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In re: The Diocese of Camden, New Jersey, Debtor.	Case No.: 20-21257 (JNP) Chapter: 11 Honorable Jerrold N. Poslusny, Jr.

INSURERS' POST-TRIAL BRIEF IN OPPOSITION TO THE EIGHTH AMENDED PLAN OF REORGANIZATION

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Interstate Fire & Casualty Company ("Interstate"); Certain Underwriters at Lloyd's, London and Certain London Market Companies (the "London Market Insurers" or "LMI");[1] The National Catholic Risk Retention Group, Inc. ("National Catholic"); and Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America ("Century" and collectively with Interstate, LMI, and National Catholic, the "Insurers"), by and through their undersigned attorneys, hereby file this post-trial brief (the "Post-Trial Brief") in opposition to confirmation of the *Eighth Amended Plan of Reorganization* (the "Eighth Amended Plan" or the "Plan")[2] filed by the Diocese of Camden, New Jersey (the "Debtor" or the "Diocese"). Capitalized terms used but not defined herein have the meanings ascribed to such terms in the Plan. In support of the Post-Trial Brief, the Insurers respectfully state as follows:

PRELIMINARY STATEMENT

The proposed Plan should not be confirmed because it does not comply with the Bankruptcy Code. In fact, the Court's four questions raised in its letter dated December 6, 2022, puts the Plan's flaws in laser focus.[3] The Plan Proponents have sought through the Plan, Trust Distribution Procedures ("TDPs"), and the Trust Agreement to re-write the Insurers' contracts so that the Insurers will be called upon to fund excessive payments to the Abuse Claimants, a goal that also financially benefits the Abuse Claimants' attorneys who sit on the Tort Committee.

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[1] The London Market Insurers are fully known as Certain Underwriters at Lloyd's, London, Catalina Worthing Insurance Ltd. f/k/a HFPI (as Part VII transferee of Excess Insurance Company Ltd. and London & Edinburgh Insurance Company Ltd.), RiverStone Insurance (UK) Ltd. (as successor in interest to Terra Nova Insurance Company Ltd.), and Sompo Japan Nipponkoa Insurance Company of Europe Limited (f/k/a The Yasuda Fire & Marine Insurance Company of Europe Ltd.).

[2] [Dkt. No. 1725] (IC 278).

[3] The Insurers will file a separate letter on the docket contemporaneous with the filing of this Post-Trial Brief that succinctly addresses the questions raised in the Court's December 6 letter [Dkt. No. 2897] (the "Court's December 6 Letter"). The Insurers have cross-referenced sections of the Post-Trial Brief within their letter where appropriate.

Fourteen trial days at which extensive evidence was admitted have confirmed that this Plan was created as a weapon to bludgeon the Insurers into submission and subjugate them to the will of a profoundly biased Trust. The Plan cannot be confirmed for at least four, principal reasons.

First, the Plan impermissibly impairs the Insurers' rights.[4] This begins with the Insurance Assignment,[5] which itself is unclear. On the one hand, it appears to transfer only the rights to the proceeds of the policies. On the other, it appears to transfer ***all*** rights under the policies. This ambiguity alone prevents confirmation of the Plan. But in either event, the Insurance Assignment is fatally deficient. It seeks to transfer one or more benefits of the policies without all of their attendant burdens (*e.g.*, SIRs or the obligation to cooperate in the defense) – stripping the Insurers of critical rights in the process. The Bankruptcy Code, however, does not permit a debtor to split the benefits of a contract from its burdens. And for good reason. Freed of any consequences (and compensated for its expenses), the Debtor lacks any incentive to comply with its contractual obligations under the policies. Meanwhile, the Trust has ***every*** incentive – and opportunity – to massively inflate the value of Abuse Claims, putting it in a position of irreconcilable conflict with whatever policy rights it receives. Worse, the Plan Proponents seek an order from this Court blessing this re-write of the Insurers' contracts by having the Court find that this proposed structure and assignment is not a breach of the Insurers' contracts and cannot give rise to any potential insurance coverage defense in the future, irrespective of the Trust fiduciaries' conduct.

Second, and relatedly, the governance structure of the Trust violates basic principles of independence and fairness under the Bankruptcy Code.[6] The Court has already corrected noted that "there is a real danger that the Trust as currently envisioned could be biased and anything but

[4] Court's December 6 Letter, Question Number 3.
[5] Court's December 6 Letter, Question Number 2.
[6] Court's December 6 Letter, Question Number 1.

neutral, thus preventing confirmation."[7] The evidence presented at trial confirmed the Court's concerns. Every party in the Trust wielding a position of power or influence over the allowance and/or valuation of Abuse Claims was handpicked by the Tort Committee, including: the Abuse Claims Reviewer, who is responsible for initially allowing and valuing Abuse Claims; the Trust Administrator, who is responsible for governing the Trust, selecting Abuse Claims for the Verdict Value Assessment, determining whether to appeal the Verdict Value Assessment, and reducing the output from that process to a Stipulation of Judgment (for use against the Insurers); and the Trust Advisory Committee, which is charged with overseeing the Trust Administrator's progress – and his bills.

Making matters worse, the Tort Committee exercised its appointment power without even a shred of impartiality. The Tort Committee appointed itself to the Trust Advisory Committee and selected for the Abuse Claims Reviewer and Trust Administrator candidates with deep connections to the plaintiffs' bar. The Trust Administrator, for example, admitted that he and his firm have every "inten[tion] to continue to act for . . . individual plaintiff attorneys and their . . . clients, usually class actions or mass tort groups."[8] Thus, the party responsible for running the Trust and demanding coverage from the Insurers – the Trust Administrator – is not only economically incentivized to collude with Abuse Claimants to inflate claims valuations (the Trust Advisory Committee pays his bills from Trust Assets), but he is also professionally predisposed and motivated to do so (representing plaintiffs' interests is a substantial part of his business). He even

[7] *See* Court's Audio Ruling (May 31, 2022) [Dkt. No. 1722].
[8] Transcript of the Deposition of Matthew J. Dundon dated August 8, 2022 (IC 001) ("Dundon Dep. Tr."), p. 137:7-10.

failed to supplement his declaration in this case, leaving out a material engagement with a firm that specializes in representing abuse claims in cases similar to this one.[9]

Third, the Plan and TDPs are noncompliant with the Bankruptcy Code and applicable law. That is most obviously true from the Plan's failure to reserve for the Insurers' administrative expense claim in violation of Section 1129(a)(9). But the Plan also flouts the law via other means. The Plan's exculpation provision, for example, is drafted so broadly that it appears to exculpate the Debtor from any liability for the Insurers' administrative expense claims. And the judgment reduction language in the Plan is so narrow and circular that it fails to compensate the Insurers for the inter-insurer Contribution Claims impaired by the Plan's releases and injunctions. Each of these outcomes offends basic principles of due process.

Equally problematic is the claims review process under the TDPs, which violates the plain terms of Section 502 of the Bankruptcy Code.[10] Section 502(a) permits any party-in-interest to object to a claim, yet the TDPs arrogate to the Abuse Claims Reviewer the sole ability to do so. Further, the TDPs permit the allowance and payment of Abuse Claims without any showing of negligence even though Section 502(b)(1) prohibits the allowance of claims that are unenforceable under applicable law.

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[9] *See Notice of Presentment of the Official Committee of Unsecured Creditors' Application for Order Authorizing the Retention of IslandDundon as Financial Advisor to the Official Committee of Unsecured Creditors of Madison Square Boys & Girls Club, Inc., Effective as of August 8, 2022*, *In re Madison Square Boys & Girls Club, Inc.*, Case No. 22-10910-shl (Bankr. S.D.N.Y.), at Dkt. No. 161 (Aug. 26, 2022) (Pachulski Stang Ziehl & Jones' application seeking an order authorizing retention of joint venture between Dundon Advisors LLC (Matthew Dundon's firm) and Island Capital Advisor LLC). The Plan Proponents failed to disclose Mr. Dundon's application in *In re Madison Square Boys & Girls Club* even though the Insurers raised the issue in a court filing months ago. *See Insurers' Response to Plan Proponents' Request to Exclude Deposition Transcripts of Matthew Dundon and Paul Finn* [Dkt. No. 2639], p. 4 ("Dundon also applied to serve as the financial advisor for the Official Committee of Unsecured Creditors in *Madison Square*, and was ultimately retained even though neither Dundon nor the Tort Committee have ever disclosed that fact in this bankruptcy case . . . .").

[10] Court's December 6 Letter, Question Number 4.

Finally, the record now conclusively shows that the Plan was not proposed in good faith under Section 1129(a)(3). Indeed, the Debtor – who bears the shared burden of proof – offered no evidence to prove its good faith. The Debtor's only fact witnesses, Father Robert Hughes and Laura Montgomery, testified to their total lack of involvement – and interest – in any aspect of the Plan beyond obtaining a cap on the Debtor's liability and related releases. This alone is sufficient to deny confirmation.

The remainder of the evidence compels that outcome. Sworn testimony now confirms that the Tort Committee dominated the drafting of the Plan and TDPs. Once the Debtor capped its liability, it "agreed that [counsel to the Tort Committee] would take the pen in drafting the TDP"[11] – with predictable results. The Tort Committee, with the Debtor's blessing (or indifference), constructed a Plan where: the Insurers' policy rights are deposited into a Trust overseen by Abuse Claimants and run entirely by their allies; Abuse Claims are permitted and paid under TDPs that limit discovery, disregard the Federal Rules of Evidence and Civil Procedure, and prohibit the Insurers from seeking judicial review; and future coverage defenses based upon any of the foregoing are judicially declared a dead letter. It is difficult to conceive of a more thoroughly collusive, and inappropriate, use of Chapter 11. Indeed, this case is being looked at by Catholic Dioceses, other debtors and potential debtors, and tort committees throughout the United States as a template and, they hope, as future legal authority supporting similar collusive plans in other sexual abuse and mass tort bankruptcy cases.

For these reasons, and for those set forth in greater detail below, the Insurers respectfully request that this Court enter an order denying confirmation of the Plan.

[11] Trial Transcript (Nov. 16, 2022) ("Nov. 16 Trial Tr.") (Prol), p. 161:23-24.

STATEMENT OF FACTS

A. The Insurance Rights and Policies

1. General Background on the Insurance Policies

The terms of the insurance policies issued to the Debtor and (to the extent applicable) the non-Debtor Other Catholic Entities are straight-forward and, as was explained at length by Dr. Harrington from the Wharton School, allocate specified risk between the insurer and the insured.[12] If an insurer can better bear any given risk, then the insurer accepts the policyholder's transference of such risk(s) in exchange for a premium.[13] The amount of a premium generally corresponds to the proportion of risk transferred, such that the greater the risk (or the broader the coverage) the higher the premium; however, the price must also remain competitive.[14] A premium, in other words, must be both (a) low enough to attract policyholders and (b) high enough to cover expected costs and produce a profit.[15]

To balance these two, competing objectives, insurance contracts adhere to certain key principles.[16]

(1) ***First***, a policy covers only specific types of claims.[17] A commercial general liability ("CGL") policy, for example, "provides liability coverage to businesses for 'general' hazards that are not more efficiently insured under specialized coverage."[18]

[12] *Declaration of Dr. Scott E. Harrington in Opposition to Confirmation of the Eighth Amended Plan of Reorganization* [Dkt. No. 2521] (LMI 1442) ("Harrington Decl."), ¶ 12.
[13] *See* Harrington Decl., ¶ 12.
[14] *Compare* Harrington Decl., ¶ 12 *with id*. at ¶ 14.
[15] *Id.* at ¶ 12.
[16] *Cf. id.* at ¶ 14.
[17] *Id.* at ¶ 14.
[18] *Id.* at ¶ 15.

(2) ***Second***, any coverage provided is subject to the specific terms, conditions, and exclusions of the policy.[19] These naturally vary by policy but, for Commercial General Liability policies, include:

a. a self-insured retention ("SIR") or deductible,[20] which the insured is required to pay before coverage is implicated;[21]

b. limits that specify the maximum the insurer will pay (whether per occurrence, in the aggregate, or both);[22]

c. the right of the insurer to control and/or participate in the defense and settlement of claims with the cooperation of the insured;[23] and

d. the right of the insurer to consent to settlement and the obligation of the policyholder not to make voluntary payments.[24]

(3) ***Finally***, a policy is underwritten for (and provided to) a specific policyholder.[25]

Put simply, insurance contracts are written for a specific insured,[26] to cover specific harms (in type and amount),[27] within the context of a specific system for adjudicating liability,[28] and are subject to specific conditions for coverage.[29]

[19] *See id.* at ¶ 14.
[20] *Id.* at ¶ 18.
[21] *See Declaration of Romy Comiter as Direct Testimony With Regard to Motion to Approve Settlement of Controversy By and Among the Diocese and the Settling Insurers Pursuant to Fed. R. Bankr. P. 9019 and Plan Confirmation* [Dkt. 2518] (LMI 1419) ("Comiter Decl."), ¶ 46.
[22] Harrington Decl., ¶ 17.
[23] *Id.* at ¶ 16.
[24] *Id.* at ¶ 16.
[25] *Id.* at ¶¶ 24, 25.
[26] *Id.* at ¶¶ 24, 25.
[27] *Id.* at ¶¶ 14, 15.
[28] *Id.* at ¶ 15.
[29] *Id.* at ¶ 15.

Each of these elements serves a discrete purpose for both the policyholder and the insurer.[30] Some, such as fixing in advance the amount and type of claim covered, "enhance the insurability of risk"[31] generally, enabling the insurer to provide, and the policyholder to purchase, coverage.[32] Others, especially the provisions set forth below, facilitate the supply of coverage at attractive premiums, either (or both) by controlling expected costs[33] or reducing the distortion of risk from "moral hazard" and "adverse selection."[34]

A "moral hazard" arises when "the policyholder may take actions before or after a loss producing event that increase[] the potential cost of claims to the insurer," which in turn inflates "the premium needed to provide coverage."[35] Likewise, "adverse selection" occurs if "entities with greater risk of loss than contemplated by the insurer's pricing [*i.e.*, premium] are more likely to buy a given type of coverage, or buy higher limits of coverage, than those with less risk of loss."[36]

Insurance contracts combat these dangers through use of the following mechanisms. First, "CGL policies often include" an SIR or deductible.[37] SIRs and deductibles "help reduce moral hazard and adverse selection by requiring the insured to bear at least part of the cost of any claims."[38] They also "lower the premium needed to provide coverage."[39]

[30] *See id.* at ¶¶ 14, 18, 19, 21-23, 64.
[31] *Id.* at ¶ 14.
[32] *See id.* at ¶ 14.
[33] *See, e.g., id.* at ¶ 18-19.
[34] *Id.* at ¶ 13.
[35] *Id.* at ¶ 13.
[36] *Id.*
[37] *Id.* at ¶ 18.
[38] *Id.*
[39] *Id.*

Second, insurers typically require either control of the defense or the right to participate (associate) in it, including any settlements of a covered claim.[40] This "reduce[s] moral hazard and enable[s] insurers to provide coverage for indemnity and defense costs at attractive premiums"[41] by curbing otherwise competing incentives between insurer and insured.[42] Specifically, when the insurer is "responsible for defense costs and indemnity for covered claims," the insured "ha[s] much less incentive to resist [such] claims or negotiate lower settlements than the insurer"[43] – who has "significant financial incentives not to 'overpay' claimants with weak evidence of causation or less severe injury."[44] The "right to participate in or control the defense of claims that implicate coverage" enables the insurer to withstand this conflict by both managing "overall claim and defense costs" and "inhibit[ing] possible agreements between policyholders and plaintiffs that could benefit them at the insurer's expense."[45]

Third, most policies "prohibit[] the insured from assigning its rights or interests under the policy without the insurer's consent," which (among other things) mitigates the risk that an assignment will increase adverse selection and moral hazard.[46] An assignment without consent heightens the prospect of adverse selection because the assignee's characteristics may translate into a higher risk of loss than contemplated when the policy was underwritten and priced for the original insured.[47] Indeed, "the assignee could have interests that are adverse to the insurer, thereby presenting a potential for conflict and increasing the cost and difficulty of claim evaluation

[40] *See generally*, *id.* at ¶¶ 19-23.
[41] *Id.* at ¶ 21.
[42] *See id*.
[43] *Id.*
[44] *Id.* at ¶ 20.
[45] *Id.* at ¶ 23.
[46] *Id.* at ¶ 25.
[47] *Id.* at ¶ 26.

and settlement by the insurer."[48] "These issues are particularly germane when . . . the [assignee] is . . . constructed and controlled by plaintiffs."[49]

Nonconsensual assignments also elevate the risk of moral hazard. The assignee may have a greater propensity (or opportunity) to take actions that amplify "the potential frequency and severity of losses before any losses occur."[50] And the assignee's conduct post-loss may "increase the ultimate magnitude of losses and/or defense and settlement costs,"[51] either by failing to "cooperate with the insurer to help minimize the magnitude of damages, defense, and settlement costs, or even tak[ing] actions that ***inflate*** costs."[52]

Finally, non-consensual assignment has the potential to destroy a critical component of an insurance contract: the insured's "[i]ncentives to comply with policy conditions," including the duty to cooperate, and "the insurer's ability to enforce" such conditions.[53] This can "increase the insurer's risk despite other policy provisions that limit its risk or condition coverage on certain actions by the insured."[54] Anti-assignment provisions curtail all of these threats.

Altogether, insurance policies are underwritten, priced, and provided in reliance on specific expectations of the characteristics and cooperation of the insured.[55] And to ensure these expectations are realized, policies include certain contract provisions, such as SIRs, the right to control or participate in the defense, and assignment prohibitions.[56] Each provision works in concert with the others and is vital to the bargain struck between insurer and insured.[57]

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[48] *Id.* at ¶ 28.
[49] *Id.*
[50] *Id.* at ¶ 24 (emphasis removed).
[51] *Id.* (emphasis removed).
[52] *Id.* at ¶ 26 (emphasis added).
[53] *Id.* at ¶ 28.
[54] *Id.*
[55] *Id.* at ¶¶ 24-25, 49.
[56] *See id.* at ¶¶ 16, 18-25.
[57] *See id.* at ¶¶ 18-19, 21, 26-28.

2. The Debtor's Policies

The insurance policies that Century, LMI, Interstate, and National Catholic issued to the Debtor contain substantially all of these protections, in each case as set forth in greater detail below.

(a) ***Century Policies***. Insurance Company of North America ("INA") is alleged to have issued to the Debtor and the Corporations of the Diocese of Camden, New Jersey and the various Institutions and Societies owned and/or operated by the Diocese two policies effective from November 27, 1969 to November 27, 1972 (collectively, as follows, the "Century Policies")[58]: (i) a primary liability policy, with limits of $100,000 each person and $300,000 each occurrence (and in the aggregate, where applicable) (the "1969 INA Primary Policy");[59] and (ii) a first-layer excess liability policy, with limits of $10 million each occurrence (and in the aggregate, where applicable).[60]

An essential feature of the Century Policies is that they confer upon Century a duty to defend any suit against the Debtor, including the unqualified right to control the defense and settlement of any claim or suit to which the Century primary policy applies, *and* the right to

[58] (JX 0001) (primary policy); (JX 0002) (excess policy); *Declaration of Carl A. Salisbury* [Dkt. No. 2516] (PP 280) ("Salisbury Decl"), ¶ 23.

[59] The insurance coverage potentially available to the Debtor during the period from November 27, 1969 to November 27, 1972 is described in the policy. (JX 0001); Salisbury Decl., ¶ 23. After an extensive search, Century is unable to locate a complete copy of the 1969 INA Primary Policy or confirm all of its material terms; however, Century located the policy jacket for another policy that is likely the same form used for the 1969 INA Primary Policy and assumes that the 1969 INA Primary Policy includes the same insuring agreement, definitions, exclusions, and conditions of that policy. *See* (JX 0004). Century reserves all rights with respect to the 1969 INA Primary Policy, including the right to maintain that the Debtor has not satisfied its burden to demonstrate the material terms of the 1969 INA Primary Policy.

[60] *See* (JX 0002). Century, Federal Insurance Company ("Federal"), and Illinois Union Insurance Company ("IUIC") (collectively, Century, Federal, and IUIC are the "Century Insurers") issued, or are alleged to have issued various excess liability policies in the 1980s, 1990s, and 2000s, but those policies contain sexual abuse or molestation exclusions and/or would only apply in excess of at least $10 million in applicable underlying limits. *See, e.g.*, (JX 0007) – (JX 0015).

associate with the Debtor in the defense and control of any claim or proceeding with respect to the Century excess policy.[61] Separately, the Century Policies are subject to conditions which require that the Debtor provide timely written notice of an occurrence or accident, cooperate with the company, not voluntarily make any payment, assume any obligation, or incur any expense, except at its own cost, and that no action shall lie against Century until the amount of the Debtor's obligation shall have been finally determined either by judgment against the Debtor after actual trial or by written agreement of the Debtor, the claimant, and Century.[62] Both Century Policies further provide that any assignment of interest thereunder is not binding on Century absent its consent.[63]

(b) ***LMI and Interstate Policies***. Following the Century Policies (*i.e.*, on and after November 27, 1972 through at least November 27, 1985),[64] the

[61] *See* (JX 0004), at § II.A.2.a ("Defense, Settlement, Supplementary Payments") (Century, *not Diocese as the Insured*, shall "[d]efend any suit against the Insured alleging [personal injury] or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent, but the Company [*i.e.*, Century], may make such investigation, negotiation and settlement of any claim or suit as it deems expedient[.]"); (JX 0002), at "DEFENSE, SETTLEMENT AND SUPPLEMENTARY PAYMENTS" ("This policy does not apply to defense, investigation, settlement or legal expenses covered by underlying insurance, but INA shall have the right and opportunity to associate with the Insured in the defense and control of any claim or proceeding reasonably likely to involve INA. In such event the Insured and INA shall cooperate fully."). In addition, Century, under its excess policy, has the right to control the defense "[w]ith respect to any occurrence not covered by . . . underlying insurance." (JX 0002), at "DEFENSE, SETTLEMENT AND SUPPLEMENTARY PAYMENTS". Where underlying insurance ***does*** apply to the occurrence, Century instead has the right to associate in the defense. *Id.*

[62] (JX 0004), at § II.D.3-5, and 7 ("Notice of Occurrence or Accident", "Notice of Claim or Suit", "Assistance and Cooperation of the Insured", and "Action Against Company"); (JX 0002), at "CONDITION No. 3 and No. 5".

[63] (JX 0004), at ¶ E of "CONDITIONS APPLICABLE TO THE ENTIRE POLICY"; (JX 0002), at "CONDITION No. 10".

[64] Interstate and LMI provided coverage to the Debtor through November 27, 1986 and November 27, 1987, respectively; however, the Interstate and LMI policy(ies) effective on and after November 27, 1985 contained sexual misconduct exclusions. Comiter Decl., ¶ 36; Harrington Decl., ¶ 29. As such, these later policies are not discussed further herein. But for the avoidance of doubt, they still contain the critical terms highlighted in Professor Harrington's testimony and detailed at length below (*e.g.*, prohibition against non-consensual assignment). *See* Harrington Decl., ¶¶ 30, 33, 35; Comiter Decl., ¶ 35.

Debtor's insurance program with respect to LMI, and later Interstate, was constructed as follows:

(1) *SIR*. The Debtor first is responsible for an SIR for each occurrence.[65] The SIR is $50,000 for the policy periods ending on November 27, 1975, and $75,000 thereafter.[66]

(2) *LMI Layer 1*. LMI then provides the initial layer of coverage beyond the SIR, with a subscribed share of the solvent portion of 80-90% per-occurrence limits of between $125,000 and $150,000.[67] The LMI policies are excess indemnity policies.[68]

(3) *Intermediate Excess Layer*. Next, one of two insurers provides coverage excess to the preceding LMI layer.[69] Interstate provides this intermediate excess coverage, with a per-occurrence limit of $4.8 million, for the policy periods beginning November 27, 1978 and ending November 27, 1985 (collectively, the "Interstate Policies").[70] Midland Insurance Company provided the intermediate excess coverage prior to Interstate but is now insolvent.[71]

(4) *Ultimate Excess Layer(s)*. Finally, LMI provides a further level of excess coverage, which sits on top of the intermediate layer from

[65] Harrington Decl., ¶¶ 31, 34; Comiter Decl., ¶¶ 31-32, 34.
[66] Comiter Decl., ¶ 37.
[67] Comiter Decl., ¶ 37; Salisbury Decl., ¶ 24.
[68] Comiter Decl., ¶ 31.
[69] Salisbury Decl., ¶¶ 26-28.
[70] *Id.* at ¶ 28.
[71] *Id.* at ¶¶ 26-27.

Midland or Interstate.[72] LMI's ultimate excess policies, together with LMI's underlying policies, collectively are referred to herein as the "LMI Policies" (the Century Policies, the Interstate Policies, and the LMI Policies are collectively referred to herein as the "Insurance Policies" or the "Policies").

The LMI and Interstate Policies are excess indemnity policies, with no duty to defend.[73] They instead reimburse the Debtor (or other insured, as applicable) for covered payments made on account of the Debtor's legal liability for amounts in excess of the policies' attachment points, and in each case subject to the terms and conditions of the policy.[74] Therefore, an essential feature of the LMI and Interstate Policies is that pursuant to its SIR, the Debtor was self-insured for the first $75,000 of "Loss" ($50,000 for policy periods ending on or before November 27, 1975) resulting from any "occurrence" (as those terms are defined in the LMI Policies) that resulted in covered injury or damage during the policy period.[75] Once the Debtor resolves a claim it can seek indemnity from LMI and, if the claim exceeds LMI's coverage, from Interstate. Before the insured under the LMI and Interstate Policies has "the right to seek reimbursement from the applicable insurer," the insured is contractually obligated "to defend any claims, . . . to pay a deductible [the SIR] towards any judgment against them," and then "the judgment [must] exceed[] the

[72] *See* Comiter Decl., ¶¶ 42-43; Harrington Decl., ¶¶ 27-28.
[73] Harrington Decl., ¶ 31; Comiter Decl., ¶ 31. *See also* Deposition Transcript of William P. Curtis dated July 29, 2022 (LMI 1196) ("Curtis Dep. Tr."), p. 60:20-61:1.
[74] Harrington Decl., ¶¶ 30-31; Comiter Decl., ¶ 27; Curtis Dep. Tr., pp. 17:15-18:2 (Curtis explains that the LMI Policies were indemnity, meaning that "the insured would pay first and then get reimbursed by the insurance company" as opposed to a "pay on behalf of policy, where . . . the insurer would step in, defend, and pay the losses"); Deposition Transcript of Stuart Phillips dated July 29, 2022 (LMI 1187) ("Phillips Dep. Tr."), pp. 35:21-36:9.
[75] Nov. 10 Trial Tr. (Montgomery), p. 157:16-24 (testifying that Debtor is a self-insured and has been since 1970).

deductible."[76] Assuming these and other terms and conditions of the policies are met, the excess insurers indemnify the Debtor for the loss (including defense expenses) within their respective limits of liability.[77]

Further, each of the LMI Policies and the Interstate Policies, like the Century Policies, contains critical protective provisions to enforce the assumptions on which they are based.[78] The LMI Policies, among other things, require the Debtor to first exhaust its applicable SIR(s),[79] permit LMI to associate in the defense with the Debtor's cooperation,[80] and prohibit any assignment without LMI's consent.[81] The Interstate Policies, which follow form to the underlying LMI Policies, are substantially similar[82] (occasionally with minor alterations, *e.g.*, granting to Interstate the right to "participate," rather than "associate," in the defense).[83]

Because the LMI and Interstate Policies are excess indemnity policies, the identity and actions of the insured (who is responsible for the defense) are particularly important.[84] Indeed, the

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[76] *Memorandum Decision* entered on August 12, 2022 [Dkt. No. 2226], p. 2.
[77] Harrington Decl., ¶¶ 30-31; Comiter Decl., ¶ 27. A chart identifying the policy numbers of each of the Insurance Policies, the relevant policy periods, and limits can be found in the *Amended Memorandum of Law in Support of Joinder by Interstate Fire & Casualty Company to Debtor's Motion for Entry of an Order Approving Settlement Agreement* [Dkt. No. 1290], p. 12 of 32.
[78] *See supra* note 55-57. *See also* Comiter Decl., ¶ 27.
[79] Comiter Decl., ¶ 46.
[80] Harrington Decl., ¶ 35; Comiter Decl., ¶ 46; Phillips Dep. Tr., pp. 32:24-33:10 (discussing that LMI should be notified of claims through the Service Organization and have the opportunity to associate in the defense).
[81] Harrington Decl., ¶ 30. *See also* (JX 0036) Package Policy Nos. SL 3759/SCL 5778, effective November 27, 1980 to November 27, 1983 [Dkt. No. 1293-4], p. 26; Comiter Decl., ¶ 46; Curtis Dep. Tr., pp. 18:24-19:5, 30:23-31:21 (Curtis testified that the LMI Policies required the use of a Service Organization and that the Service Organization would manage correspondence, maintain a file, analyze and assess the claims, manage the expenses of a case, maintain all the financial records, and pay the defense counsel statements).
[82] Harrington Decl., ¶ 30.
[83] *Compare id.* at ¶ 33 ("[Interstate] at its own option may, but is not required to, participate in the investigation, settlement or defense of any claim or suit against the insured.") *with id.* at ¶ 35 ("[. . .] [LMI] shall have the opportunity to be associated with the Assured in the defense of any claims . . . in which case the Assured and [LMI] shall cooperate to the mutual advantage of both.") (internal citations and quotations omitted).
[84] *See* Harrington Decl., ¶¶ 28, 43, 45, 61; Phillips Dep. Tr., pp. 39:4-40:15 ("The Diocese would retain defense counsel for any matters that were litigated.").

LMI and Interstate Policies "were underwritten and priced under the assumption" that the Debtor would undertake a vigorous defense against claims,[85] and include incentives for that purpose.[86] This is especially true for pending claims (i.e., claims that have not yet been settled or adjudicated), the resolution of which "depend[s] on the investigation, defense, negotiation, and settlement of the claim."[87]

(c) ***National Catholic Policies.*** National Catholic is alleged to have issued to the Diocese certain sexual misconduct coverage, coverage which has been continuously renewed and is currently in place. Such coverage had a $750,000 limit for each loss and a $750,000 aggregate limit of coverage for all losses, as well as an SIR of $250,000 for each loss.[88]

National Catholic's coverage is claims-made, rather than occurrence based, and is on an indemnity basis such that once the Debtor resolves a claim it can seek indemnity from National Catholic if the amount exceeds the SIR.[89] Furthermore, under the applicable policy, "[i]t is the sole duty of the [Diocese] to investigate, settle, defend and appeal any claim under this policy, and [National Catholic] shall not be required to assume charge of the settlement or defense of any

[85] Harrington Decl., ¶ 64; Phillips Dep. Tr., pp. 40:11-15, 74:13-75:25 (stating that the Debtor would defend claims and retain counsel under the LMI Policies); Curtis Dep. Tr., p. 12:4-8 (affirming that as a self-insured, the Debtor defended itself and was in charge of its own defense).
[86] *See* Harrington Decl., ¶ 49. *See also* Trial Transcript (Nov. 17, 2022) ("Nov. 17 Trial Tr.") (Harrington), p. 148:5-14; *supra* note 55. *See also* Curtis Dep. Tr., p. 12:9-22 (Curtis testifying that the self-insurance structure permitted a "more efficient" way for the Debtor to handle claims themselves and "get better outcomes").
[87] Harrington Decl., ¶ 27. *See also id*. at ¶¶ 45, 63-64.
[88] *Stipulation And Consent Order By And Among The Debtor, St. Mary's Church Gloucester, The Official Committee Of Tort Claimant Creditors, And Crystal Martrell Gibbs Regarding Relief From Stay And Related Issues* [Dkt No. 2620], ¶ D; *Objection Of The National Catholic Risk Retention Group, Inc. To The Debtor, St. Mary's Church Gloucester, The Official Committee Of Tort Claimant Creditors, And Crystal Martrell Gibbs' Application For Entry Of Stipulation And Consent Order Regarding Relief From Stay And Related Issues* [Dkt No. 2441], Exhibit A ("TNCRRG Policy").
[89] TNCRRG Policy, Self-Insured Retention Form.

claim made against the [Diocese]."[90] In the event National Catholic elects "to associate with the [Diocese] in the defense and control of any claim …, the [Diocese] and [National Catholic] shall cooperate in all things in the defense of such claim."[91] Lastly, "[i]f any claim seeks damages that exceed or appear reasonably likely to exceed the [SIR], then . . . upon written request from [National Catholic], the [Diocese] shall tender such portion of the [SIR] as [National Catholic] may deem necessary to pursue or complete the defense or settlement of such claim."[92]

3. Claims for Which the Debtor is Not Insured

The Debtor is responsible for all claims where the abuse occurs in uninsured periods, uncovered claims, amounts that it assumed under SIRs, and any insolvent share (including liability attributable to Midland, the 10-20% co-order that subscribed to the LMI layer of the Package Policies, and any subscribed amounts by insolvent London Companies).[93] For instance, the Debtor "does not believe it had insurance coverage for any claims that occurred before November 27, 1969."[94] At least 63 Proofs of Claim ("POCs"), 18% of the 345 total POCs, fall in uninsured periods for which the Debtor is solely responsible.[95] Proofs of Claim alleging abuse during policy periods where the policy contains a molestation exclusion or where the claim falls within an SIR would also be the responsibility of the Debtor.

[90] TNCRRG Policy, Self-Insured Retention Form, § II.A.1.
[91] TNCRRG Policy, Self-Insured Retention Form, § II.A.1.
[92] TNCRRG Policy, Self-Insured Retention Form, § II.A.2.b.
[93] Comiter Decl., ¶¶ 33, 117, 130.
[94] *See Eighth Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Describing Eighth Amended Chapter 11 Plan of Reorganization* [Dkt. No. 1724] (LMI 1056) (IC277) (the "Eighth Amended Disclosure Statement" or the "Disclosure Statement"), p. 35.
[95] (*See* PP 082) (showing at least 63 Proofs of Claims for which alleged abuse is stated to have ended prior to 1969 when Debtor admits it had no coverage.)

B. The Debtor's Prepetition History with Sex Abuse Claims

The Debtor and its Parishes have been faced with claims arising from the abuse of minors since prior to 1990.[96] Over the years, the Debtor litigated and/or settled these claims, including by asserting New Jersey's statute of limitations, and Doctrine of Charitable Immunity,[97] and by challenging the merits of the claim.[98] From 1990 to 2019, the Debtor settled approximately 99 claims asserted by individuals who claimed that they were abused as minors by priests and employees of the Debtor totaling approximately $10,120,000 (*approximately $102,222 per claim*).[99]

On December 1, 2019, amendments to New Jersey's statute of limitations (the New Jersey Child Victim's Act or the "CVA") went into effect opening a two-year revival period for individuals to assert civil claims of child abuse regardless of when it is reported to have occurred, and to file claims against institutions and individuals, even if those claims had already expired and/or were dismissed because they were filed late.[100] The new law also expanded the statute of limitations for victims to bring claims of child sexual abuse to age 55 or until seven years from the time that an alleged victim became aware of his/her injury, whichever occurs later.[101]

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[96] *See* Declaration of Katheryn R. McNally [Dkt. No. 2517] (PP 0281) ("McNally Decl."), ¶ 35.
[97] *See Park v. Tsiavos*, 679 Fed. App'x 120, 122-23 (3d Cir. 2017) (under New Jersey's charitable immunity statute, "an entity qualifies for charitable immunity when it '(1) was formed for nonprofit purposes; (2) is organized exclusively for religious, charitable or educational purposes; and (3) was promoting such objectives and purposes at the time of the injury to plaintiff who was then a beneficiary of the charitable works.'") (internal citation omitted).
[98] Comiter Decl., ¶ 48.
[99] Eighth Amended Disclosure Statement, p. 35; Comiter Decl., ¶ 70; Trial Transcript (Nov. 10, 2022) ("Nov. 10 Trial Tr.") (Montgomery), pp. 160:25-162:1.
[100] *See* Eighth Amended Disclosure Statement, p. 35; New Jersey Child Victims Act, New Jersey Senate Bill No. 477 ("S477").
[101] *See* Eighth Amended Disclosure Statement, p. 35; New Jersey Child Victims Act, New Jersey Senate Bill No. 477 ("S477").

