities like that asserted in the Survivor Claims.

OBJECTION

While the United States Court of Appeals for the Third Circuit has held derivative standing may be conferred upon an official committee,[14] the Third Circuit has also expressed that granting derivative standing is uncommon and "is the exception rather than the rule." *Merritt v. Cheshire Land Preservation Trust (In re Merritt)*, 711 F. App'x 83, 86 (3d Cir. 2017) (quoting *In re Balt. Emergency Servs. II, Corp.*, 432 F.3d 557, 562 (4th Cir. 2005)); *accord Weyandt v. Fed. Home Loan Mortg. Corp. (In re Weyandt)*, 544 F. App'x 107, 110 (3d Cir. 2013). The Third Circuit has not set forth the procedures necessary to be followed when seeking derivative standing; however, the Third Circuit has expressed its agreements with the approaches taken by the Second Circuit and Seventh Circuit. *Infinity Invs. Ltd. v. Kingsborough (In re Yes! Entm't Corp.)*, 316 B.R. 141, 145 (D. Del. 2004) (citing *Cybergenics*, 330 F.3d at 580). Under the guidelines provided by the Second Circuit and Seventh Circuit, the Committee in this case is **required** to: (i) demonstrate the existence of one or more colorable claims; (ii) demonstrate that the Debtor unjustifiably refused to pursue one or more colorable claims; and (iii) obtain permission from this Court to initiate the action. *Id.* Importantly, it is **the Committee's burden** to demonstrate it has satisfied these requirements. *Id.* Here, the Committee has wholly failed to meet its burden.

I. The Committee has failed to demonstrate colorable claims exist.

For a claim to be colorable, it must be a plausible claim that would survive a motion to dismiss brought under Fed. R. Bankr. P. 7012(b)(6). *In re Rosenblum*, 545 B.R. 846, 863–64 (Bankr. E.D. Pa. 2016). A plausible claim requires the plaintiff to assert "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). While the facts should be viewed in

[14] *See generally Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003).

the light most favorable to the plaintiff when determining plausibility, legal conclusions which are pled are not to be assumed as correct. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-211 (3d Cir. 2009). Here, the Committee is seeking standing to file independent complaints against the Charitable Trust and the Real Estate Trust, respectively.[15] As demonstrated below, neither Complaint asserts a colorable claim and thus, the Motion should be denied.

A. The Committee has failed to demonstrate colorable claims, pursuant to 11 U.S.C. §§ 544(b)(1) and 12 Pa.C.S. § 5104(a).

As set forth below, the Committee's claims fail under section 544(b)(1) and 12 Pa.C.S. § 5104(a), because: (i) the Committee has not demonstrated any transfers actually occurred (nor has the Committee identified what transfers it actually seeks to avoid); (ii) the Committee has failed to identify a single creditor who could bring the alleged claims; (iii) the Committee has failed to adequately plead the alleged claims; and (iv) all such claims are barred by the applicable statute of limitations.

i. The Committee fails to demonstrate any transfers actually occurred.

At the core of the express language of section 544(b) of the Bankruptcy Code as well as 12 Pa.C.S. § 5104(a) is the requirement that a transfer actually occurred or that an obligation was actually incurred.[16] The Committee has not, and cannot under any set of facts, demonstrate or meet this threshold legal requirement. As discussed at length above, the Debtor was wholly unable to own property as an unincorporated association in 2009. *See, e.g.*, *Krumbine*, 663 A.2d at 160; *Canovaro*, 191 A. 140 (Pa. 1937). In addition to the legal inability of the Debtor to own property and consequent inability to transfer such property, with respect to the Real Estate Trust, the real

[15] Since each proposed claim asserts identical causes of action and relies upon the same material statements, the causes of action asserted in each of the Complaints are collectively addressed below.

[16] It should not go without mention that the Committee has, in fact, failed to identify ***any*** transfers it seeks to avoid. Rather, the Committee has made broad conclusory statements, without evidence, that transfers occurred.

estate deeds drafted prior to the written declaration of the trust, which are and have been for years properly recorded, reflect the grantee as some variation of the Bishop in a trustee or trust capacity. Accordingly, the Debtor was wholly unable to have transferred any interest of the Debtor in property and the Committee has failed to demonstrate that the most basic threshold element of a colorable claim exists. In the absence of a transfer of the Debtor's property, the Committee has failed to demonstrate a colorable claim exists or even could exist under sections 544(b)(1) of the Bankruptcy Code and 12 Pa.C.S. § 5104(a).

ii. The Committee has failed to identify creditors entitled to bring an action under 12 Pa.C.S. § 5104(a), as required by 11 U.S.C. § 544(b)(1).

Section 544(b)(1) of the Bankruptcy Code provides, in relevant part:

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law **by a creditor holding an unsecured claim that is allowable under section 502 of this title** or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b)(1) (emphasis added). By its express terms, section 544(b)(1) of the Bankruptcy Code requires identification of an actual "creditor holding an unsecured claim that is allowable under section 502" of the Bankruptcy Code. *Lubetkin v. Sheikh (In re 40 Lakeview Drive)*, Adv. Pro. No. 16-1165 VFP, 2018 Bankr. LEXIS 4155, at *32 (Bankr. D.N.J. Sept. 6, 2018) (citing 11 U.S.C. § 544(b)(1); *In re Tzanides*, 574 B.R. 489, 511 (Bankr. D.N.J. 2017)). Neither complaint identifies a single creditor upon whose behalf the Committee seeks relief. Because the Committee has failed to identify any creditor(s) that could pursue an action pursuant to 12 Pa.C.S. § 5104(a), the Committee has failed to demonstrate a colorable claim exists. *See Burtch v. Salem Inv. Partners, III, LP (In re Parker Sch. Unifs., LLC)*, No. 19-50770, 2021 Bankr. LEXIS 2759, at *23–24 (Bankr. D. Del. Oct. 5, 2021).

iii. ***The Committee fails to adequately plead a cause of action under 12 Pa.C.S. § 5104(a).***

Rule 9(b) of the Federal Rules of Civil Procedure, as made applicable by Fed. R. Bankr. P. 7009, requires that when asserting allegations of fraud in a complaint, the circumstances giving rise to the fraud be plead with particularity. While the rule also states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally," the Third Circuit has followed, among others, the First, Fifth and Ninth Circuits in requiring that the particular details of the alleged fraud provide reliable indicia that lead to a strong inference that the fraud was committed. *See Foglia v. Renal Ventures Mgmt, LLC,* 754 F.3d 153, 155–57 (3d. Cir. 2014). "[E]nough facts from which malice might reasonably be inferred" must be pled to satisfy Fed. R. Civ. P. 9(b). *Schatz v. Republican State Leadership Comm*., 669 F.3d 50, 58 (1st Cir. 2012). The Complaints fail to meet these heightened pleading requirements.