On June 15, 2019, the Debtor, along with several other dioceses, established the Independent Victim Compensation Program ("IVCP").[102] The IVCP was designed to fund the settlement of Abuse Claims by minors against priests of the participating dioceses regardless of whether they fell within the statute of limitations. The program was administered by Kenneth Feinberg and Camille Biros, two noted independent victims' compensation experts who previously had administered a number of similar programs for the Catholic Dioceses in New York and Pennsylvania.[103] The IVCP Administrators acted independently in evaluating and compensating individual sexual abuse claims.[104]

Through the IVCP Administrators, an additional seventy-one claims were resolved with payments totaling $8,102,500 (*average claim settled for approximately $114,000*) before the Debtor suspended its participation in the operation of the IVCP.[105] The cost to the Debtor of implementing and administering the IVCP was approximately $900,000.[106]

The Debtor's CFO, Mrs. Montgomery, testified that the Debtor spent $8 million prepetition on coverage counsel to recover less than $2 million for sexual abuse claims from LMI in coverage

[102] The Roman Catholic Archdiocese of Newark and the Dioceses of Metuchen, Paterson and Trenton also participated in the IVCP. Eighth Amended Disclosure Statement, p. 36. Comiter Decl., ¶ 50; McNally Decl., ¶ 51; Trial Transcript (Nov. 9, 2022) ("Nov. 9 Trial Tr.") (Hughes), p. 60:4-10.
[103] Mr. Feinberg and Ms. Biros also have administered similar programs for the September 11th Victim Compensation Fund, the Hokie Spirit Memorial Fund (Virginia Tech shootings), Deepwater Horizon/BP oil spill fund, the Penn State abuse claims, Aurora, Colorado shooting victim relief fund, The Newtown-Sandy Hook Community Foundation, the One Fund (2013 Boston Marathon bombings), and the Archdiocese of New York Independent Reconciliation and Compensation Program. Eighth Amended Disclosure Statement, p. 36.
[104] *See* Eighth Amended Disclosure Statement, p. 36.
[105] Eighth Amended Disclosure Statement, p. 36; Comiter Decl., ¶ 76; Trial Transcript (Oct. 17, 2020 – PM) ("Oct. 17 PM Trial Tr.") (Wilen), p. 61:19-22.
[106] *See* Nov. 10 Trial Tr. (Montgomery), pp. 110:24-112:13.

litigation.[107] The Debtor was aware of the complexity and cost of coverage litigation, and the range of coverage defenses available to insurers for sexual abuse claims from this effort.[108]

No case filed against the Debtor pre-petition went to a jury or resulted in a jury verdict against the Debtor.[109]

C. The Debtor's Bankruptcy Filing

On October 1, 2020 (the "Petition Date"), the Debtor filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, commencing the case captioned *In re The Diocese of Camden, New Jersey*, United States Bankruptcy Court for the District of New Jersey, Case No. 20-21257 (JNP) (the "Bankruptcy Case").[110] The Debtor commenced the Bankruptcy Case because: (i) the IVCP drained the line of credit the Debtor had with PNC Bank; (ii) COVID caused church revenue to plummet; and (iii) 55 lawsuits were filed against the Debtor following the opening of the CVA.[111]

1. The Bar Date Order

Two weeks later, on October 14, 2020, the Debtor moved to establish a bar date for Abuse Claims and an order approving a form of Proof of Claim.[112] The form did not require an Abuse

[107] *Id.* at pp. 161:20-162:7 (Diocese spent $8 million in coverage litigation against LMI and recovered about $2 million).
[108] *See id.* at p. 162:10-14 (Diocese had the benefit of $8 million spent on coverage lawyers in connection with prior litigation against London Market Insurers).
[109] *See Objections and Responses to the Interstate Fire & Casualty Company's London Market Insurers', Century Indemnity Company's and AIG Insurers' First Request for Admissions June 10, 2022 in Connection with Debtor's Eighth Amended Plan of Reorganization* ("Debtor's First RFA Resp.") (IC 248), No. 12 ("the Diocese is not aware of any claims that actually went to verdict"); *id.* at No. 13 ("the Diocese is not aware of any judgments which were rendered").
[110] Nov. 9 Trial Tr. (Hughes), p. 34:23-24.
[111] *See* Nov. 10 Trial Tr. (Montgomery), pp. 110:25-111:19.
[112] [Dkt. No. 74-2].

Claimant to provide facts establishing each of the elements of an Abuse Claim against the Debtor.[113] Nor did it require Abuse Claimants to sign the form and personally attest to facts.[114]

On February 5, 2021, the Court approved the Proof of Claim form with only minor revisions after the Debtor acquiesced to changes sought by the Tort Committee that further watered down the information required.[115] After the Debtor and Tort Committee assured the Court that the Proofs of Claim submitted would be subject to strict scrutiny by a post-petition trust,[116] the Court held that "if a claimant completes the official form 410 and files it timely, the claim is entitled to *prima facie* validity" and that "all that is necessary for *prima facie* validity of a claim was a date and a location of the alleged tort."[117] On February 21, 2021, the Court set June 30, 2021, as the Bar Date for filing Proofs of Claim, and established protocols for handling the Proofs of Claim (the "Bar Date Order").[118]

2. The Proofs of Claim and Objections Thereto

On the Petition Date, there were only approximately 52 unresolved Abuse Claims pending in the tort system.[119] After years of advertising its settlement program and solicitation of claims by plaintiff lawyers, the Debtor and its advisors predicted, upon its filing, that there might be at

[113] *Century's Objection to the Terms of Proposed Bar Date Order and Form of Proof of Claim* [Dkt. No. 337] (the "Century Bar Date Order Objection"), pp. 7-8 (including more fulsome explanation of the benefits of requiring that Proofs of Claim are signed by claimants).
[114] *Id.* at pp. 7, 13-18 (including more fulsome explanation of the deficiencies in the form of the Proofs of Claim).
[115] *See* Court's Audio Ruling (Feb. 5, 2021) [Dkt. No. 399].
[116] *See The Diocese of Camden, New Jersey and The Official Committee of Tort Claimant Creditors' Joint Opposition to Century Indemnity Company's Appeal*, p. 21, *Century Indemnity Company v. The Diocese of Camden, New Jersey et al.*, United States District Court for the District of New Jersey, Case No. 21-3561 (NLK) [Dkt. No. 17] ("Each proof of claim submitted to the Bankruptcy Court will be subject to an objection process, which Century may participate in.").
[117] *Id.*; Transcript of Hearing (Feb. 5, 2021), pp. 21:5-7, 23:16-18.
[118] *Order Establishing Deadline for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof* [Dkt. No. 409].
[119] Trial Transcript (Oct. 6, 2022 - PM) ("Oct. 6 PM Trial Tr."), p. 61:17-21 (Scarcella).

most 100 Proofs of Claim generated by a Bar Date Order.[120] Yet 324 Abuse Claimants filed 345 Proofs of Claim against the Debtor for sexual abuse allegedly committed by its clerics or other employees.[121] Thus, after accounting for claims pending in the tort system and in the IVCP, the actual number of Proofs of Claim filed was almost two times what was projected.

The unexpectedly large number of new claimants that filed Proofs of Claim had never called the Debtor's hotline nor contacted the IVCP, notwithstanding the publicity of these services.[122] Furthermore, 100 of the Proofs of Claim lacked an allegation against the Debtor or made allegations inconsistent with the claims that had been resolved prior to the Bankruptcy Case.[123] The Proofs of Claim also included many filed by out-of-state law firms, which appear not to have previously represented a claimant against the Debtor in the tort system, including law firms from states as widespread as California (AVA Law Group; Andrews & Thornton) and Oregon (Pfau Cochran).[124]

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[120] According to Mr. Wilen, more claims were filed in the bankruptcy than the Debtor expected. *See* Oct. 17 PM Trial Tr. (Wilen), 62:17-24. The IVCP resolved 71 claims and another 119 were withdrawn when the IVCP operations were suspended by the bankruptcy filing. *See* Deposition Transcript of Allen Wilen dated July 20, 2022 ("Wilen Dep. Tr. II"), pp. 102:3-10, 103:23-104:2, 104:23-105:4. Had claims against the Debtor continued to be filed at the rate seen by the IVCP over its 15.5 months of operation, this would have resulted in 110 POCs for new claimants in the 9 month period between the Petition Date and the Bar Date, significantly fewer than the number that were actually filed.

[121] *Declaration of Allen Wilen, CPA in Support of Debtor's Motion for Entry of an Order Approving Settlement of Controversy by and Among the Diocese and the Settling Insurers Pursuant to Fed R. Bankr. P. 9019* [Dkt. No. 1087-3] (LMI 0014) ("Wilen 9019 Decl."), ¶ 14. If late-filed claims are counted, there are approximately 363 Proofs of Claim alleging sexual abuse on behalf of 342 Claimants. *See* (JX 0048) - (JX 0410) (Proofs of Claim).

[122] *See* Wilen Dep. Tr. II, pp. 115:24-116:15 (listing issues with claims, including that they were Boy Scouts claims, that they named priests who were not on any credibly-accused lists, and that claimants had never called the Debtor's hotline).

[123] *See Fifth Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Describing Fifth Amended Chapter 11 Plan Proposed by the Debtor-in-Possession* [Dkt. No. 1393] (IC 339) (the "Fifth Amended Disclosure Statement"), p. 76.

[124] *See* (JX 0048) – (JX 0410) (Proofs of Claim).

The Insurers timely filed objections to individual Proofs of Claim under Section 502(b)(1) of the Bankruptcy Code, including eighteen objections filed by LMI[125] and 7 filed by Century.[126] In June 2022, the Tort Committee filed an omnibus response to the Insurers' initial set of objections to individual Proofs of Claim arguing that claim objections should be adjourned until after this Court's decision on what is now the Eight Amended Plan because the claims would be handled "in an expeditious and cost effective manner" under the Plan.[127] On August 24, 2022, the Court adjourned the objections to the Proofs of Claim over Century's objection to an undetermined date, pending a decision on plan confirmation and standing, leaving even the facially defective claims untested.[128]

3. Review of Proofs of Claim

After the Bar Date, the Debtor hired the Eisner Advisory Group LLP ("Eisner") to review and value the Proofs of Claim.[129] The Eisner firm generally and Mr. Wilen specifically have extensive experience valuing claims in a myriad of different contexts.[130] Eisner used the classification and matrix values for compensating claims in the IVCP as part of its valuation.[131] In the aggregate, Eisner estimated the Diocese' claim liability at approximately $34 million.[132]

The Tort Committee hired Katheryn McNally to value the Proofs of Claims. Ms. McNally asserted that the Debtor's prior settlement history in the tort system and the IVCP were not relevant

[125] [Dkt. Nos.1547, 1548, 1604, 1613, 1634, 1644, 1646, 1749, 1750, 1752, 1753, 1949, 1951, 1952, 1954, 1972, 1986, 1987].
[126] [Dkt. Nos. 1765, 1848, 1849, 1850, 1851, 1852, 1853].
[127] *Response of the Official Committee of Tort Claimant Creditors to Objections by Certain Insurers to Survivor Claims* [Dkt. No. 1768], pp. 10-11; *see generally Diocese's Omnibus Response to Insurer Claim Objections* [Dkt. No. 2258] (arguing it would be more "cost effective" to decide claim objections under procedures established by the Eighth Amended Plan of Reorganization).
[128] *See, e.g.*, Minute Order entered on Aug. 24, 2022 related to [Dkt. No. 1750].
[129] Fifth Amended Disclosure Statement, p. 84. *See also* Oct. 17 PM Trial Tr. (Wilen), p. 65:3-12.
[130] Oct. 17 PM Trial Tr. (Wilen), pp. 26:13-27:23 ("Q: Do you have any education or training on valuing claims? A: 25-plus years of working in the bankruptcy world.").
[131] *See* Eighth Amended Disclosure Statement, p. 75; Oct. 17 PM Trial Tr. (Wilen), p. 65:3-6.
[132] Wilen 9019 Decl., ¶ 17.

and ignored them.[133] Instead she cherry picked jury verdicts in other sexual abuse cases in other states and used her selection of these values with few adjustments to value the claims.[134] The range of values she used to price allowed claims was between $1.2 million and $2.4 million,[135] resulting in an aggregate liability for the Debtor of between $398 million and $785 million.[136]

Ms. McNally had not been previously admitted as an expert on tort claims valuation in any court proceeding.[137] Her methodology is not used by anyone else in the field,[138] has not been peer reviewed,[139] and does not generate results that are subject to replication.[140] Ms. McNally instead generates dramatically higher values by applying data on jury verdicts from other defendants, in other jurisdictions, to each claim without accounting for the low probability that all but a few of them would have reached a verdict in the tort system (none pre-petition had).[141]

Moreover, Ms. McNally's opinions were purportedly based on her "experience."[142] Trial cross-examination revealed that her experience consisted of: never having been qualified as an

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[133] McNally Decl., ¶¶ 11-12, 18.

[134] *See Declaration of Marc Scarcella, M.A. as Direct Testimony With Regard to Motion to Approve Settlement of Controversy By and Among the Diocese and the Settling Insurers Pursuant to Fed. R. Bankr. P. 9019* [Dkt. No. 2513] (LMI 1395) ("Scarcella Decl."), ¶ 70 ("[T]he 36 cases included in the Potentially Comparable Settlements are, by definition, a selectively biased sample because it only includes tort resolutions that resulted in the Abuse Claimant receiving payment from an institutional defendant.")

[135] *Id.* at ¶ 51.

[136] *Id.*

[137] Trial Transcript (Oct. 12, 2022 - AM) ("Oct. 12 AM Trial Tr.") (McNally), pp. 8:24-9:1 ("Q: Ms. McNally, you have never testified as an expert witness before, have you? A: Only in deposition.").

[138] *Id.* at pp. 9:2-10:1 (McNally) ("Q: So you're the only person who's ever used that methodology, correct? A: If we're talking about the capitalized defined term from the specific report, yes.").

[139] Trial Transcript (Oct. 17, 2022 – AM) ("Oct. 17 AM Trial Tr.") (McNally), p. 80:19-22 ("Q: But I am asking, specifically, if I looked for a peer reviewed article that discussed Claro valuation methodology, I wouldn't find anything, would I? A: Correct.").

[140] *See* Comiter Decl., ¶ 15 (The Claro Valuation is a "bespoke approach developed by Ms. McNally."), ¶ 64 ("The valuation methodologies applied in the Claro Valuation are not generally accepted and are unique.").

[141] *See Declaration of Paul J. Hinton in Connection with Confirmation Hearing for Eighth Amended Chapter 11 Plan of Reorganization for the Diocese of Camden, NJ* [Dkt. No. 2651] (LMI 1438-A) ("Hinton Decl."), ¶¶ 31, 35.

[142] Oct. 17 AM Trial Tr. (McNally), p. 51:5-7 ("Q: So, as I understand it, your valuation opinion, here, is based, at least in part, on your experience, correct? A: I would say my experience informs me, yes.").

expert previously;[143] although she did not testify at trial, providing a report in the *Boy Scouts of America* bankruptcy that valued sexual abuse claims at an order of magnitude higher than Judge Silverstein ultimately found appropriate;[144] and refusing to testify to her valuation "experience" in multiple other matters as a result of confidentiality restrictions.[145]

The Insurers moved to exclude Ms. McNally's testimony on *Daubert* grounds.[146] This Court held that "The alleged flaws in the data chosen or the adjustment factors used or how they were applied do not prevent admissibility, but will affect how much weight to give [Ms. McNally's] testimony."[147]

The Insurers hired Romy Comiter and Paul Hinton to review and critique the claim valuation analysis of Ms. McNally. They each concluded that Ms. McNally dramatically overstated the value of the claims.[148] Mr. Hinton went further by showing that if one accepted Ms. McNally's base premise but made several adjustments to correct errors in how Ms. McNally applied her analysis it would generate an independent estimated valuation of the Debtor's liability of between $71 million and $91 million.[149]

Counsel to the Debtor hired Mr. Scarcella, a claims valuation expert, to conduct an independent valuation of the Abuse Claims in connection with its *Motion for Entry of an Order Approving Settlement of Controversy by and Among the Diocese and the Settling Insurers*

[143] *Id.* at pp. 8:24-9:1 ("Q: Ms. McNally, you have never testified as an expert witness before, have you? A: Only in deposition.").
[144] McNally had estimated that the total value of claims in the *Boy Scouts of America* bankruptcy was between $24.76 billion and $30.41 billion, but Judge Silverstein concluded that the aggregate value of claims was likely between $2.4 billion and $3.6 billion, or approximately ten percent (10%) of McNally's estimate. Hinton Decl., ¶ 26; *see also* Oct. 12 AM Trial Tr. (McNally), pp. 62:17-74:16, 75:4-76:15.
[145] Oct. 17 AM Trial Tr. (McNally), pp. 52:16-53:23, 54:11-20, 54:25-56:20, 57:23-59:10.
[146] *See* [Dkt. Nos. 1457, 2499, 2549]. The Insurers renewed their motion in limine to exclude Ms. McNally after she testified at trial based on further admissions she made during her trial examination. Oct. 17 PM Trial Tr., pp. 18:8-23:21.
[147] Court's Audio Ruling (Sep. 26, 2022) [Dkt. No. 2484].
[148] Comiter Decl., ¶¶ 13-16; Hinton Decl., ¶ 10.
[149] Trial Transcript (Oct. 20, 2022 – AM) ("Oct. 20 AM Trial Tr."), p. 99:8-11.

Pursuant to Fed. R. Bankr. P. 9019 (the "9019 Motion").[150] He distinguished Abuse Claimants who had previously filed lawsuits from those who first made a claim of Abuse after the Debtor announced the Bar Date for filing Proofs of Claim.[151] Mr. Scarcella valued the Proofs of Claim for which the Debtor may have been notified prior to the alleged abuse of the specific abuser's improprieties based on the expectation that they might have won a verdict in the tort system.[152] Scarcella valued the remaining claims at the Eisner IVCP levels.[153] In the aggregate, Mr. Scarcella valued the Debtor's liability for the claims between $71 million and $81 million, or between $244,000 and $296,000 for each allowed claim.[154]

4. The Insurance Coverage Adversary Proceeding

On October 21, 2020, the Debtor sued multiple insurers in an adversary proceeding captioned *The Diocese of Camden, New Jersey v. Insurance Company of North America, et. al*. (Adversary Proceeding No. 20-01573) (the "Insurance Coverage Adversary Proceeding"). In the Insurance Coverage Adversary Proceeding, the Debtor sought declaratory judgment regarding the rights, duties, and liabilities of the Insurers regarding insurance policies and certificates as they relate to coverage for Abuse Claims against the Debtor or Other Catholic Entities.[155] The Debtor filed an amended complaint on November 25, 2021, which, among other things, added the Tort Committee as a defendant.[156] The Insurers then filed answers that further informed the Debtor of their coverage defenses.[157]

[150] [Dkt. No. 1087].
[151] Scarcella Decl., ¶¶ 25-26.
[152] *Id.* at ¶¶ 75-79.
[153] *Id.* at ¶ 85.
[154] *Id.* at ¶¶ 25-26.
[155] *See* Complaint [Insurance Coverage Adversary Proceeding, Dkt. No. 1], p. 3.
[156] *See* Am. Complaint [Insurance Coverage Adversary Proceeding, Dkt. No.10].
[157] *See* [Insurance Coverage Adversary Proceeding, Dkt. Nos. 46 (National Catholic), 67 (Century), 68 (LMI), and 69 (Interstate)].

Since January 5, 2022, the Insurance Coverage Adversary Proceeding has been stayed pending a Court order determining whether to approve or deny the Insurance Settlement (as defined herein).[158]

5. The Assertion of Additional/Questionable Claims

Even though 324 non-duplicative Abuse Claims were timely filed in the Bankruptcy Case (with an additional 19 Abuse Claims filed tardily),[159] the Debtor had no prior record of approximately ***170*** of those Abuse Claims.[160] Mr. Wilen testified that he viewed these Abuse Claims with "professional skepticism" because "no one [had heard] of [them] before."[161] Mr. Wilen ultimately identified 33 Abuse Claims that failed to meet the threshold for payment and 67 that were substantially deficient,[162] for a total of approximately 100 low- or no-value Abuse Claims.[163]

Mr. Wilen's testimony is corroborated, both factually and conceptually, by substantial evidence. Most notably, the Fifth Amended Disclosure Statement retains Mr. Wilen's characterizations of the Abuse Claims, providing that "33 [Abuse Claims] were given a value of $0.00"[164] and "67 [Abuse Claims] were valued at low[] amounts, due to the fact that the proofs of claim allege inconsistent details or the allegations are not consistent with background facts."[165] Father Hughes likewise testified that he had "no basis or reason to dispute"[166] the statement in the

[158] [Insurance Coverage Adversary Proceeding, Dkt. No. 121].
[159] Fifth Amended Disclosure Statement, p. 75.
[160] Oct. 17 Trial Tr. (Wilen), p. 63:18-20.
[161] *Id.* at pp. 63:22-64:1.
[162] Fifth Amended Disclosure Statement, p. 85. *See also* Wilen 9019 Decl., ¶ 16.
[163] *See* Oct. 17 Trial Tr. (Wilen), pp. 77:12-78:8. *See also supra* notes 129-132.
[164] Fifth Amended Disclosure Statement, p. 76.
[165] Fifth Amended Disclosure Statement, p. 75.
[166] Nov. 10 Trial Tr. (Hughes), p. 94:17.

9019 Motion that "[m]any of [the Abuse Claims] are subject to coverage defenses and/or assert claims where the Diocese's liability is questionable at best."[167]

Finally, Dr. Treacy explained why questionable claims likely were asserted to begin with. She attributed a high probability of questionable claims to the fact that claimants may obtain a monetary distribution, which creates a "clear and pervasive secondary gain motive."[168] Put differently, individuals may have been motivated to file invalid Abuse Claims in the hopes of receiving a payout.[169] Dr. Treacy felt that this danger was particularly acute here as she was personally aware of individuals in Camden who were solicited by law firms to file claims after the Bankruptcy Case was filed.[170]

D. The Debtors and Insurers Reach an Agreement on an Insurance Settlement and a Plan of Reorganization Incorporating It, Designed to Resolve the Case

1. Negotiation of the Insurance Settlement

On April 7, 2021, the Debtor and the Tort Committee filed a *Joint Motion of the Diocese and the Official Committee of Tort Claimant Creditors for Entry of an Order (i) Appointing a Mediator, (ii) Referring Matters to Mandatory Global Mediation, and (iii) Granting Related Relief* (the "Mediation Motion").[171] On May 20, 2021, the Court entered an order granting the Mediation Motion and appointed former Judge Jose Linares (ret.) to mediate certain issues in the Bankruptcy Case (the "Mediation Order").[172] The Mediation Order ordered the "Mediation Parties" (as that

[167] *Id.* at p. 92:18-20. *See also id*. at pp. 92:17-94:19.
[168] *Expert Declaration of Dr. Eileen C. Treacy Regarding the Suitability of the TDP* [Dkt. No. 2523] (LMI 1440) ("Treacy Decl."), ¶ 13.
[169] *See id.* ("[I]n my expert experience as a child/adult sexual abuse evaluator, the secondary gain motives present in this case are ample reasons to suspect the existence of false claims.").
[170] Nov. 17 Trial Tr. (Treacy), pp. 67:24-68:17; 73:17-74:2 ("I know since that deposition that people I know who lived in Camden were -- and went to Catholic school were elicited or solicited by law firms to see if they had a claim, which would increase the probability of a false claim.").
[171] [Dkt. No. 562].
[172] *See Order (I) Appointing Mediator, (II) Referring Certain Matters to Mediation, and (III) Granting Related Relief* [Dkt. No. 640].

term is defined in the Mediation Order) to participate in mediation, and included the Insurers and the Debtor.[173]

The Debtor's initial efforts to reach agreement on a settlement with the Tort Committee were met with unreasonable demands ($1 billion) and a general unwillingness to negotiate.[174] As the Tort Committee became increasingly intransigent, discussion shifted to a Debtor sponsored plan supported by an insurer settlement that could be solicited directly to the Abuse Claimants, bypassing the Tort Committee's counsel.

The Debtor was aided by the Eisner firm; its defense counsel in the underlying abuse litigation, Cooper Levenson; and bankruptcy counsel, Richard Trenk.[175] Together, they analyzed the Proofs of Claim.[176] Ms. Montgomery and Mr. Wilen met with the Tort Committee about their analysis of the claims.[177]

The Insurers voluntarily participated in the mediation, which occurred over the period of several months. From July 2021 through the end of the year, the Debtor and the Insurers participated in multiple mediation sessions, including eight full days of in-person mediation

[173] Mediation Order [Dkt. No. 640].

[174] Trial Transcript (Nov. 14, 2022) ("Nov. 14 Trial Tr.") (Hughes), pp. 29:17-31:3 ("Yes, I mean, BRG originally had a conversation with me where we talked about, they were looking at numbers, you know, that started with a B, you know, instead of an M, for settlement numbers. And they thought the claims were worth a billion dollars. They were throwing out numbers just – to what we could afford to pay as a Diocese. To which I continually said, you know, this is a small Diocese. This is not your, this is not a cash flush Diocese. We're not sitting on a billion dollars in cash somewhere. It's just, it's, it was ugly in the beginning, the discussions that we had. And we were so far apart that I just didn't see any way we were going to bridge that difference.").

[175] *See, e.g.*, Trenk Isabel P.C.'s October 2021 Fee Statement [Dkt. No. 931] (IC 504); Trenk Isabel P.C.'s November 2021 Fee Statement [Dkt. No. 1030] (IC 505); Trenk Isabel P.C.'s December 2021 Fee Statement [Dkt. No. 1082] (IC 506).

[176] *See generally* Deposition Transcript of Allen Wilen dated March 4, 2022 ("Wilen Dep. Tr."), Ex. AW-6 (PP 0065-A) ("Diocese of Camden Survivor Claims Summary").

[177] Nov. 14 Trial Tr. (Wilen), p. 58:17-24 ("Q: Prior to April 11th 2022, did you attend any mediation sessions with the Tort Committee where the categorization or the valuation of abuse claims was discussed? A: Yes."); Montgomery Dep. Tr., pp. 63:12-64:5 ("In the initial session in July, when we worked on the number of claims, and the details surrounding that, we were in the same room as the counsel for the claimants -- for the tort claimants.").

sessions and additional telephone conferences with former Judge Linares in an effort to reach a global resolution to this Bankruptcy Case.[178]

As settlement discussions between the Debtor and Insurers gained traction, the Tort Committee lowered its demand. What "started [at] over a billion . . . dropped to $750,000,000. . . . . Then, ultimately, in the low one hundreds."[179]

Over the course of the fourth quarter of 2021, discussions between the Debtor and Insurers advanced and became more serious with the parties exchanging settlement agreement drafts and drafts of the Plan Documents.[180]

2. Terms of the Insurance Settlement

These mediation sessions culminated in an agreement (the "Insurance Settlement") among the Debtor, LMI, Interstate, the AIG Insurers,[181] National Catholic, and Century (the "Settled Insurers"). Pursuant to the Insurance Settlement, the Settled Insurers agreed to contribute a total of $30 million that, upon confirmation of an accompanying Chapter 11 plan, would be paid to a

[178] *See* Nov. 9 Trial Tr. (Hughes), pp. 67:5-70:1 (describing mediations and referencing demonstrative listing mediation sessions on July 28, July 29, Aug. 18, Sept. 13, Sept. 14, Sept. 20, Sept. 21, Oct. 21, and Nov. 8, 2021); Nov. 10 Trial Tr. (Montgomery), p. 134:7-9 (agreeing that Insurers were at many of the mediation sessions).

[179] Nov. 9 Trial Tr. (Hughes), p. 70:12-13.

[180] *See* Trenk Isabel P.C.'s October 2021 Fee Statement [Dkt. No. 931] (IC 504) (time entries for 10/26, 10/27 (reviewing draft settlement agreement), 10/28 (conference call with Insurers, drafting supplement to disclosure statement), and 10/29 (drafting supplement to disclosure statement) (pp. 20, 22, 23)); Trenk Isabel P.C.'s November 2021 Fee Statement [Dkt. No. 1030] (IC 505) (time entries for 11/1 (reviewing Insurers' comments to disclosure statement supplement), 11/3 (correspond with Insurers), 11/4 (telephone call between Debtor and Tort Committee discussing analysis of claims, among other subjects), 11/5 (conference call with Insurers), 11/9 (correspond with Insurers), 11/10 (analyze mediation issues, review materials related to Marc Scarcella), 11/11 (draft motion for order approving disclosure statement), 11/19 (conference call with Insurers), 11/30 (revise order settling insurance claims) (pp. 3-5, 7, 9-11, 15-16, 20-21)); Trenk Isabel P.C.'s December 2021 Fee Statement [Dkt. No. 1082] (IC 506) (time entries for 12/6 (telephone calls with Insurers), 12/9 (discuss settlement with counsel for OCEs), 12/16 (conference calls with Insurers and Judge Poslusny), 12/20 (revise settlement agreement), 12/23 (conference call with Insurers), 12/27 (revise settlement agreement), 12/29 (revise settlement agreement), 12/30 (revise settlement agreement), and 12/31 (discuss settlement with counsel for OCEs) (p. 7, 9-10, 4-15, 19, 22-23)).

[181] The AIG Insurers include Granite State Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA.

post-confirmation trust established for the benefit of Abuse Claimants.[182] In exchange, the Settled Insurers would receive a release and buyback of their Insurance Policies, assurance on key terms of the plan of reorganization, an injunction to protect the Settled Insurers from incurring further liability in relation to the Abuse Claims, and other relief.[183] For their part, the Debtor and the Other Catholic Entities agreed to contribute a total of $60 million to the trust. Thus, in total, the trust would have been funded with $90 million.[184]

The Insurance Settlement required that the plan be in the form dictated in the Insurance Settlement and that the Debtor was to "seek entry of the Confirmation Order" and specific "Confirmation Findings and Conclusions."[185] The Insurance Settlement further provided that it could only be terminated (a) "in writing upon mutual assent" or (b) if the Settling Insurers provided thirty days' notice after a Termination Event occurs.[186] Neither event occurred.

The Insurance Settlement did not contain a "fiduciary out" provision or any other provision allowing the Debtor to change its mind and refuse to seek approval of the plan based on fiduciary obligations or otherwise. When entering into the Insurance Settlement, the Settled Insurers relied

[182] Fifth Amended Disclosure Statement, p. 96; Insurance Settlement [Dkt. No. 1144] (LMI 0023), §§ j, aa, ggg, mmm, and gggg (listing Settled Insurers' settlement amounts, totaling $30 million).
[183] *See* Insurance Settlement [Dkt. No. 1144] (LMI 0023), § 4.a(iv)-(v) (releasing all obligations created by Insurance Policies upon receipt of buy-back payment by the Trust), § 6(d) (obligating the Diocese to seek entry of Confirmation Order including an injunction releasing Settled Insurers from the Insurance Policies).
[184] *See generally First Supplement to the Diocese's Motion for Entry of an Order Approving Settlement of Controversy By and Among the Diocese and the Settling Insurers Pursuant to Fed. R. Bankr. P. 9019* [Dkt. No. 1144], pp. 2-3 of 72] (LMI 0023), ¶¶ 2-7; *Second Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Describing Second Amended Chapter 11 Plan Proposed by the Debtor-In-Possession* [Dkt. No. 1142, pp. 11-12 of 142], pp. 3-4. *See also* Scarcella Decl., ¶ 45; Trial Transcript (Nov. 30, 2022) ("Nov. 30 Trial Tr.") (Hinton), pp. 134:10-135:14.
[185] Insurance Settlement [Dkt. No. 1144] (LMI 0023), § 6(d).
[186] Insurance Settlement [Dkt. No. 1144] (LMI 0023), § 9.

in part on the lack of any "fiduciary out" or other provision allowing the Debtor to unilaterally terminate, or withdraw from, the Insurance Settlement.[187]

3. Effort Devoted Towards Effecting The Insurance Settlement's Approval

On January 5, 2022, the Debtor filed the 9019 Motion to approve the Insurance Settlement.[188] On February 2, 2022, after further mediation sessions, the Debtor filed its First Supplement to the 9019 Motion.[189] The Settled Insurers supported the 9019 Motion,[190] and LMI, Interstate, the AIG Insurers and Century each filed briefs in support of the Insurance Settlement.[191]

The Tort Committee and the Abuse Claimants' state court counsel opposed the Insurance Settlement and objected to the 9019 Motion.[192]

The Settled Insurers expended significant resources prosecuting the Insurance Settlement and defending it against the Tort Committee's (and its allies') opposition. LMI, Interstate, and Century retained experts to defend against the Tort Committee's objections;[193] and all of the Insurers spent time to prepare pleadings in support of the Insurance Settlement, to oppose various motions filed by the Tort Committee designed to frustrate the Insurance Settlement, and to prepare

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[187] *See* [Dkt. No. 3021-1, p. 501 of 669] (Time entry from T. Schiavoni dated Nov. 14, 2021 stating "Draft outline of options for embedding Century's settlement in Plan so that the Diocese must go forward wit[h] consensual Plan with Insurers"). The Time Entries from Trenk Isabel P.C.'s May 2022 Fee Statement (IC 329) show Richard Trenk being briefed on the terms of the Hartford settlement agreement in the *Boy Scout* case. The Hartford settlement agreement, like the Insurance Settlement here, was designed to overcome opposition to settlement by the tort committee by bringing an insurer funded debtor plan to a vote.

[188] *See Motion for Entry of an Order to Approve Settlement of Controversary* [sic] *by and Among the Diocese and Certain Insurers Pursuant to Federal Rule of Bankruptcy 9019(a)* [Dkt. No. 1087].

[189] [Dkt. No. 1144].

[190] Nov. 14 Trial Tr. (Wilen), pp. 79:23-80:15.

[191] [Dkt. Nos. 1220, 1223, 1228, 1290].

[192] *See* [Dkt. No. 1224] (Tort Committee's objection to 9019 Motion), [Dkt. Nos. 1317, 1319] (certain Abuse Claimants' objection to 9019 Motion).

[193] *Motion in Limine of the Official Committee of Tort Claimant Creditors to Exclude the Expert Reports and Testimony of Marc Scarcella* [Dkt. No. 1458], Exs. 1-2; *see also* Declaration of David L. McKnight ("McKnight Decl."), ¶ 7 (tallying fees of attorneys and other professionals hired by Insurers related to Insurance Settlement, including FTI Consulting (Romy Comiter) and the Brattle Group (Paul Hinton and David McKnight)).

for, take, and defend depositions related to the Insurance Settlement and the plan. Mr. McKnight testified that the Insurers incurred at least $2,436,390 in legal and professional fees supporting the Insurance Settlement.[194] Mr. Hinton confirmed in his testimony that the costs are at least $2.4 million.[195] The Settled Insurers relied upon the terms of the Insurance Settlement—and the absence of any "fiduciary out" provision (or a similar provision) allowing the Debtor to terminate the Insurance Settlement—in expending substantial time and money to advance the Insurance Settlement and litigate the 9019 Motion.[196]

On March 10, 2022, as contemplated by the Insurance Settlement, the Debtor filed an amended plan of reorganization that incorporated the terms of the Insurance Settlement and provided the means through which the Insurance Settlement would be carried out (the "Third Amended Plan").[197] On March 30, 2022, the Debtor filed its *Fifth Amended Plan of Reorganization* (the "Fifth Amended Plan")[198] and the Fifth Amended Disclosure Statement describing the Fifth Amended Plan.[199] The Fifth Amended Plan incorporated the Insurance Settlement.[200] On April 6, 2022, the Court entered an Order approving the Fifth Amended Disclosure Statement, as modified, for solicitation.[201]

The Court then scheduled a four-day evidentiary hearing on the Rule 9019 Motion to commence on April 19, 2022.[202]

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[194] McKnight Decl., ¶ 7.
[195] Nov. 30 Trial Tr. (Hinton), pp. at 97:25-98:6.
[196] *See* [Dkt. No. 3021-1, p. 501 of 669] (Time entry from T. Schiavoni dated Nov. 14, 2021 stating "Draft outline of options for embedding Century's settlement in Plan so that the Diocese must go forward wit[h] consensual Plan with Insurers").
[197] [Dkt. No. 1307].
[198] [Dkt. No. 1394] (LMI 1050).
[199] [Dkt. No. 1393] (IC 339).
[200] Fifth Amended Plan, § 1.2.54.
[201] *See* [Dkt. No. 1447].
[202] [Dkt. Nos. 1219, 1360].

E. The Negotiation of the Tort Committee Settlement

But unbeknownst at the time to the Settled Insurers, the Debtor had been quietly negotiating a competing settlement with the Tort Committee during the months following the (later-adjourned) hearing on the First Amended Disclosure Statement (defined below).

1. The Plan Proponents' Secret Plan Negotiations in December 2021 and January 2022

A hearing on the Debtor's motion to approve the *First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Describing Chapter 11 Plan Proposed by the Debtor-in-Possession* (the "First Amended Disclosure Statement" describing the "First Amended Plan")[203] was scheduled for December 8, 2021.[204] Also scheduled for hearing were the Tort Committee's motions: (1) for an aggregate estimation of survivor claims,[205] (2) for standing to commence certain claims and causes of action to recover or collapse the Other Catholic Entities and the DOC Trusts into the Debtor;[206] and (3) to compel the Debtor to file amended schedules, statements of financial affairs and monthly operating reports, and to impose sanctions against the Debtor, the Bishop, and officers and directors of the Debtor.[207] But none of these matters went forward. The Court instead spoke in chambers separately with counsel for the Debtor and counsel for the Tort Committee and ultimately adjourned the hearing to allow the Plan Proponents to participate in a follow-up mediation over which the Court would preside.[208] The Court

[203] [Dkt. No. 869] (First Amended Disclosure Statement); [Dkt. No. 973] (Motion to approve First Amended Disclosure Statement).
[204] [Dkt. No. 879]. *See also* Nov. 16 Trial Tr. (Prol), p. 98:20-22.
[205] [Dkt. No. 962].
[206] [Dkt. No. 871].
[207] [Dkt No. 964]. *See also* Nov. 16 Trial Tr. (Prol), pp. 98:24-99:10.
[208] Nov. 16 Trial Tr. (Prol), pp. 104:22-105:4.

subsequently entered an order scheduling a mandatory mediation on January 12, 2022 between the Plan Proponents.[209]

Between December 8, 2021 and January 12, 2022, the Plan Proponents discussed the pending First Amended Disclosure Statement, the structure of the January 12 mediation, and the Plan Proponents' goals.[210] Additionally, the Debtor asked the Tort Committee's counsel to "put together a terms sheet with terms of a [p]lan that it would support in the event that [they] were able to agree on the monetary contribution that the Diocese and the [O]ther Catholic [E]ntities would make at the January 12th mediation."[211]

Brent Weisenberg, the Tort Committee's counsel, responded with a series of initial proposed term sheets the Tort Committee had prepared, beginning on December 25, 2021 (the "December 25 Term Sheet").[212] On January 5, 2022 – the ***same day*** the Debtor filed the 9019 Motion – the Debtor's counsel, Robert Roglieri, returned edits to the December 25 Term Sheet.[213] Despite filing the 9019 Motion that same day, Mr. Roglieri made no edits to the portion of the December 25 Term Sheet addressing resolution of Abuse Claims.[214]

On January 6, 2022, Mr. Weisenberg replied to Mr. Roglieri with a revised version of the term sheet (the "January 6 Term Sheet").[215] The January 6 Term Sheet provided for, among other things, the treatment and liquidation of Abuse Claims, the funding of a trust, and the rights of

[209] [*See* Dkt. No. 1073]. *See also* Nov. 16 Trial Tr. (Prol), p. 105:11-16.
[210] Nov. 16 Trial Tr. (Prol), p. 107:8-16.
[211] *Id.* at p. 107:16-21.
[212] *See* (JX 0419) at Plan Pro00000003.
[213] *See generally* (JX 429) (January 5, 2022 email from Robert Roglieri attaching term sheet with comments); *Motion for Entry of an Order to Approve Settlement of Controversary* [sic] *by and Among the Diocese and Certain Insurers Pursuant to Federal Rule of Bankruptcy Procedure 9019(a)* [Dkt. No. 1087] (filed January 5, 2022).
[214] *See* (JX 0429). *See also* Deposition Transcript of Brent Weisenberg dated September 19, 2022 (IC 102) ("Weisenberg Dep. Tr."), pp. 94:4-95:3; Nov. 16 Trial Tr. (Prol), pp. 139:1-25, 140:6-7.
[215] *See generally* (JX 240). *See also* Nov. 16 Trial Tr. (Prol), pp. 136:04-137:11.

Abuse Claimants against Insurers.[216] It further classified Abuse Claims into seven numeric categories based on severity of abuse, just like the IVCP Program.[217] Most notably, the January 6 Term Sheet restrained the Debtor from pursuing with the 9019 Motion – one day after the Debtor filed it.

Mr. Weisenberg then sent a further updated term sheet on January 11, 2022, in advance of the January 12 mediation (the "January 11 Term Sheet"). Under the January 11 Term Sheet, a newly created trust would be substituted as the named plaintiff in the Insurance Coverage Adversary Proceeding.[218] The January 11 Term Sheet further contemplated that certain Abuse Claims would be resolved directly through the state court tort system, noting that the trust would "have the right to pursue judgment against Non-Settling Insurers for coverage of the Diocese's liability for Class 5 and Class 6 Claims [i.e., Abuse Claims]" and that "[n]o limitations on recovery from Non-Settling Insurers will be imposed because the Diocese is in bankruptcy or by any distribution from the Trust to any Class 5 claimant and Class 6 claimant."[219] Like the January 6 Term Sheet, the January 11 Term Sheet restrained the Debtor from pursuing the 9019 Motion.

2. The Plan Proponents' *Ex Parte* January 10 Email to the Court

On January 10, 2022, Mr. Weisenberg, acting on behalf of the Tort Committee, sent an email to the Court outlining the term sheet that the parties had been negotiating since December 25.[220] In his email, Mr. Weisenberg informed the Court that the Plan Proponents had "agreed on a basic structure which we would like to make [the Court] aware of to facilitate our [mediation]

[216] Nov. 16 Trial Tr., (Prol) p. 132:16-133:4.
[217] *Id.* at pp. 133:8-15, 134:23-135:4.
[218] *See* (JX 0423) (Brent Weisenberg's January 11, 2022 cover email attaching January 11 Term Sheet); (JX 0424) (January 11 Term Sheet).
[219] (JX 0424) at PlanPro00000081. *See also* Weisenberg Dep. Tr., pp. 61:4-25, 62:19-63:3.
[220] *See generally* (JX 0422) (January 10, 2022 email from Brent Weisenberg to Judge Poslusny).

discussions."[221] Consistent with prior versions of the term sheet, Mr. Weisenberg's January 10 email to the Court indicated that the default for resolution of Abuse Claims would be through the tort system, where a newly created trust would "pursue recoveries against any insurer who has not settled the claims asserted against it by the Diocese or the Trust," and proposed dividing the abuse claims into seven different categories.[222] Mr. Weisenberg copied Debtor's counsel (Messrs. Trenk and Roglieri) and the Tort Committee's other counsel (Mr. Prol and Ms. Maker) on his January 10 email. He omitted counsel for the Insurers.[223] When questioned during his deposition, Mr. Weisenberg was instructed not to answer why the Tort Committee omitted the Insurers' counsel from the January 10 email.[224] Mr. Weisenberg likewise would not answer whether the Tort Committee should have provided the Insurers' counsel with a copy of any term sheet it shared with the Court.[225] The Tort Committee failed to inform the Court in the January 10 email that the Plan Proponents' negotiated term sheet required the Debtor drop the 9019 Motion.[226]

3. The April 11 Mediation

The term sheet "was exchanged several times." And although the Diocese "commented on it, [] the terms were never ultimately agreed upon."[227] Three days after the January 11 Term Sheet, Mr. Prol emailed Mr. Trenk and told him that the Tort Committee's "bottom line" on a settlement was $100 million on the effective date or $120 million payable with $80 million on the effective date and $10 million per year for four years.[228] The Debtor did not agree.

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[221] (JX 0422) at PlanPro00000066.
[222] *Id.* *See also* Nov. 16 Trial Tr. (Prol), pp. 148:22-150:7, 150:19-20, 151:22-25.
[223] *See generally* (JX 0422). *See also* Weisenberg Dep. Tr., pp. 47:15-48:9; Nov. 16 Trial Tr. (Prol), pp. 151:5-21, 152:7-15, 152:19.
[224] Weisenberg Dep. Tr., pp. 48:15-49:2.
[225] *Id.* at pp. 30:20-31:15.
[226] *See generally* (JX 0422).
[227] Nov. 16 Trial Tr. (Prol), p. 108:7-9.
[228] (JX 0426). *See also* Weisenberg Dep. Tr., pp. 67:20-68:4, 69:5-8, 69:24-70:6.

While the Debtor and the Tort Committee did not reach a deal in January, they continued to mediate, including sessions on January 12, January 18, and March 15.[229] Throughout the mediations, proposals were floated to decrease the $100 million payment, but the Tort Committee insisted that any such payments be made as a lump sum, to which the Debtor objected.[230]

The Plan Proponents were set to attend another mediation on April 11, 2022. Beforehand, Mr. Weisenberg and Mr. Roglieri discussed "how to achieve a successful mediation."[231] One of the topics of discussion between Messrs. Weisenberg and Roglieri was the "TCC's willingness to reconsider its position on the [demand for one] hundred million dollars."[232]

Late in the day at the April 11 mediation the Tort Committee proposed a settlement amount of $87.5 million from the Debtor and the Other Catholic Entities over four years.[233] But the Tort Committee conditioned the $87.5 million settlement proposal on the Debtor's agreement to transfer its rights in its insurance policies to (what is now known as) the Trust.[234] The Debtor accepted. The agreement the Plan Proponents reached at the April 11 mediation (the "Tort Committee Settlement") was the basis for what eventually became the Eighth Amended Plan.[235] At 8:25 p.m. that evening, the Debtor notified the Settled Insurers that it had reached a tentative settlement with the Tort Committee but provided no details.

[229] Nov. 9 Trial Tr. (Hughes), p. 131:5-14.
[230] Wilen Dep. Tr. II, pp. 57:4-58:6, 117:19-118:18.
[231] Weisenberg Dep. Tr., pp. 77:14-20, 78:3-14.
[232] *Id.* at p. 78:15-20.
[233] Nov. 9 Trial Tr. (Hughes), pp. 105:22-106:4, 106:21-107:14.
[234] Deposition Transcript of Laura Montgomery dated July 21, 2022 (IC 034) ("Montgomery Dep. Tr."), p. 198:8-12; Deposition Transcript of Father Hughes dated July 22, 2022 (IC 042) ("Hughes Dep. Tr."), pp. 201:19-20, 202:4-6.
[235] Nov. 9 Trial Tr. (Hughes), p. 116:11-21 ("Q: And does [the Eighth Amended Plan of Reorganization] embody to the best of your knowledge the settlement or the proposed settlement, subject to the Court's ruling, with the Tort Claimants' Committee? A: Yes.").

Early April 12, 2022, Mr. Weisenberg sent an email to Debtor's counsel broadly outlining the terms of the proposed settlement, including $87.5 million payable with $50 million on the effective date, $10 million annually in years 1-3, and $7.5 million in year 4, with "[a]ll deferred payments . . . secured by a first priority lien on the cash and investments held by or for the benefit of the Parishes . . . ."[236] The email also stated that the Tort Committee Settlement would entail "[t]he assignment of all insurance policy proceeds to a Trust and TDP procedures in a manner to be agreed upon in a revised Plan."[237] In exchange, the Debtor agreed to withdraw its pending 9019 Motion to approve the Insurance Settlement and instead support a new plan and trust distribution procedures agreeable to the Tort Committee.[238]

During an April 12, 2022 status conference – one week before the commencement of the evidentiary hearing on the 9019 Motion – the Debtor informed the Court, the Settled Insurers, and other parties in interest that it (i) intended to repudiate the Insurance Settlement in favor of a settlement with the Tort Committee, (ii) would be withdrawing the 9019 Motion, and (iii) would file a new plan supported by the Tort Committee on or before April 22, 2022.[239]

4. The Negotiations Over the Tort Committee Settlement Lacked Transparency, the Requisite Corporate Formalities, or Even Involvement from the Debtor's Principals

The negotiations over the Tort Committee Settlement were conducted in secret and excluded the Insurers entirely. The Plan Proponents never communicated with any Insurer the fact that they were negotiating a term sheet.[240] This exclusion of the Insurers is consistent with the Tort Committee's course of bargaining: of the 17 mediations that occurred between the Plan

[236] (JX 0428).
[237] *Id.*
[238] *Id.*
[239] *See* Hearing Transcript (Apr. 12, 2022) ("Apr. 12 Hr'g Tr."), p. 6:2-13.
[240] Weisenberg Dep. Tr., p. 50:9-12, 50:14.

Proponents, the Tort Committee never once asked for a one-on-one session with any insurance carrier.[241]

The Plan Proponents also took steps to minimize the discoverable information about the communications that led to the Tort Committee Settlement. Debbie Cutter, Laura Montgomery's executive assistant who was responsible for preparing minutes for the Debtor's Board of Trustees, Financial Counsel, and College of Consultors, was directed not to omit from the minutes any discussions involving the bankruptcy during which counsel was present. This included all discussions of the Tort Committee Settlement.[242] Thus, "there are no minutes whatsoever that reflect anything about the agreement, [or] the consideration by the Board of Trustees of the agreement with the Tort Claimant Committee."[243] Further, there are no references in the minutes to the Debtor's efforts to reach an agreement with the Tort Committee, nor are there any references to whether the Debtor would continue to seek approval of the Insurance Settlement.[244] Similarly, when the Plan Proponents reached the Tort Committee Settlement in April, the Debtor prepared no document to memorialize the terms of the agreement – other than correspondence between the Plan Proponents' counsel.[245]

Deferral to a Debtor's business judgment is predicated on a showing that the Debtor has followed corporate formalities in considering and approving a transaction. Here, there is a

[241] Nov. 17 Trial Tr. (Prol), pp. 21:19-20, 22:4-14.
[242] Nov. 10 Trial Tr. (Montgomery), pp. 208:6-209:2 ("Q: And is it the case that there are no minutes whatsoever that reflect anything about the agreement, the consideration by the Board of Trustees of the agreement with the Tort Claimant Committee? A: Because all of that was done with our counsel present, yes.").
[243] *Id.* at pp. 207:19-208:8, 208:20-209:2. *See also* Nov. 9 Trial Tr. (Hughes), p. 172:2-5, 172:10 ("Q: In fact, sir, am I correct that there is no board minutes that reflect a substantive discussion or consideration of the eighth amended plan for either the corporate board, the Finance Council, or the College of Counselors? . . . . A: Right. They're not reflected in any."); Hughes Dep. Tr., pp. 80:12-81:5.
[244] Hughes Dep. Tr., p. 79:5-21.
[245] Nov. 9 Trial Tr. (Hughes), p. 149:10-15. *See also* Hughes Dep. Tr., pp. 71:19-73:15.

complete failure of proof as to what the Board of Trustees of the Diocese considered or even deliberated on whether the Diocese should repudiate the Insurance Settlement and enter into the Tort Committee Settlement. The Debtor has produced no corporate resolution or minutes showing that the Board of Trustees of the Diocese authorized the repudiation of the Insurance Settlement and entry into the Tort Committee Settlement. Nor were resolutions produced showing that the boards of any of the Other Catholic Entities met, conferred, and authorized the Eighth Amended Plan.

Father Hughes and Mrs. Montgomery claimed that they were unaware of the Debtor's counsel's discussions with the Tort Committee's counsel during this period. They also claimed that they were not aware of any of the term sheets or their contents.[246] Mrs. Montgomery went so far as to comment that her lack of involvement was "very unusual" given that she would typically "review every draft."[247] Even Mr. Wilen, who was retained to assist the Debtor with plan feasibility and timing calculations,[248] claimed that he "wasn't involved with those settlement discussions at all, at that point in time."[249]

Father Hughes also claimed that he had never seen Mr. Weisenberg's April 12 email outlining the terms of Tort Committee Settlement,[250] other relevant emails between counsel for the Debtor and the Tort Committee discussing the terms and implementation of the Tort Committee Settlement,[251] Mr. Weisenberg's January 10 email to the Court,[252] or the draft Plan Documents and

[246] Nov. 10 Trial Tr. (Hughes), pp. 9:22-16:3, 19:1-10, 21:14-19 (referencing (JX 0420) and (JX 0424)); Nov. 10 Trial Tr. (Montgomery), pp. 193:16-195:20, 197:9-198:3.
[247] Nov. 10 Trial Tr. (Montgomery), p. 194:16-17.
[248] Nov. 14 Trial Tr. (Wilen), p. 61:5-10.
[249] *Id.* at p. 138:4-6.
[250] Nov. 10 Trial Tr. (Hughes), p. 24:7-11 (referencing (JX 0428)).
[251] *See id.* at pp. 24:22-25:13 (referencing (JX 0430)).
[252] *Id.* at pp. 22:5-9, 22:25-23:3.

redlines that were shared between counsel for the Plan Proponents.[253] Father Hughes was not even familiar with the four adversary proceedings that had been commenced by the Tort Committee against the Debtor prior to the Tort Committee Settlement.[254]

Similarly, Mrs. Montgomery claimed that she had only met with members of the Tort Committee one time prior to April 11, 2022, to discuss the number and categorization of Abuse Claims, but was otherwise uninvolved in pre-April 11 settlement discussions.[255] Mrs. Montgomery was not familiar with Mr. Weisenberg's January 10 email to the Court,[256] Mr. Weisenberg's April 12 email to Debtor's counsel,[257] the concept of a Trust Agreement,[258] or the possibility that the Debtor could be sued for breach of contract for withdrawing from the Insurance Settlement.[259]

5. The Plan Proponents' Negotiations Were Premised on the Repudiation of the Insurance Settlement

A central component of the Plan Proponents' negotiation of the Tort Committee Settlement was the anticipated repudiation of the Insurance Settlement. Even though the 9019 Motion was filed with the Court on January 5, 2022, the very next day the Tort Committee added language to the January 6 Term Sheet providing that "[w]ithin three (3) business days of execution . . . by both an authorized representative of the Debtor and the [Tort] Committee, the Debtor shall adjourn the hearing on [the 9019 Motion]."[260] As negotiations progressed, it was clear that any deal proposed

[253] *Id.* at pp. 14:14.
[254] *See id.* at pp. 26:14-27:23, 27:24-28:6, 28:7-14, 28:15-22 (referencing (JX 0415), (JX 0416), (JX 0417), and (JX 0418)).
[255] Nov. 10 Trial Tr. (Montgomery), pp. 184:17-185:1, 187:12-188:3.
[256] *Id.* at pp. 195:24-196:2.
[257] *Id.* at p. 198:4-14 (referencing (JX 0428)).
[258] *Id.* at p. 188:4-11 ("Q: [D]o you know what the Trust Agreement is in this case? A: I'm going blank, I'm sorry.").
[259] Montgomery Dep. Tr., pp. 138:23-139:1, 139:5-6.
[260] (JX 0419) & (JX 0420) at p. 13. *See also* Nov. 16 Trial Tr. (Prol), p. 136:4-20; Weisenberg Dep. Tr., pp. 42:11-44:6.

by the Tort Committee would be conditioned on the Debtor withdrawing its support of the Insurance Settlement and the 9019 Motion.[261]

The parties discussed the withdrawal of the 9019 Motion at the April 11 mediation, specifically including "[w]hat impact if any proposing a plan . . . would have on the 9019 motion" and the understanding that "if the Debtor and the Committee agree on a plan . . . [the Debtor] can no longer prosecute the 9019 Motion."[262] Mr. Weisenberg's April 12 email outlining the terms of the Tort Committee Settlement likewise listed "[t]iming for withdrawal of Insurance Settlement Motion" as one of the outstanding items to be discussed.[263]

Moreover, the Tort Committee used estate funds to research the Debtor's ability to repudiate a settlement during Chapter 11 and prepared a memo on the topic – immediately after reaching the Tort Committee Settlement.[264] While Mr. Trenk never responded with a specific timeline for withdrawal of the Insurance Settlement,[265] the Debtor took no further actions to prosecute the 9019 Motion following April 11.[266]

On May 19, 2022, the Insurers commenced an adversary proceeding to establish an administrative expense claim arising from the Debtor's breach of the Insurance Settlement (the "Administrative Expense Claim") captioned *Century Indemnity Company et al. v. The Diocese of Camden, New Jersey*, Adv. Proc. No. 22-01123-JNP (the "Administrative Expense Claim Adversary Proceeding"). Based on the Plan Proponents' own expert testimony, the Insurers might face $123.5 million in liability under the Plan. And Mr. Prol, lead counsel for the Tort Committee,

[261] Weisenberg Dep. Tr., pp. 44:25-45:12.
[262] *Id.* at pp. 87:5-8, 87:16, 87:21-89:3.
[263] (JX 0428). *See also* Nov. 16 Trial Tr. (Prol), pp. 163:11-164:1, 164:7-165:2, 166:18-167:6; Weisenberg Dep. Tr., pp. 86:24-87:4.
[264] *Nineteenth Monthly Fee Statement of Lowenstein Sandler LLP for the Period April 1, 2022 Through April 30, 2022* [Dkt. No. 1747] (IC 325), p. 35 of 81. *See also* Nov. 16 Trial Tr. (Prol), pp. 168:13-170:1.
[265] Nov. 16 Trial Tr. (Prol), p. 164:10-25.
[266] *Id.* at p. 167:7-9.

asserted in various news articles that the Tort Committee Settlement would allow the Tort Committee to sue insurance companies for "hundreds of millions of dollars" in liability.[267] Thus, the Insurers' losses caused by the Debtor's repudiation of the Insurance Settlement would be ***at a minimum*** $93.5 million and possibly much more.[268] Coupled with the $2.4 million in attorneys' fees, the Insurers' total Administrative Expense Claim in the Bankruptcy Case would be at least $95.9 million. "The amount of this administrative claim alone would exceed the Debtor's and other non-debtor Catholic entities' settlement contributions to the Trust."[269]

The Court has stayed the Administrative Expense Claim Adversary Proceeding pending its resolution of the 9019 Motion and the confirmation proceedings for the Eighth Amended Plan (the "Plan Confirmation Proceedings").[270]

6. No Changed Circumstances Occurred Between The Motion to Approve the Insurance Settlement and the Debtor's Repudiation of the Insurance Settlement

At the confirmation hearing (the "Confirmation Hearing"), the Debtor's witnesses testified that the Debtor reached a settlement agreement with the Settled Insurers,[271] that the Debtor authorized the filing of the 9019 Motion and was aware of its contents,[272] that the Insurer Settlement was the product of good faith by the Insurers,[273] and that the Insurance Settlement was viewed by the Debtor as a positive development in the case.[274]

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[267] Nov. 17 Trial Tr. (Prol), p. 26:5-25.
[268] *See* Hinton Decl., ¶ 15 (referencing testimony by Carl Salisbury); Nov. 30 Trial Tr. (Hinton), p. 99:6-17.
[269] Hinton Decl., ¶ 47.
[270] *See Order Granting, in Part, and Denying, in Part, Diocese's Motion to (I) Dismiss Complaint; (II) Stay Action; or (III) Extend Time to Answer Complaint* [Administrative Expense Claim Adversary Proceeding, Dkt. No. 32].
[271] Nov. 9 Trial Tr. (Hughes), p. 150:4-6.
[272] *Id.* at p. 185:23-24.
[273] *Id.* at p. 150:7-10.
[274] *Id.* at p. 152:10-20.

The Debtor, moreover, was aware of resistance from the Tort Committee to the Insurance Settlement before entering into it but continued to press forward.[275] Indeed, nothing in the Insurance Settlement gave the Tort Committee a veto right over it or established any condition precedent for Tort Committee consent.[276] Despite all of this, the Debtor asserted that "changed circumstances" prevent it from pursuing the 9019 Motion.

On August 30, 2022, the Court ordered the Debtor to respond to Century's discovery requests for information related to the Debtor's alleged "changed circumstances."[277] The Debtor was unable to identify any changed circumstances beyond the Tort Committee Settlement itself, and general references to the depositions of Father Hughes, Mrs. Montgomery, and Mr. Wilen where they discuss the Tort Committee Settlement.[278]

F. After Reaching the Tort Committee Settlement, the Debtor Gave the Tort Committee Control Over the Drafting of the TDPs in Exchange for a Cap on its Liability for Abuse Claims

Even though the Tort Committee previously refused a settlement proposal that included an $87.5 million contribution from the Debtor – admittedly "similar" monetary terms to the eventual Tort Committee Settlement[279] – and later insisted that the Tort Committee's "bottom line" for a

[275] *See* Nov. 16 Trial Tr. (Prol), p. 106:13-14. *See also* [Dkt. No. 1224] (Tort Committee Objection to 9019 Motion); Fifth Amended Disclosure Statement, p. 4 ('[T]he Tort Committee intends to object to the proposed settlement on the basis that this contribution is inadequate in light of, among other things, the claims held by the Debtor against its insurers and the value of claims in Class 5 and Class 6."). .

[276] *See generally* Insurance Settlement [Dkt. No. 1144] (LMI **0023**).

[277] [Dkt. No. 2347] (audio ruling); [Dkt. No. 3043] (Order). In the Third Circuit, a debtor may justify its failure to support a motion to approve a settlement pursuant to Fed. R. Bankr. P. 9019 that it previously filed by bringing to the Court's attention "any changed circumstances since the entry into the stipulation of settlement." *Myers v. Martin* (*In re Martin*), 91 F.3d 389, 394 (3d Cir. 1996).

[278] *See Second Amended Objections and Responses to Insurers' First Set of Interrogatories to the Diocese of Camden, New Jersey* (IC 258), at Resp. No. 7 ("[T]he Diocese asserts that the settlement with the Tort Committee embodied in the Plan represents changed circumstances, the pursuit of which is in the best interests of the estate. The Diocese further refers the Insurers to the deposition transcripts of Father Hughes, Ms. Laura Montgomery and Allen Wilen.").

[279] Nov. 16 Trial Tr. (Prol), pp. 130:23-131:18 (Debtor offered settlement with $87.5 million monetary term in either December 2021 or January 2022).

settlement would be a contribution of $100 million,[280] the Tort Committee on April 11 accepted the $87.5 million contribution that had been on the table for months.[281]

April 11 was the deadline for the Debtor to serve the Solicitation Package for the Fifth Amended Plan, which included the Insurance Settlement[282]

1. The Tort Committee Dominated and Controlled the Drafting Process for the TDPs Included in the Plan

The TDPs are the core of the Plan Proponents' Plan—they provide the procedures for allowing and valuing Abuse Claims, the funds available to pay Abuse Claimants, the allowance of Indirect Claims, and the expedited distribution election.[283] Yet the TDPs were not drafted until after April 11, 2022 – the date of the Tort Committee Settlement (capping the Debtor's liability).[284] Father Hughes agreed that "the terms for the allowance and valuation of the claims were only prepared after the diocese reached agreement with the tort committee on the dollar amount of the diocese's contribution to the trust."[285] Ms. Montgomery confirmed that this occurred "after the April 11th settlement."[286]

In exchange for the $87.5 million cap on its liability under the Tort Committee Settlement, the Debtor turned the pen over to the Tort Committee to draft the TDPs without input from other

[280] (JX 0426) (Email from J. Prol to R. Trenk dated Jan. 14, 2022).
[281] Nov. 16 Trial Tr. (Prol), p. 157:14-157:19.
[282] *Order (I) Scheduling Certain Dates and Deadlines in Connection with Confirmation of the Debtor's Fifth Amended Plan of Reorganization, (II) Establishing Certain Protocols and (III) Granting Related Relief* [Dkt. No. 1474], p. 4.
[283] *See generally* Eighth Amended Disclosure Statement, pp. 99-106.
[284] Nov. 16 Trial Tr. (Prol), pp. 158:24-159:1 ("Q: And isn't it true that the TDP was not drafted until April 11th, correct? A: That's correct.").
[285] Nov. 9 Trial Tr. (Hughes), p. 136:15-25.
[286] Nov. 10 Trial Tr. (Montgomery), pp. 188:20-189:1.

parties.[287] The Tort Committee then took over responsibility for amending all Plan Documents, other than the Disclosure Statement, to its satisfaction.[288]

> Q: "Now, in connection – the Diocese's settlement with the Tort Committee, we talked about that – on April 11th, right?"
> A: "Yes"
> Q: "And in that time frame, isn't it true that the Diocese and the Tort Committee agreed that Lowenstein would take the pen in drafting the TDP, correct?"
> A: "Yes, it was agreed that Lowenstein would make the first edits to the – would draft the first draft of the TDP, yes."[289]

The Tort Committee's counsel did not provide the Debtor with its TDPs until the evening of April 27, 2022, three business days before they were filed with the Seventh Amended Plan of Reorganization on May 3, 2022.[290] While drafts were exchanged between April 27 and May 3, they do not reflect changes by the Debtor directed at the allowance and valuation provisions.[291] The Debtor made no substantive changes.[292]

Father Hughes conceded that he is unaware of any evidence showing that anybody other than the Tort Committee drafted the terms for allowing and valuing claims.

> Q: "Do you have any evidence that you can offer that shows that anybody other than the Tort Committee drafted the terms for allowing and valuing claims?"
> . . .
> THE WITNESS: "I'm not aware."[293]

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[287] Nov. 16 Trial Tr. (Prol), pp. 161:18-162:1. Weisenberg Dep. Tr., p. 144:2-19.
[288] Nov. 16 Trial Tr. (Prol), p. 117:11-19.
[289] *Id*. at pp. 161:18-162:1.
[290] *Id.* at p. 184:3-9.
[291] Weisenberg Dep. Tr., p. 184:23-25 ("Q: So the TDP negotiation with the drafting back and forth occurred over three business days, correct? A: Correct.").
[292] There were no changes to the first five paragraphs of the Tort Committee's draft. Nov. 16 Trial Tr. (Prol), p. 185:18-22. There were no substantive changes to paragraph 7, which concerns the acceptance or reconsideration of the initial review claim. *Id.* at pp. 187:24-188:5. There were no substantive changes to paragraph 8(viii), which governs the Insurers' ability to participate in the verdict value assessment process. *Id*. at p. 188:6-12. There were no substantive changes to paragraph 8(ix), which establishes the Verdict Values Procedures. *Id.* at p. 188:13-20. There were no substantive changes to paragraph 14, which governs the review of Class 6 claims. *Id.* at p. 189:16-23. There were no substantive changes to paragraphs 12 and 13, regarding establishing reserves and distributions from the Trust. *Id.* at p. 190:4-7.
[293] Hughes Dep. Tr., pp. 128:19-129:1.

The Debtor's other employees testified that they did not contribute to the drafting of the TDPs, and that they were not even aware of the contents of the TDPs.[294] Mrs. Montgomery admitted she had no basis to rule out the possibility that the Tort Committee drafted the TDPs.[295] Mr. Wilen had no knowledge of who drafted the TDPs, and was not consulted despite his extensive experience drafting TDPs.[296] Similarly, the Diocesan Finance Counsel was not involved in drafting the TDPs.[297]

The Plan Proponents' fee statements from the period in which the TDPs were drafted further corroborate that the Tort Committee drafted the TDPs. Expert analysis showed that "[f]rom April 11 to May 31, 2022 counsel to the Tort Committee spent 175.7 hours drafting and revising the TDPs while counsel for the Debtor only spent 11.4 hours."[298] "[I]t is clear that the Tort Committee took the lead in drafting the updated Plan and TDPs, and that the Debtor was not heavily involved in the process."[299]

2. The Debtor and the Other Catholic Entities Had No Economic Stake in the Drafting of the TDPs at the Time the Tort Committee Drafted Them

The Debtor had no economic stake in drafting the terms of the TDPs after it reached the Tort Committee Settlement and capped its liability at $87.5 million. Mr. Hinton explained the change in incentives after the Tort Committee Settlement that affected the formation of the Plan: "Once the Debtor's settlement contribution was agreed, the [TDP] changes were not disciplined

[294] Nov. 10 Trial Tr. (Montgomery), p. 207:4-8 ("Q: [D]o you know whether anybody else on the Board of Trustees of the Camden Trust knows anything more about the TDPs than Father Hughes? A: No.").
[295] Montgomery Dep. Tr., pp. 64:21-65:13.
[296] Nov. 14 Trial Tr. (Wilen), pp. 57:11-58:16, 74:19-75:8, 82:7-83:12.
[297] Deposition Transcript of Patrick McGrory dated September 2, 2022 (IC 095) ("McGrory Dep. Tr."), p. 129:14-23.
[298] McKnight Decl., ¶ 18.
[299] *Id.* at ¶ 19.

by involvement in the drafting process of parties with divergent economic interests. The Tort Committee interest in changes in procedures to raise the potential liability of insurers was unmitigated by any opposing economic interest."[300] The Debtor's fact witnesses conceded this point.