First, as discussed above, the complaints are littered with the incorrect legal conclusion that the Trusts were populated with assets of the Debtor. Therefore, the complaints fail to identify, with specificity or otherwise, any plausible transfer which could create liability for the Debtor or Trusts.

Second, the Committee has failed to allege any facts supporting any fraudulent intent, let alone supportable badges of fraud, alleging only:

(a) transfers of all assets of the Debtor allegedly occurred;

(b) the Debtor allegedly transferred assets and retained possession and control of those assets after the alleged transfers;

(c) that the Debtor became insolvent as a result of the alleged transfers;

(d) the Debtor never received reasonably equivalent value in exchange for the alleged transfers;

(e) before alleged transfers occurred, the Debtor faced increasing threats of litigation based on widely-publicized reports of clergy sexual abuse throughout the United States;

(f) the assets in the Trusts must be used to benefit the Debtor;

(g) an out of context statement made **in 2017** regarding an unrelated trust; and

(h) another out of context statement made **in 2017** regarding individuals' concerns about protecting assets during a grand jury investigation.

As it relates to (a) through (e), as set forth in detail above, no transfers ever occurred or could have occurred, because the Debtor was legally incapable of owning property in 2009. Accordingly, these allegations regarding "badges of fraud" fail. As it relates to (e), the Committee has also failed to provide any evidence that the Debtor specifically faced increasing threats of litigation. With respect to (f), the Trusts do no more than what Pennsylvania law required under 10 P.S. § 81—in other words, the Trust merely complied with Pennsylvania law. Finally, with respect to (g) and (h), the Committee is relying on minutes of meetings that took place **eight years** after the documentation of the Trusts. Moreover, the mere statements relied upon by the Committee do not evince any fraudulent intent. In short, the Committee includes no statements or information, either from the time the Trusts were documented in the written declarations or from the subsequent twelve years, to reasonably support its claim or from which any reasonable person could infer that the Trusts were documented with malicious or fraudulent intent. Furthermore, the fact that the documenting of the Trusts merely formalized the then-existing state of both Canon Law and Pennsylvania laws along with the existence of comprehensive and robust insurance coverage for satisfaction of such claims, rebuts the Committee's unfounded conclusions of malicious intent. For the foregoing reasons, the Committee's claim under 12 Pa.C.S. § 5104(a) is not colorable.

iv. Any claims under 12 Pa.C.S. § 5104(a) are barred by the statute of limitations.

Pursuant to 12 Pa.C.S. § 5109, a claim for relief with respect to a transfer or obligation is extinguished unless an action is brought under section 5104(a)(1) (a) not later than four years after the transfer was made or the obligation was incurred or (b) if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant. 12 Pa.C.S. § 5109(1). As the Committee concedes, the trusts were documented more than four years prior to the Petition Date and, accordingly, an action could only be timely if the alleged transfers were not, and could reasonably have not been, discovered within one year of the Petition Date—i.e., if the action under 12 Pa.C.S. § 5104(a)(1) was tolled by the discovery rule. As set forth below, it was not.

As recognized by the Third Circuit, the discovery rule functions to toll the statute of limitations when the plaintiff, "despite the exercise of due diligence, is unable to know of the existence of the injury and its cause." *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991). The applicable standard is whether "the plaintiff knows, or reasonably should know" that the plaintiff has been injured and that the injury has been caused by another's conduct. *See Oshiver v. Levin*, 38 F.3d 1380, 1386 (3d Cir. 1994); *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471–72 (Pa. 1983) ("We hold, therefore, that the 'discovery rule' exception arises from the inability, despite the exercise of diligence, to determine the injury or its cause, not upon a retrospective view of whether the facts were *actually* ascertained within the period." (emphasis in original)). As the Supreme Court of Pennsylvania has explained:

> As the discovery rule has developed, the salient point giving rise to its application is the inability of the injured, despite the exercise of reasonable diligence, to know that he is injured and by what cause. We have clarified that in this context, reasonable diligence is not an absolute standard, but is what is expected from a party who has been given reason to inform himself of the facts upon which his right to

> recovery is premised. As we have stated: There are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence. **Put another way, the question in any given case is not, what did the plaintiff know of the injury done him? But, what might he have known, by the use of the means of information within his reach, with the vigilance the law requires of him?** While reasonable diligence is an objective test, it is sufficiently flexible to take into account the differences between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question. **Under this test, a party's actions are evaluated to determine whether he exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interest and the interest of others.**

Fine v. Checcio, 870 A.2d 850, 858–59 (Pa. 2005) (emphasis added). Here, the Committee cannot demonstrate that any reasonable person did not have before them sufficient information to start the running of the limitations period well over a year before this case was commenced.

In an attempt to fit within the tolling provisions of 12 Pa.C.S. § 5109, the Committee baldly (and incorrectly) asserts that creditors lacked access to the Debtor's financial records and there were no other facts, conditions, or circumstances knowable to the Debtor's creditors that would have caused a reasonable person to inquire regarding the Trusts. This statement belies reality, because: (a) all persons are charged with knowledge of the law; (b) the ownership status of all assets in the Real Estate Trust are a matter of public record; and (c) the Debtor has regularly and consistently made its financials accessible.

First, all parties are imputed with knowledge of the law. *County of Lehigh v. Lerner*, 475 A.2d 1357, 1359 (Pa. Cmwlth. 1984) (stating it is an ancient legal maxim that all of us are presumed to know the law). As set forth at great length above, it has long been the law in Pennsylvania that (a) unincorporated associations generally could not own property and (b) property of unincorporated religious associations was held in trust, solely for religious

purposes. *See generally Canovaro*, 191 A. 140 (Pa. 1937); *Krumbine*, 663 A.2d at 160. Accordingly, all creditors are imputed with the knowledge that the Debtor could not generally hold property and was only permitted, as a religious organization, to have property held in trust for its benefit.