Father Hughes, Vicar General

> Q: "... And am I right that the Diocese didn't have an economic interest at stake in setting the terms for the criteria to allow and value claims after it reached an agreement with the Tort Committee on the dollar amount that it was going to contribute to a settlement?"
> A: "Yes."[301]

Allen Wilen, Debtor's Financial Advisor

> Q: "Isn't it true that the cap on the Diocese's liability was the only part of the agreement with the Tort Committee that the Diocese had an economic stake in?"
> A: "Yes."[302]

Moreover, the Debtor did not seriously interrogate the Tort Committee's TDPs. The Debtor never asked the Tort Committee for legal precedent to support the TDPs, manage the conflicts of interest, or preserve the Insurers' rights under the Trust and TDPs.[303] The Plan Proponents' fact witnesses also made clear in their testimony that the Debtor did not resist any language the Tort Committee proposed relating to the allowance and valuation of claims in the TDPs.[304] The Debtor did not express any concerns or ask any questions about leaving the method, manner, and procedures of the Verdict Value Assessment to someone selected by the Tort Committee's appointed Trust Administrator.[305] The Debtor never asked Mr. Prol whether the

[300] Hinton Decl., ¶ 52; *see also* McKnight Decl., ¶¶ 10, 12 (explaining that after the Debtor had capped its liability at $87.5 million, it no longer had an economic interest in how the claims would be adjudicated and paid).
[301] Nov. 9 Trial Tr. (Hughes), p. 135:2-7.
[302] Nov. 14 Trial Tr. (Wilen), p. 75:5-8.
[303] Nov. 16 Trial Tr. (Prol), pp. 171:20-172:7, 173:2-11.
[304] Nov. 9 Trial Tr. (Hughes), p. 142:12-24; Montgomery Dep. Tr., pp. 72:17-73:7.
[305] Nov. 16 Trial Tr. (Prol), pp. 173:22-175:3.

criteria for allowing a claim under the TDPs required the perpetrator to be on the credibly accused list prior to the alleged abuse, nor did the Debtor ask Mr. Prol any questions about why the Tort Committee was given the right to appoint the members of the Trust Advisory Committee.[306]

The Debtor's indifference extended to the Trust fiduciaries. The Debtor did not propose anyone to serve as the Trust Administrator,[307] the Abuse Claims Reviewer[308] or as a member of the Trust Advisory Committee.[309] Nor did the Debtor do any due diligence on individuals for any of these positions.[310] Father Hughes candidly admitted at trial that he does not even know who has been proposed to serve as the Abuse Claims Reviewer.[311] And the Tort Committee did not seek any input from the Debtor or the Trustee as to the selection of the Trust Administrator.[312]

The Debtor's fact witnesses, Father Hughes, Mts. Montgomery, and Mr. Wilen confirmed each of these points. Father Hughes testified that capping the liability of the Debtor and Other Catholic Entities and ending its responsibility for professional fees was of foremost importance to the Debtor.[313] Mr. Wilen testified that the Debtor was not concerned about the TDPs other than the payments required from the Debtor.[314] Even counsel for the Tort Committee shared the same

[306] *Id.* at p. 187:11-15; Nov. 17 Trial Tr. (Prol), p. 10:8-11.
[307] Nov. 9 Trial Tr. (Hughes), p. 144:17-22.
[308] *Id.* at p. 144:22-24.
[309] Hughes Dep. Tr., p. 120:5-7.
[310] Neither Father Hughes nor Laura Montgomery are aware of any diligence performed in selecting Mr. Dundon as Trust Administrator or Mr. Finn as Abuse Claims Reviewer. *See* Nov. 9 Trial Tr. (Hughes), pp. 145:11-14, 190:10-24; Nov. 10 Trial Tr. (Montgomery), pp. 144:22-24, 145:11-14. In addition, witnesses for the Plan Proponents—Mrs. Montgomery, Father Hughes, and Brent Weisenberg—could not answer why the Plan Proponents selected Mr. Dundon to serve as the Trust Administrator, *see* Montgomery Dep. Tr., pp. 66:11-21, 96:9-15; Hughes Dep. Tr., p. 119:6–24, Weisenberg Dep. Tr., pp. 182:5–7, 190:12–22, or Mr. Finn to serve as the Abuse Claims Reviewer. *See* Montgomery Dep. Tr., pp. 66:8–16, 96:9–15; Hughes Dep. Tr., pp. 118:24–119:4; Weisenberg Dep. Tr., pp. 182:8–10, 195:20–21.
[311] Nov. 10 Trial Tr. (Hughes), p. 120:1-4.
[312] Nov. 17 Trial Tr. (Prol), p. 7:3-9; *see also* Nov. 16 Trial Tr. (Prol), pp. 170:2-171:2.
[313] Nov. 10 Trial Tr. (Hughes), p. 184:10-16.
[314] Nov. 14 Trial Tr. (Wilen), pp. 53:7-55:11; Wilen Dep. Tr. II, p. 14:10-20.

impression, testifying that the Debtor was primarily concerned with the speed of liquidation of Abuse Claims and fees that the Debtor would accrue as part of the process.[315]

Counsel for the Other Catholic Entities was even more blunt. As he put it, "we had a motive, which was to get out" and "we didn't really care" about the TDPs.[316]

> "The transaction is to get a release to get a channeling injunction and how much is it going to cost. That's what we were involved with. ***We didn't really care, and I say this, I should say we didn't focus upon TDPs***, we didn't focus about assignments of insurance or proceeds and, frankly, we are not even -- we were not even focusing tremendously on the plan itself because ***we had a motive, which was to get out*** and to try to make sure that we got the releases and channeling injunction."[317]

3. The Plan Proponents Excluded the Insurers and Other Parties from the Entirety of the Process of Drafting the TDPs and Selecting the Trust Administrator, Abuse Claims Reviewer, and Members of the Trust Advisory Committee

The Debtor and Tort Committee excluded the Insurers from involvement with the drafting of the Plan Documents. They did not provide the Insurers with drafts of the Plan or the associated TDPs before they were filed and did not solicit feedback.[318]

> Jeffrey Prol, Tort Committee Counsel
> Q: And you're not aware of any draft of the TDP that ultimately made its way in the plan being shared with any insurer, correct?
> A: No.
> Q: You didn't have any discussions with respect to any drafts of the TDP with any insurer, did you?
> A: No.[319]

> Jeff Prol, Tort Committee Counsel
>
> Q: Now, you were asked by Mr. Winsberg if you had ever shown any of the insurers drafts of the TDP in these documents, correct? We talked about that a second ago?

[315] Weisenberg Dep. Tr., p. 86:3-23.
[316] Hearing Transcript (Sep. 21, 2022) ("Sep. 21 Hr'g Tr.") (Abramowitz), pp. 20:24-21:10.
[317] *Id*. at pp. 20:24-21:10 (emphasis added).
[318] Nov. 16 Trial Tr. (Prol), p. at 173:12-21; Nov. 17 Trial Tr. (Prol), p. 41:15-17.
[319] Nov. 16 Trial Tr. (Prol), p. 173:12-18.

A: Yes.
Q: Has the TCC ever solicited feedback from the insurers about provisions in the 8th Amended Plan?
A: I don't think so, no.[320]

Michael Hogan, the Unknown Claimant Representative, likewise was sidelined from any role in the negotiation or formulation of the Plan.[321] Indeed, Mr. Hogan's testimony shows that he was completely shut out of discussions of the TDPs and the selection of professionals who would administer them.[322] An unknown claimant representative is, among other things, intended to impose a check on the power of a tort committee.[323]

4. The TDPs and the Trust Agreement are not the Product of Mediation

Father Hughes acknowledged that the terms of the TDPs were not mediated.

Q: Like Judge Linares didn't mediate the trust distribution procedures, did he?
A: Not that I'm aware of."[324]

Father Hughes' testimony is corroborated by the Plan Proponents' time records from April and May 2022, none of which include any references to communications with Judge Linares or mediations related to the TDPs.[325] Moreover, the TDPs could not have been mediated: there were

[320] Nov. 17 Trial Tr. (Prol), p. 41:11-17.
[321] Deposition Transcript of Michael Hogan dated September 9, 2022 ("Hogan Dep. Tr."), pp. 12:14-13:5.
[322] *Id.* at pp. 13:13-14:2, 14:6-11, 14:19-15:4.
[323] *See* MARK PLEVIN, LESLIE A. EPLEY, CLIFTON S. ELGARTEN, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 N.Y.U. ANN. SURV. AM. L. 271, 298 (2006) ("Those interests will not only pit him generally against all current claimants in competing for limited funds, but should pit him most forcefully against those current claimants with weak or deficient claims who are also competing for those limited funds.").
[324] Hughes Dep. Tr., p. 117:21-23.
[325] *See* Lowenstein Sandler April 2022 Fee Statement [Dkt. No. 1747] (IC 325); Trenk Isabel April 2022 Fee Statement [Dkt. No. 1588] (IC 326); Lowenstein Sandler May 2022 Fee Statement [Dkt. No. 1822] (IC 328); Trenk Isabel May 2022 Fee Statement [Dkt. No. 1730] (IC 329) (each showing no mediations or communications with Judge Linares regarding the TDPs).

no mediations between April 11, 2022, and June 1, 2022 – the period during which the TDPs were written.[326]

G. The Resulting TDPs are a Wish List of Terms for Plaintiff Lawyers Designed to Artificially Inflate the Value of Claims

The terms of the TDPs, over which the Tort Committee exercised complete control, are one-sidedly in favor of the Abuse Claimants at the expense of the Insurers.

First, the TDPs are devoid of any criteria for the allowance of Abuse Claims.[327] Nor are there any criteria for the ***disallowance*** of Abuse Claims.[328] The TDPs likewise lack any provision delineating the burden of proof or the quantum of evidence necessary for an Allowed Claim.[329] By contrast, the Fifth Amended Plan included the standard of proof for allowing and disallowing claims – but that language was deleted from the Eighth Amended Plan.[330] Not surprisingly, Father Hughes was unable to identify "anything in the TDPs that would preclude a claim that's fraudulent from being allowed and paid by the [Trust Administrator],"[331] or "anything to ensure that the procedures for allowing claims under the TDPs didn't allow claims that were non-compensable."[332]

Second, the Tort Committee altered the Plan to include the following provision allowing the Trust Administrator to waive the Bar Date and allow untimely Abuse Claims at his discretion:

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[326] Nov. 9 Trial Tr. (Hughes), p. 139:22-24 ("Q: . . . . [Y]ou'll agree with me there are no mediations between April 11th and June 1 of 2022? A: Correct.").
[327] *See* TDPs, Plan, Ex. 2.2.113 [Dkt. No. 1725, pp. 97-111 of 111], §§ 1, 4, 6 (the TDPs only provide that the Abuse Claims Reviewer will determine if an Abuse Claim is Allowed, not the procedures used to make that determination); *see also* Plan, Article II, §§ 2.2.1 and 2.2.11 (defining "Abuse Claim" and "Allowed"); Hinton Decl. ¶ 27 (". . .the Trust Distribution Plan procedures do not set forth any criteria to be used in making such a determination.").
[328] *See* Hinton Decl., ¶ 8.
[329] *See* Bitar Decl., ¶ 14.
[330] *See* Nov. 30 Trial Tr. (Hinton), p. 130:7-19.
[331] Nov. 9 Trial Tr. (Hughes), p. 144:1-4.
[332] *Id.* at p. 143:17-25.

"[P]ursuant to the Trust Distribution Procedures, the Trust Administrator shall have the authority to deem any untimely Class 5 Claim Allowed even if such Claim was not filed by the Bar Date."[333] Mr. Wilen was unable to identify any benefit to the Estate from permitting the Trust Administrator to waive the Bar Date.[334]

Third, the Debtor allowed the Tort Committee to appoint the individuals that control the allowance and valuation of Abuse Claims.[335] The Tort Committee selected Matthew Dundon to serve as the Trust Administrator and Paul Finn to serve as the Abuse Claims Reviewer.[336] Each have deep-rooted connections to the plaintiffs' bar.

Mr. Dundon admitted that his representation of individual plaintiffs' attorneys and their client or clients in aggregate litigations and bankruptcies is an important part of his business and that he expects to continue these representations. When asked "how important," Mr. Dundun testified "Important in that it makes up a meaningful share of our revenue."[337] Mr. Dundon went on to identify various plaintiffs' firms that are regular clients, including a "long-standing relationship with the Pachulski firm."[338] As a part of that relationship, Mr. Dundon has "regular ongoing conversation[s] with various partners at Pachulski, including but not limited to Jim [Stang], about newly-filed Chapter 11 cases."[339] Mr. Dundun further acknowledged approximately 10 to 20 engagements with Lowenstein Sandler.[340]

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[333] Plan, § 2.2.11.
[334] Nov. 14 Trial Tr. (Wilen), p. 148:5-15.
[335] *See* Plan, §§ 2.2.109 and 2.2.2.
[336] *See* Deposition Transcript of Paul Finn dated August 3, 2022 and August 25, 2022 ("Finn Dep. Tr."), pp. 23:17-24, 24:1-9; Deposition Transcript of Matthew Dundon dated August 8, 2022 ("Dundon Dep. Tr."), pp. 123:16-124:10.
[337] Dundon Dep. Tr., p. 137:6-17.
[338] *Id.* at p. 69:3-5.
[339] *Id.* at p. 69:19-23.
[340] *See id.* at pp. 94:22-95:14.

Mr. Finn admitted a long-term relationship with the Pfau Cochran firm, which represents Abuse Claimants against the Debtor.[341] Mr. Finn also admitted close ties to Adam Slater and Jonathan Schulman and their firm.[342] This firm represents one of the larger groups of Abuse Claims against the Debtor, and Mr. Finn considers Adam Slater, the named partner, "a friend."[343]

Finally, the Tort Committee ensured that the Plan Documents grant to the Trust Administrator and Abuse Claims Reviewer significant power and authority over, among other things, Abuse Claims and the TDPs.[344] The Trust Administrator and the Abuse Claims Reviewer, for example, have the power to "modify the terms" of the TDPs in consultation with the Trust Advisory Committee.[345]

In combination, these various provisions stack the deck in favor of the Abuse Claimants and, for the reasons discussed below, deny the Insurers due process in the adjudication of the Abuse Claims.

H. The Plan Proponents File the Plan Documents

[341] Finn Dep. Tr., pp. 101:24-102:9. *See also* Diocese of Camden Survivor Claims Summary, Claims Summary – Consolidated, pp. 6, 14 of 18 (listing Pfau Cochran as counsel for Victim No. 82/Claim No. 163, Victim No. 83/Claim No. 164, Victim No. 84/Claim No. 165, Victim No. 85/Claim No. 166, Victim No. 252/Claim No. 426, and Victim No. 257/Claim No. 431).

[342] Finn Dep. Tr., p. 103:3-11. *See also* Diocese of Camden Survivor Claims Summary, Claims Summary – Consolidated, pp. 6-7, 11-14 of 18 (listing Slater Slater Schulman as counsel for Victim No. 89/Claim No. 171, Victim No. 110/Claim No. 193, Victim No. 192/Claim No. 278, Victim No. 193/Claim No. 279, Victim No. 194/Claim No. 280, Victim No. 195/Claim No. 281, Victim No. 217/Claim No. 278, Victim No. 235/Claim No. 397, Victim No. 246/Claim No. 420; *id.*, Claims Summary – Special Claims, pp. 4, 7-8 of 9 (listing Slater Slater Schulman as counsel for Claim No. 193, Claim No. 378, Claim No. 397, and Claim No. 420).

[343] Finn Dep. Tr., p. 103:3-7.

[344] *See, e.g.*, Plan, §§ 2.2.11, 2.2.114, 7.6, 8.6, 10.4.2; Trust Agreement, Plan, Ex. 2.2.110 [Dkt. No. 1725, pp. 79-95 of 111], §§ 1.7.4, 3.2; TDPs, §§ 8(ii), (xi)-(xiii), 9(iii), 12. *See also, e.g.*, Plan, § 8.2; TDPs, §§ 1, 4, 11.

[345] *See* TDPs, § 16(iii).

The Debtor filed the *Sixth Amended Plan of Reorganization* on April 22, 2022 (the "Sixth Amended Plan"),[346] which substantially modified the Fifth Amended Plan and ***abandoned*** the Insurance Settlement.[347] At the April 27, 2022 status conference, the Court entered its *Order Granting LMI's Emergency Motion to Vacate the Existing Confirmation Schedule*,[348] pursuant to which the Court vacated the previous plan confirmation schedule[349] then in effect and directed the Debtor to file a disclosure statement with respect to its Sixth Amended Plan.

On May 3, 2022, the Debtor filed a *Seventh Amended Plan of Reorganization* ("Seventh Amended Plan")[350] and the *Seventh Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Describing Seventh Amended Chapter 11 Plan of Reorganization of the Diocese of Camden, New Jersey* ("Seventh Amended Disclosure Statement").[351]

Subsequently, on June 1, 2022, the Plan Proponents jointly filed the Eighth Amended Plan[352] and the Eighth Amended Disclosure Statement.[353] On June 20, 2022, the Court entered an Order approving the Eighth Amended Disclosure Statement, as modified, for solicitation.[354] The Insurers have filed objections to the Eighth Amended Plan.[355] Thereafter, the parties engaged in extensive discovery, including further expert and fact witness depositions.

I. The Plan Proponents' Efforts to Cover Up their Bad Faith Conduct

[346] [Dkt. No. 1527].
[347] *See* Sixth Amended Plan, § 7.2.3 (transferring Insurance Interests to Plan Trust, in breach of the terms of Insurance Settlement).
[348] [Dkt. No. 1565].
[349] [Dkt. No. 1474].
[350] [Dkt. No. 1568].
[351] [Dkt. No. 1567].
[352] [Dkt. No. 1725].
[353] [Dkt. No. 1724] (LMI 1056).
[354] *See* [Dkt. No. 1818].
[355] *See* [Dkt. Nos. 2401, 2410].

1. The Insurers' Discovery Requests and the Plan Proponents' Discovery Responses

Pursuant to the Court's scheduling order, as amended, the parties were entitled to conduct fact discovery in connection with the Plan between June 1, 2022 (the date the Plan was filed) and September 14, 2022 (the date the parties were ultimately required to file their responses to requests for admissions and their objections to confirmation of the Plan).[356]

The Insurers pursued Plan discovery diligently during this time. On June 10 and 20, 2022, the Insurers served interrogatories and requests for production on the Debtor and the Tort Committee.[357] These discovery requests included, among other things, requests to produce (as follows, collectively, the "Settlement Discovery"):

(a) "[a]ll Documents and Communications relating to the TDPs, including without limitation all drafts of the TDPs [and] all documents reflecting the drafting history of the TDPs";[358]

(b) "[a]ll Documents and Communications relating to the [Tort Committee] Settlement, including but not limited to, all drafts of the Tort Committee Settlement";[359] and

(c) "[a]ll Documents relating to any Communications pre- or post- entering into the Insurance Settlement . . . with any person or entity relating to the Insurance

[356] [Dkt. Nos. 1845, 2352].
[357] *See Motion to Compel Production of Documents Purportedly Subject to Common Interest Privilege and to Obtain Other Relief* [Dkt. No. 2101] (the "First Motion to Compel") at § I.
[358] *Insurers' First Requests for Production of Documents to the Diocese of Camden, New Jersey in Connection with the Debtor's Eighth Amended Plan of Reorganization* ("RPD 1 to Debtor") at Request No. 14 [Dkt. No. 2101-2, p. 37 of 147]); *Insurers' Requests for Production of Documents to the Official Committee of Tort Claimant Creditors* ("RPD 1 to TCC") at Request No. 44 [Dkt. No. 2101-2, p. 141 of 147].
[359] RPD 1 to Debtor at Request No. 50 [Dkt. No. 2101-2, p. 43 of 147]; *see also* RDP 1 to TCC, at Request No. 53 [Dkt. No. 2101-2, p. 143 of 147] ("All drafts of the Plan, the Trust, the Trust Agreement, the TDPs, the [Tort Committee] Settlement, and/or the Trust Documents.").

> Settlement, including whether the [Debtor] should enter into the [Tort Committee] Settlement . . . ."[360]

On June 28, 2022, counsel for the Tort Committee – on behalf of the Tort Committee, the Debtor, and approximately 70 other parties – responded via letter to the Insurers' Settlement Discovery, contending, among other things, that the Insurers lacked standing to seek ***any*** of the discovery.[361] Shortly thereafter, on June 30, 2022, the Plan Proponents in their respective formal responses lodged objections to the Settlement Discovery on privilege grounds and declined to produce any documents.[362]

2. The Insurers' Motions to Compel

As a result of the Plan Proponents' refusal to produce responsive documents to the Settlement Discovery, the Insurers in late July filed their First Motion to Compel and Second Motion to Compel.[363] The Tort Committee, on behalf of the Plan Proponents, opposed the First and Second Motions to Compel vociferously, stating "[T]here are ***no documents*** outside of the Plan that evidence the [Tort] Committee Settlement; there is ***no term sheet***, plan support agreement, or other writing ***regarding the terms of the [Tort Committee] Settlement***."[364] The Debtor, in a July 28, 2022 email exchange with counsel for Century, likewise declared that "there

[360] *Insurers' Third Requests for Production of Documents to the Diocese of Camden, New Jersey in Connection with the Debtor's Eighth Amended Plan of Reorganization*, at Request No. 3 [Dkt. No. 2101-2, p. 62 of 147]; RDP 1 to TCC, at Request No. 54 [Dkt. No. 2101-2, p. 143 of 147].
[361] Letter from Michael A. Kaplan, counsel to the Tort Committee, to Harris Winsberg, counsel to Interstate (June 28, 2022) [Dkt. No. 1926-1] (IC 341), p. 3 ("The sole issues the [Propounding] Insurers have standing to raise are the issues of law that are well-settled for which no discovery is necessary.").
[362] *See* First Mot. to Compel, Ex. A [Dkt. 2101-1].
[363] *See id.* [Dkt. No. 2101]; *Motion to Compel Production of Documents Purportedly Subject to Mediation Privilege and to Obtain Other Relief* [Dkt. No. 2102] (the "Second Motion to Compel").
[364] Letter from Michael A. Kaplan, counsel to the Tort Committee, to the Honorable Jerrold N. Poslusny, Jr. (Aug. 1, 2022) [Dkt. No. 2138] (referred to herein as the "Kaplan August 1 Letter") (IC 343), § II.A. (emphasis added).

is NO other writing (at all) concerning the terms with the TCC."[365] The Court later took the First Motion to Compel under advisement.[366]

In the interim, the Insurers also sought an extension of the then-current confirmation schedule due to the Plan Proponents' intransigent discovery conduct (the "Motion to Adjourn").[367] The Insurers noted, among other things, that the Plan Proponents had "failed to produce a single email or document that outlines the terms of the [Tort Committee] [S]ettlement" and asserted that the Plan Proponents' claims that no such document(s) (apart from the Plan) existed strained credulity.[368]

Counsel for each of the Plan Proponents ridiculed the notion in response. The Debtor's counsel, for example, derided the Insurers' claims as "conspiracy theories," insisting that the Plan Proponents had "disclosed all documents, drafts, and communications between [them] relating to the Plan, Trust, Trust Documents, and TDP."[369] Counsel for the Tort Committee likewise dismissed the Insurers' concerns and reiterated that, "[a]s the Plan Proponents ha[d] represented numerous times, they [we]re not withholding documents and ha[d] produced all documents related to drafting of the Plan and TDP."[370]

The Plan Proponents doubled down on these assertions at the August 10, 2022, hearing on the Motion to Adjourn. After counsel for Interstate raised the likelihood of a term sheet or other

[365] Email from Richard D. Trenk, counsel to the Debtor, to Tancred Schiavoni, counsel to Century, dated July 28, 2022 (IC 342).
[366] For clarity, the Insurers' Second Motion to Compel was mooted by the Plan Proponents' voluntary waiver of the mediation privilege. As such, the Court took under advisement only the First Motion to Compel.
[367] *See Interstate Fire & Casualty Company's Motion to Adjourn Certain Dates and Deadlines in Connection with Confirmation of the Eighth Amended Plan of Reorganization* [Dkt. No. 2114].
[368] *Id.* at ¶ 9.
[369] Letter from Richard D. Trenk, counsel to the Debtor, to the Honorable Jerrold N. Poslusny, Jr. (Aug. 5, 2022) [Dkt. No. 2186] (IC 344), p. 3.
[370] Letter from Michael A. Kaplan, counsel to the Tort Committee, to the Honorable Jerrold N. Poslusny, Jr. (Aug. 5, 2022) [Dkt. No. 2187] (IC 345), p. 1 n.2.

writing between the Plan Proponents prior to the Tort Committee Settlement, the Debtor's counsel represented that "[t]here's no additional document that they could get from the [Debtor]," scoffing that "they say 'oh, it's hard to believe there wasn't a written terms sheet' . . . [b]ut there's ***no other*** document and if there was, we gave it."[371] The Tort Committee's counsel quickly followed suit, affirming that the Tort Committee "ha[d] produced all of the documents relating to the drafting of the [P]lan."[372]

Yet nine days later, the Tort Committee produced (the "August 19 Production") an April 12 email exchange between the Plan Proponents' counsel that confirmed the Tort Committee Settlement and outlined various terms thereof (the "April 12 Exchange").[373] The April 12 Exchange had not been produced at any time previously.[374]

Shortly after this supplemental production, the Court ruled on the First Motion to Compel (the "August 26 Ruling"). The Court in the August 26 Ruling held, in pertinent part, that the common interest applied "to any documents or communications related to the [Tort Committee] [S]ettlement and pursuit of the current [P]lan beginning [April] 11, unless the attorney-client privilege was otherwise waived."[375] The Court then ordered the Plan Proponents to "produce any documents . . . not already produced that do not fall within the common interest privilege" as described.[376] When the Insurers sought a determination that the Plan Proponents' discovery

[371] Transcript of Hearing (Aug. 10, 2022) (the "Aug. 10 Hr'g Tr.") (IC 234), pp. 70:16-19, 71:1-2.
[372] *Id.* at pp. 75:25-76:1.
[373] *See* Letter from Harris Winsberg, counsel to Interstate, to the Honorable Jerrold N. Poslusny, Jr. (Aug. 24, 2022) (the "Winsberg Aug. 24 Letter"), Ex. 1 [Dkt. No. 2297-1].
[374] *Id.* at p. 3.
[375] Transcript of Court's Audio Rulings (Aug. 26, 2022) (IC 190) (the "Aug. 26 Audio Ruling"), p. 11:9-12.
[376] *Id.* at p. 11:13-15.

conduct precluded a finding of good faith with respect to the Plan,[377] the Court denied their request but noted that "it does appear that the [April 12 Exchange] should have been provided sooner."[378]

The Plan Proponents refused to comply with the August 26 Ruling.[379] As a result, Interstate (joined by Century) was forced to file yet another motion to compel – the ***third*** in less than two months (the "Third Motion to Compel") – which both Plan Proponents opposed strenuously, arguing that all documents prior to April 11 were irrelevant to the Plan Confirmation Proceedings.[380]

At a later hearing on the dispute, the Court questioned the accuracy of this argument. More specifically, the Court asked: "[I]f there were discussions prior to April 11th saying [hypothetically] . . . 'if we can reach a deal, we can really stick it to the insurers,' why is that not relevant for good faith?'"[381] The Debtor's counsel, in response, stated that, "until April 11th . . . there was ***no discussion*** with the [Tort Committee] about other than that their position was the insurance – they wanted to deal with the insurance . . . ."[382] Counsel for the Tort Committee echoed these comments, characterizing the Tort Committee Settlement as "a surprise to everyone," and claiming that "any discussions before April 11th would have been related to the fifth amended plan and [the Tort Committee's] objection to the same, and – and not in any way connected to the – what is now the [Plan]."[383]

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[377] *See generally* Letter from Harris B. Winsberg and Siobhain P. Minarovich, counsel to Interstate, to the Court (Aug. 24, 2022) [Dkt. No. 2297].
[378] Transcript of Audio Rulings (Aug. 30, 2022) [Dkt. No. 2347], pp. 10:10-12:4.
[379] *See generally*, Letter from Harris B. Winsberg, counsel to Interstate, to the Honorable Jerrold N. Poslusny, Jr. (Sep. 9, 2022) [Dkt. No. 2373].
[380] *See* Letter from Richard D. Trenk, counsel to the Debtor, to the Honorable Jerrold N. Poslusny, Jr. (Sep. 13, 2022) [Dkt. No. 2392] (IC 347), p. 3; *see also* Letter from Michael A. Kaplan, counsel to the Tort Committee, to the Honorable Jerrold N. Poslusny, Jr. (Sep. 12, 2022) [Dkt. No. 2378] (IC 346), p. 1.
[381] Transcript of Motions Hearing (Sep. 14, 2022) (the "Sep. 14 Hr'g Tr.") (IC 239), p. 29:5-9.
[382] *Id.* at p. 30:10-14 (emphasis added).
[383] *Id.* at p. 32:4-7.

The Court granted the Third Motion to Compel shortly after the hearing, ordering the Plan Proponents to produce "all non-privileged information that was requested by the insurers for which . . . they have standing and that has not already been provided."[384]

3. The Plan Proponents' September 16 Production

On Friday, September 16, 2022, the Plan Proponents made a joint production, consisting of approximately 50 files (the "September 16 Production"). That following Monday, September 19, 2022, the Insurers took the Rule 30(b)(6) deposition of the Tort Committee's designee, Mr. Weisenberg.

The September 16 Production contained, among other things: (i) pages of email correspondence relating to settlement negotiations between the Plan Proponents dated prior to April 11 (the "Settlement Correspondence"); and (ii) several different versions (and/or redlines thereof) of a draft "Plan of Reorganization Term Sheet" between the Plan Proponents exchanged in January (each, generically, a "Term Sheet"). These are the very documents the Plan Proponents had previously claimed did not exist.

4. The Tort Committee Settlement and Its Consequences

Several consequences flowed from the Tort Committee Settlement.

First, the imminent trial on the 9019 Motion was adjourned.[385] Second, the terms of the now-TDPs evolved dramatically from those set forth in the Term Sheet. The Tort Committee's initial draft of the TDPs (post-April 11) contained, for the first time, the concepts of an Initial Review Determination, Verdict Value Assessment, and Stipulated Judgment.[386] The original

[384] *Id.* at p. 44:7-12.
[385] *See* Transcript of Telephonic Status Conference (Apr. 12, 2022) (IC 216), p. 5:19-21.
[386] *Compare* PlanPro00000072-95 (JX 0424) *with* TCC00000952-965 (JX 0437); *cf.* Weisenberg Dep. Tr., pp. 40:8-41:16.

requirements of structured classification of Abuse Claims and tort-system liquidation of severe Abuse Claims were excised entirely,[387] as was the concept of trying or settling these Abuse Claims with insurer consent.[388] These significant changes all followed the input of the plaintiffs' attorneys.[389] Finally, the Tort Committee and the Debtor embarked on a coordinated campaign of "maximum pressure on the insurers [to] not give them any air to breath [*sic*]," an objective illustrated by their discovery conduct in the Bankruptcy Case.[390]

J. The Revised Proposed Confirmation Order

On September 7, 2022, the Plan Proponents filed a *Proposed Order Confirming Eighth Amended* Plan *of Reorganization* (the "Original Confirmation Order").[391] On October 4, 2022, the Plan Proponents – without leave of the Court – replaced the Original Confirmation Order with a revised proposed form of *Order Confirming Eighth Amended Plan of Reorganization* (the "Revised Confirmation Order"),[392] which is the operative (proposed) form of confirmation order.

This Revised Confirmation Order, among other things, adds or alters (as applicable) the exculpation and judgment reduction clauses contained in the Plan. Specifically, Paragraph 22 of the Revised Confirmation Order modifies the exculpation clause set forth in Section 11.6 of the Plan to state in relevant part (as follows, the "Exculpation Clause"):

> From and after the Effective Date, none of the Exculpated Parties shall have or incur any liability for any claim to any other Exculpated Party, to any Holder of a Claim, or to any other party in interest, for any act or omission that occurred from the Petition Date through the Effective Date in connection with the Chapter 11 Case or the filing of the Chapter 11 Case, the formulation, negotiation, or pursuit of

[387] *Compare* PlanPro00000072-95 (JX 424) *with* TCC00000952-965 (JX 437); *cf.* Weisenberg Dep. Tr., pp. 40:8-41:16.
[388] *Compare* PlanPro00000072-95 (JX 424) *with* TCC00000952-965 (JX 437); *cf.* Weisenberg Dep. Tr., pp. 40:8-41:16.
[389] *See* Weisenberg Dep. Tr., pp. 144:20-145:1.
[390] Winsberg Aug. 24 Letter, Ex. 1; TCC 00004682 (JX 0430).
[391] [Dkt. No. 2371].
[392] [Dkt. No. 2586, Exhibit A].

> confirmation of this Plan, the consummation of this Plan, and the administration of this Plan or the property to be distribution under the Plan, except for claims arising from the gross negligence, willful misconduct, fraud, or breach of the fiduciary duty of loyalty of any Exculpated Party [. . .].[393]

The Revised Confirmation Order also redefines "Exculpated Party[(ies)]" to mean, collectively: "(i) the Debtor, the Estate, the Tort Committee and the Trade Committee; (ii) [all of their respective] professionals [. . .]; (iii) the officers and directors of the Debtor [. . .]; (iv) the members of the College of Consultors [. . .]; and (v) the members of the Finance Council [. . .]."[394]

The Exculpation Clause thus purports to release from liability (for any act or omission during the Chapter 11 Case and related to the Plan) not only the Debtor, its directors and officers, and all Estate fiduciaries, but also (i) the Estate ***itself*** and (ii) members of the Debtor's clerical consultative bodies, the College of Consultors and the Finance Council.[395] And although the Exculpation Clause contains a limited carveout for "gross negligence, willful misconduct, fraud, or breach of the fiduciary duty of loyalty of any Exculpated Party,"[396] it does not mention or otherwise exclude the claims asserted in the Insurers' Administrative Expense Claim Adversary Proceeding.[397]

In addition to providing this modified Exculpation Clause, the Revised Confirmation Order replaces the judgment reduction provision contained in Section 9.3 of the Plan with a "Judgment Reduction Clause" that begins[398] as follows (this excerpt, the "Primary Reduction Provision"):

> In any Action, including the Insurance Coverage Adversary Proceeding, involving the Debtor or an Other Catholic Entity, the Reorganized Debtor, or the Trust (collectively, "Alleged Insured") or an Abuse Claimant, as applicable, and one or

[393] Revised Confirmation Order, ¶ 22 (edited for clarity).
[394] *Id.*
[395] *See generally, id.*
[396] *Id.*
[397] *See generally, id.*
[398] For clarity, Section 9.3 of the Plan (as amended and restated in Paragraph 19 of the Revised Confirmation Order) is presented in the Revised Confirmation Order as one, complete paragraph. *See id.* It is separated into discrete provisions herein for ease of reference.

> more Non-Settling Insurers, where a Non-Settling Insurer has asserted, asserts, or could assert any Contribution Claim against any of the Settling Insurers, then any judgment or award obtained by such Alleged Insured or Abuse Claimant against such Non-Settling Insurer shall be automatically reduced by the amount, if any, that any of the Settling Insurers is liable to pay such Non-Settling Insurer as a result of its Contribution Claim, so that the Contribution Claim is thereby satisfied and extinguished entirely ("Reduction Amount").[399]

The Judgment Reduction Clause goes on to state (this excerpt, the "Forced Reduction Provision"):

> In any Action involving an Alleged Insured or Abuse Claimant against a Non-Settling Insurer, where any of the Settling Insurers are not a party, such Alleged Insured or Abuse Claimant shall obtain a finding from that court or arbitrator(s), as applicable, of the Reduction Amount before entry of judgment against such Non-Settling Insurer. In the event that such a reduction is not made as described above, then any Contribution Claim by any Non-Settling Insurer against any of the Settling Insurers shall be reduced by the Reduction Amount, as determined by the court or arbitrator(s) in which such Contribution Claim is filed.[400]

After obligating the Settling Insurers to cooperate in the defense of any Contribution Claim, the Judgment Reduction Clause concludes as follows (this excerpt, the "Reimbursement Provision"):

> In the event that application of the Reduction Amount eliminates the Non-Settling Insurer's Contribution Claim, then such Non-Settling Insurer shall fully reimburse the Settling Insurers their costs and expenses, including legal fees, incurred in responding to the Contribution Claim Action, including all costs, expenses and fees incurred in seeking relief from the Bankruptcy Court.[401]

Finally, the Judgment Reduction Clause by its terms permits offsetting reductions only and does not contemplate a recovery for any portion of a Contribution Claim that exceeds the underlying judgment, if any, against the Non-Settling Insurer.[402]

[399] *Id.* at ¶ 19.
[400] *Id.*
[401] *Id.*
[402] *See id.*

K. The Evidentiary Hearing on Confirmation of the Eighth Amended Plan and the 9019 Motion

Commencing October 6, 2022, the Court convened a 14-day combined evidentiary hearing to consider (a) approval of the 9019 Motion and (b) confirmation of the Eighth Amended Plan. That hearing concluded on December 1, 2022. For the reasons set forth below, the Court should deny confirmation of the Eighth Amended Plan.

ARGUMENT AND CITATION TO LEGAL AUTHORITY

I. THE INSURANCE ASSIGNMENT VIOLATES THE BANKRUPTCY CODE AND STATE LAW

The Plan cannot be confirmed because its key component, the Insurance Assignment, is prohibited under applicable law. This inquiry begins with state (*i.e.*, New Jersey) law.[403] If New Jersey law does not allow the Insurance Assignment either for the Debtor or each of the non-debtors, then the analysis continues under the Bankruptcy Code to determine whether it permits the Insurance Assignment despite New Jersey law to the contrary. Here, both New Jersey law and the Bankruptcy Code bar the Insurance Assignment, in each case as set forth in greater detail below. Accordingly, the Plan is unconfirmable under Sections 1129(a)(1) and (3).