Second, as it relates to the Real Estate Trust, the manner in which the real property is titled has been a matter of public record since the deeds conveying the properties were recorded. Accordingly, all creditors of the Debtor are charged with knowledge of the contents of the deeds available in the public record. 21 P.S. § 357; *see also Brandmeier v. Pond Creek Coal Co.*, 67 A. 951, 952 (Pa. 1907) (stating "both parties had access to the public records, had equal opportunity to know what they contained, and were equally affected with constructive notice" regarding how land was titled); *Salter v. Reed*, 15 Pa. 260, 263 (1851) ("The object of the recording acts is to give public notice in whom the title to real estate resides"); *Weik v. Estate of Brown*, 794 A.2d 907, 911 (Pa. Super. 2002) ("Clearly, the recording statute has been given effect beyond determining priority of title. It has been interpreted to give notice to the public of title transfer and the contents of a deed."). Each deed to property within the Real Estate Trust demonstrates that it is **not** held in the name of the Debtor; rather, each deed demonstrates each property is held in trust. (*See generally* Kerwin Dec.) Therefore, all creditors of the Debtor had knowledge that the Debtor did not own any of the assets in the Real Estate Trust.

As it relates to the Charitable Trust, since at least 2018, audited financials of the "Roman Catholic Diocese of Harrisburg Charitable Trust and Affiliates" have been made available on Diocese of Harrisburg's website for the public access and review. These financials clearly disclose:

> The accompanying consolidated financial statements of the Roman Catholic Diocese of Harrisburg Charitable Trust and Affiliates include the assets, liabilities, net assets, and financial activities of the Roman Catholic Diocese of Harrisburg Charitable Trust

> ("Charitable Trust"), Diocesan Savings and Loan Fund ("Savings and Loan Fund"), Roman Catholic Diocese of Harrisburg Irrevocable Trust ("Irrevocable Trust"), Harrisburg Catholic Administrative Services, Inc. ("HCAS"), Roman Catholic Diocese of Harrisburg Real Estate Trust ("Real Estate Trust"), Kolbe Catholic Publishing Associates ("Catholic Witness') (collectively, the "Diocesan Administrative Entities or DAE").

A true and correct copy of the most recent financials posted on the website as of December 21, 2018 are attached to the Kaercher Declaration as **Exhibit M** and is incorporated in this paragraph by reference. Moreover, financial information is annually published in "The Catholic Witness" ("***Catholic Witness***"), which is the official Catholic newspaper within the Debtor's geographic area—published twenty-four (24) times per year in print and online—and which is offered on a complimentary basis to all members of Parishes within the Debtor's geographic area. (Dkt. No. 2, ¶¶ 121–124.) Specifically:

(a) each time the financials have been presented as the financial statements of the Diocese of Harrisburg's Central Offices and Ministries;

(b) from 2009 through 2016, the financials were captioned as the financials for the "Diocesan Administrative Entities of the Diocese of Harrisburg";

(c) since 2017, the financials were captioned as the financials for the "Roman Catholic Diocese of Harrisburg Charitable Trust and Affiliates";

(d) in the April 27, 2012 issue of the Catholic Witness, the Debtor expressly noted, among other things, that "beginning with last year's statement, the assets and liabilities of Catholic Charities are accounted for separately, and not presented within the consolidated financial statements of The Roman Catholic Diocese of Harrisburg, ***Charitable Trust*** and Affiliates";

(e) in the April 17, 2012 issue of the Catholic Witness, the Debtor also expressly noted:

> Some of the amounts shown in the financial statements reflect the aggregate amounts of funds managed by HCAS. Accordingly, these amounts show up as both assets and liabilities, to reflect both the asset and corresponding obligation to parishes, schools, and affiliated corporations.

(f) in the December 21, 2018 issue of the Catholic Witness, the Debtor expressly referred to the "Diocesan Administrative Entities" as The Roman Catholic Diocese of Harrisburg Charitable Trust and Affiliates; and

(g) in each issue, Catholic Witness has provided that "the complete financial reports for the diocese, together with the independent auditor's report and notes to the financial statements, are available from Harrisburg Catholic Administrative Services, Inc. (HCAS) upon request."

(*See generally* Kaercher Dec., Exhs. A–L.) Since at least 2011, the information provided in the Catholic Witness was also posted directly to the Diocese of Harrisburg's website. (Kaercher Dec., ¶ 4.) The foregoing information discloses or makes reasonably knowable with reasonable diligence **all facts** the Committee alleges justify its asserted fraudulent transfer claim. In particular, the foregoing information discloses: (i) the assets of the Charitable Trust were within the "control" of the diocesan bishop; (ii) the Charitable Trust contained significant assets; and (iii) the assets in the Charitable Trust were benefitting, directly or indirectly, the Debtor (in addition to other entities within the Diocese of Harrisburg). In addition, as of reporting the 2017 financials, while a clerical change, all creditors were on notice that the financials reported were for the "Roman Catholic Diocese of Harrisburg Charitable Trust and Affiliates" rather than "Diocesan Administrative Entities of the Diocese of Harrisburg."[17] Moreover, the foregoing **expressly** offers to provide more information upon request. Under the circumstances, any creditor of the Debtor had **full access** to the financials of the various entities within the Diocese of Harrisburg, including the Debtor.[18]

The notice provided by the Debtor over the years in this case is distinguishable from the notice examined in *In re Archdiocese of Milwaukee*, 483 B.R. 855 (Bankr. E.D. Wis. 2012). In the

[17] A review of later financial reporting would reveal that the "Roman Catholic Diocese of Harrisburg Charitable Trust and Affiliates" are often referred to as the "Diocesan Administrative Entities of the Diocese of Harrisburg."

[18] The Court may note that nothing in the financials demonstrates a transfer occurred (because no transfers did occur). However, the financials **do** demonstrate all facts the Committee **alleges** are sufficient to support its cause of action. Accordingly, if such facts are adequate to support a cause of action, all those facts were known or reasonably knowable. Therefore, the discovery rule built into 12 Pa.C.S. § 5109 does not save the Committee's alleged claims from being time-barred.