A. The Insurance Assignment Is Invalid Under New Jersey Law

A determination of the assignability of an insurance policy under New Jersey law starts with the policy itself. If the policy forbids assignment absent the consent of the insurer, then "an

[403] *See Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."); *In re BSA*, 642 B.R. 504, 670 (Bankr. D. Del. 2022) ("Whether an anti-assignment clause in an insurance policy prohibits assignment is, in the first instance, a matter of state law.").

assignment without the insurer's consent invalidates it"[404] – with one exception. Post-loss, a policyholder may assign its money claim (against the insurer) for the amount of the loss despite an anti-assignment provision.[405] The rationale for this exception "is related to the purpose behind a no-assignment clause . . .[,] which is to protect the insurer from insuring a different risk than intended."[406] As such, the exception is narrow: it does not permit an assignment of the policy (at any time), or the assignment of an interest under the policy before a loss – only an assignment of the policyholder's chose in action (*viz*., the money claim) that accrues ***following*** a loss, and only then if the assignment will not "violate the essence of the contract."[407]

The Insurance Assignment fails this test on both fronts. At the outset, each of the Insurance Policies contains a prohibition on non-consensual assignment.[408] And since the Insurers have not consented to the Insurance Assignment, it is prohibited under New Jersey law unless it falls within the exception – which it does not, for at least two reasons. ***First***, the Insurance Assignment "violate[s] the essence of the [Insurance Policies],"[409] and the purpose of the anti-assignment provisions more generally, because it materially alters the level of risk to the Insurers.[410] The Insurance Policies were underwritten and provided based on the assumption of a vigorous defense,[411] in an adversarial system,[412] resulting in a judgment or approved settlement.[413] A

[404] *Flint Frozen Foods, Inc. v. Firemen's Ins. Co.*, 79 A.2d 739, 742 (N.J. Super. Ct. 1951) (internal quotations and citations omitted), *rev'd on other grounds*, 86 A.2d 673 (N.J. 1952).
[405] *See, e.g.*, *Elat, Inc. v. Aetna Cas. & Sur. Co.*, 654 A.2d 503, 505 (N.J. Super. Ct. App. Div. 1995).
[406] *Elat*, 654 at 505.
[407] *Caldwell Trucking PRP Grp. v. Spaulding Composites Co.*, 890 F. Supp. 1247, 1260 (D.N.J. 1995) (internal citations and quotations omitted).
[408] *See supra* Statement of Facts, § A.2.
[409] *Caldwell Trucking PRP Grp. v. Spaulding Composites Co.*, 890 F. Supp. 1247, 1260 (D.N.J. 1995) (internal citations and quotations omitted).
[410] Harrington Decl., ¶ 60 ("Confirmation of the Plan in its present form would transform the risk transfer agreements as specified in the non-settling insurers' policies and increase significantly the potential liabilities of non-settling insurers.").
[411] *Id.* at ¶ 64.
[412] *Id.* at ¶ 11(b).
[413] *Id.* at ¶ 36.

Stipulation of Judgment emerging from a manufactured (and non-adversarial) liquidation protocol, controlled by a plaintiff-dominated Trust that is itself financially incentivized to maximize claims, is a risk that the Insurers had no intention of insuring.[414] The Insurance Assignment therefore is fundamentally inconsistent with both the nature of the Insurance Policies and the rationale for the anti-assignment exception, and is permissible under neither.[415]

Second, the Insurance Assignment of the indemnity Insurance Policies (specifically including the LMI and Interstate Policies)[416] does not qualify for the exception because the requisite loss has not occurred. Under an indemnity policy, the insured "has sustained no loss" until it has paid a damages award "imposed upon it by law."[417] A loss under an indemnity policy, in other words, "accrues at the point that the liability is discharged by payment."[418] Thus, "there is no cause of action" against an insurer under an indemnity policy – and therefore no interest to assign – until the insured has "suffered an actual money loss."[419] But the Debtor has not "suffered an actual money loss"[420] on the Abuse Claims because the Debtor has not paid a damages award "imposed upon it by law"[421] on account of the Abuse Claims.[422] And under the Plan, the Debtor

[414] *See generally, id.* at ¶ 11.
[415] *Caldwell Trucking*, 890 F. Supp. at 1261.
[416] Professor Harrington and Ms. Comiter testified that the LMI and Interstate Policies are indemnity policies. Harrington Decl., ¶ 31 ("The Interstate and LMI policies are indemnity policies . . ."); Comiter Decl., ¶ 27 ("The LMI policies are excess indemnity policies . . ."). New Jersey precedent confirms these conclusions. *See, e.g., Bernstein v. Palmer Chevrolet & Oldsmobile, Inc.*, 206 A.2d 176, 179 (N.J. Super. Ct. App. Div. 1965) ("[U]nder an indemnity policy the insured must have suffered an actual money loss before the insurer is liable."). *See also Save Mart Supermarkets v. Underwriters at Lloyd's London*, 843 F. Supp. 597, 603 (N.D. Cal. 1994) (determining that LMI policies with "Ultimate Net Loss" and "Loss Payment" provisions, like the LMI Policies here, "indicate[d] an agreement of indemnity rather than liability.").
[417] *Chodosh Bros. v. Am. Mut. Liab. Ins. Co.*, 196 A. 654, 655 (N.J. 1938).
[418] *First Indem. of Am. Ins. Co. v. Kemenash*, 744 A.2d 691, 696 (N.J. Super. Ct. App. Div. 2000).
[419] *Bernstein*, 206 A.2d at 179.
[420] *Id.*
[421] *Chodosh Bros.*, 196 A. at 655.
[422] *See, e.g.*, Trial Transcript (Oct. 21, 2022) ("Oct. 21 Trial Tr.") (Baker), p. 64:4-19 (testifying that there has been no adjudication of the underlying abuse claims).

never will.[423] As a result, the Insurance Assignment of the indemnity Insurance Policies will occur before – not after – the loss has occurred, rendering it invalid under New Jersey law.[424]

B. The Insurance Assignment Is Impermissible Under the Bankruptcy Code

The Insurance Assignment is equally invalid under the Bankruptcy Code. Although the Plan does not specify the specific section(s) of the Bankruptcy Code on which it relies to effect the Insurance Assignment, there are only two that could apply: Section 363 or Section 365. To the extent the Insurance Policies are executory contracts, Section 365 applies to the Insurance Assignment.[425] If the Insurance Policies are not executory, Section 363 applies to the Insurance Assignment.[426] The Insurance Assignment (and thus the Plan) complies with neither. Further, the Plan's transfer of the non-Debtor, Other Catholic Entities' interests in the Insurance Policies lacks ***any*** jurisdictional or statutory predicate. Accordingly, and as described in greater detail below, the Bankruptcy Code does not permit the Insurance Assignment.

1. The Insurance Assignment Violates Section 363's Requirements

A transfer under Section 363 must be made *cum onere*.[427] That principle requires "the rights and obligations under [an] agreement[] to be transferred together, if at all."[428] In other words, the benefits of a contract must travel with the burdens – and a debtor may not split one

[423] *See* Plan, § 7.2.2.
[424] *Cf., e.g.*, *Elat*, 654 A.2d at 505 ("[***O***]***nce a loss occurs***, the assignment is of the loss and not the policy and is thus not barred by a no-assignment provision.").
[425] *See DB Structured Prods. v. Am. Home Mortg. Holdings, Inc. (In re Am. Home Mortg. Holdings, Inc.)*, 402 B.R. 87, 93 (Bankr. D. Del. 2009) ("If a contract is executory, the debtor must . . . comply with [S]ection 365.").
[426] *See id.* ("[I]f a contract is not executory, a debtor may assign, delegate, or transfer rights . . . under [S]ection 363 . . . provided that the criteria of that section are satisfied.").
[427] *Id.* at 103 ("[T]he *cum onere* principle applies equally to the transfer of rights and obligations under a non-executory contract pursuant to [Section] 363 of the Bankruptcy code as to the assumption and assignment of contracts and leases pursuant to [Section] 365.").
[428] *Id.* at 98.

from the other.[429] This is a corollary of the long-standing rule that debtors cannot use the Chapter 11 process to modify prepetition contracts to the detriment of non-debtor counterparties.[430] The rule applies with equal force to prepetition insurance policies, prohibiting the alteration of "the rights and obligations of the debtor and [its insurer] . . . because of the [d]ebtor's Chapter 11 filing."[431] "The filing of a bankruptcy petition does not alter the scope or terms of a debtor's insurance policy"[432] or permit an insured to "obtain greater rights to the proceeds of [an insurance] policy."[433] As such, a bankruptcy court cannot confirm a plan that excises provisions of an insurance policy "because doing so would rewrite the [insurance] [p]olicies and expand the [d]ebtor['s] rights under them," and "the Court cannot modify those rights pursuant to the Bankruptcy Code."[434]

But that is precisely what the Plan aims to achieve. The plain wording of the Plan shows that the Debtor seeks to assign ***all*** rights under the Insurance Policies, providing that the Trust-assignee "shall have ***full access to coverage*** under the non-Settling Insurer Policies to the greatest extent permitted by applicable non-bankruptcy law, in the same manner and to the same extent as the Covered Parties prior to the confirmation of this Plan and the Insurance Assignment."[435] The Plan further states, "[t]he Trust shall be entitled to (i) all recoveries on account of Transferred Insurance Interests as set forth in this Plan, the Trust Distribution Plan and the Confirmation Order

[429] *See id.*
[430] *See, e.g. In re SPM Mfg. Corp.,* 984 F.2d 1305, 1311 (1st Cir. 1993) (bankruptcy courts lack authority to enter
orders that "expand the contractual obligations of the parties"); *Matters of Crippin*, 877 F.2d 594, 598 (7th Cir. 1989); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984); *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 769 F. Supp. 671, 707 (D. Del. 1991), *aff'd,* 988 F.2d 414 (3d Cir. 1993).
[431] *In re Amatex Corp.*, 107 B.R. 856, 865-66 (E.D. Pa. 1989), *aff'd*, 908 F.2d 961 (3d Cir. 1990).
[432] *In re MF Glob. Holdings Ltd.*, 469 B.R. 177, 194 (Bankr. S.D.N.Y. 2012).
[433] *In re Denario*, 267 B.R. 496, 499 (Bankr. N.D.N.Y. 2001) (quotation omitted).
[434] *MF Glob. Holdings*, 469 B.R. at 193.
[435] Plan, § 7.8.1.2 (emphasis added).

and to (ii) assert and/or assign to any Abuse Claimant all Claims that currently exist or may arise in the future against Non-Settling Insurers."[436] At the very least, the Insurance Assignment purports to transfer to the Trust the right to the "proceeds of [the] Non-Settling Insurer Policies."[437] But conspicuously absent from the Insurance Assignment, and the Plan more generally, is any requirement that the Trust or Trust Administrator satisfy any SIRs, use a Service Organization, cooperate in the defense, or undertake any other responsibility of an insured under the Insurance Policies.[438]

Thus, the Plan aims to sever the benefits of the Insurance Policies (coverage) from their burdens (*e.g.*, the SIRs and defense provisions) – and through the Insurance Assignment, to transfer the former without the latter. This violates the *cum onere* rule and results in an impermissible modification of the Insurance Policies.[439] As such, the Insurance Assignment is noncompliant with Section 363 and cannot be approved under that Section.[440]

2. The Insurance Assignment Violates Section 365.

The Insurance Assignment of the LMI and Interstate Policies fails under Section 365 for similar reasons. Section 365 controls the assignment of executory contracts, which cannot be transferred under Section 363.[441] Nonetheless, an assumption and assignment of an executory contract under Section 365, like the transfer of a non-executory contract under Section 363, must

[436] *Id.* at § 7.8.1.1.

[438] Although the Plan states that the Trust "shall assume responsibility for, and be bound by, only such obligations of the Covered Parties under the Non-Settling Insurer Policies as are necessary to enforce the Transferred Insurance Interests," *Id.* at § 7.8.2.2, this toothless provision does not solve the issue. To start, it lacks any indication of which obligations are necessary, or to whom. More important, it still violates the *cum onere* rule, which requires the transfer of ***all*** obligations accompanying a right – not simply the expedient ones. *See Am. Home Mortg.*, 402 B.R. at 103.

[439] *Cf. id.*; *MF Glob. Holdings*, 469 B.R. at 193 ("[T]he Court cannot modify [policy] rights pursuant to the Bankruptcy Code.").

[440] *See* 11 U.S.C. § 1129(a)(1).

[441] *Am. Home Mortg.*, 402 B.R. at 93.

also be made *cum onere*.[442] In addition, the assignee of an executory contract must provide "adequate assurance of future performance . . . of such contract."[443] And even then, Section 365 prohibits the assumption and assignment of an executory contract if "applicable law excuses a party . . . from accepting performance from or rendering performance to an entity other than the debtor" and "such party does not consent" to the assignment.[444]

The Insurance Assignment of the LMI and Interstate Policies satisfies none of these requirements. It will not be made *cum onere*;[445] New Jersey law excuses LMI and Interstate from rendering performance to the Trust-assignee;[446] and neither LMI nor Interstate consent to the Insurance Assignment.[447] Further, the Trust has not provided adequate assurance of its future performance under the LMI and Interstate Policies – and, given the likely costs[448] and the Trust's inherent bias against the Insurers,[449] nor can it.[450] Consequently, the Insurance Assignment is not permissible under Section 365 of the Bankruptcy Code.

The only remaining inquiry is whether the LMI and Interstate Policies are executory.[451] And they are. "[An executory contract is] a contract under which the obligation of both the

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[442] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984) ("Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract *cum onere*."), *superseded by statute on other grounds*. *See also, e.g.*, *In re Italian Cook Oil Corp*, 190 F.2d 994, 997 (3d Cir. 1951) ("The trustee . . . may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.").
[443] 11 U.S.C. § 365(f)(2)(B).
[444] 11 U.S.C. § 365(c)(1).
[445] *See supra* § I.B.1.
[446] *See supra* § I.A.
[447] *See supra* § I.A.
[448] *See* Bitar Decl., ¶ 42 ("[W]hile the amount of costs and expenses is case specific and will vary widely, it would not be uncommon that the costs and fees of defending a single plaintiff case to final judgment would exceed $1.5 million or more."). Since there are over 300 Abuse Claims, potential defense costs could exceed $450 million – far in excess of the amount of the Trust Assets.
[449] *See infra* § III(B).
[450] *Cf. In re Fleming Cos.*, 499 F.3d 300, 306 (3d Cir. 2007) (an assignee must give adequate assurance of future performance for contract terms that are material and economically significant).
[451] Should the Court decide that the LMI Policies are executory contracts, the same analysis should apply to the Interstate Policies because the Interstate Policies follow form.

bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other."[452] "What determines a material breach is governed by state law, but the contract itself can define what acts or events qualify as a material breach."[453] Relevant state law likewise governs "[w]hat constitutes a material unperformed obligation."[454] But as a general matter, "[c]ourts have ruled that contingent obligations under a contract are sufficient to render a contract executory when the contingent obligations are essential to the contract."[455] At least one court, moreover, has determined that an insured's duty to defend is a material obligation and distinguished cases holding differently. In *Riley v. Mutual Insurance Co. Ltd.*,[456] the District Court for the Eastern District of Pennsylvania stated:

> Several courts have held that an insured's unfulfilled duty to defend under an insurance policy does not render the policy executory. . . . ***These decisions are inapposite***, however, because they turn on the court's conclusion "that the failure of the insured to perform those continuing obligations would not excuse the insurer from being required to perform and, consequently, that the . . . definition of an executory contract would not be satisfied." Here, where the duty to defend is a material term of Defendant's insurance policy, ***the insured's failure to defend does*** "***excuse the insurer from being required to perform***."[457]

The Third Circuit subsequently affirmed the District Court's decision in *Riley*.[458]

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[452] *Spyglass Media Grp., LLC v. Bruce Cohen Prods. (In re Weinstein Co. Hldgs., LLC)*, 997 F.3d 497, 504 (3d Cir. 2021) (internal quotations omitted); *Sharon Steel Cor. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989); *In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 239–40 (3d Cir. 1995).

[453] *Riley v. Mut. Ins. Co. Ltd.*, 2019 WL 9596537, at *7 (E.D. Pa. Jan. 8, 2019), *aff'd*, 805 F. App'x 143 (3d Cir. 2020) (citing *In re Gen. DataComm Indus., Inc.*, 407 F.3d 616, 623 (3d Cir. 2005)).

[454] *Weinstein Co.*, 997 F.3d at 504 (citing *Columbia Gas*, 50 F.3d at 239 n.10).

[455] *In re Safety-Kleen Corp.*, 410 B.R. 164, 168 (Bankr. D. Del. 2009) (citing *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1046 (4th Cir. 1985), *cert. denied* 475 U.S. 1057, 106 S. Ct. 1285, 89 L. Ed. 2d 592 (1986) (holding that a licensor's contingent duty to defend infringement suits was a material obligation)); *In re Exide Techs*., 340 B.R. 222, 234 (Bankr. D. Del. 2006) (citing *Richmond Metal*). *See also* LMI Plan Objection, p. 36.

[456] *Riley*, 2019 WL 9596537, at *8 (E.D. Pa. Jan. 8, 2019).

[457] *Id.* (emphasis added) (internal citations omitted) (quoting *Argonaut Ins. Co. v. Ames Dep't Stores (In re Ames Dep't Stores*), No. 93 Civ. 4014 (KMW), 1995 U.S. Dist. LEXIS 6704, at *7 (S.D.N.Y. May 17, 1995)). *See also* LMI Plan Objection, pp. 35-36.

[458] *See Riley*, 805 F. App'x 143 (3d Cir. 2020).

The analysis in *Riley* applies with equal force to the LMI and Interstate Policies, under which the Debtor is a self-insurer.[459] As a self-insurer, the Debtor owes to LMI and Interstate the same duty to defend claims vigorously as a primary insurer would.[460] This obligation is a fundamental and inseparable component of the LMI and Interstate Policies.[461] In a word, the Debtor's duty to defend is material – and the Debtor's ***failure*** "to defend [against an Abuse Claim would] excuse [LMI and Interstate] from being required to perform" under the LMI and Interstate Policies.[462] As such, the LMI and Interstate Policies are executory contracts;[463] and the Insurance Assignment of the LMI and Interstate Policies must comply with Section 365.[464] Its failure to do so precludes approval of the Insurance Assignment.[465]

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[459] *See* Nov. 10 Trial Tr. (Montgomery), p. 157:18-24 (testifying that Debtor is currently a self-insured and has been a self-insured since at least 1970). *See, e.g.*, (JX 0033) at p. 21, Loss Payments (stating that LMI, if Liable, will pay only that amount in excess of the self-insured retention); (JX 0033) at p. 4, Part I (Aggregate Agreement); and (JX 0036) at p. 4, Part 1 (Aggregate Agreement). *Compare* Harrington Decl., ¶¶ 31, 34 *and* Comiter Decl., ¶¶ 31-32, 34, 37 *with* Plan, p. 24 ("The Debtor Cash Contribution and the OCE Cash Contributions are being made in respect of . . . when a self-insured retention . . . must be satisfied to access coverage . . . .").

[460] *Cf. Mercury Indem. Co. of Am. v. Great N. Ins. Co.*, Civil Action No. 19-14278 (MAS)(LHG), 2022 U.S. Dist. LEXIS 50747, at *31-32 (D.N.J. Mar. 22, 2022) ("In New Jersey, the primary insurer owes the excess insurer a duty to exercise good faith, 'to take the initiative' in handling claims and to attempt to reach a settlement within the primary insurer's policy limit.") (internal citations omitted).

[461] *Cf.* Harrington Decl., ¶ 64 ("The non-settling insurers' policies were underwritten and priced under the assumption that the insured would be responsible for SIRs and deductibles, thus providing the insured with incentives for vigorous defense and settlement negotiations.").

[462] *Riley*, 2019 WL 9596537, at *8 (internal citations and quotations omitted). The Debtor has additional obligations under the LMI and Interstate Policies, including: allowing LMI and Interstate to associate/participate in the Debtor's administration and defense of claims; use at all times of a Service Organization; provision of notice of claims; provision of records; and cooperation with LMI and Interstate to their mutual advantage. *See* LMI Plan Objection, § II.A. See also Comiter Decl., ¶¶ 46, 145; Trial Transcript (Oct. 11, 2022 – AM) (Comiter), p. 26:12-17; Trial Transcript (Oct. 11, 2022 – PM) ("Oct. 11 PM Trial Tr.") (Comiter), pp. 35:10-37:17. As conditions precedent to any indemnity from LMI and Interstate, the Debtor's failure to discharge these obligations similarly would excuse LMI and Interstate from performing under their respective Policies. *See* Oct. 11 PM Trial Tr. (Comiter), p. 25:15-20; Deposition Transcript of Stuart Phillips dated July 29, 2022 (LMI 1187) ("Phillips Dep. Tr."), pp. 32:24-33:10 (discussing that LMI should be notified of claims through the Service Organization and have the opportunity to associate in the defense).

[463] *Cf. Columbia Gas*, 50 F.3d at 239 ("[If] both parties have unperformed obligations that would constitute a material breach if not performed, the contract is . . . executory under [Section] 365.").

[464] *See Am. Home Mortg.*, 402 B.R. at 93.

[465] *See* 11 U.S.C. § 1129(a)(1).

3. The Insurance Assignment of the Other Catholic Entities' Interests Lacks any Legal Basis.

Finally, the Insurance Assignment of the Other Catholic Entities' interests (as applicable) in and to the Insurance Policies is impermissible for the additional reason[466] that it lacks the necessary jurisdictional and statutory predicates. A bankruptcy court may exercise jurisdiction over – and by extension, a plan may affect – only property of a debtor's estate, which is defined by Section 541. That section provides that a debtor's estate is comprised of, among other things, "all legal or equitable interests ***of the debtor*** in property as of the commencement of the case."[467] Thus, Section 541 on its face does not apply to the property of non-debtors. And in the context of non-debtor additional insureds specifically, courts have repeatedly found that the non-debtor's interests in such policies are not property of the estate.[468]

In *In re Forty-Eight Insulations, Inc.*,[469] for example, the Bankruptcy Court for the Northern District of Illinois held squarely that "[a]nother party's interests [there a non-debtor's interests in an insurance policy] do not become property of the estate."[470] The Eighth Circuit BAP reached the same conclusion nearly twenty years later, stating, "while the bankruptcy court may exercise jurisdiction over (a liability insurance) policy, the interests of the co-insured, a non-debtor, are not property of the estate."[471]

Accordingly, to the extent any of the Other Catholic Entities have interests in the Insurance Policies as co- or additional insureds, those interests are separate from the Debtor's and are not

[466] The Insurance Assignment of the Other Catholic Entities' interests is prohibited under New Jersey law for the same reasons as the Insurance Assignment of the Debtor's interests. *See supra* § I(A).
[467] 11 U.S.C. § 541(a)(1) (emphasis added).
[468] *See Overton's, Inc. v. Interstate Fire & Cas. Ins. Co. (In re Sportstuff, Inc.)*, 430 B.R. 170, 178 n.15 (B.A.P. 8th Cir. 2010) (citing cases).
[469] 133 B.R. 973 (Bankr. N.D. Ill. 1991).
[470] *Id.* at 978.
[471] *Sportstuff, Inc.*, 430 B.R. at 178 n.15.

part of the estate.[472] This has two, related consequences. ***First***, it deprives the Court of jurisdiction over the Other Catholic Entities' interests in the Insurance Policies. While the Court has exclusive jurisdiction "over the debtor's property . . . and over the estate,"[473] the Other Catholic Entities' interests in the Insurance Policies are neither the Debtor's property nor part of the estate, and bankruptcy jurisdiction stops short of "matters which involve only the property rights of non-debtors."[474] As a consequence, the Court lacks jurisdiction to approve the Insurance Assignment of the Other Catholic Entities' independent contractual rights.[475] ***Second***, even if the Court had jurisdiction over the matter, there is no provision of the Bankruptcy Code authorizing the assignment of property by non-debtors. Section 363 contemplates only the disposal of "property of the estate,"[476] and Section 365 is restricted to "executory contract[s] . . . of the debtor."[477] Likewise, Section 1123 – which governs the transfer of property under a Chapter 11 plan – limits any such transfer to "property of the estate."[478] As such, the Plan lacks the statutory hook necessary to achieve the Insurance Assignment of the Other Catholic Entities' interests. Each of the statutory and jurisdictional defects is fatal to the Insurance Assignment of the Other Catholic Entities' interests in the Insurance Policies.

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[472] *Id.*
[473] *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004).
[474] *In re Selig*, 135 B.R. 241, 246 (Bankr. E.D. Pa. 1992); *cf. In re Holland Indus., Inc.*, 103 B.R. 461, 470 (Bankr. S.D.N.Y. 1989) ("The bankruptcy court has no jurisdiction to determine the tax liability of non-debtors . . . and the debtor itself remains liable for the unpaid taxes regardless of the collection mechanism pursued by the IRS." (internal citations omitted)).
[475] *See, e.g., Sportstuff, Inc.*, 430 B.R. at 177–78.
[476] 11 U.S.C. § 363(b)(1).
[477] 11 U.S.C. § 365(a).
[478] 11 U.S.C. §§ 1123(a)(5)(B), (D); (b)(4). *See also id*. at § 1123(b)(2) (". . . a plan may . . . subject to [S]ection 365 . . . provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor . . .").

C. The Debtor Cannot Assign Century's Policies

As previously discussed,[479] the Century Policies confer upon Century an express right and a duty to defend any suit against the Debtor, including the unqualified right to control the defense and settlement of any claim or suit to which the Century Policies apply.[480] The Century Policies are also subject to conditions which require that the Debtor cooperate with Century and not voluntarily make any payment or assume any obligation, except at its own cost.[481]

The Tort Committee has argued that Century forfeited its right to control the settlement process by declining coverage.[482] The affirmative defense the Tort Committee relies on does not provide specificity, grounds or explanation for a declination of coverage, nor does it provide an explanation for which specific claims are declined and under which specific policies those unspecified claims would be denied under. Courts recognize that a generalized denial of coverage set forth in an affirmative defense does not constitute a denial of coverage.[483] The Third Affirmative Defense asserted by Century in the adversary proceeding provides nothing more than notice of a legal theory upon which Century may have in the Insurance Adversary Proceeding.[484]

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[479] *See supra* Statement of Facts, § A(2).

[480] (JX-0004), at § II.A.2.a ("Defense, Settlement, Supplementary Payments"); (JX-0002), at "DEFENSE, SETTLEMENT AND SUPPLEMENTARY PAYMENTS".

[481] (JX-0004), at § II.D.5 ("Assistance and Cooperation of the Insured"); (JX-0002), at "CONDITIONS No. 3" ("Insured's Duties in the Event of Occurrence, Claim, or Suit").

[482] [Dkt. No. 3024], ¶ 100.

[483] *See, e.g. Congoleum Corporation v. ACE American Ins. Co., et al.*, Dkt No. MID-L-8908-1, at page 13 (Nicholas J. Stroumstos, Jr., J.S.C.) (N.J. Super. Ct. Law Div. May 18, 2007) (unpublished opinion) ("the Court has already found that the upper layer insurance defendant's answers in affirmative defenses do not constitute denials of coverage, and accordingly did not constitute a breach toward their obligations to Congoleum."), a copy of which is attached hereto as Exhibit 1; *Deutsche Bank. Tr. Co. Americas v. Royal Surplus Lines Ins. Co.*, No. CIV.A. 06C-09-261JAP, 2012 WL 2898478, at *13 (Del. Super. Ct. July 12, 2012) (affirmative defense did not qualify as denials of coverage because denials "must be tailored to the specific claim for which coverage is being denied and must state the specific reasons for the denial of coverage of that particular claim.").

[484] *See, e.g.* FED. R. CIV. P. 8(c); *Tyco Products LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 900 (Ed. Pa. 2011) (recognizing that affirmative defense must merely provide fair notice of the issue involved).

Given the timing of Century's answer in the Insurance Coverage Adversary Proceeding, the Third Affirmative Defense cannot possibly constitute a denial of coverage of claims that purportedly implicate the Century Policies. Century's answer was filed on March 12, 2021, at a time when only five (5) of the 324 Survivor Proofs of Claim had been filed, and more than a month before Century was provided access to a single Survivor Proof of Claim.[485] It is impossible for Century to have denied coverage for claims that had not yet been presented to Century nor could Century have "wrongfully refused coverage and a defense to its insured" when the Debtor had yet to tender a single claim to Century. Moreover, Century's duty to defend extends to "suits" only and all lawsuits filed against the Debtor were stayed as a result of the Debtor filing this proceeding. Accordingly, Century's Third Affirmative Defense in the Insurance Coverage Adversary Proceeding is not a declination of coverage for the Abuse Claims.

To be sure, Century has not declined coverage, including any potential duty to defend suits, for all of the Abuse Claims under the Century primary policy, nor could it have for the reasons demonstrated above. Century would have an obligation to defend the Debtor under the Century primary policy in connection with any lawsuit asserted against the Debtor that alleges "personal injury" caused by an "occurrence" (as defined therein) and arising out of the ownership, maintenance or use of the premises designated and all operations necessary or incidental thereto. Because Century has not declined coverage for the Abuse Claims, including any potential duty to defend, Century has an express and unqualified right to control the defense and settlement of any claims asserted against the Debtor, to which the insurance applies.

[485] On February 11, 2021, the Court entered the Bar Date Order [Dkt. No. 409] which, *inter alia*, included a Confidentiality Protocol which expressly conditioned the Insurers' access to "Survivor Proof of Claim" on the execution of a "Confidentiality Agreement." *See* [Dkt. No. 409], p. 11. Century's representatives first executed a Confidentiality Agreement on April 21, 2021.

II. THE PLAN IMPERMISSIBLY IMPAIRS THE INSURERS' RIGHTS

The Insurers incorporate by reference, as if fully set forth herein, the arguments presented in Section C of the London Market Insurers' Objection to the Debtor's Eighth Amended Plan of Reorganization (the "LMI Plan Objection")[486] and Sections I.A–E and V of the Insurers' Preliminary Objection to the Eighth Amended Plan of Reorganization for the Diocese of Camden, New Jersey (the "Insurer Plan Objection,"[487] and together with the LMI Plan Objection, the "Plan Objections"). The Insurers summarize and supplement such arguments as follows.

Confirmation of the Plan must be denied under Sections 1129(a)(1) and/or (3) because the Plan inappropriately impairs the Insurers' rights under their Insurance Policies. It is a bedrock principle of bankruptcy law that a "debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either."[488] Rather, "[w]hatever 'limitation[s] on the debtor's property [apply] outside of bankruptcy [] appl[y] inside of bankruptcy as well."[489] Thus, a debtor may not use the bankruptcy process to renegotiate its bargained-for contractual rights and

[486] LMI Plan Objection [Dkt. No. 2401], pp. 28-43.
[487] Insurer Plan Objection [Dkt. No. 2410], pp. 19-36, 69-75.
[488] *Mission Prod. Hldgs., Inc. v. Tempnology*, LLC, 139 S. Ct. 1652, 1663 (2019) (citations and internal quotations omitted).
[489] *Id.*

obligations (under a prepetition insurance policy or otherwise).[490] Nor may a debtor rewrite contracts to include terms to which the parties did not previously agree.[491]

Yet the Plan Proponents have proposed a Plan that impairs the Insurers' rights so thoroughly that it effectively rewrites the Policies – in clear violation of blackletter law. This impairment is evident from at least the following in the Plan: (1) the lack of any genuine insurance neutrality provision; and (2) the numerous terms that affirmatively prejudice the Insurers. For these reasons, and as set forth in greater detail below, the Plan cannot be confirmed.

A. The Plan Is Not Insurance Neutral

The clearest indication of the Plan's impairment of the Insurers' rights is the lack of any true insurance neutrality language. Insurance neutrality is "a meaningful concept where . . . a plan does not materially alter the quantum of liability that the [debtor's] insurers would be called to absorb."[492] Procedurally, insurance neutrality grew out of standing disputes between Chapter 11

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[490] *See supra* note 490. *See also* Insurer Plan Objection, p. 19; *In re Cajun Elec. Power Co-Op, Inc.*, 230 B.R. 715, 737 (Bankr. M.D. La. 1999) (finding that the plan violated section 1129(a)(3) of the Bankruptcy Code and, therefore, was unconfirmable because it "call[ed] for an improper modification of the [power supply contracts] in that it seeks to bind the Members for 25 years to treatment which they do not want and for which they did not contract"); *cf. Coca-Cola Bottling Co. of Shreveport, Inc.*, 769 F. Supp. at 707 ("Courts do not rewrite contracts to include terms not assented to by the parties."); *In re Exide Hldgs., Inc.*, No. 20-11157, 2021 WL 3145612, at *6 (D. Del. July 26, 2021) (citing with approval *Coca-Cola*, 769 F. Supp. at 707). *See also, e.g., Amatex Corp. v. Aetna Cas. & Sur. Co. (In re Amatex Corp.)*, 97 B.R. 220, 221 (Bankr. E.D. Pa. 1989), *aff'd sub nom., Amatex Corp. v. Stonewall Ins. Co.*, 102 B.R. 411, 414 (E.D. Pa. 1989) (refusing to compel insurers to make lump-sum payments to the debtor "contrary to the terms of their policies"); *641 Assocs. v. Balcor Real Estate Fin. (In re 641 Assocs.)*, No. 91-11234S, 1993 Bankr. LEXIS 1191, *20–21 (Bankr. E.D. Pa. Aug. 26, 1993) ("There is no provision in the Bankruptcy Code allowing a bankruptcy court to disregard state-law contractual rights."); *Cissel v. Am. Home Assur. Co.*, 521 F.2d 790, 792 (6th Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976) (holding that a bankruptcy trustee could not obtain recovery from insurer for claims filed against the estate absent a judgment or a written settlement agreement among the policyholder, the claimant, and the insurance company, as required by the policy holder); *In re The Wallace & Gale Co.*, No. 85-40092 (Bankr. D. Md.), July 22, 1998 Hr'g Tr. at 119–21 (refusing to confirm a plan that violated insurer's contractual rights in asbestos bankruptcy); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984) (holding that the Bankruptcy Code is not intended to expand debtor's rights against others more than they existed at the commencement of the case).

[491] *See supra* note 491. *See also Coca-Cola Bottling Co. of Shreveport, Inc.*, 769 F. Supp. at 707; Insurer Plan Objection, pp. 1–2.

[492] *In re Glob. Indus. Techs.*, 645 F.3d 201, 212 (3d Cir. 2011).

debtors and their insurers.[493] But it is rooted in (the prevention of) impairment.[494] More specifically, insurance neutrality requires that a plan "neither increase[es] [an] insurer['s] pre-petition obligations nor impair[s] [its] pre-petition contractual rights under the subject insurance polic[y]."[495] This is analytically indistinguishable from the well-established prohibition against using the Bankruptcy Code to modify prepetition contracts; preventing a debtor from enlarging its rights under a contract and ensuring that a non-debtor counterparty's contractual rights do not shrink are two sides of the same coin.[496] Thus, insurance neutrality as a concept should not be limited to determining an insurer's standing. Rather, it should also be viewed as shorthand for whether a Chapter 11 plan violates the proscription against altering prepetition contracts.

The Plan clearly does. Under the Plan, any language ostensibly preserving the Insurers' rights is subject to an exception that swallows the rule.[497] The gist of these exclusionary provisions is that the Insurers' contractual rights are preserved – except for the many situations where they are not. This construction is patently deficient. It stands in stark contrast to even the rudimentary insurance neutrality language in *Combustion Engineering*, which provided that "nothing in the [p]lan shall in anyway [*sic*] operate to, or have the effect of, impairing [the] insurers' legal, equitable or contractual rights, if any, in any respect."[498] The more robust, and appropriate,

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[493] *See id.* (vacating and remanding after determining that the plan's insurance neutrality language was insufficient to deny certain of the debtor's insurers standing to appear and contest plan confirmation); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 217 (3d Cir. 2004) (holding that certain insurers did not have appellate standing to challenge a plan because of the plan's insurance neutrality provision).
[494] *See Glob. Indus. Techs.*, 645 F.3d at 212.
[495] *Id.*
[496] *Compare id. with, e.g.*, *In re Downey Fin. Corp.*, 428 B.R. 595, 607 (Bankr. D. Del. 2010) ("[The Bankruptcy Code] is not intended to expand the debtor's rights against others beyond what rights existed at the commencement of the case.").
[497] *See, e.g.*, Plan, § 10.1.1 ("Non-Settling Insurers retain any defenses that they would be able to raise if the Claim for coverage for an Abuse Claim were brought by any Covered Party, ***except any defense arising from the Insurance Assignment***.") (emphasis added). *See also* Plan, §7.8.1.2; TDPs, ¶ 9(v).
[498] 391 F.3d at 217 (internal quotations omitted).

language developed elsewhere (*e.g., In re T H Agric. & Nutrition, L.L.C.*)[499] underscores the incoherence of the formulation in the Plan.[500]

More to the point, the Plan's selective incorporation of the rights that the Insurers are permitted to retain defeats the entire purpose of insurance neutrality – and highlights the resulting injury. Either "***nothing*** [in the Plan] impairs [the Insurers'] rights"[501] or, as here, the Insurers' rights are impaired.[502] It necessarily follows from there that the Plan modifies the Insurance Policies: it enlarges the Debtor's (or Trust's) rights under the Insurance Policies at the expense of the Insurers. This alone compels denial of confirmation.[503]

B. The Plan Is Insurance Prejudicial

Although the Plan's lack of insurance neutrality is itself adequate to deny confirmation, the degree to which the Plan impairs the Insurers' rights – effectively amending their Policies in the process – demands that result. The Plan (and other Plan Documents more generally) endeavor to abrogate or eliminate the Insurers' rights in at least the following four respects.