Milwaukee case, the court was faced with determining whether a similar statute of limitations barred the claims seeking to avoid transfers from a specific account to parishes and schools. *Id. at* 862. Because the alleged transfer occurred outside the four-year lookback period, the *Milwaukee* court examined whether the claims were timely under the "discovery rule." *Id.* In examining the timeliness of the claims under the "discovery rule," the *Milwaukee* court noted that the Debtor's financials reflected that the account in question was closed, but would not necessarily lead a creditor to know it was transferred. *Id.* at 864. Nevertheless, the *Milwaukee* court explained "at bottom, the inquiry is whether an unsecured creditor of the Debtor reasonably could have discovered the transfer" before one year before the debtor's petition date. *Id.* at 866. The *Milwaukee* court ultimately concluded it was a "close case" but did rule in favor of the Committee. *Id. (*"Although an extremely close case is presented, the Court concludes that the Committee has stated a plausible claim that a creditor reasonably could not have discovered the transfer.").[19]

This case is distinguishable because: (a) the law in Pennsylvania has always required property be held in trust for religious organizations; and (b) far more information regarding the financials of the Diocese of Harrisburg was made available to creditors of the Debtor. Rather than a single entry on consecutive financial statements like in *Milwaukee*, the Debtor regularly and repeatedly published its financial records revealing they were financial records for the Charitable Trust and other entities. Coupled with the state of law in Pennsylvania, this information permitted any creditor to know, "by use of the means of the information within [its] reach" and "with the vigilance the law requires,"[20] the Charitable Trust existed and contained significant assets utilized in the mission and ministry of the Roman Catholic Church within the Diocese of Harrisburg.

[19] It bears mentioning that the *Milwaukee* court ultimately denied the committee's derivative standing motion on other grounds. *Milwaukee*, 483 B.R. at 871.
[20] *Fine*, 870 A.2d at 858–59.

Based upon the foregoing, no creditor could hold a timely fraudulent transfer claim against either the Real Estate Trust or Charitable Trust.

B. The Committee has failed to state colorable claims to set aside or otherwise disregard the Trusts.

The Committee's claims to set aside or otherwise disregard the Trusts fail, because: (i) the Debtor is not—and legally could not be—the settlor of the Trusts; (ii) each Trust contains valid spendthrift provisions; (iii) even if the spendthrift provisions were invalidated, creditors cannot compel distributions from discretionary trusts; and (iv) the Trusts are not revocable.

i. The Debtor is not the settlor of either Trust.

The Committee asserts two claims for turnover of property of the estate, relying on (a) the so-called "self-settled trust" common law doctrine and (b) 20 Pa.C.S. § 7745. The Committee's claims fail because the Debtor was not the settlor of the Trusts. In the Committee's draft complaints, the Committee wholly relies on its erroneous assertion that the Debtor was the settlor of each Trust. (*See, e.g.*, Dkt. No. 840, at 35–36). "Settlor" is defined, in pertinent part, as "a person, including a testator, who creates or contributes property to a trust." 20 Pa.C.S. § 7703. As set forth above, the Trusts were documented in 2009. However, until 2013, the Debtor was wholly incapable of owning property in its own name, because the Debtor was an unincorporated association. *Krumbine*, 663 A.2d at 160. If the Debtor was unable to own property at the time the Trusts were documented, it follows by necessity that the Debtor could not have contributed property to the Trusts. Therefore, the Debtor was unable to be the settlor of either Trust, and the Committee's claims fail.

ii. The Trusts contain valid spendthrift provisions.

Under Pennsylvania's Uniform Trust Act (the "***UTA***"), valid spendthrift provisions prohibit creditors of a beneficiary from recovering any interest of the beneficiary from the trust:

> A judgment creditor or assignee of the beneficiary may reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means **to the extent the beneficiary's interest is not subject to a spendthrift provision.**

20 Pa.C.S. § 7741 (emphasis added). As it relates to spendthrift provisions, the UTA provides:

> **(a)** ***Validity.*** **—** A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.
>
> **(b)** ***Creation.*** **—** A trust instrument providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.
>
> **(c)** ***Effect.*** **—** A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision. Except as otherwise provided in this subchapter, a creditor or assignee of the beneficiary of a spendthrift trust may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

20 Pa.C.S. § 7742. Each of the Trusts contain valid spendthrift provisions. Accordingly, except as otherwise provided in Subchapter E of Chapter 77 of Title 20 of the Pennsylvania Consolidated Statutes (20 Pa.C.S. §§ 7741–7748), no creditor of the Debtor may reach any interest or distribution by the trustee of the Trusts before they are received by the Debtor. There are only five exceptions to the enforceability of a spendthrift provision in an irrevocable trust like the Trusts, none of which apply in this case. *See* 20 Pa.C.S. §§ 7743, 7745(2). Accordingly, the Committee has failed to state a claim to defeat the spendthrift provisions in the Trusts.

iii. Creditors may not compel distributions from discretionary trusts regardless of an enforceable spendthrift provision.

Even assuming the spendthrift provisions are invalid (which they are not), the UTA provides:

> Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

> (1) the discretion is expressed in the form of a standard of distribution;
> (2) the trustee has abused the discretion; or
> (3) the beneficiary is the trustee or a cotrustee of the trust.

20 Pa.C.S. § 7744(b). The exceptions to this provision do not apply in this case. *See* 20 Pa.C.S. § 7744(c). Accordingly, even if the spendthrift provisions in the Trusts are not enforceable (which is incorrect), the UTA would **still not allow** a creditor to compel a distribution from either Trust to the Debtor. This conclusion would be the same prior to the time of the written Trust declarations based on the applicable Canon Law and Pennsylvania law discussed above.

iv. The Trusts are not revocable.

The Committee describes the Trusts as revocable without citing any legal authority supporting that conclusion. The written Trust declarations, however, clearly indicate that the Trusts are irrevocable. Fortunately, the UTA also clearly defines this term as follows:

> "Revocable trust." — A trust is revocable to the extent the settlor, immediately before the time as of which the determination is made, had the power, acting without the consent of the trustee or any person holding an interest adverse to revocation, to prevent the transfer of the trust property at the settlor's death by revocation or amendment of or withdrawal of property from the trust.

20 Pa.C.S. § 7703. As discussed above, the Debtor is not a settlor of the Trusts because the Debtor made no transfer to the Trusts. But even if the Debtor is treated as settlor, the Debtor does not have any power to revoke, amend, or withdraw property from the trust without the consent of the trustee, and accordingly the Trusts are not revocable. And any argument that the Bishop, as trustee, could simply revoke the Trusts ignores the limitations imposed upon the Bishop by Canon Law. This conclusion would be the same prior to the time of the written Trust declarations based on the applicable Canon Law and Pennsylvania law discussed above.

C. The Committee's alter ego claims fail.

The Committee's alter ego claims cannot be sustained, because (i) alter ego as a remedy is not applicable to trusts under Pennsylvania law; and (ii) the Committee has failed to adequately plead the elements necessary for an alter ego claim.

i. The alter ego remedy is not applicable to trusts under Pennsylvania law.

To the Debtor's knowledge, there is **no** authority in Pennsylvania supporting application of the alter ego remedy to trusts and this Court should not create one. The Supreme Court of Pennsylvania has long held that there is a strong presumption in Pennsylvania against piercing the corporate veil. *Wedner v. Unemployment Bd.*, 296 A.2d 792, 794 (Pa. 1972). And even when piercing the corporate veil and imposing alter ego is appropriate, Pennsylvania courts have consistently held it is the shareholder—**not some other entity**—who is held liable. *Fletcher-Harlee Corp. v. Szymanski*, 936 A.2d 87, 95 (Pa. Super. 2007); *Vill. At Camelback Prop. Owners Ass'n Inc. v. Carr*, 538 A.2d 528, 532 (Pa. Super. 1988) (explaining that only shareholders may be liable for the acts of a corporation when piercing the corporate veil); *see also Rosenberg v. DVI Receivables, XIV, LLC*, 400 F. Supp. 3d 236, 251 (E.D. Pa. 2019) ("Pennsylvania courts have been hesitant to extend the concept of veil piercing, **and have strictly employed it as a means for holding those with ownership interest in a corporation liable**." (emphasis added)). It is thus unsurprising that Pennsylvania courts have concluded that where there is no ownership interest, there can be no action to pierce the corporate veil. *See Newcrete Prods. v. City of Wilkes-Barre*, 37 A.3d 7, 16–17 (Pa. Cmwlth. 2012).

On this point, *Mark Hershey Farms, Inc. v. Robinson*, 171 A.3d 810 (Pa. Super. 2017) is instructive. In *Robinson*, where an individual was the sole beneficiary and executor of an estate and used the estate's control over a corporation to incur substantial debt, the trial court held the sole beneficiary of the estate liable on the principle of piercing the corporate veil, notwithstanding

that the beneficiary was not a shareholder in the corporation. *Id.* at 813. On appeal, the *Robinson* court noted "when it is appropriate to pierce the corporate veil, it is the shareholder, and not some other entity, who is held liable." *Id.* at 816 (citations omitted). Recognizing the trial court's findings, and notwithstanding the *Robinson* court's conclusion that ample support existed in the record that the beneficiary had acted utterly irresponsibly and with a desire to shield himself from liability, the *Robinson* court concluded:

> There is, however, no legal basis to apply the concept of piercing the corporate veil to a beneficiary of an estate and hold a beneficiary of an estate liable for the debts of the estate. Such a broad rule would be contrary to the limited nature of this narrow exception to the strong presumption against piercing the corporate veil.

Id. at 816–17.

Here, there is no ownership interest between the Debtor and the Trusts. The Debtor is an unincorporated association whose members consist of approximately 230,000 Catholics within fifteen counties in the Commonwealth of Pennsylvania. While Bishop Gainer has authority over the Debtor pursuant to Canon Law and 15 Pa.C.S. § 9136, Bishop Gainer does not maintain, and no diocesan bishop before him maintained, any ownership interest whatsoever in the Debtor. Similarly, neither of the Trusts have had, or now have, any ownership interest in the Debtor, nor does Bishop Gainer have any ownership interests in the Trusts. To the contrary, since 1868 the Debtor existed as an unincorporated association and the Trusts have separately existed by statute for the religious purposes of the unincorporated association. *See generally Canovaro*, 191 A. 140 (Pa. 1937). Accordingly, there can be no alter ego remedy under Pennsylvania law.

ii. Even if the alter ego remedy was applicable to trusts (which it is not), the Committee has failed to adequately plead the elements for an alter-ego remedy.

The Supreme Court of Pennsylvania has dictated for at least half a century that "the accepted rule in Pennsylvania is that a corporation is an entity distinct from its shareholders even

if the stock is held entirely by one person."[21] *College Watercooler Grp., Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200, 207 (Pa. 1976) (citing *Barium Steel Corp. v. Wiley*, 108 A.2d 336 (Pa. 1954)). Notwithstanding the foregoing, the Supreme Court of Pennsylvania has also recognized that "the corporate veil is properly pierced whenever one in control of a corporation uses that control or corporate assets to further one's own personal interests." *Id.* Over the years, Pennsylvania courts have articulated factors that **may** justify piercing the corporate veil and imposing alter ego liability—undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, and use of the corporate form to perpetrate a fraud. *Longenecker v. Commonwealth*, 596 A.2d 1261, 1262 (Pa. Cmwlth. 1991). However, Pennsylvania courts have regularly and consistently cautioned that "Pennsylvania carries a strong presumption against piercing the corporate veil." *Robinson*, 171 A.3d at 816 (citing *Fletcher-Harlee Corp.*, 936 A.2d at 95). Because of this presumption, the corporate entity should be upheld unless specific, unusual circumstances call for an exception. *See id.* (citing *Lumax Indus., Inc. v. Aultman*, 669 A.2d 893, 895 (Pa. 1995); *see also Culbreth v. AMosa, Ltd.*, 898 F.2d 13, 15 (3d Cir. 1990) (stating Pennsylvania law requires "a threshold showing that the controlled corporation acted robot- or puppet-like in mechanical response to the controller's tugs on its strings or pressure on its buttons"). The Committee has failed to: (a) demonstrate or even allege that the Debtor acted like a puppet in mechanical response to the Trusts; or (b) otherwise make allegations detailing specific, unusual circumstances warranting an exception to the general rule.

First, the Committee alleges "the Diocese exerts sufficient control over the 2009 Trusts because the Bishop is the Trustee and controls all Trust assets." (Dkt. No. 840, at 38.) This allegation is a legal conclusion unsupported by any factual allegations and is, nevertheless, not

[21] Importantly, the Supreme Court of Pennsylvania has not opined upon the applicability of the alter ego remedy with respect to a trust, which is not an entity but, instead, is a relationship.

relevant or material (and is factually incorrect).[22] In *Lumax Industries*, the Supreme Court of Pennsylvania was faced with a similar allegation—an individual was the only person involved in the operation of a corporation. *See Lumax Indus.*, 669 A.2d at 895. The *Lumax Industries* court held that such an allegation "is irrelevant and immaterial to the cause of action," because "a corporation is to be regarded as an independent entity even if its stock is owned entirely by one person." *Id.* Along the same lines, even assuming the Committee's allegation was factually correct, it is irrelevant and immaterial to the cause of action.