1. Prejudicial Provisions Throughout Target Coverage Defenses

First, the Plan contains a number of highly prejudicial provisions that seek to strip the Insurers of coverage defenses to which they are entitled. This proposed elimination begins with Section 7.8.1.2, which provides:

> The Non-Settling Insurers shall retain any and all coverage defenses, ***except any defense regarding or arising from the Insurance Assignment***, but confirmation or effectuation of this Plan ***shall not trigger any coverage defense, or give rise to any additional coverage defense***, that did not exist prior to the Debtor's filing for

[499] No. 08-14692 (REG), 2009 Bankr. LEXIS 4673 (Bankr. S.D.N.Y. May 28, 2009).
[500] *Compare id*. at *84-86 *with* Plan, §§ 7.8.1.2, 10.1.1.
[501] *Combustion Eng'g, Inc.*, 391 F.3d at 216 (emphasis in original) (internal citations and quotations omitted).
[502] *Glob. Indus. Techs.*, 645 F.3d at 212.
[503] *Compare MF Glob. Holdings*, 469 B.R. at 193 ("[Contractual] provisions cannot be excised because doing so would rewrite the . . . Policies and expand the Debtor['s] rights under them. . . . [T]he Court cannot modify those rights pursuant to the Bankruptcy Code") *with* 11 U.S.C. § 1129(a)(1).

> bankruptcy or Plan Confirmation, ***and no coverage defenses*** are created by the Debtor's bankruptcy ***or the negotiation***, solicitation, or confirmation ***of this Plan, or the terms thereof***, including any treatment of, or protections afforded to, any Covered Party or Settling Insurer under this Plan.[504]

At first glance, this section is explicit in its intent. It openly aims to eradicate any coverage defenses arising as a result of the Plan itself (specifically including the Insurance Assignment)[505] and/or the Plan Proponents' actions throughout the Plan process[506] – which is itself inappropriate.[507] Less immediately obvious, however, is the Plan Proponents' attempt through this section to extinguish any defense raised on account of the TDPs' unreasonableness, like in *Congoleum Corp. v. Ace Am. Ins. Co.*[508] The eponymous plaintiff in *Congoleum* brought a declaratory judgment action against certain of its insurers, seeking a declaration that (among other things) its insurers were "obligated to provide coverage" for asbestos claims that had been allowed and liquidated under a "Claimant Agreement" later folded into a prepackaged bankruptcy plan.[509]

The Claimant Agreement – which had been negotiated among Congoleum and plaintiffs' lawyers for the asbestos claimants, without Congoleum's insurers[510] – "abandon[ed] viable defenses [from] the tort system,"[511] "allow[ed] time-barred claims,"[512] "contain[ed] no meaningful

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[504] Plan, § 7.8.1.2 (emphasis added).
[505] *See id.* at § 7.8.1.2 ("[N]o coverage defenses are created by . . . the terms [of the Plan], including any treatment of, or protections afforded to, any Covered Party . . . under this Plan."); *id*. at § 10.1.1 ("Non-Settling Insurers retain any defenses that they would be able to raise if the Claim for coverage for an Abuse Claim were brought by any Covered Party, except any defense arising from the Insurance Assignment.").
[506] *See id.* at § 7.8.1.2 ("[C]onfirmation or effectuation of this Plan shall not trigger any coverage defense, or give rise to any additional coverage defense, that did not exist prior to the Debtor's filing for bankruptcy or Plan Confirmation, and no coverage defenses are created by the Debtor's bankruptcy or the negotiation, solicitation, or confirmation of this Plan . . .").
[507] *Cf. Societe Internationale Pour Participations v. Rogers*, 357 U.S. 197, 209 (1958) ("[The Due Process Clause imposes] constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.").
[508] NO. MID-L-8908-01, 2007 N.J. Super. Unpub. LEXIS 3000 (N.J. Sup. Ct. May 18, 2007).
[509] *Id*. at *1-13.
[510] *Id.* at *11-12, 16.
[511] *Id*. at *18.
[512] *Id*. at *19.

exposure requirement,"[513] and "contain[ed] no meaningful provisions to ferret out fraudulent claims."[514] As a result, the insurers declined coverage on the basis that the Claimant Agreement was not entered in good faith and was unreasonable.[515] After a thorough review of the many deficiencies of the Claimant Agreement, Judge Stroumtsos determined that the "Claimant Agreement [wa]s an unreasonable agreement, not made in good faith" and held that the insurers has "no obligation or coverage for the Claimant Agreement."[516]

Like the Claimant Agreement in *Congoleum*, the TDPs here "abandon[] viable defenses in the tort system,"[517] "allow[] time-barred claims,"[518] "contain[] no meaningful [liability] requirement,"[519] and "contain[] no meaningful provisions to ferret out fraudulent claims."[520] And, like the Claimant Agreement in *Congoleum*, the TDPs were negotiated among plaintiffs' lawyers without any input from the Insurers.[521] Put simply, there is ample evidence that the TDPs are "unreasonable . . . [and] not made in good faith."[522] Yet Section 7.8.1.2 of the Plan endeavors to prevent in advance any outcome like that in *Congoleum* by insulating every constituent element of the TDPs: the negotiation of the Plan (which includes, most prominently, the Tort Committee

[513] *Id*.
[514] *Id*.
[515] *See id*. at *13.
[516] *Id*. at *23.
[517] *Id*. at *18; *cf*. Bitar Decl., ¶ 27 ("Thus, if the law is correctly applied, strict liability and respondeat superior claims generally do not survive a motion to dismiss. The TDPs do not appear to have a mechanism to ferret out these baseless claims."); *id.* at ¶ 48.
[518] *Congoleum Corp.*, 2007 N.J. Super. Unpub. LEXIS 3000, at *19; *cf*. Plan, § 2.2.11 ("Notwithstanding the foregoing, pursuant to the Trust Distribution Procedures, the Trust Administrator shall have the authority to deem any untimely Class 5 Claim Allowed even if such Claim was not filed by the Bar Date.").
[519] *Congoleum Corp.*, 2007 N.J. Super. Unpub. LEXIS 3000, at *19; *cf*. Bitar Decl., ¶ 23 ("In the tort system, if a plaintiff cannot present admissible evidence that the institution was negligent (and therefore bears some responsibility for the alleged abuse), his or her claim will be dismissed before trial. Under the TDPs, however, this safeguard is lost. There is no such legal requirement; evidence of negligence by the institution is not a prerequisite for any recovery.")
[520] *Congoleum Corp.*, 2007 N.J. Super. Unpub. LEXIS 3000, at *19; *cf*. Treacy Decl. at ¶ 10.
[521] *See* Nov. 16 Trial Tr. (Prol), p. at 173:12-21; Nov. 17 Trial Tr. (Prol), p. 41:15-17.
[522] *Congoleum Corp.*, 2007 N.J. Super. Unpub. LEXIS 3000, at *22.

Settlement),[523] the Insurance Assignment, the terms of the Plan more generally, and the confirmation or effectuation thereof.[524]

Equally problematic are Sections 7.8.1(d), 7.8.2.1, and 10.1.1 of the Plan, along with Paragraph 16 of the Revised Proposed Confirmation Order.[525] Section 10.1.1 provides that "each Non-Settling Insurer shall retain any and all legal and factual defenses that may exist in respect to [a liquidated Abuse Claim] and, ***except as set forth in this Section***, all coverage defenses."[526] It goes on to state that "Non-Settling Insurers retain any defenses that they would be able to raise if the Claim for coverage for an Abuse Claim were brought by any Covered Party, ***except any defense arising from the Insurance Assignment***."[527] Section 7.8.2.1 likewise aims to inoculate the Insurance Assignment from any challenge, stating that the Court "shall determine . . . whether (a) the Insurance Assignment is valid and (b) whether [the] Insurance Assignment or the discharge and injunctions set forth in [the] Plan, void, defeat, or ***impair the insurance coverage*** under the Non-Settling Insurer Policies."[528] Section 7.8.1(d) then purports to prevent any "limitations on recovery from Non-Settling Insurers . . . by virtue of the fact that the Debtor is in bankruptcy or by any distribution from the Trust to an Abuse Claimant."[529] Finally, the Revised Proposed

[523] *See* Nov. 16 Trial Tr. (Prol), p. 117:11-19; (JX 0428).
[524] *See, e.g.*, Plan, § 7.1 ("Effective ***as of the date the Confirmation Order is entered***, the Trust shall be established . . . for the purposes of . . . receiving, liquidating and distributing ***Trust Assets*** in accordance with this Plan and the [TDP].") (emphasis added); *id*. at § 2.2.112 ("Trust Assets means the Cash and other assets to be transferred to the Trust under this Plan"); *id*. at § 7.2.3 ("In addition to the Debtor Cash Contribution and the OCE Cash Contributions . . . the Transferred Insurance Interests . . . are automatically and without further act or deed assigned and transferred to the Trust on the Effective Date."); *id*. at § 2.2.62 ("Insurance Assignment means the assignment of the Transferred Insurance Interests to the Trust.").
[525] *See also*, Plan, § 10.4.5 ("With respect to any Stipulation of Judgment entered pursuant to the [TDP], the Trust will pursue the full amount of any such Stipulation of Judgment against the relevant Non-Settling Insurer on behalf of the Abuse Claimant and the Abuse Claimant shall be deemed to have assigned the full amount of such Stipulation of Judgment to the Trust.").
[526] Plan, § 10.1.1 (emphasis added).
[527] Plan, § 10.1.1 (emphasis added).
[528] Plan, § 7.8.2.1 (emphasis added).
[529] Plan, § 7.8.1(d).

Confirmation Order provides that "each of the Non-Settling Insurance Policies shall continue in accordance with its terms, such that each of the parties' contractual, legal and equitable rights under each such Non-Settling Insurance Policy shall remain unaltered"[530] – "***[e]xcept as provided in the Plan*** . . . ."[531]

These provisions, together with Section 7.8.1.2, purport to cripple the Insurers' contractual rights and defenses against ***future*** coverage demands from the Trust Administrator following the liquidation of Abuse Claims under the TDPs. Absent these provisions, the Insurers would have the ability to assert all applicable coverage defenses based on any failure to comply with the Insurance Policies' requirements, such as: the duty to defend; the duty to cooperate; the right of the Insurers to associate in the defense; and the right of the Insurers to consent to settlements (or to challenge unreasonable ones). But by cordoning off the Insurance Assignment and "any distribution from the Trust to an Abuse Claimant," the Plan Proponents plainly seek to strip the Insurers (now) of any defenses they may hold (in the future) with respect to the TDPs.

All of this is patently prejudicial to the Insurers. As important, it is prohibited. "There is no provision in the Bankruptcy Code allowing a bankruptcy court to disregard state-law contractual rights."[532] Nor can the Insurers' coverage defenses simply be "excised [from the Insurance Policies] because doing so would rewrite the . . . Policies and expand the Debtor['s] rights under them."[533]

[530] Revised Proposed Confirmation Order, ¶ 16.
[531] Revised Proposed Confirmation Order, ¶ 16 (emphasis added).
[532] *641 Assocs. v. Balcor Real Estate Fin.*, No. 91-11234S, 1993 Bankr. LEXIS 1191, *20–21 (Bankr. E.D. Pa. Aug. 26, 1993).
[533] *In re MF Glob. Holdings Ltd.*, 469 B.R. 177, 193 (Bankr. S.D.N.Y. 2012).

2. The Plan Violates the Requirements for SIRs

Second, the Plan purports to extinguish the Debtor's and Other Catholic Entities' obligations to satisfy the SIRs under the Insurance Policies. SIRs, however, were (and are) a critical component of the applicable Policies that cannot simply be removed. As a threshold matter, SIRs occupy a principal place in the Policies' incentive structure – encouraging the Debtor to investigate and discover invalid claims to avoid making unnecessary out-of-pocket payments.[534] SIRs also permitted the Debtor to obtain coverage at a lower premium, in part because the Insurers' obligations arise only upon the Debtor's exhaustion of the SIRs (and only then, if all other terms and conditions of the Policies are satisfied).[535]

Yet the Plan aims to eliminate the SIRs from the equation entirely. According to Section 7.2.2 of the Plan, the Debtor Cash Contribution and the OCE Cash Contribution "are being made in respect of the uninsured exposure of the Debtor and the Other Catholic Entities for Abuse Claims, including . . . when a[n] [SIR] must be satisfied to access coverage under Non-Settling Insurer Policies."[536] And after payment, "the Debtor and the Other Catholic Entities shall have no further financial obligations under this Plan or the Plan Documents."[537] The Plan thus provides that the cash payments to the Trust from the Debtor and the Other Catholic Entities will fully satisfy their responsibilities under the SIRs – irrespective of the ultimate amount of those contractual obligations.[538] Worse, even if these cash payments would or could be sufficient to satisfy the SIRs – which is unlikely at best[539] – there is no indication in any of the Plan Documents

[534] *In re MF Glob. Holdings Ltd.*, 469 B.R. 177, 193 (Bankr. S.D.N.Y. 2012).
[535] *See* Harrington Decl., ¶¶ 18-23.
[536] Plan, § 7.2.2.
[537] *Id.*
[538] *See Id.*
[539] *See infra* § VIII(D).

that they ***will*** be used for that purpose,[540] or even that the Trust Administrator would be obligated to do so.[541]

The Plan clearly seeks to jettison the SIRs while retaining coverage under the Insurance Policies. This attempted unilateral revision of the Policies denies the Insurers the benefit of their respective bargains, to their clear prejudice. It increases their ultimate liability, denies them a key protection against frivolous or *de minimis* claims, and upends the incentive structure on which the Policies were based. The Plan Proponents' efforts to rewrite the Insurance Policies should not, and cannot, be approved.

3. The Plan Fundamentally Impairs the Insurers' Policy Rights[542]

Third, the Plan undermines the Insurers' most basic contractual rights under their respective Insurance Policies. As set forth above, the Policies were underwritten, priced, and provided based on certain key assumptions – including, among other things, the identity and risk profile of the insured and an alignment of interests between the Insurers and the Debtor (or other insured, as applicable).[543] To reinforce these assumptions, the Insurance Policies contain specific provisions that: (a) require the Debtor to satisfy the SIR as a prerequisite to coverage (with respect to the LMI and Interstate Policies);[544] (b) provide to the Insurers the right either to control the defense and settlement (Century primary policy)[545] or to associate (Century excess policy and

[540] Harrington Decl., ¶ 62 ("There is no indication of whether such funds will be segregated or how large the amounts are compared to exposure.")
[541] Harrington Decl., ¶ 62 ("Moreover, there is no indication that the Trust Administrator would be obligated to satisfy any SIRs.").
[542] The Insurers incorporate by reference, as if fully set forth herein, Section III.D. of the Insurer Plan Objection.
[543] Harrington Decl., ¶¶ 49, 64. For the remainder of this section, "Debtor" means "the Debtor (or other insured, as applicable)."
[544] Harrington Decl , ¶¶ 31, 34; Comiter Decl at ¶¶ 31-32, 34.
[545] (JX 0004), at § II.A.2.a; (JX 0002), at "DEFENSE, SETTLEMENT AND SUPPLEMENTARY PAYMENTS".

LMI)[546] or participate (Interstate)[547] in it; (c) require the Debtor's cooperation;[548] (d) prohibit any non-consensual assignment;[549] and (e) require that the Debtor make "no voluntary payment" and obtain the Insurers' consent to settlement.[550] As such, these provisions, and the attendant rights granted to the Insurers, are essential and indivisible elements of the Insurance Policies.

Yet the Plan (and TDPs) eviscerate every single one of these provisions. First, the Plan effectively excises the SIRs from the Policies. Then, the Insurance Assignment functionally substitutes the original insured(s) with the Trust, an adverse entity the Insurers did not underwrite or agree to insure.[551] Finally, the TDPs subvert the conventional claims resolution process for which the Insurance Policies were written – *i.e.*, the tort system.[552]

The tort system is a necessarily adversarial process where (a) the Abuse Claimant bears the burden of proving each element of his claim,[553] (b) the facts are determined by an impartial factfinder,[554] (c) the rules of evidence and civil procedure apply,[555] and (d) each litigant has the right to appeal.[556] But not under the TDPs, which dramatically alter the process. To start, the TDPs extract all Abuse Claims from the rigors of the tort system and instead permit the liquidation

[546] Harrington Decl., ¶ 35; *see also* (JX 0002), at "DEFENSE, SETTLEMENT AND SUPPLEMENTARY PAYMENTS".
[547] Harrington Decl., ¶ 33.
[548] Harrington Decl., ¶ 35; (JX 0004), at § II.D.5; (JX 0002), at "CONDITION No. 3.(c)".
[549] Harrington Decl., ¶ 30; (JX 0004), at ¶ E of "CONDITIONS APPLICABLE TO THE ENTIRE POLICY"; (JX 0002), at CONDITION No. 10".
[550] Harrington Decl., ¶ 30; *See e.g.*, (JX 0004), at § II.A.2.a ("Defense, Settlement, Supplementary Payments"), "CONDITIONS No. 5"; (JX 0002), at "DEFENSE, SETTLEMENT AND SUPPLEMENTARY PAYMENTS", "CONDITIONS No. 3".
[551] *See generally supra* § I.
[552] *See supra* note II(B)(3).
[553] Bitar Decl., ¶ 29 ("[I]n the tort system, a plaintiff alleging a sexual abuse claim against an institution such as the Diocese must prove each and every element of a negligence claim: duty, breach, causation, and damages.").
[554] Bitar Decl., ¶ 36 ("In the tort system . . . the facts are determined by an impartial judge or jury.").
[555] Bitar Decl., ¶ 26 ("In the tort system, claims of sexual abuse are subject to an adversarial process in which . . . the case proceeds according to the applicable rules of civil procedure and evidence.").
[556] Bitar Decl., ¶ 19 ("In the tort system . . . [e]ither party may appeal any final judgment, and appeals are heard by a panel of neutral judges.").

of Abuse Claims through homegrown mechanisms, the Initial Review Determination and/or a Verdict Value Assessment.[557] Both of these lack the procedural and substantive protections of the tort system.[558]

Worse, each mechanism affirmatively ***warps*** the ordinary adjudicative process and its protections.[559] This is particularly true of the Verdict Value Assessment, which lacks even an impartial factfinder. The Verdict Value Assessment instead entrusts the process to the purported Neutral, "a retired judge with tort experience."[560] Despite that title, however, the Neutral need ***not*** be impartial; the Plan Proponents excised from a prior version of the TDPs the requirement that the Neutral be "an independent neutral third party."[561] And in any event, the Neutral is not – and cannot be – impartial in the traditional, financial sense because he or she is paid by the Trust.[562]

But even if the Neutral were truly neutral, the TDPs stack the deck procedurally against the Insurers in an effort to achieve an outcome in bankruptcy that is not available in the tort system. The Verdict Value Assessment permits an award (*i.e.*, a Verdict Value) on an Abuse Claim without the prerequisite evidence of the Debtor's negligence,[563] even though proof of negligence would be

[557] *See generally*, TDPs, §§ 4, 6-8. *See also*, Harrington Decl., ¶ 61. Although the TDPs contemplate the exercise of a State Court Option (*viz*., a tort-out), it is exceedingly limited. *See* TDPs, § 9.
[558] Bitar Decl., ¶¶ 7-8.
[559] *See generally*, Bitar Decl., ¶ 7. *See also, e.g.*, *id*. at ¶ 62 (noting that injury and damages are not a prerequisite to recovery under the Initial Review Determination).
[560] TDPs, § 8(ii).
[561] (JX 0440) at TCC1341 (emphasis added).
[562] TDPs, § 8(iii) ("The costs associated with the Verdict Value Assessment shall be paid by the Trust, including . . . the valuation by the Neutral."). *Cf.* Code of Conduct for United States Judges, Canon 3(C)(1)(c) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including . . . [if] the judge . . . individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.").
[563] Bitar Decl., ¶ 23 ("Under the TDPs . . . there is no such legal requirement; evidence of negligence by the institution is not a prerequisite for any recovery.").

part of a plaintiff's *prima facie* case in the tort system.[564] For that matter, the Verdict Value Assessment does not even require ***admissible*** evidence at all: the Federal Rules of Evidence are not incorporated – or even mentioned – in the TDPs. Similarly absent is any mention of the Federal Rules of Civil Procedure. Yet if (or when) this process delivers an extortionate Verdict Value award, the purportedly "Responsible Insurer" is not entitled to any appeal.[565] Only the Trust Administrator may exercise the State Court Option if the amount of the Verdict Value award is not "acceptable to [him]."[566] In sum, the TDPs enable the pursuit of coverage for Abuse Claims for which the Debtor is not legally liable, using evidence that is not admissible, in front of a factfinder who is not impartial, and in a proceeding that is not appealable (except by the Trust Administrator).

These patently prejudicial TDPs, when combined with the formation of a biased Trust and the remainder of the Plan (including, *e.g.*, the Insurance Assignment coupled with the lack of insurance neutrality), have profoundly negative consequences. The Insurance Assignment to the Trust, and corresponding cap on the Debtor's liability, eliminates any chance of a vigorous defense – and with it the right to participate in one.[567] Together with the selection of a partisan Abuse Claims Reviewer and Trust Administrator, overseen by an equally adverse Trust Advisory Committee, this inverts the incentives and assumptions on which the Insurance Policies are based. Now, the nominal insured (the Debtor) lacks any incentive to investigate or defend against the Abuse Claims; the in-effect policyholder (the Trust) has every reason ***not*** to; and the plaintiff

[564] *Id.* ("In the tort system, if a plaintiff cannot present admissible evidence that the institution was negligent (and therefore bears some responsibility for the alleged abuse), his or her claim will be dismissed before trial.").
[565] *See id.* at ¶ 65 ("But there is no avenue for the Diocese or the Responsible Insurer to seek a determination that the Abuse Claim Reviewer or Neutral improperly allowed a claim or awarded too large a sum in damages.").
[566] TDP, § 9(i)(c). *See also* Bitar Decl., ¶ 65.
[567] *See supra* Statement of Facts, § F(2); § I.

(Abuse Claimant) is opposite from an ally (the Trust Administrator or Abuse Claims Reviewer) rather than an adversary.

Beyond merely realigning the incentive structure to inflate claims, the Plan and TDPs also provide the means to do so. The TDPs pave the way for the Abuse Claimants, Abuse Claims Reviewer, and Trust Administrator to generate massive claim valuations by eliminating all substantive and procedural safeguards that means-test claims in the tort system – while simultaneously preventing the Insurers from seeking judicial review of the undoubtedly excessive outcome. The glaring omission of insurance neutrality then purports to thwart in advance any coverage defenses the Insurers might raise because of these issues. Combined, this framework results in the systematic destruction of the Insurers' bargained-for contractual rights under the Insurance Policies. The Plan's impairment of the Insurers' rights under the Policies is inconsistent with the requirements of the Bankruptcy Code and therefore the Plan cannot be confirmed.

4. The TDPs Interfere with the Insurers' Contractual Rights by Functioning as a Non-Consensual Alternative Dispute Resolution Provision

Finally, the Plan and TDPs improperly interfere with the Insurers' contractual rights because the TDPs function in practice as a non-consensual Alternative Dispute Resolution ("ADR") clause. The TDPs require that an independent review of the Abuse Claims by the Abuse Claims Reviewer occur outside of the judicial process. The Abuse Claims Reviewer determines whether the Abuse Claims are allowed and then determines the value of them.[568] This functions as an ADR provision because it is a non-judicial resolution of claims and the Insurers certainly have not agreed to it.[569]

[568] *See* TDPs, § 4.

[569] *See Columbus Circle NJ LLC v. Island Constr. Co., LLC*, 2017 WL 958489, at *3 (N.J. Super. Ct. App. Div. Mar. 13, 2017) ("Like arbitration, mediation is a form of non-judicial dispute resolution."); *see also*

The question of whether parties have agreed to arbitrate is determined by state law.[570] For an arbitration provision to be enforceable, the parties must have agreed to such provision. A "submission to arbitration is essentially a contract, and the parties are bound to the extent of that contract."[571]

"The Court has stressed that '[i]n the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be.'"[572] That parties to an agreement may waive statutory remedies in favor of arbitration is a settled principle of law in this State.[573] However, an arbitration provision must be clear and unambiguous so that the parties have notice that their claims involving jury trials would be resolved instead through arbitration.[574] "In the same vein, a 'court may not rewrite a contract to broaden the scope of arbitration[.]"[575]

In order to bind the Insurers under these TDPs, the Insurers must consent. The TDPs state that the Abuse Claims Reviewer will provide the valuation of an Abuse Claim for the claimant to

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Flores-Galan v. J.P. Morgan Chase & Co., 2011 WL 5901397, at *5 (N.J. Super. Ct. App. Div. Nov. 23, 2011).

[570] *Gold Lion Steel LLC v. Glob. Merch. Cash, Inc.*, No. 21-cv-10702 (KSH) (CLW), No. 21-cv-10702 (KSH) (CLW), 2022 U.S. Dist. LEXIS 35076, at *11 (D.N.J. Feb. 28, 2022). *See also Mehler v. Terminix Int'l Co.*, 205 F.3d 44, 48 (2d Cir. 2000) ("courts should generally apply state-law principles that govern the formation of contracts" in deciding whether a contractual obligation to arbitrate exists).

[571] *Alamo Rent A Car, Inc. v. Galarza*, 703 A.2d 961, 964 (N.J. Super. Ct. App. Div. Dec. 8, 1997) (internal citations omitted).

[572] *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124, 132, 773 A.2d 665, 670 (2001) (citing *In re Arbitration Between Grover & Universal Underwriters Ins. Co.*, 80 N.J. 221, 228, 403 A.2d 448 (1979)).

[573] *Garfinkel* 168 N.J. at 131.

[574] *See Moon v. Breathless Inc*, 868 F.3d 209, 214 (3d Cir. 2017); *Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ.*, 78 N.J. at 140, 393 A.2d 267.

[575] *Garfinkel*, 168 N.J. at 132 (internal citations omitted).

accept or deny.[576] Without the Insurers' consent, which they have not provided, this provision is not enforceable.

III. THE TRUST IS GROSSLY CONFLICTED LEAVING THE CLAIMANTS' DESIGNEES IN THE POSITION OF ALLOWING AND VALUING THEIR OWN CLAIMS

The structure of the Trust is inherently biased and prejudicial to the interests of the estate and Insurers and therefore cannot be approved by the Court pursuant to Sections 502(b), 1129(a)(3), 1123(a)(5), and 1129(a)(7) of the Bankruptcy Code.

A. The Trust Governance Procedures Do Not Comply with the Bankruptcy Code and Will Prejudice the Estate and Insurers

The governing structure contemplated by the Plan and the Trust Agreement is thoroughly conflicted and designed to invite self-dealing as the Trust is governed and administered entirely by parties beholden to the Abuse Claimants and their interests. The Trust Advisory Committee, which oversees the Trust and to whom the Trust fiduciaries report, has a makeup coextensive with that of the Tort Committee.[577] The Tort Committee appoints both Trust fiduciaries—the Claims Reviewer (Mr. Finn)[578] and the Trust Administrator (Mr. Dundon)[579]—who together control the allowance and valuation of Abuse Claims and liquidation of Trust Assets with nearly unbridled discretion. The Trust Administrator selects the so-called "Neutral."[580]

The process for selecting individuals to serve as fiduciaries for the Trust is even more inherently biased. There is no requirement in the Plan that the Trust Administrator and Abuse

[576] *See* TDPs, §§ 6-7 (i)-(ii).
[577] Notice of Filing of First Supplement to the Eighth Amended Plan of Reorganization [Dkt. No. 2006], p. 2 ("[T]he Trust Advisory Committee will be comprised of each of the members of the [Tort Committee] . . .").
[578] Plan, § 2.2.2; *see also* [Dkt. No. 2006] (selecting Paul Finn as the Abuse Claims Reviewer).
[579] *Id.* at § 2.2.109; *see also* [Dkt. No. 2006] (selecting Michael Dundon as the Trust Administrator).
[580] TDPs, § 8(ii).

Claims Reviewer be neutral, independent, or unbiased.[581] The Debtor was not asked and did not recommend candidates to serve as the Trust fiduciaries.[582] Mrs. Montgomery and Father Hughes testified that they were unaware of any due diligence performed by the Diocese in connection with the proposed appointment of the Trust Administrator,[583] the Abuse Claims Reviewer,[584] or the members of the Trust Advisory Committee.[585] The individuals selected to serve as the Trust Administrator and the Abuse Claims Reviewer are both conflicted.[586] Finally, none of the Plan Proponents' witnesses have ever testified as to why these individuals should be selected.

In short, every Trust professional involved in the allowance or valuation of Abuse Claims is selected directly or indirectly by the Abuse Claimants, leaving the claimants' designee to allow and value their own claims. Granting such power to Messrs. Dundon and Finn, who both have extensive ties to the Tort Committee and plaintiffs' lawyers, while the abuse claims remain contingent and unliquidated creates an inescapable conflict of interest; it pits their personal financial incentives to maximize the value of Abuse Claims against the interests of the estate to minimize liability.

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[581] Bitar Decl., ¶ 56; *see generally* TDPs.

[582] *See* Nov. 17 Trial Tr. (Prol), p. 7:3-9 (Q. "Now, isn't it true the Tort Committee did not seek any input from the Diocese as to the selection of the Trust Administrator?" A. "That's correct." Q. "And you didn't ask. . .the Trustee for any recommendations, did you?" A. "No.").

[583] *See* Nov. 10 Trial Tr. (Montgomery), p. 190:10-13 (Q. "But my question is do you have any personal knowledge of any due diligence the Diocese did in connection with the Trust [Administrator]?" A. "No, I do not."); Nov. 9 Trial Tr. (Hughes), p. 145:11-14 (Q. "Can you tell us, has the Diocese done any due diligence, whatsoever, that you can identify on the selection of the settlement trustee for the 8th Amended Plan?" A. "I'm not aware that we did.").

[584] *See* Nov. 10 Trial Tr. (Montgomery), p. 190:14-17 (Q. "And do you have any personal knowledge as to any due diligence the Diocese did in connection with the appointment of the abuse claim reviewer?" A. I do not.").

[585] *See* Nov. 10 Trial Tr. (Montgomery), p. 190:18-20, 24 (Q. "And do you have any knowledge of any due diligence the Diocese did in connection with the members that would serve on the Trust Advisory Committee?" A. "I do not.").

[586] *See, e.g.*, Dundon Dep. Tr., pp. 94:22–95:14 (admitting that he worked with Lowenstein Sandler on as many as 20 previous matters); *id.* at pp. 62:16–64:10, 134:10–16, 137:6–17 (disclosing his connection to plaintiffs' attorneys); Finn Dep. Tr., p. 175:1–20 (admitting that he has worked with most of the plaintiffs' attorneys in this case).

Under Section 1129(a)(5) of the Bankruptcy Code, appointment of voting trustees of the debtor must be "consistent with the interests of creditors and equity security holders and with public policy."[587] In evaluating whether appointment of a director of officer is "consistent with public policy," courts evaluate a number of factors, including (1) whether the individual has affiliations with groups adverse to the best interests of the debtor; (2) whether the individual is a "disinterested person"; (3) and whether the individual provides adequate representation of all creditors and equity security owners.[588] The structure of the Trust and appointment of the Trust fiduciaries under the Eighth Amended Plan in inconsistent with public policy and cannot be confirmed.

B. <u>The Trust Fiduciaries are Conflicted</u>

For a trustee to retain professionals to assist in carrying out the duties spelled out under Section 704 of the Bankruptcy Code, the professional must one, "not hold or represent an interest adverse to the estate" and two, be a "disinterested" person.[589] Mr. Dundon and Mr. Finn fail both prongs of this test, which precludes confirmation of the Plan. Further, the appointment of Mr. Dundon and Mr. Finn is inherently biased and prejudicial to the interests of the estate, claimants who do not engage them in other matters, and the Insurers and therefore cannot be approved by the Court pursuant to sections 1129(a)(3), 1123(a)(5), and 1129(a)(7) of the Bankruptcy Code.

If appointed, Mr. Dundon and Mr. Finn, who were both handpicked by the Tort Committee[590] and have extensive business and financial ties to prominent plaintiffs' lawyers with

[587] 11 USCA §1129(a)(5)(i)-(ii).
[588] *In re Digerati Tech., Inc.*, No. 13-33264, 2014 WL 2203895, at *5 (Bankr. S.D. Tex. May 27, 2014).
[589] 11 U.S.C. § 327(a).
[590] Plan, §§ 2.2.2 (Tort Committee appoints Abuse Claims Reviewer); 2.2.109 (Tort Committee appoints Trust Administrator).

interests in this case,[591] will have considerable discretion under the TDPs to implement and enforce the Trust, including the allowance and valuation of all of the Abuse Claims by their clients and/or claimants represented by plaintiff lawyers with whom they have a business relationship. Such discretion is inherently prejudicial where the fiduciaries were appointed by the Tort Committee, whose economic interests are directly adverse to the common interest of the Debtor and its insurers to minimize liability and damages. This conflict of interest by the Trust fiduciaries is fatal to the Plan's confirmation under the good faith provision of Section 1129(a)(3) and separately under the statutory scheme adopted by Section 502 to ensure that bankruptcy only recognizes claims that are legally cognizable under state law in the tort system.

1. The Proposed Trust Fiduciaries Have Interests Directly Adverse to the Interests of the Estate

"Conflict of interest rules are *more strictly applied* in the bankruptcy context than in other areas of the law, at least insofar as they relate to professionals retained by the estate."[592] Under the governing structure of the TDPs, Mr. Dundon and Mr. Finn are granted nearly unbridled discretion regarding the allowance and evaluation of Abuse Claims and liquidation of Trust Assets. Putting this discretion in the hands of conflicted fiduciaries when the claims at issue remain contingent and unliquidated creates an inescapable conflict of interest. The Debtor and Abuse Claimants do not share the same interests in liquidating the claimants' contingent claims or in implementing the procedures of the TDPs. The Debtor has a duty and "interest in defending

[591] *See* Finn Dep. Tr., pp. 101:24-102:9, 103:3-103:7, 107:3-108:6 (stating long standing relationship with Pfau, Cochran, Vertetis & Amala PLLC, Slater, Slater, Schulman LLP, and Paul Mones, who either serve or are represented on the Tort Committee); Dundon Dep. Tr., pp. 69:3-4, 95:2-14, 134:10-16, 135:11-13, 137:6-15 (stating long standing relationships with Pachulski, Lowenstein Sandler, Pfau Cochran Vertetis & Amala PLLC, and Slater Schulman LLP and "a number of plaintiff attorneys who have claims in [sexual abuse] cases," and that working with plaintiffs' attorneys representing class actions or mass tort groups was "an important part of [his] business").

[592] 1 COLLIER ON BANKRUPTCY, § 8.03[1] (15th ed. 2002) (emphasis added).

liability and minimizing damages."[593] On the other hand, the Tort Committee and individual plaintiffs' counsel who represent the members of the Committee have an interest in maximizing both the amount paid for individual claims and the amount of total claims qualified for payment - irrespective of the merits of those claims.[594] The Trust can only assume the rights held by the Debtor.[595] It takes those rights with the same obligation and interest in defending liability and minimizing damages.

Thus, while it may be in the best interest of the Debtor to consider various options to resolve the contingent unliquidated claims, its interests diverge from the Tort Committee and lead plaintiffs' lawyers, with whom Mr. Dundon and Mr. Finn have long-standing business and personal relationships, on any option that impacts in any way the timing, amount, or nature of the payments made to the Abuse Claimants. Mr. Dundon and Mr. Finn's ties to the Tort Committee and plaintiffs' lawyers create an incentive to maximize the value of a claim when liquidating a contingent claim to a fixed amount, which is directly adverse to the interests of the estate and Insurers.

Under the Fifth Amended Plan, the role of the trust is limited to allocating a fixed settlement fund to claimants under a point system that distributes the funds proportionally among

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[593] *In re Pittsburgh Corning Corp.*, 308 B.R. 716, 727 (Bankr. W.D. Pa. Apr. 27, 2004).

[594] Harrington Decl., ¶ 40 ("The Trust Administrator will be a fiduciary of the abuse claimants. . .which implies an objective of maximizing payments to abuse claimants, in direct conflict with the economics underlying contractual provisions in non-settling insurers' policies."). *See also Pittsburgh Corning Corp.*, 308 B.R. at 727 (Bankr. W.D. Pa. Apr. 27, 2004); *Century Indem. Co. v. Congoleum Corp. (In re Congoleum Corp.)*, 426 F.3d 675, 691-92 (3d Cir. 2005) (finding the insurance interests of the claimants and the debtor were not closely aligned where claims had yet to be liquidated.)

[595] *In re Bake-Line Group, LLC*, 359 B.R. 566, 570 (D. De. 2007) ("The trustee can assert no greater rights than the debtor had on the date the case was commenced.") (quoting 5 Collier on Bankruptcy § 541.04 (15th ed. 2006)); *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 356 (3d Cir. 2001) ("[I]n actions brought by a trustee as successor to the debtor's interest under section 541, the 'trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor.'" (quoting *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989)).

the claimants. But the TDP here is encoded to instruct the Trust Administrator and Abuse Claims Reviewer to implement the TDPs and determine the value of the claims in the most liberal fashion possible. Under this Plan, the Trust Administrator and Abuse Claims Reviewer will by necessity be torn between serving competing interests.

The good faith standard under the Bankruptcy Code requires that the plan be "proposed with honesty, good intentions, and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy code."[596] As courts in the Third Circuit have found repeatedly, conflicts of interest—such as those inherent in the Trust—preclude a good faith finding under Section 1129(a)(3).[597] Giving fiduciaries with direct adverse interests to the estate the unbridled discretion to determine the valuation of all Abuse Claims is adverse to public policy and should preclude confirmation of the Plan.[598]

2. The Proposed Trust Fiduciaries Hold Interests Adverse to the Estate

Mr. Dundon and Mr. Finn are beholden to the Abuse Claimants' interests and thus cannot meet the high standards of conduct expected from fiduciaries in bankruptcy, nor meet the lower threshold of "disinterested persons."

"When persons perform duties in the administration of the bankruptcy estate, they act as officers of the court and not private persons" and are "held to high fiduciary standards of

[596] *In re Sound Radio, Inc.*, 93 B.R. 849, 852 (Bankr. D.N.J. 1988).
[597] *See, e.g., In re Am. Capital Equip. LLC*, 688 F.3d 145, 158 (3d Cir. 2012) (affirming finding that a plan was unconfirmable for lack of good faith because the plan "establishe[d] an inherent conflict of interest."); *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001) (finding a good faith violation where the debtor's CEO had an interest in one of the debtor's largest creditors); *In re ACandS, Inc.*, 311 B.R. 36, 43 (Bankr. D. Del. 2004) (denying confirmation of plan where there was "obvious self-dealing" resulting from "control of the debtor.").
[598] *See Digerati Techs.*, 2014 WL 2203895, at *21-22 (denying confirmation because plan violated section 1129(a)(5) where proposed officers had interests materially adverse to equity security holders, and such lack of disinterestedness worked against a finding that their post-confirmation positions were "consistent with public policy – particularly since no new independent officers or directors are being appointed under the Plan").

conduct."[599] As estate fiduciary for claimants, the guardian ad litem standard that the Third Circuit adopted in *In re Imerys Talc Am., Inc. v. Cyprus Historical Excess Insurers* as a guidepost to prevent conflicts is most likely to apply here.[600] Further, a disinterested person "should be divested of *any scintilla* of personal interest which might be reflected in his decision concerning estate matters."[601] Mr. Dundon and Mr. Finn's ties to the Tort Committee and plaintiffs' lawyers bar them from meeting either standard. Mr. Dundon's ties to plaintiffs' lawyers who are pursuing or have pursued sexual abuse claims make it impossible for him to pass the disinterested test as he has an economic self-interest to maximize payments to abuse claimants to the detriment of the Insurers.

Mr. Dundon is a principal of Dundon Advisers LLC ("Dundon Advisors") which provides advisory services related to bankruptcy, insolvency, and other conditions of financial distress and "loan[s] out" personnel to serve as trustees and administrators.[602] Dundon Advisers has previously advised plaintiffs' firms on sex abuse claims with respect to insurance coverage, including Boy Scouts of America.[603] This Bankruptcy Case involves some of the same claimants since some claimants against Boy Scouts assert that their scout troops were sponsored by the Debtor. Mr. Dundon stated in his deposition that his firm has "a good relationship with a number of plaintiff attorneys who have claims in [sexual abuse] cases."[604] And Mr. Dundon personally has a "long-standing relationship"[605] and a "regular ongoing conversation"[606] with partners at Pachulski Stang

[599] *Matter of Evangeline Refining Co.*, 890 F.2d 1312, 1323 (5th Cir. 1989) (internal citation omitted).
[600] 38 F.4th 361, 374-379 (3d Cir. 2022) (applying conflicts standard applicable for fiduciaries to future claimants' representative in bankruptcy proceeding).
[601] *Matter of Coedsco, Inc.*, 18 B.R. 997, 999 (Bankr. S.D.N.Y. 1982) (emphasis added).
[602] Dundon Dep. Tr., pp. 29:23-30:1, 31:25-32:10.
[603] Dundon Dep. Tr., pp. 47:16-48:3.
[604] Dundon Dep. Tr., p. 134:12-16.
[605] *Id.* at p. 69:3-5.
[606] *Id.* at p. 69:19-24.

Ziehl & Jones ("Pachulski"), a plaintiffs' firm which represents "victim committees and committees most of whose members are victims in sex abuse bankruptcies."[607] In fact, Mr. Dundon has sought to be retained through Pachulski to serve as the financial advisor for the Official Committee of Unsecured Creditors in *In re Madison Square Boys & Girls Club, Inc.* in the United States Bankruptcy Court for the Southern District of New York, a potential conflict that Mr. Dundon has never disclosed to the Court.[608] Finally, Mr. Dundon candidly admitted that he "certainly intend[s] to continue to act for . . . individual plaintiff attorneys and their client or clients"[609] because it "makes up a meaningful share of [his] revenue."[610]

Mr. Finn, the proposed Abuse Claims Reviewer, similarly acknowledged longstanding business and personal relationships with a number of plaintiffs firms representing sexual abuse victims including Pfau Cochran Vertetis Amala PLLC, who he goes "back many years with,"[611] Slater Slater Schulman LLP,[612] Andreozzi & Associates, and Jeff Anderson & Associates.[613]

Both Mr. Dundon and Mr. Finn stated that the Tort Committee asked them to take on the fiduciary role but provided minimal information as to what the role entailed.[614] Neither Mr. Dundon nor Mr. Finn mentioned any discussions with, or approval by, the Debtor.

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[607] *Id.* at p. 67:19-22.
[608] *See supra* note 9.
[609] Dundon Dep. Tr., p. 137:6-10.
[610] *Id.* at p. 137:14-15.
[611] Finn Dep. Tr., pp. 101:24; 102:5-9
[612] *Id.* at p. 103:3-7 ("I consider Adam Slater a friend.").
[613] *Id.* at pp. 184:23-185:1.
[614] *See* Dundon Dep. Tr., pp. 123:19-124:2 ("Q: Have you spoken to anybody at all about your duties as trust administrator? A: I have spoken to the Tort Committee's counsel when they said 'Are you interested in being a trust administrator?' and I think I probably said 'What's that?' and they described it. They described it at some very high level what it was."); Finn Dep. Tr., p. 21:21-23 ("Q: Who first approached you to serve as the abuse claims reviewer? A: I got a call from Brent Weisenberg."), 21:2-5 ("Q: So what, if anything, did you know about this position when you agreed to serve it? A: Other than Camden is in New Jersey, that's all I knew.").

If appointed as Trust Administrator, Mr. Dundon will have nearly unilateral authority over the Trust's operations. The Trust Administrator's powers include, among others, (i) exercising the powers of a trustee under Sections 704, 108, and 1106 of the Bankruptcy Code (including commencing, prosecuting or settling Causes of Action, enforcing contracts, and asserting Claims, defenses, offsets and privileges);[615] (ii) deeming untimely Class 5 Claims to be "Allowed" even if those claims were not filed by the Bar Date;[616] (iii) implementing the TDPs pursuant to the terms and conditions of the Plan and the Trust Agreement to resolve, liquidate, and pay Class 5 and Class 6 Claims;[617] (iv) retaining professionals, including legal counsel, accountants, financial advisors, auditors and other agents on behalf of the Trust;[618] (v) putting claims through an Independent Review;[619] (vi) deciding to appeal a Verdict Value Assessment through use of the State Court Option;[620] (vii) pursuing Coverage Claims against Insurers;[621] (viii) defending and indemnifying Covered Parties against Abuse Claims as provided in the TDPs;[622] (ix) objecting to Channeled Claims;[623] and (x) using Trust assets to prosecute litigation against the Insurers.[624] The Trust Administrator is essentially a fox guarding the henhouse because he is only beholden to the Tort Committee, which appointed him, and the Trust Advisory Committee, appointed by the Tort Committee, to whom he reports.[625]

[615] Plan, § 7.6.
[616] *Id.* at § 2.2.11. *See also supra* Statement of Facts, § G at notes 333-334.
[617] *Id.* at § 2.2.114; *see also* Trust Agreement, § 3.2.8.
[618] *Id.* at § 7.6; *see also* Trust Agreement, § 3.2.11.
[619] TDPs, § 8.
[620] *Id.* at § 8(xi).
[621] Plan, § 7.6.
[622] *Id.* at § 7.6.
[623] *Id.* at § 8.6.
[624] *Id.* at § 10.4.2; *see also* Trust Agreement, § 1.7.4.
[625] Trust Agreement, § 7.1; *see also* [Dkt. No. 2006]; *supra* Statement of Facts, § G at notes 335-343.

With respect to the TDPs, the Trust Administrator has the authority in conjunction with an Abuse Claimant to submit an Abuse Claim for review under a Verdict Value Assessment.[626] The Verdict Value Assessment is then overseen by the Neutral (whom the Trust Administrator appoints).[627] The Trust Administrator then has the authority to appeal the Verdict Value Determination using the State Court Option[628] or to submit an Offer within Limits to the relevant Insurer.[629] The Trust Administrator is also authorized to reduce the Verdict Value to a Stipulation of Judgment executed by the Independent Review Claimholder, the Trust Administrator, and the Diocese Affiliated Entities (but importantly not the Insurers),[630] and may issue a demand letter to the Insurers for payment of the Stipulation of Judgment.[631]

The Abuse Claims Reviewer is responsible for conducting a review of each of the Proofs of Claim filed by Holders of Class 5 Claims against the Debtor to determine whether such Claim should be Allowed.[632] If so, Mr. Finn, as the Abuse Claims Reviewer, alone will assign a point value for the Abuse Claim using the Evaluation Factors.[633] That point value will then determine the cash distribution for such Abuse Claim.[634]

The Abuse Claims Reviewer's actions and process are reviewed by the Trust Administrator. The Trust Administrator is entitled to remove the Abuse Claims Reviewer "for cause" and to appoint a new Abuse Claims Reviewer subject to consultation with the Trust Advisory Committee.[635] Further, the Trust Administrator is obligated to provide the Trust

[626] TDPs, § 8.
[627] *Id.* at § 8(ii).
[628] *Id.* at §8 (xi).
[629] *Id.* at §8 (xii).
[630] *Id.* at § 8(xiii).
[631] *Id.* at § 8(xiii).
[632] *Id.* at §§ 1, 4.
[633] *Id.*
[634] *Id.* at §§ 11, 13.
[635] Trust Agreement, § 3.2.12.

Advisory Committee with periodic updates on his and the Abuse Claims Reviewer's progress.[636] Finally, the Trust Administrator and the Abuse Claims Reviewer have the ability to modify the TDPs, in consultation with the Advisory Committee, "in any manner that is not inconsistent with or otherwise in contravention of the terms of the Plan and the Confirmation Order."[637]

Giving biased and conflicted fiduciaries that are beholden to the Abuse Claimants such discretion to allow and value claims allows the Tort Committee to act on its substantial financial incentives to maximize recoveries for only certain of the trust beneficiaries, the Abuse Claimants, to the detriment of others, such as the Insurers.[638]

The numerous financial ties between Mr. Dundon and Mr. Finn and plaintiff lawyers in this case leaves them in an untenable position because their representation of the Trust will be materially limited by their responsibilities to other clients and personal interests. Mr. Dundon's current representation of claimants poises a significant risk - indeed, a virtual certainty - that his representation of the Trust will be materially limited. It defies common sense to expect the Mr. Dundon will be a zealous advocate for the Trust knowing that he simultaneously works with counsel to individual claimants in other cases

Further, the issues inherent in the TDPs will not be resolved by the appointment of different Trust fiduciaries because the lack of well-defined procedures creates an inherently biased claims evaluation system.[639] The TDPs do not contain any criteria for the Abuse Claims Reviewer to determine whether an Abuse Claim should be allowed, nor any criteria for the Neutral to value a

[636] *Id.* at §7.3.
[637] TDPs, §16(iii); *see also* Bitar Decl., ¶ 9.
[638] *See* Hinton Decl., ¶ 8 ("[T]he Plan created a dual track for valuing claims and making coverage demands of insurers based on verdict values and . . . those provisions were prejudicial to insurers, inflated claims and contained no procedures for disallowing claims."). *See also id.* at ¶¶ 27, 50.
[639] *See infra* § VII(C)(3)-(4).

claim.[640] Unlike other trust agreements, including the agreement in Boy Scouts of America, the TDPs provide no objective, empirical basis on which to value claims and instead rely on the "subjective judgment of the Neutral."[641] While the Neutral may strive to be unbiased in the execution of their duties under the Plan, the inherent bias in the Plan itself ensures that the outcome will be biased against the Insurers' interests.[642] The inherent bias is encoded into the Neutral through the TDPs' requirement that the Neutral employ the Verdict Value Assessment. Regardless of the experience of the Neutral and their own viewpoint, such a subjective system cannot assure that the Neutral's assessment of damages would be consistent with values that would prevail in the tort system in the absence of bankruptcy.[643]

In sum, the appointment of conflicted Trust fiduciaries such as Mr. Dundon and Mr. Finn amplifies the existing problems in the TDPs, but simply replacing them will not solve the biases embedded in the procedures themselves.

IV. THE ABSENCE OF ALLOWANCE CRITERIA IN THE TDPS IS A PRODUCT OF THE UNBRIDLED DOMINATION OF THE TORT COMMITTEE AND RENDERS THE PLAN UNCONFIRMABLE

A core principle of bankruptcy is that a "claim against the bankruptcy estate 'will not be allowed in a bankruptcy proceeding if the same claim would not be enforceable against the debtor outside of bankruptcy.'"[644] This means that sexual-abuse and other tort claimants must be subjected to the same proof standards they would face outside of bankruptcy. The TDPs are at

[640] *See* Hinton Decl., ¶¶ 27, 38; TDPs, §§ 11(i), 8(vi).
[641] Hinton Decl., ¶ 38.
[642] *See* Nov. 30 Trial Tr. (Hinton), p. 84:16-19 ("I think [the Neutral] will try to be unbiased, but the plan, itself, is biased, and so, if you are an unbiased person who is asked to implement a biased plan, the result will be biased.").
[643] Hinton Decl., ¶ 38.
[644] *Combustion Eng'g*, 391 F.3d at 245 n.66 (quoting *United States v. Sanford*, 979 F.2d 1511, 1513 (11th Cir. 1992)).

odds with this fundamental principle. Indeed, the TDPs abandon any impediment to allowing any claim.

This explicitly disobeys the Third Circuit's requirement that a claimant must establish each of the legal elements to state a claim and do so by the same standard of proof it would face outside of bankruptcy.[645] The TDPs omit any mechanism for identifying claims that are fraudulent, false, or simply not legally cognizable. Instead, the Plan effects the compulsory assignment of all objections to the Proofs of Claims to a claimant-controlled Trust, which then effectively waives all objections through TDPs that impose no standard for allowance. Further, the TDPs simply lack the procedural protections that exist in the tort system to assess the validity of Abuse Claims.[646] The lack of these protections underscores why Insurers are unlikely to ever agree to a Stipulation of Judgment where they would not do so in the tort system.[647]

The result is TDPs that as a matter of law unambiguously—indeed, *indisputably*—do not subject Abuse Claims to the same proof standards they would face outside of bankruptcy.[648] Rather, they excuse the Abuse Claimant from even having a legally cognizable claim against the Debtor.[649]

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[645] *See In re Allegheny, Int'l, Inc*., 954 F.2d 167, 173 (3d Cir. 1992).

[646] Bitar Decl., ¶¶ 9-25 (outlining the many differences between the TDPs and the tort system, including differences in the adjudicative process, differences in the decisionmakers adjudicating the abuse claims, and differences in the calculation and payment of damages or settlement amounts).

[647] Nov. 30 Trial Tr. (Bitar), pp. 44:14-17, 44:25-45:20 (stating that Bitar could never recommend that an insurer client agree to a stipulated judgment in the tort system and that she was not aware of any institutional client that had ever stipulated to a judgment in a sexual abuse case).

[648] Bitar Decl., ¶ 14 (noting that Initial Claims Review Determination lacks any burden of proof on the claimant).

[649] It would be pure error of law to confirm a plan that has no allowance criteria. S*ee Universal Minerals, Inc. v. C. A. Hughes & Co*., 669 F.2d 98, 103 (3d Cir. 1981) (an appellate court "must exercise a plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.").

A. The TDPs Fail to Include Criteria for Allowing Claims

While the TDPs are supposed to provide procedures for allowing and valuing claims, the TDPs here do not provide any standard for allowing a claim. The most the TDPs say is that the Abuse Claims Reviewer will determine whether "the Abuse Claim should be Allowed"[650] but the TDPs are devoid of any criteria for what is necessary to establish that a claim will be allowed.[651] And there is no criteria for disallowing a claim.[652]

The Fifth Amended Plan included language concerning the standard of proof for allowing and disallowing claims, but that language was deleted from the Eighth Amended Plan drafted by the Tort Committee.[653] The only barrier left for allowing a claim was that it be *timely* filed, but even that safeguard was stripped from the Plan by the Tort Committee. Now Section 2.2.11 of the Plan provides that "the Trust Administrator shall have the authority to deem any untimely Class 5 Claim Allowed even if such Claim was not filed by the Bar Date."[654] It is solely up to the Abuse Claims Reviewer's discretion whether to allow an Abuse Claim. But he is selected by the Tort Committee, situationally conflicted, and given no basis in the TDPs to disallow any claim.

Nor is the absence of allowance procedures addressed by the Proof of Claim form. While the Proof of Claim solicited information that may be sufficient for a tort claim against an actual abuser, it falls short of soliciting the type and range of information necessary to establish the ***Debtor's*** liability as an organization for the underlying conduct, and in turn, the Insurers' potential

[650] *See* TDPs, § 1.
[651] *See id.* at §§ 1, 4, 6 (the TDPs only provide that the Abuse Claims Reviewer will determine if an Abuse Claim is Allowed, not the procedures used to make that determination); *see also* Plan, §§ 2.2.1 and 2.2.11 (defining "Abuse Claim" and "Allowed"); Hinton Decl. ¶ 27 (". . . the Trust Distribution Plan procedures do not set forth any criteria to be used in making such a determination.").
[652] *See* Hinton Decl., ¶ 8.
[653] *See* Nov. 30 Trial Tr. (Hinton), p. 130:7-19.
[654] *See* Plan, § 2.2.11; Bitar Decl., ¶ 14. *See also supra* Statement of Facts, § G at notes 333-334.

coverage obligations.[655] Among other things, the form failed to ask the claimant to affirm either that the Diocese knew or should have known about the abuser, or that the claimant has evidence of that knowledge.[656] Under New Jersey law, such an omission precludes the establishment of a claim against the Debtor.[657] Thus, the centrality of a defendant organization's knowledge of or notice about a particular individual renders the Proofs of Claim subject to objection under section 502(a) for containing inadequate support to establish legal liability against the Debtor.

B. The TDP Claims Review Process is Entirely Inconsistent with the Statutory Scheme Adopted by Section 502 of the Bankruptcy Code and Deprives Insurers of Their Statutory Right to Object to Claims

The Plan is also unconfirmable for the additional reason that it ignores the statutory scheme under Section 502 of the Bankruptcy Code and deprives other parties to the estate and Insurers of their statutory right to object to claims.[658]

Section 502(a) sets out procedures that allow the Court and other parties in interest to evaluate whether a claim is valid and is "entirely consistent with the central purpose of the

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[655] Where a proof of claim does not provide "facts and documents necessary to support the claim, it is not entitled to the presumption of *prima facie* validity" because it does not adhere to the requirements of Rule 3001. *In re Kincaid*, 388 B.R. 610, 614 (Bankr. E.D. Pa. 2008); see *In re Jorczak*, 314 B.R. 474, 481 (Bankr. D. Conn. 2004) ("If, however, the claimant fails to allege facts in the proof of claim that are sufficient to support the claim, e.g., by failing to attach sufficient documentation to comply with Fed. R. Bankr. P. 3001(c), the claim is not automatically disallowed; rather, it is merely deprived of any *prima facie* validity which it could otherwise have obtained.").

[656] *See supra* Statement of Facts, § C(1).

[657] *See Davis v. Devereux Found*., 209 N.J. 269, 292 (2012) (explaining New Jersey courts recognize the tort of negligent hiring "where the employee either ***knew or should have known*** that the employee was violent or aggressive, or that the employee might engage in injurious conduct toward third persons") (emphasis added); *G.A.-H. v. K.G.G*., 238 N.J. 401, 416, *reconsideration denied*, 239 N.J. 76 (2019) (for negligent supervision or training, the claimant must prove that "(1) an employer ***knew or had reason to know*** that the failure to supervise or train an employee in a certain way would create a risk of harm and (2) that risk of harm materializes and causes the plaintiff's damages"); *Ianuale v. Borough of Keyport*, Civ. No. 16-9147 (FLW) (LHG), 2018 WL 5005005, at *13 (D.N.J. Oct. 16, 2018) (dismissing negligent hiring claim where "Plaintiffs have not presented any facts at summary judgment indicating that Defendants ***had reason to know*** of any 'particular unfitness, incompetence, or dangerous attributes' of any of the Defendants") (emphasis added).

[658] *See* 11 U.S.C. §§ 502(a), 1129(a)(1).

bankruptcy code as it relates to creditors—equality of distribution."[659] Allowing creditors to object to claims "facilitates resolutions of the claims reconciliation process, which is necessary to ensure prompt and equal distributions."[660] To be sure, while courts may, in appropriate circumstances limit creditors' rights to object to certain claims, they cannot remove such rights altogether.[661]

But here, the Verdict Value Assessment and Initial Review Determination process lack any of the procedural safeguards that guarantee that claims are fully vetted and fairly valued in the tort system. Nothing in the TDPs state that the Debtor or the Insurers are entitled to respond to the Abuse Claims in writing before the claim is valued.[662] The TDPs also include no mechanism for dismissing a claim[663] or for allowing competing expert testimony.[664] The procedures limit discovery to ninety days, "barring exceptional circumstances,"[665] and the scope of discovery is "vague [and] ill-defined."[666] For example, it is unclear whether the Diocese or Insurers can request a medical exam of the claimant.[667] Ms. Bitar testified that the "amorphous and unclear" procedures around discovery under the TDPs are inapposite to the "robust" discovery allowed under the tort system.[668]

In the tort system, information gleaned from plaintiffs and third parties in discovery can be critical to the survival of a plaintiff's claims or to the mitigation of a damages award. The TDPs present no mechanism to secure documents beyond what a plaintiff may have in his possession

[659] *Whitely v. Slobodian (In re Mechanicsburg Fitness, Inc.)*, 592 B.R. 798, 807 (Bankr. M.D. Pa. 2018).
[660] *Id.*
[661] *See generally, e.g., In re Spansion, Inc*., 426 B.R. 114, 147 (Bankr. D. Del. 2010) (recognizing that a plan's proposal to limit creditors' right to object to unsecured claims to the claims agent was reasonable and permissible under the confines of section 502(a) of the Bankruptcy Code).
[662] Bitar Decl., ¶ 20.
[663] *Id.* at ¶ 29.
[664] *Id.* at ¶ 61.
[665] TDPs, § 8(v). These "exceptional circumstances" are determined "in the sole discretion of the Neutral." *Id.*
[666] Bitar Decl., ¶ 14.
[667] *Id.* at ¶ 20.
[668] *See* Nov. 30 Trial Tr. (Bitar), p. 31:10-19.

and, even when permitted, simply do not afford access to the third-party discovery available in the tort system.[669] Nor do the TDPs incentivize engaging in any discovery beyond what a plaintiff provides; the Neutral is given wide and unchecked latitude to require as much or as little documentary or other support for a claim as he chooses.[670] The Neutral alone decides the "precise method, manner and procedures" to be used.[671]

The Abuse Claim Reviewer has the power to determine if a claim is Allowed using information "he may, in his sole discretion, choose to consider."[672] The TDPs dispense with any judicial scrutiny by permitting claimants, their lawyers, and the Debtor essentially to self-adjudicate the validity of their clients' claims. The criteria applied to each Abuse Claim is not set out in the TDPs and instead gives the Trust (through the Abuse Claims Reviewer) the sole discretion to determine whether a claim is Allowed by stripping the Insurers of their statutory right to object. Such a structure is contrary to the Bankruptcy Code and should preclude confirmation because "[a]ny defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy."[673]

An insurer's due process rights include "an opportunity to present every available defense."[674] Accordingly, section 502(a) vests in all "part[ies] in interest" the right to object to claims. "The language of section 502(a) is clear and unambiguous. It plainly authorizes a party

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[669] *See* Bitar Decl., ¶ 20 ("Under the TDPs, an Abuse Claimant may craft his or her claim by providing whatever information he or she chooses, largely at their own discretion.").
[670] *See* Bitar Decl., ¶ 13.
[671] *Id.* at ¶ 13.
[672] *Id.* at ¶ 10.
[673] *Travelers Cas. & Sur. Co. of America v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007); *see also* 11 U.S.C. § 558 ("The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statute of limitations, statute of frauds, usury, and other personal defenses.").
[674] *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see, e.g., Mullins v. Direct Dig., LLC*, 795 F.3d 654, 669-70 (7th Cir. 2015) ("It is certainly true that a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability.") (internal citations omitted).

in interest to object to any claim or interest, proof of which is filed under section 501 of the Code."[675] Yet here, in clear violation of section 502(a), the Plan assigns that right to the Trust, vesting in the Trust Administrator and the Abuse Claims Reviewer the exclusive right to object to claims.[676] The Plan and the TDPs give the Abuse Claims Reviewer and the so-called "Neutral" unvetted discretion with regard to the allowance of claims, but are completely devoid of the procedures by which they will do so.[677] Moreover, the Initial Review Determination contains "no burden of proof to be applied, no requirement to prove a case on the merits, no consideration of defenses to liability, and no consideration of evidentiary standards."[678]

After the Abuse Claims Reviewer makes an Initial Review Determination for an Abuse Claim, that claim may, at the discretion of the Abuse Claimant and the Trust Administrator, be valued under the Verdict Value Assessment procedures.[679] The procedures afford the Insurer no option to appeal the Offer within Limits or litigate the offer in court. Instead, the Insurer must agree to the Offer within Limits or it is reduced to a Stipulation of Judgment that the Trust may enforce against the Insurer.[680] The Insurer may litigate the claim in court ***only*** if the Stipulation of Judgment is determined by a court to be invalid.[681]

The Abuse Claims Reviewer, who is appointed by the Tort Committee,[682] has the "sole discretion" to determine if a claim is allowed, which effectively eliminates the adversarial process and deprives the Insurers of their statutory rights.[683] Thus, in clear contravention of the plain

[675] *Mechanicsburg Fitness*, 592 B.R. at 807.
[676] TDPs, § 4.
[677] Plan, §§ 2.2.1 and 2.2.11 (defining "Abuse Claim" and "Allowed"); *see also* Hinton Decl., ¶ 27 (". . .the Trust Distribution Plan procedures do not set forth any criteria to be used in making such a determination.").
[678] *See* Bitar Decl., ¶ 14.
[679] TDPs, § 8. *See supra* notes 626-631.
[680] *Id.* at §§ 8(xii)-(xiii).
[681] *Id.* at § 9(i).
[682] Plan, § 2.2.2 (Tort Committee appoints Abuse Claims Reviewer).
[683] *See* Bitar Decl., ¶ 10.

language of Section 502(a) of the Bankruptcy Code and in violation of Section 1129(a)(1), the Plan assigns away the estate's right to object and effectively waives the Insurers' separate right to object and be heard by the court.[684]

A plan that essentially allows ***all*** claims and waives any potential objections to such claims cannot be approved. This process violates Section 502(a) of the Bankruptcy Code and renders the Plan unconfirmable.[685]

C. The TDPs Do Not Survive "Careful and Comprehensive Scrutiny," Which this Circuit has Admonished Courts to Apply in Overseeing Mass Tort Bankruptcies

Sexual abuse cases like this one present a dramatic risk of "over claiming" that sharply underscores the need to gather adequate information before treating claims as valid. "The problem of over claiming inheres in any move from a tort system predicated on individualized proof toward a streamlined administrative regime."[686]

Because of these risks, the Third Circuit has admonished courts to apply "careful and comprehensive scrutiny" in overseeing mass tort bankruptcies.[687] Such close scrutiny is required, the Court explained, because the issues that arise in resolving mass tort bankruptcies "are similar to those that arise in class actions for personal injuries," where settlement presents serious risks that class members' interests may be compromised by "lawyers for the class who may, in

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[684] *See In re C.P. Hall Co.*, 513 B.R. 540, 544 (Bankr. N.D. Ill. 2014) ("The court's obligation to rule on a claim objection is mandatory, and the creditor's right to a ruling is also unqualified."); *see also generally In re Congoleum Corporation*, 414 B.R. 44, 55 (D.N.J. 2009) (recognizing the bankruptcy court "had an independent obligation to consider the confirmability of the Plan under 11 U.S.C. § 1129(a). . . ."); *In re Vincente*, 257 B.R. 168, 179 (Bankr. E.D. Pa. 2001) ("Courts have repeatedly found unconfirmable a plan that attempts to impair rights properly adjudicated through an adversary proceeding, a claim objection or a § 506 motion.").

[685] *See* 11 U.S.C. § 1129(a)(1).

[686] RICHARD A. NAGREDA, MASS TORTS IN A WORLD OF SETTLEMENT, 150 (2007); *see In re Silica Products Liability Litig.*, 398 F. Supp. 2d 563, 571–72 (S.D. Tex. 2005); *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 314–16 (E.D.N.Y. 2002) (influx of questionable claims required court to re-design claims process).

[687] *Congoleum Corp.*, 426 F.3d at 693–94.

derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class."[688]

The same problem is presented here. After years of advertising its voluntary settlement program, the Debtor predicted, upon its filing, that there may be approximately 100 Abuse Claims asserted in this Chapter 11 proceeding. That number multiplied exponentially—diluting recoveries on meritorious claims—as claimants needed to provide only a sliver of information to submit a Proof of Claim to receive a share of any payouts.[689]

Other bankruptcy courts have recognized the need for particularly detailed allowance criteria when mass tort claims are at issue as a means to winnow out non-compensable claims.[690] The bankruptcy court in *In re The Delaco Co.*[691] amended a bar date order to require that personal injury and wrongful death claimants complete a questionnaire, and set a separate bar date for receipt of the questionnaire.[692] Similarly, the district court in *In re A.H. Robins Co., Inc.*, sitting as a bankruptcy court, established a two-step process by which claimants would first file a statement of intent to make a certain type of claim along with their name and address, and then

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[688] *Id.*

[689] *See supra* Statement of Facts, § (C)(2). *See also* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation*, Santa Monica, CA: RAND Corporation, 1995 ("Aggregation will be more appealing to attorneys with larger numbers of less valuable cases, who can use aggregation to resolve claims cheaply without having their worth tested."); *Looting the Boy Scouts*, Wall Street Journal (March 2, 2021).

[690] If tort claims are presumptively allowed based on a check-the-box form, the only recourse would be to object to them individually in the bankruptcy. As tort claims are entitled to a jury, the bankruptcy court lacks the ability to resolve such claims, which would lead to their transfer to the District Court. 28 U.S.C. § 157(b)(5). In denying the transfer of 2,400 tort cases from state courts to the district court associated with another recent mass tort bankruptcy, Judge Noreika held the transfer of so many claims would overwhelm the District of Delaware: "[T]he transfer of these cases would grind the wheels of justice to a halt, as cases at all stages of development are fixed here and added to an already-busy docket." *In re Imerys Talc Am., Inc*., No. 19-MC-103 (MN), 2019 WL 3253366, at *8 (D. Del. July 19, 2019). The same is true with regard to the District of New Jersey.

[691] *In re The Delaco Co*., United States Bankruptcy Court for the Southern District of New York, No. 04-10899 (CB).

[692] *See Amended Order under 11 U.S.C. §§ 105 and 502 and FED. R. BANKR. P. 2002(a)(7), 3001(a), and 9008 Requiring Personal Injury Claimants to File Questionnaires*, *id.* [ECF No. 196].

later would be required to fill out a detailed a questionnaire.[693] The Plan here is not confirmable as a matter of law because it establishes as presumptively valid claims which lack that additional information.

D. By Eliminating Any Allowance Procedures, the TDPs are Designed to Allow a Flood of Meritless Claims

The risk of "over claiming" that required close scrutiny in *Congoleum* is set to be the reality in this Bankruptcy Case because this case lacks any oversight for the claims review process. The Tort Committee created a scheme whereby all alleged Abuse Claims will be allowed regardless of whether there is any evidence to support such claims. As discussed above, the TDPs have ***no*** allowance procedures and, just as troubling, lack any measures to flush out fraudulent or otherwise meritless claims.[694] This scheme established under the TDPs almost encourages the filing of claims that are factually and/or legally deficient.

1. The Trust Documents Lack Any Fraud Prevention Measures

Under the TDPs, the Trust Administrator and the Abuse Claims Reviewer are solely responsible for implementing claims allowance and payment procedures without any meaningful or disinterested oversight. Any internal control procedures are left to their discretion to develop with very limited checks and balances. There are ***no*** fraud prevention measures included in the TDPs, which courts generally require for confirmation.[695]

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[693] 862 F.2d 1092, 1093 (4th Cir. 1988).

[694] *See supra* §§ IV(A), IV(D)(1).

[695] *See, e.g., In re Kaiser Gypsum Co., Inc.*, Case No. 16-31602-JCW (Bankr. W.D.N.C.), September 4, 2019 Hr'g Tr. [Dkt. No. 1785], pp. 64-66 ("I don't think . . . a federal court should approve a mechanism and a process that could lead to fraud, particularly in an area where the trusts have been subject to false claims . . . This is one that I'm concerned about of whether the plan, ultimately, is confirmable based on this."); *In re Maremont Corp.*, Case No. 19-10118-KJC (Bankr. D. Del.), March 18, 2019 Hr'g Tr. [Dkt. No. 166], pp. 6-7 (refusing to confirm plan because it lacked "provisions that will guard against the possibility that [] fraud should occur"). *See also BSA*, 642 B.R. at 644-645 (requiring implementation of procedures to detect fraudulent claims where proposed TDPs did not provide for any).

When reviewing the TDPs, Dr. Treacy testified that the procedures set forth in the TDPs suggest a desire to allow fraudulent claims.[696] The TDPs are "inadequate to safeguard against fraudulent or otherwise unreliable Abuse Claims."[697] Even Father Hughes admitted that he is not aware of anything in the TDPs to preclude fraudulent claims.[698] Thus, the record clearly establishes that there are simply no measures in the TDPs to ensure fraudulent claims are disallowed.

2. The Lack of Well-Defined Procedures in the TDPs Will Lead to the Allowance and Payment of Inflated and/or Non-Compensable Claims

The allowance and valuation mechanisms under the TDPs deliver results contrary to the "objectives and purposes of the Bankruptcy Code."[699] Rather than promoting the orderly liquidation of claims within the four corners of the Bankruptcy Code (and applicable non-bankruptcy law), the TDPs reward holders of invalid or otherwise improper Abuse Claims with a seat at the table and a share of the spoils – particularly given the lack of any measures to ensure that only valid and compensable claims are paid under the TDPs.