Second, the Committee alleges "the 2009 Trusts are used for a singular purpose—to fund and carry out Diocesan operations." (Dkt. No. 840, at 38.) This allegation is also irrelevant and factually incorrect. The allegation is factually incorrect because each Trust has many beneficiaries. Each of the Trusts states its purpose is "to perform the functions of, and to carry out the purpose of the Roman Catholic Church, specifically in carrying out Diocesan operations within the territorial confines of the Diocese." While the Committee would have this Court equate the foregoing with **solely the Debtor**, such a construction is inconsistent the plain language of the documents and usage of the term Diocese and Diocesan within the Church and Canon Law. *See, e.g.*, Canon 368 ("Particular churches, in which and from which the one and only Catholic Church exists, are first of all dioceses, to which, unless it is otherwise evident, are likened a territorial prelature and territorial abbacy, an apostolic vicariate and an apostolic prefecture, and an apostolic administration erected in a stable manner."); Canon 369 ("A diocese is a portion of the people of God which is entrusted to a bishop for him to shepherd with the cooperation of the presbyterium . . ."); Canon 372, § 1 ("As a rule, a portion of the people of God which constitutes

[22] This allegation is factually incorrect—the diocesan bishop, currently Bishop Gainer, is the equivalent of the chief executive officer of the Debtor. Separately, the diocesan bishop is the trustee under each of the Trusts. The ***Debtor*** does not control either Trust. Rather, Bishop Gainer maintains varying levels of control and discretion, separately, over the Debtor and each Trust.

a diocese or other particular church is limited to a definite territory so that it includes all the faithful living in the territory."). Accordingly, the language in the Trusts does not state their sole purpose is to fund the Debtor and the Debtor's operations. Rather, the language in each of the Trusts states no more than what is required by Pennsylvania statute (10 P.S. § 81) and Canon Law. Consistent with the dictate mandated by Pennsylvania statute and Canon Law, the Trusts have been utilized since their origins in 1868 to, among other things, subsidize schools and parishes within the territorial confines of the Diocese of Harrisburg, provide funding for Catholic Charities of the Diocese of Harrisburg, Pennsylvania Inc., and otherwise undertake Christian charity for the benefit of those people within the territory of the Diocese of Harrisburg in furtherance of the purposes of the Roman Catholic Church and consistent with Canon Law.

Third, the Committee alleges "the Diocese claims to have limited assets of its own, thus *suggesting* that it is undercapitalized." (Dkt. No. 840, at 38 (emphasis added).) In support, the Committee cites only to the Debtor's schedules, however, the Committee makes no allegations that the Debtor **is** undercapitalized or otherwise had insufficient capital to conduct normal business operations. In fact, the Committee does not point to **any** evidence that the Debtor was not paying its creditors as of the Petition Date, that the Debtor has been unable to meet its obligations during the pendency of this case, or that the Debtor ever stated that it was undercapitalized. Accordingly, this allegation fails.

Finally, the Committee alleges "allowing the Diocese to shield itself under a fraudulent scheme from the liabilities of Survivors of sexual abuse plainly constitutes an injustice." (Dkt. No. 840, at 38.) This is a legal conclusion unsupported by any facts and is, nevertheless, insufficient to support a claim. *See Lumax Indus.*, 669 A.2d at 895 ("In order to withstand a demurrer, the pleader must state what [the defendant] allegedly did that would bring [the defendant's] actions

within the parameters of a cause of action based on a theory of piercing the corporate veil."). And, with the limited other allegations made by the Committee, this allegation standing alone is insufficient. *See Culbreth*, 898 F.2d at 14–15 ("Assuming that Pennsylvania will permit recovery on an alter-ego theory on a showing of injustice, as opposed to fraud or deceit, it is nevertheless plain that Pennsylvania . . . does not allow recovery unless the party seeking to pierce the corporate veil on an alter-ego theory establishes that the controlling corporation wholly ignored the separate status of the controlled corporation and so dominated and controlled its affairs that its separate existence was a mere sham."). Moreover, this allegation does not state what ***the Trusts*** did to warrant holding them liable for alleged actions of the Debtor.

In short, the Committee has failed to make allegations showing a colorable alter ego or piercing the corporate veil claim.

D. The Committee's claims under section 550 of the Bankruptcy Code fail because the underlying avoidance claims fail.

As set forth above, the Committee cannot meet the standard for avoidance under section 544 of the Bankruptcy Code (or any of the other sections of the Bankruptcy Code). Because the Committee's avoidance claims under the Bankruptcy Code fail, there can be no recovery under section 550 of the Bankruptcy Code. *See* 11 U.S.C. § 550(a) (limiting liability only "to the extent a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title").

E. The Committee's claims for turnover fail because the Committee's underlying claims against the Trusts fail.

As set forth above, the Committee's fraudulent transfer claims, trust claims, and alter ego claims fail. Because a turnover claim may not be used as a means to adjudicate a debtor's underlying rights in property, the Committee's turnover claims must necessarily fail. *See Phila. Entm't & Dev. Partners, L.P. v. Pennsylvania Dep't of Revenue (In re Phila. Entm't & Dev. Partners, L.P.)*, 549 B.R. 103, 144 (Bankr. E.D. Pa. 2016), *rev'd on other grounds*, 879 F.3d 492

(3d Cir. 2018) ("If a debtor does not possess a present and undisputed right to possess or use the property as of the commencement of a bankruptcy case, section 542(a) may not be used to acquire such rights.") (citations omitted).

F. The Committee has failed to identify any authority providing for termination of the Trusts.

The Committee cites 20 Pa.C.S. § 7745, seeking to compel the termination of the Trusts. Nothing in 20 Pa.C.S. § 7745 provides such a remedy.[23] Nor was the Debtor able to identify a single Pennsylvania case in which termination of a charitable trust was compelled over the objection of a trustee or beneficiary.

II. The Committee has failed to demonstrate the Debtor unjustifiably refused to pursue the claims against the Trusts.

Even if the Committee could demonstrate that its asserted claims against the Trusts are colorable (and it cannot), the Committee must also demonstrate that the Debtor unjustifiably refused to pursue those claims. *See Infinity*, 316 B.R. at 145. In assessing whether a debtor has unjustifiably refused to pursue claims, the Court must perform a cost-benefit analysis of pursuing such claims. *See In re Nat'l Forge Co.*, 326 B.R. 532, 548 (W.D. Pa. 2005) ("In determining whether a Debtor's refusal is unjustified, courts generally perform a cost-benefit analysis of the claims to determine whether the creditors' claims have colorable merit and whether, in light of the probable costs of litigation, the claims would likely benefit the estate."); *see also In re MIG, Inc.*, 2009 Bankr. LEXIS 4313, at *5 (Bankr. D. Del. Dec. 18, 2009) (a court weighing derivative standing "should assure itself that there is a sufficient likelihood of success to justify the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce"). The cost-benefit analysis must weigh the potential burden on the

[23] In fact, such a remedy would be seemingly inconsistent with 20 Pa.C.S. § 7740.3.

estate against the ability of the party requesting standing to succeed on its claims and the likely benefit of any success. *See Official Comm. of Asbestos Claimants v. Bank of N.Y. (In re G-I Holdings, Inc.)*, 2006 U.S. Dist. LEXIS 45510, at *46-47 (D.N.J. June 21, 2006) (reversing and remanding grant of derivative standing because the bankruptcy court did not conduct a cost-benefit analysis); *see also In re Wash. Mut., Inc.*, 451 B.R. 200, 266-67 (Bankr. D. Del. 2011) ("The Court is required . . . to balance the probability of success on the claim against the burden on the estate that would result from its prosecution."), *vacated in part*, 2012 Bankr. LEXIS 895 (Bankr. D. Del. Feb. 23, 2012). Importantly, the weight of authority agrees that whether a debtor's refusal is justifiable is the most important factor a court should consider. *In re Racing Servs., Inc.*, 540 F.3d 892, 900 (8th Cir. 2008) (citing *Fogel v. Zell*, 221 F.3d 955, 966 (7th Cir. 2000); *Canadian Pac. Forest Prods. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1442 (6th Cir. 1995); *La. World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 247–48 (5th Cir. 1988); *In re STN Enters.*, 779 F.2d 901, 905 (2d Cir. 1985)). And it is the **Committee's burden** to demonstrate the debtor's unjustifiable refusal to bring a claim:

> To satisfy its burden, the creditor, at a minimum, must provide the bankruptcy court with specific reasons why it believes that the trustee's refusal is unjustified. A creditor thus does not meet its burden with a naked assertion that 'the trustee's refusal is unjustified.' ***If presented with nothing more than this, the bankruptcy court may properly deny a creditor's motion without explanation. The creditor, not the bankruptcy court, has the onus of establishing that the trustee refuses to bring the creditor's claim.***

Racing Servs. Inc., 540 F.3d at 900 (emphasis added).

Courts in the Third Circuit examine the following factors when conducting a cost-benefit analysis: (a) the probability of legal success in the event the action is pursued; (b) whether the action is likely to benefit the reorganization estate; (c) financial recovery in the event of success; (d) whether appointment of a trustee or another party to bring the action would be preferable; and

(e) the cost to the estate in proceeding with the action and the terms relative to any attorneys' fees. *G-I Holdings, Inc.*, 2006 U.S. Dist. LEXIS 45510, at *40 (citing *STN Enters.*, 779 F.2d at 905-06). A court is required to make "detailed factual findings" in support of its cost-benefit analysis. *Id.* at *40-41 (citations omitted). In this case, however, far from carrying its heavy evidentiary burden, the Committee has not presented any evidence upon which this Court can undertake, with detailed factual findings, a cost-benefit analysis of the claims the Committee seeks to pursue.

A. The Committee has little likelihood of success on the claims.

As the above analysis of the Committee's claims reveals, the Committee stands little (if any) chance of success on the merits on **any** of its claims, even if the Committee, at this time, can meet the standard for defeating a motion to dismiss (which the Debtor does not believe the Committee can).

B. The Committee has not demonstrated the claims would benefit the estate.

The Committee has not set forth any analysis or evidence of the likely net result of pursuing the claims against the Trusts. The Committee's cost-benefit analysis amounts to an inaccurate recitation of the Committee's allegation of the value of the Trusts, which is unsupported by **any evidence**. Moreover, this recitation amounts to little more than an absolute best case scenario without regard to cost of litigation, likelihood of success, and recoverability of any judgment.[24]

In addition to the foregoing, the Committee has failed to address the dilutive effect of other claims that may arise out of the Committee's actions on ultimate recoveries by creditors, including Survivors. Such other claims include the potentially enormous relative expense of bringing the claims themselves but also the potentially significant claims that the Trusts would have against the

[24] The Committee's limited recitation of the benefit to the estate even misapprehends what that benefit would be—even if the Committee were successful, the greatest possible benefit to the estate would be, at most, what was purportedly transferred by the Debtor in 2009, not the gross amount contained in the Trusts today.

Debtor under Section 502(h) of the Bankruptcy Code. Indeed, the Trusts themselves could be the main beneficiary of the Committee's proposed litigation. Substantial insurance exists for the liabilities associated with the claims of the Survivors, and there are only *de minimis* non-Survivor claims against the Debtor. Accordingly, even if the Committee succeeds, the estate will not be the principal beneficiary of the proceeds of the litigation. Instead, the Trusts will recover most of the proceeds either on account of their claims under section 502(h) of the Bankruptcy Code or by virtue of the Debtor being entitled to proceeds of the litigation in excess of creditor claims (and being obligated to transfer such proceeds to the Trusts in accordance with Pennsylvania law and Canon Law). Therefore, taking into account the substantial costs and attorneys' fees likely associated with the proposed litigation, the Debtor's estate would be a net loser, even if the litigation were to succeed.

Similarly, the Committee presupposes (without legal or factual authority or evidentiary support) that the Survivors will be the direct and sole beneficiaries of any proceeds of litigation against the Trusts. In so doing, the Committee fails to account for (or even mention) that only one timely-filed, non-time-barred claim was filed against the Debtor prior to the Bar Date and the Debtor maintains significant insurance coverage for claims like those asserted by Survivors.

The Committee also fails to consider recovery-maximizing alternatives to the litigation that it proposes. The Committee states that the Debtor claims to have insufficient assets to compensate Survivors. However, as the Committee well knows, the Debtor has never made such a claim. Indeed, the Debtor stood ready to propose a plan embodying a financial settlement with the Committee with significant funding by and concessions from the Debtor, parishes and schools within the Debtor, and the Trusts. Unfortunately, unhappy with **other** sources of recovery, the Committee has trained its aim misguidedly toward the Trusts. The Committee has not and cannot

set forth any evidence that protracted and costly litigation with an extremely low likelihood of success is the value-maximizing alternative for the estate, including for its own constituency.

C. The Committee has not demonstrated the cost to the Debtor's estate.

The Committee also fails to account for the detrimental impact of the proposed litigation on the Debtor, the Debtor's estate, and prospects for a successful reorganization prospects. If the Committee were granted standing, the litigation against the Trusts would be fact-intensive, complex, and time-consuming, with the attendant increased costs to the estate (which are not quantified or even addressed by the Committee) and an inevitable delay in distributions to Survivors. Furthermore, requesting that the Debtor, or permitting the Committee, to commence a litigation threatening the very existence of the Trusts threats the "stable patrimony" of the Diocese (i.e., the juridic entity) and correspondingly threatens significantly the Debtor's ability to reorganize as a going concern. Attacking the stable patrimony of the Diocese with only an unsubstantiated benefit in sight endangers the viability of the Diocese, the Debtor, and the Debtor's reorganization to the detriment of not only the recoveries of Survivors but also those that rely on the Debtor to perform its mission and ministry on a day-to-day basis.

D. The Debtor will soon be filing a confirmable plan of reorganization.

Finally, as the Debtor has stated from the beginning of this case, the Debtor commenced this case with two objectives: (a) provide reasonable and equitable compensation to survivors; and (b) monetize the insurance assets of the Debtor for the benefit of survivors. To that end, the Debtor has continued discussions with its insurance carriers to formulate a path forward to monetize the Debtor's insurance assets. Through these discussions, the Debtor and its carriers have reached a settlement, which is embodied in a plan of reorganization and accompanying settlement agreements being finalized and expected to be filed in the very near future. The settlement contemplated by the to-be-filed plan and accompanying settlement agreements will provide for

substantial contributions from the (i) Debtor, (ii) certain related non-debtor entities, and (iii) the Debtor's insurance carriers. Once filed, if confirmed, the plan will provide compensation to Survivors in an amount that, on an average basis, greatly exceeds the current Pennsylvania state-wide settlement average, regardless of whether such Survivors hold claims disallowable as time-barred under applicable state law.[25]

In sum, even if the Committee were able to show that the estate's claims against the Trusts are colorable, it has not even attempted to demonstrate that the benefits of litigating such claims would outweigh the substantial costs associated with such litigation. In light of the facts and circumstances of this case and applicable law, the Committee cannot make such a showing, and the Debtor is fully justified in refusing to pursue such claims. As the *Milwaukee* court stated in denying the committee's motion for derivative standing in that case, "the status of this case should be much closer to a plan proposal than months, if not years, of protracted expensive litigation of dubious merit." *Milwaukee*, 483 B.R. at 870. The same is true here and, therefore, this Court should deny the Motion.

[25] The Debtor is aware the Committee has filed a plan (Dkt. No. 906) (the "***Committee Plan***"). Based upon the Debtor's review, the Committee Plan appears to patently unconfirmable, and an appropriate objection reflecting as much will be forthcoming from the Debtor.

WHEREFORE, the Debtor respectfully requests that the Court deny the relief requested in the Motion and grant such other or further relief as this Court deems just and proper.

Dated: January 11, 2022
Nashville, Tennessee

Respectfully submitted,

WALLER LANSDEN DORTCH & DAVIS, LLP

/s/ Blake D. Roth

Blake D. Roth (State Bar No. 306951)
Tyler N. Layne (admitted *pro hac vice*)
511 Union Street, Suite 2700
Nashville, TN 37219
Telephone: (615) 244-6380
Facsimile: (615) 244-6804
Email: blake.roth@wallerlaw.com
tyler.layne@wallerlaw.com

-and-

KLEINBARD, LLC

Matthew H. Haverstick (State Bar No. 85072)
Joshua J. Voss (State Bar No. 306853)
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, Pennsylvania 19103
Telephone: (215) 568-2000
Facsimile: (215) 568-0140
Email: mhaverstick@kleinbard.com
jvoss@kleinbard.com

Attorneys for the Debtor and Debtor In Possession

EXHIBIT A
SETTLEMENT AMOUNTS IN PENNSYLVANIA

Diocese	Total Paid	Claims	Average	Source (last updated 5.18.21)
Harrisburg	$12,784,450	111	$115,175	https://www.fox43.com/article/news/diocese-of-harrisburg-pays-12-7-million-to-survivors-of-clergy-sexual-abuse/521-4062e8cb-546d-49b8-97a3-ca5bf15d7b9f#:~:text=News-,Diocese%20of%20Harrisburg%20pays%20%2412.7%20million%20to%20survivors%20of%20clergy,%2C%20according%20to%20Mike%20...
Allentown	$15,850,000	96	$165,104	https://www.allentowndiocese.org/press-release/final-report-independent-reconciliation-and-compensation-program
Erie	$16,600,000	134	$123,881	https://www.eriercd.org/images/sections/news/pdf/DIocese%20announces%20completion%20of%20ISRP.pdf
Greensburg	$5,908,293	72	$82,060	https://www.dioceseofgreensburg.org/news/latest/Lists/Releases/DispForm.aspx?ID=53&Source=https%3A%2F%2Fww%2Edioceseofgreensburg%2Eorg%2Fnews%2Flatest%2FLists%2FReleases%2FAllItems%2Easpx&ContentTypeId=0x010095C232AE9E203E48872DD529BEF6DC39
Philadelphia	$50,585,000	226	$223,827	https://catholicphilly.com/media-files/2020/06/Third-Interim-Report-IOC.pdf
Pittsburgh	$19,237,000	224	$85,879.46	https://diopitt.org/news/independent-mediator-awards-over-19-million-to-victims-survivorsof-childhood-sexual-abuse
Scranton	$24,460,000	213	$114,836	https://www.dioceseofscranton.org/news/independent-survivors-compensation-program-provides-assistance-to-survivors-of-abuse/report-on-the-independent-survivors-compensation-program-in-the-diocese-of-scranton/
GRAND TOTAL:	**$145,424,743**	**1076**	**$135,153.11**	