The primary purpose of the Bankruptcy Code is to ensure "equality of distribution among creditors of the debtor."[700] "[A] creditor cannot collect more, in total, than the amount it is owed" from the debtor.[701] All claims for payment must (eventually) be reduced to an absolute dollar

[696] *See* Nov. 17 Trial Tr. (Treacy), p. 76:12–22 (Q: "Doctor, just to clarify what you said, there's nothing in any document here that suggests that anyone wants to allow fraudulent claims, is there? Is there anything in the TDPs that suggest that? A: Yes, actually I think there is. I think the fact that they're not having trained people do this who know sex abuse and know how to determine real cases or not, because there's no objective testing. And the testing is objective. This is not subjective. And they're not having clinical interviews with people who have expertise. So I think it is opening the door.").
[697] Treacy Decl., ¶ 10.
[698] *See* Nov. 9 Trial Tr. (Hughes), p. 144:1–4.
[699] *AcandS*, 311 B.R. at 43.
[700] *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991).
[701] *Nuveen Mun. Tr. v. Withumsmith Brown, P.C.*, 692 F.3d 283, 295 (3d Cir. 2012).

amount.[702] Further, the claim itself should be cognizable and enforceable against the debtor to receive a distribution.[703] The claim valuation and allowance procedures contemplated by the TDPs are antithetical to each of these objectives.

In this regard, the present case is comparable to *In re American Capital Equipment, Inc.*[704] In that case, the debtor and the asbestos claimants proposed—over the objection of the insurers—to enter into a settlement that would have permitted asbestos claimants to resolve their claims by opting into an alternative dispute resolution process, rather than pursuing court litigation. The resolution process on its face was "indisputably procedurally much more favorable [than court litigation] and, thus advantageous to the Asbestos Claimants' cause."[705] "In return for the opportunity to take advantage of" the alternative dispute resolution process, the asbestos claimants were required "to give to the [d]ebtor 20% of any insurance proceeds that the Asbestos Claimants would obtain from the Insurers if, and to the extent that, they prevail on their claims," which the debtor would use to pay its creditors.[706] The bankruptcy court surmised that, in light of the significant procedural advantages accorded to the asbestos claimants, such claimants were "eminently more than happy" to agree to this arrangement.[707] Finally, because the debtor would only receive the 20% "surcharge" if the debtor's defense of such claims proved unsuccessful, "the

[702] *See* 11 U.S.C. § 502(b) ("[T]he court . . . shall determine the amount of such claim in lawful currency of the United States . . .").
[703] *See id*. at § 502(b)(1) (providing for the disallowance of claims "unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured."); *id*. at § 704(a)(5) ("The trustee shall . . . examine proofs of claim and object to the allowance of any claim that is improper.").
[704] 405 B.R. 415 (Bankr. W.D. Pa. 2009).
[705] *Id.* at 422.
[706] *Id.*
[707] *Id.*

[d]ebtor [was] nothing but financially incentivized to sabotage its own defense or, more aptly, the [i]nsurers' defense of itself vis-à-vis the Asbestos Claims."[708]

The court rejected the plan, finding that it was "the result of patent collusion" between the debtor and the claimants, and that it was "no[] surprise[] to see the extreme extent to which due process protections/procedural safeguards afforded to the Insurers" had "been relaxed by relevant terms of the Fifth Plan."[709] The court observed, "there is really no valid reason for the [d]ebtor to even care if the Asbestos Claims get settled"; if they were settled, any excess judgment beyond what was covered by insurance would be "worthless" because, inter alia, "the [d]ebtor [wa]s in bankruptcy" and would not have to pay on any judgments.[710] The court therefore concluded that the debtor "wishe[d] to settle for one reason"—"to obtain the 20% Surcharge."[711] Indeed, the debtor "hope[d] that its defense—or, more aptly, the [i]nsurers' defense of itself—[would] be unsuccessful, given that such defense must fail in order for the [d]ebtor to obtain such surcharge," and the proposed plan was simply an attempt "to facilitate [such] defeat."[712]

On appeal, the district court affirmed, finding "no error, let alone a clear error," with the bankruptcy court's determination, including that the proposed plan "was the result of collusion between the [d]ebtor and the asbestos claimants."[713] The Third Circuit also affirmed, finding that the plan was not proposed in good faith because "it establishe[d] an inherent conflict of interest," namely, a system in which the debtor would be "financially incentivized to sabotage its own

[708] *Id.* at 423.
[709] *Id.* at 422-423.
[710] *Id.*
[711] *Id.* at 423.
[712] *Id.*
[713] *Skinner Engine Co. v. Allianz Global Risk U.S. Ins. Co.*, No. 09-0886, 2010 U.S. Dist. LEXIS 45667, at *7 (WD. Pa. Mar. 29, 2010).

defense."[714] Because this "inherent conflict of interest" undercut any incentive to defend against the claims, the plan failed Section 1129(a)(3)'s good faith requirement.[715]

The same concerns loom large here. The Plan proposed by the Debtor has all the hallmarks of collusion. Certainly, the TDPs are not the product of arms-length negotiation. The biased TDPs require fiduciaries to treat all claims as presumptively valid and compensable. The Abuse Claims Reviewer has no required procedure to disallow claims but is required to assign a value to all allowed claims based on a points system. As described in greater detail below, the Court should reject the Debtor's Plan here for the same reasons the court rejected the proposed plan in *American Capital Equipment*.

Altogether, the Plan Proponents' TDPs scheme violates foundational principles of bankruptcy law underlying the allowance, denomination, and payment of claims.[716] The Plan therefore fails to "achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[717] As a result, the Plan cannot satisfy Section 1129(a)(3), and confirmation must be denied.

V. THE TDP PROCEDURES FOR VALUING CLAIMS ARE NOT CONFIRMABLE AS A MATTER OF LAW

A. The Valuation Provisions of the TDPs are Structured to Treat Claims Differently Based on the Party Responsible for Payment

The Court's authority to approve the confirmation of a plan of reorganization that employs TDPs must be "exercised within the parameters of the Code itself."[718] While the Court has

[714] *Am. Capital Equip., LLC*, 688 F.3d at 158.
[715] *Id.* at 158-159.
[716] *See* 11 U.S.C. § 502(b) ("[T]he court . . . shall determine the amount of such claim in lawful currency of the United States . . ."); *Travelers Cas. & Sur. Co. of Am.*, 549 U.S. at 450 ("[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code") (internal citations and quotations omitted) (formatting in original); *Nuveen Mun. Tr.*, 692 F.3d at 295 ("[A] creditor cannot collect more, in total, than the amount it is owed.").
[717] *Am. Capital Equip. LLC*, 688 F.3d at 158.
[718] *See In re Combustion Eng'g*, 391 F.3d at 236.

equitable power to "craft remedies necessary to facilitate the reorganization of a debtor," that does not allow courts to disregard the clear language of the Code.[719] The Court's authority is "cabined by the Code."[720]

In the preceding argument section, it was shown how the allowance procedures of the TDP rendered the plan not confirmable because they had been designed to allow claims that would not be enforceable against the debtor outside of bankruptcy. The plan is not confirmable as a matter of law for the separate and independent reason that the valuation provisions of the TDPs are structured to treat claims differently based on the party responsible for payment. The Debtor's liability is fixed by one value and the Insurers' by another under the TDPs. A defendant's liability for a claim either is one amount or it is another, but in no event can the ***same*** defendant's liability for the ***same*** claim be fixed at different amounts due solely to the identity of the liability payor.[721] Yet that is precisely what the TDPs dual-valuation framework achieves. And these two methodologies arrive at vastly different valuations—nearly ten times more for the insurers

The valuation methodology that the TDPs apply to claims for which payment is to be sought from Insurers in also designed to inflate the value of claims relative to the tort system. The Verdict Value Assessment that is applied does not account for historical settlements and dismissals, and is therefore inherently biased towards high claim values. The TDPs further skew the valuation by assuming that all claims get to a verdict. But that is not an accurate reflection of what happens in the tort system—only a small fraction of cases get to verdict. Thus, by imposing a "Verdict Value" on Insurers for all claims, the TDPs by design artificially inflate the value of claims relative to the tort system.

[719] *Id.*
[720] *Id.*
[721] *See* Hinton Decl., ¶ 19 ("Thus, the Debtor's liability is fixed by one value and the insurers' by another.").

The only reason the TDPs are structured this way is to gin up the value of the claims to bill insurers more through the bankruptcy than what they otherwise would be exposed to in the tort system. A plan cannot rely on the court's equitable power to achieve a result inconsistent with specific provisions of the Bankruptcy Code.[722] If the claim valuation procedures within the TDPs are approved, the court will be exercising its authority well outside the parameters of the Bankruptcy Code. Simply put, the TDPs are utterly at odds with the most fundamental principles of the Bankruptcy Code.

B. The Plan Provisions Value Claims Lower When Computing Parish Contributions and Higher When Computing Insurer Liabilities

The Debtor's expert Mr. Wilen testified as to how the contributions for 63 parishes were computed and listed the amounts of the contributions for each.[723] In aggregate these contributions across all the Parishes amount to $9.4 million with the remaining fraction of the $10 million total contribution defined in the Plan being made by three high schools.[724] The calculation performed by Mr. Wilen involved matching the locations of abuse identified in connection with each claim to the Parish locations.[725] Then Mr. Wilen used the claim valuations he previously developed for the Debtor to estimate a share of claim liability for each Parish. But the same claims when attributed verdict values by Ms. McNally have values ten times as high.[726] These are the values

[722] *In re Combustion Eng'g*, 391 F.3d at 236-237, 248 (vacating the confirmation order after finding that, based on the facts, the court could not rely on its equitable powers to circumvent the more specific requirements of the Bankruptcy Code).
[723] *See* Nov. 14, 2022 Trial Tr. (Wilen), pp. 11:1-12:10; (IC 337) (Parish Contribution Summary).
[724] *Id*.
[725] *See* Nov. 14, 2022 Trial Tr. (Wilen), pp. 11:13-11:20 ("each and every parish and school had a $50,000 minimum contribution. And then we allocated the remaining amount to $10 million based upon the severity and number of claims that the parishes had. Using my analysis that I had testified before on, using the IVCP calculations.").
[726] *See* McNally Decl., Table 12 (showing average per-claim value of about $1.2 million to $2.4 million).

used by Mr. Salisbury to calculate the liability of the insurers under the Plan TDPs Verdict Value Assessment.[727]

Using a single parish as an example makes the double standard for valuing different parties' liabilities starkly evident. Consider Parish 57. Mr. Wilen identifies four claimants as having alleged abuse at Parish 57 Church locations.[728] He estimates the Parish's settlement contribution at $123,548 total, or about $31,000 per claim.[729] The specific claims naming Parish 57 are claim numbers: POC179; POC248; POC285; and POC475.[730] The underlying valuations of these claims, implicit in the proposed Plan settlement contribution of the Parishes, are: $143,000; $123,500; $191,500; and $143,000 respectively.[731] However, the valuations of these same four claims based on verdict values, as reported by Ms. McNally, are: $1,792,462; $1,024,264; $2,560,659; and $1,792,462 (in her Scenario A) or alternatively: $3,532,424; $2,018,528; $5,046,321; and $3,532,424 (in her Scenario B).[732] On average the claim valuation implicit in the Plan used to determine the liability contribution of Parish 57 is: $150 thousand; while the valuation used to determine the liability of the insurers for the same four claims is between $1.8 million and $3.5 million. Thus, based on this example, the Plan valuation procedure for determining insurer liability is between 11.9 and 23.5 times higher than the valuation procedure used to determine the settlement contribution of St Stephen's RC Church.

The Diocese's settlement net of the parishes' $10 million contribution proposed in the Plan is estimated on a consistent basis. The underlying claim valuations used to justify each

[727] *See* Salisbury Decl., ¶ 18.
[728] (IC 337) (Parish Contribution Summary).
[729] *Id.*
[730] *See* JX0142 (POC 179); JX0210 (POC 248); JX0244 (POC 285); JX0347 (POC 475).
[731] *See* PP-082 (row for POC 179 showing 143,000 in column labeled recommended amount ivcp eisn; row for POC 248 showing 123,500 in same column; row for POC 285 showing 191,500 in same column; row for POC 475 showing 143,000 in same column).
[732] *See* McNally Decl., Exhibit H at 2-4.

contribution as reasonable are the same. Thus, either the Debtor's settlement is a reasonable contribution and the TDPs used to determine the insurers' liability is wrong, or the Debtor is under-funding the Trust and the TDP Verdict Value Assessment provides a fair valuation. Either way the Plan is defective. It is either defective because it underfunded by the Debtor, or it is defective by establishing claims valuation procedures that grossly overvalue claims for the purpose of inflating coverage litigation claims. The objecting insurers contend that the valuation procedure have been artificially inflated to achieve a purpose not recognized by the Bankruptcy Code.

C. The Plan and TDPs Employ Abuse Claims Valuation Methodologies Unequally

The TDPs provide for two different valuation procedures—one for valuing claims to make initial distributions from amounts contributed by the Diocese (the points system)[733] and another to assess the Insurers' liability for Abuse Claims.[734]

The valuation methodology applied under the TDPs to assess the Insurers' liability for Abuse Claims is incompatible with the approach used for every other relevant aspect of the Plan. Under the TDPs, Verdict Value Assessments are used for purposes of making coverage demands of the Insurers.[735] Verdict Value Assessments, in turn, are based on purported Verdict Values.[736] Thus, for purposes of coverage demands, the TDPs employ Verdict Values to determine the value

[733] Any later contributions to the Trust are also distributed based on points. After finalizing the points awards based on the Evaluation Factors, the Abuse Claims Reviewer "determine[s] the dollar value of each Abuse Claimant's actual distribution based on the Class 5 Claimant's pro rata share of the total final points assigned and the available funds for Distribution." TDPs, § 13. Each holder of an Allowed Claim receives a *pro rata* distribution from the Trust corresponding to the (i) claimant's points award, (ii) total number of points awarded, and (iii) distributable assets in the Trust. *Id.* This is true even for Abuse Claims that are Allowed and/or valued through the State Court Option, *id.* at § 9(ii)(c), or Verdict Value Assessment process. *Id.* at § 8(xiv). As such, the value of any given Allowed Claim is ***entirely*** relative: there is no absolute, dollar value assigned to any Allowed Claim. *Id.* at §§ 4(ii), 11, and 13. The dollar value of each Allowed Claim instead effectively equals the distributable assets available for such Allowed Claim.

[734] *See* Hinton Decl., ¶¶ 8, 19; *see also* Nov. 30 Trial Tr. (Hinton), p. 145:03-146:12.

[735] Hinton Decl., ¶ 19 ("The second valuation procedure contained in the Plan is the Verdict Value Assessment in which the Neutral would determine the [Verdict Value]. The [TDP] provides for the Trust Administrator to use the Verdict Values to make coverage claims against the insurers.").

[736] *Id.*

of Abuse Claims.[737] This approach – using purported Verdict Values as a proxy for liability – is identical to the methodology that Ms. McNally employed to value the Abuse Claims on behalf of the Tort Committee.[738]

However, this methodology is not applied to anything else outside of the Insurers. It was not used to determine the amount of the Debtor's and Other Catholic Entities' contribution to the Trust under the Plan[739] (and preceding TCC Settlement).[740] Nor was it used to calculate the liquidation analysis for the Plan[741] or to determine the reserve for Abuse Claims carried on the

[737] *Id*.

[738] *Compare* Hinton Decl., ¶ 9 ("Ms. McNally values abuse claims based on verdicts that a jury or court may find the damages to be if a plaintiff were to prevail") (internal quotations and citations omitted) *with id*. ("This approach mirrors the Verdict Value Assessment contained in the Plan."). *See also* Comiter Decl., ¶ 62 ("[Ms. McNally's] valuation . . . uses only (a selection of) jury verdicts and disregards all historical settlements, as the underlying comparative dataset.").

[739] *Compare* McNally Decl., ¶ 217 (opining that, under her valuation methodology, "[a] reasonable range of claim value for all Valued Abuse Claims in the aggregate i[s] $398.4 million-$785.1 million.") *with* Plan, § 7.2.1 ("The Trust shall be funded with . . . $87.5 million by the Debtor and the Other Catholic Entities") *and* Nov. 10 Trial Tr. (Montgomery), p. 185:2-16 ("Q: And isn't it true that the 87 and a half million dollar settlement in your view is sufficient to fully and fairly compensate the [Abuse Claimants] for their losses?" [. . .] A: I believe that the 87.5 [million dollars] meets the criteria and meets the goal that we set out. And that was to be fair and equitable to the survivors and allow the Church to continue its mission."). *See also* Nov. 14 Trial Tr. (Wilen) p. 147:17-22 ("Q: Was the methodology that you used for allocating the $10 million, among the parishes, did that use the same methodology for valuing the claims that the Tort Claimants [Committee] advocated being used for valuing claims against the Diocese and the parishes? A: No.")

[740] *Compare* McNally Decl., ¶ 217 *with* (JX 0428) (April 12, 2022 email from Brent Weisenberg stating: "Richard/Bobby, this confirms our settlement this evening of $87.5mm payable as follows [. . .]")

[741] Nov. 14 Trial Tr. (Wilen), pp. 108:20-109:5 ("Q: Looking at where it says on the demonstrative, page 4, estimated general unsecured claims, $97,392,526. A: Yes. Q: [. . .] That's inclusive of all unsecured claims, correct? A: That includes all unsecured claims, plus my valuation of the IVCP process for the Tort [Abuse] Claims. Q: So you're [*sic*] valuation to the IVCP was what was used to create that number? A: Yes. [. . .].").

Debtor's books prepetition.[742] Each of these instead either used[743] or at least paralleled[744] claim values derived from the Debtor's historical experience. As a result, "the Debtor's liability is fixed by one value and the [Insurers'] by another" under the TDPs.[745]

The Debtor's liability for an Abuse Claim has – by virtue of the Plan – been fixed at one value,[746] while an Insurer's alleged liability (for the ***same Abuse Claim***) will – through the Verdict Value Assessment – be fixed at an entirely different value.[747]

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[742] Nov. 10 Trial Tr. (Montgomery), pp. 177:22-178:14 ("Q: And can you just tell the Court . . . how those reserves for abuse claims were set on the Diocese's financial statements . . .? Q: Okay, so our auditors wanted us to have a reserve on the books for at least those claims that had gone through the IVCP. So what we did was we took an average of the claims that were paid out and we multiplied that by the total number of claims that were in the IVCP program. Q: And so in connection with the reserve, the Diocese used the results from the IVCP program, correct? A: For that exercise, yes. Q: And then that number made its way into the Diocese's financial statements, correct? [. . .] A: Yes.").

[743] *See* Nov. 14 Trial Tr. (Wilen), p. 86:10-12 (Q: To the extent you're using the claims to determine the payments for the [P]arishes, were you using your IVCP analysis? [A:] Yes, I was.") (Wilen).

[744] *Compare* Plan, § 7.2.1 ("The Trust shall be funded with . . . $87.5 million by the Debtor and the Other Catholic Entities") *with* Eighth Amended Disclosure Statement, p. 76 ("[T]he Diocese retained Roux to provide a rebuttal expert report in connection with the insurance settlement. Roux determined that a reasonable estimate of the Diocese's Abuse Claim liability should range from approximately $71 million to ***$86 million***.") (emphasis added). *See also*, Hinton Decl., ¶ 19 ("The Plan includes two claim valuation procedures, one that was inherited from the Fifth Amended Plan that incorporated the prior settlement, which would allocate a share of the aggregate Debtor settlement to claimants based on a scoring system . . . Under this procedure, the average claim value would match that used to derive the Debtors' [*sic*] contribution to the prior $90 million settlement from its historical experience of resolving claims in the tort system.").

[745] Hinton Decl., ¶ 19. *See also* Nov. 16 Trial Tr.(Prol), pp. 124:15-125:11 ("Q: [. . .] And what – what does the plan say about [the liquidation of Abuse Claims]? A: The plan provides that – there were three different elements in terms of how claims are liquidated. First there's an expedited provision for small claims . . . Secondly, there is a tort claims reviewer that's appointed [who] will value the claims based upon factors that are set forth in the TDP . . . And that valuation is solely for purposes of distributing funds that the trust has. It has no impact upon the insurance carriers' liability under the plan. And the third mechanism is a verdict value assessment . . . And ultimately the neutral will come up to an recommendation [*sic*] with regard to . . . what a reasonable jury would award . . . The trust administrator will then make a demand on the carriers that might be responsible for that particular claim [. . .].").

[746] *See* Plan, § 7.2.2 ("Notwithstanding the foregoing, the Debtor and the Other Catholic Entities shall have no further financial obligations under this Plan or the Plan Documents other than the obligations required to be paid to the Trust in Section 7.2.2 of this Plan.").

[747] *See* Hinton Decl., ¶ 19.

In *In re AC&S, Inc.*,[748] the court found that the Tort Committee in that case took control of drafting the TDPs and valued claims differently based on who represented the claimants.[749] Those TDPs classified and treated similar claims in a disparate manner, based on the influence and cunning of their lawyers.[750] The court denied confirmation of the plan of *AC&S* reorganization on the basis of the deficiencies in the TDPs.[751]

For purposes of fixing the Debtor's (and Other Catholic Entities') liability under the Plan, the Abuse Claims on average were valued at roughly double the historical baseline.[752] But applying Ms. McNally's methodology to estimate the average expected Verdict Value from the Verdict Value Assessment yields a result that is more than ***ten times*** the Debtor's historical baseline.[753] In other words, the Plan values each Abuse Claim at approximately $207,000 for purposes of fixing the Debtor's liability,[754] yet the TDPs likely will value that same Abuse Claim at anywhere from $1.2 million to $2.5 million for purposes of demanding coverage from the Insurers.[755]

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[748] *ACandS, Inc.*, 311 B.R. 36.
[749] *See id.* at 43.
[750] *See id.*
[751] *See id.* (denying confirmation where the plan and terms were "largely drafted by and for the benefit of" a single creditor group).
[752] *Compare* Eighth Amended Disclosure Statement, p. 3 ("The Trust will be funded by $87,500,000 in cash from the Debtor and Other Catholic Entities. As of the date of this Disclosure Statement, 324 non-duplicative [Abuse] Claims have been filed, which will share collectively in the funds . . .") *with id*. at p. 35 ("From 1990 to 2019, the Diocese paid . . . approximately $102,222 per claim") *and id*. at p. 36 ("Through the IVCP . . . [the] average claim settled for approximately $114,000 [per claim]"). Dividing $87,500,000 by 324 equals approximately $207,000 per Abuse Claim, which is slightly less than double the combined (pre-IVCP and IVCP) historical average of approximately $108,000 per claim.
[753] Hinton Decl., ¶ 21 ("The expected value determined through the Verdict Value Assessment of between $1.2 million and $2.5 million, based on the values estimated by Ms. McNally, is more than ten times the average values of historical tort claims that settled prior to 2019, and the average value of subsequent settlements in the [IVCP].").
[754] *See supra* note 752.
[755] Hinton Decl., ¶ 21.

This is patently prejudicial to the Insurers.[756] It is also a fundamentally unfair and inequitable result.[757]

D. The TDP Valuation Methodology Applied to Insurers are Designed to Hyper-Inflate the Value of Claims Relative to the Tort System

The "Verdict Values" developed under the TDPs are by design multiples greater than the awards the claims would receive in the tort system.

Ms. McNally estimated that verdicts would be valued from $1,229,506 to $2,423,001 per claim.[758] This estimate is an order of magnitude greater than claims resolved by the Diocese of Camden over the last three decades. The Debtor admitted in its own disclosure statement that between 1990 and 2019, it paid 99 settlements to abuse victims totaling approximately $10,120,000, or $102,222 per claim.[759] Similarly, under the IVCP the Debtor admitted that it resolved seventy-one claims with aggregate payments of $8,102,500, or $114,000 per claim.[760] The anticipated Verdict Values are even greater than the Debtor's own valuation of the Abuse Claims in the Bankruptcy Case in connection with the Insurance Settlement and the Fifth Amended Plan. There, the Debtor valued 324 non-duplicative claims based on historical settlements at $34 million, with average value per claimant approaching $105,000.[761]

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[756] Hinton Decl., ¶ 19 ("This dual track valuation feature of the Plan is prejudicial to insurers because the verdict values are expected to be so much higher than the Diocese's historical experience of resolving claims in the tort system."). *See also id*. at ¶ 49 ("If [V]erdict [V]alues . . . were used to determine claim liability instead of the claim valuations the Diocese experts used to develop the substantial contributions of the Parishes, their proposed contributions would not represent a substantial proportion of liability. The discrepancy shows that the amounts the TDP procedures would generate against insurers is out of line with the amounts that the Diocese and [P]arishes would contribute in settlement and provides evidence of the prejudicial impact of the TDP on insurers.").

[757] *Cf. ACandS, Inc.*, 311 B.R. at 43 ("It is also impossible to conclude that this plan is imbued with fundamental fairness.").

[758] McNally Decl., Table 12.

[759] Eighth Amended Disclosure Statement, p. 35. *See also* Hinton Decl., ¶ 21.

[760] Eighth Amended Disclosure Statement, p. 36. *See also* Hinton Decl., ¶ 21.

[761] Hinton Decl., ¶ 21.

The Claro Valuation Methodology used by Ms. McNally is empirically problematic because it grossly overestimated the value of abuse claims in the *Boy Scouts* bankruptcy, estimating that the total value of claims was between $24.76 billion and $30.41 billion even though Judge Silverstein found that the aggregate value of claims was likely between $2.4 billion and $3.6 billion, or approximately ten percent (10%) of Ms. McNally's estimate.[762]

1. The Defects in the McNally Analysis are Codified in the TDPs

While the TDPs do not explicitly adopt McNally's valuation methodology, also referred to as the "Claro Valuation Methodology," McNally's valuations are necessarily instructive because "all the defects in the McNally analysis have been written into the eighth TDP."[763] For example, the TDPs and the McNally analysis do not account for the probability of actually getting a verdict.[764] Thus, because "the verdict value assessment in the plan contains many of the same steps that are in the McNally valuation methodology . . . all the flaws in that methodology have now been written into a TDP."[765] Thus, Mr. Hinton found it instructive that Mr. Salisbury's testimony relied upon McNally's valuation methodology to reach his conclusion that the Insurers' potential liability under the Plan was $123.5 million[766] and if the Insurers' liability was truly $123.5 million, then the Debtor's proposed contribution of $87.5 million would be unreasonably low.[767]

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[762] Hinton Decl., ¶ 26; *see also* Oct. 12 AM Trial Tr. (McNally), pp. 62:17-74:16, 75:4-76:15.
[763] Nov. 30 Trial Tr. (Hinton), p. 142:3-19.
[764] Nov. 30 Trial Tr. (Hinton), p. 142:20-22.
[765] Nov. 30 Trial Tr. (Hinton), pp. 144:23-145:2. *Id.* at pp. 160:24-161:13 (noting that "to the extent that the TDP has essentially codified the biased assumptions in the McNally analysis, . . . it does require the same framework to be used").
[766] Nov. 30 Trial Tr. (Hinton), pp. 143:2-9, 144:20-25. *See also id.* at p. 145:17-23 ("Ms. McNally comes up with values that are based on verdicts that are ten times as high, so if you now write a plan that has a TDP that allows you to get these higher values and go off to the insurers for those amounts, obviously you're going to increase the insurer liability, and so it will go up, according to Mr. Salisbury, to a hundred and . . . 23 million, not the 30 million."); *id.* at pp. 162:15-163:1, 164:9-165:4.
[767] Nov. 30 Trial Tr. (Hinton), p. 146:5-12.

The Verdict Value Assessment does not account for historical settlements and dismissals, and is therefore inherently biased towards high claim values. The TDPs further skew the valuation because they assume that all claims would get to a verdict. But that is not an accurate reflection of what happens in the tort system—only a small fraction of cases get to verdict.[768] Most cases do not reach a verdict, but by assigning each claim a Verdict Value the Neutral is required to value all the claims "as if they all were comparable to the small subset of actual cases litigated to trial," without accounting for the fact that many cases litigated in the tort system end without a verdict. Thus, by imposing a "Verdict Value" on Insurers for all claims, the TDPs by design artificially inflate the value of claims relative to the tort system.

The separate valuation procedures in place for the Insurers exist without any ability for an insurer to challenge that analysis.[769] The Court cannot approve valuation procedures that are intended to "materially alter the quantum of liability that the insurers would be called upon to absorb."[770]

2. The Trust has No Incentive to Defend Against the Use of the TDPs to Inflate Claim

With the Debtor's contribution fixed through its settlement with the Tort Committee, it has no incentive to defend against the use of the TDPs to inflate claim values in coverage litigation brought by the Trust. Indeed, the absence of an economic interest in the treatment of insurers under the TDPs benefited the Debtor by helping win Tort Committee support for the Plan.

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[768] *See* Nov. 30 Trial Tr. (Hinton), p. 172:16-174:15.

[769] *See In re Am. Capital Equip., LLC*, 688 B.R. at 160 (noting that "the [TDP] system creates this inherent conflict, while at the same time severely limiting or eliminating Insurers' ability to take discovery, submit evidence, contest causation, or appeal a decision").

[770] *In re Glob. Indus. Techs.*, 645 F.3d at 212; *see also Am. Capital Equip., LLC*, 688 B.R. at 160 (finding a lack of good faith where "the [TDP] process simultaneously strips Insurers of certain procedural and substantive rights without the protections of § 524(g)").

This dynamic is reminiscent of the plan proposed in *In re American Capital Equipment*,[771] under which the debtor was not "financially incentivized" to defend against claims, and, in fact, "there [was] really no valid reason for the [d]ebtor to even care" if the claims got settled.[772] Likewise here, the Debtor has no real reason to care about the fate of Abuse Claims—nor the discovery necessary to defend against such claims. And, as in *American Capital Equipment*, where the court denounced the "extreme extent to which due process protections/procedural safeguards afforded to the Insurers" had "been relaxed by relevant terms of the" plan,[773] the TDPs here would override the express terms of insurance policies and deprive insurers of their bargained-for rights, such as the right to challenge a settlement, or even to participate in the process. Such "relaxing" of procedural safeguards, coupled with the perverse incentives created for the Debtor and Abuse Claimants, render the "collusion" here "readily apparent."[774]

Finally, under the TDPs, the Neutral is afforded impermissibly broad discretion in conducting the Verdict Value Assessment, particularly because he has the ability to make up the rules as he goes.[775] Further, "[t]he TDP leaves open the question as to how the Neutral is going to come up with and make determinations. There's no guidance and no expectation that they'll be an empirical basis. The idea is to . . . have the neutral act as if they were standing in for a jury and make the assumption that every single case that goes through that process would get a verdict and ask the neutral to come up with a number that they think a reasonable jury would award."[776]

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[771] 405 B.R. 415 (Bankr. W.D. Pa. 2009).
[772] *Id.*at 423.
[773] *Id.* at 422-423.
[774] *Id.*at 421.
[775] Nov. 30 Trial Tr. (Hinton), p. 71:4-21 (citing TDPs, § 8(ix) ("The precise method, manner and procedures by which the Neutral shall determine the Verdict Value . . . shall be decided by the Neutral")).
[776] Nov. 30 Trial Tr. (Hinton), pp. 153:12-13, 153:23-154:5. Hinton contrasts the approach in the Eighth Amended Plan with that used in *Boy Scouts* where a claims matrix was used to provide guidance. *Id.* at p. 156:14-23.

Mr. Hinton contends that the TDPs are essentially asking the Neutral to arbitrarily award a number to each Independent Review Claim based on experience.[777] Even if the Neutral is not himself biased, Mr. Hinton testified that because the Plan is biased "if you are an unbiased person who is asked to implement a biased plan, the result will be biased."[778] [779]

VI. THE PLAN'S RELIANCE ON THE ISSUANCE OF NON-CONSENSUAL STIPULATED JUDGMENTS THROUGH THE TDPS RENDERS THE PLAN NON-CONFIRMABLE

Under the TDPs, the Trust Administrator is authorized to made a demand that the Responsible Insurer satisfy the amount awarded under a Verdict Value Determination.[780] And, if that request is not satisfied within 30 days, "the Trust Administrator shall have the sole discretion to reduce the Verdict Value or any portion thereof to a Stipulation of Judgment."[781] Through the use of Stipulations of Judgments, a judgment can be entered against the Insurers without their consent or any of the due process protections afforded to them under the tort system.

As emphasized by Karen Bitar, one of the Insurers' experts, the TDPs do not have an adversarial process and are contrary to the procedures in the tort system. "There is nothing in the tort system that would allow a litigant to secure an assignment of claims, or be permitted to seek a Stipulation of Judgment by virtue of being granted access to a judicial forum that is denied to other litigants."[782] The TDPs deny the Insurers an opportunity to vigorously defend themselves.[783]

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[777] Nov. 30 Trial Tr. (Hinton), p. 154:6-15.
[778] Nov. 30 Trial Tr. (Hinton), p. 84:14-19.
[779] The TDPs proposed in this case are distinguishable from those approved by the Court in *In re BSA*, 642 B.R. 504, 646-48, because there the debtor presented evidence that it was actively involved in negotiating and drafting the terms of the trust distribution procedures. No such evidence has been presented by the Plan Proponents here.
[780] TDPs, § 8(xii); *see also* Nov. 16 Trial Tr. (Prol), p. 125:9-15.
[781] TDPs, § 8(xiii).
[782] Bitar Decl., ¶ 21.
[783] Nov. 30 Trial Tr. (Bitar), pp. 44:14-17, 44:25-14 ("A stipulation is put in front of the insurance company. They could either accept it or not, and then, if they don't, they can be - - the Trust Administrator can go to the State Court opinion, which . . . there's nothing like that in the tort system.").

These TDPs improperly modify how the tort system works.[784] In the tort system, the Insurers would be sued for coverage and would defend against that claim. The Insurers are only given the chance to challenge the reasonableness of the Stipulation of Judgment after it has already been entered and then they are charged with the burden of setting it aside.

The TDPs seek authority for the Trust to issue a judgment but the Bankruptcy Court does not have this authority and, therefore, cannot delegate such authority under the TDPs. An Article III court can adjudicate to conclusion a personal injury case and hold a jury trial. This Court cannot approve the TDPs with the Stipulation of Judgment provision. The authority of a non-Article III court is limited. The Stipulation of Judgment provision of the TDPs therefore violates Article III of the Constitution by assigning authority reserved for Article III courts to the Bankruptcy Court.

In *Stern v. Marshall*, the Supreme Court "made clear that non-Article III bankruptcy judges do not have the constitutional authority to adjudicate a claim that is exclusively based upon a legal right grounded in state law."[785] Bankruptcy courts have the authority to enter final orders only for "core proceedings" arising under title 11.[786] "Core" proceedings do not include the "liquidation or estimation of contingent or unliquidated personal injury tort . . . claims against the estate for purposes of distribution" under title 11.[787] For "non-core" matters where the "parties have not consented to final adjudication by the bankruptcy court," a bankruptcy judge may only propose

[784] The Tort Committee's expert, Carl Salisbury, testified about coverage litigation in the tort system. "Based on my experience, a coverage litigation like this would take three to five years. The litigation will require the exchange of written discovery, interviews of witnesses with relevant knowledge, taking numerous depositions, including Survivor and Diocese witness depositions, third-party discovery, expert reports and depositions, court hearings and conferences, preparation and attendance at a *Griggs* hearing, and the preparation of pre-trial motions." Salisbury Decl., ¶ 70.
[785] *In re One2One Communications, LLC*, 805 F.3d 428, 433 (3d Cir. 2015) (citing *Stern v. Marshall*, 564 U.S. 462, 494 (2011) (finding bankruptcy court lacked the constitutional authority to enter a final judgment on a state law counterclaim)).
[786] *Stern*, 564 U.S. at 474; 28 U.S.C § 157(b)(1).
[787] 28 U.S.C § 157(b)(2)(B).

findings of fact and conclusions to the district court.[788] It is the "district court that enters a final judgment in such cases after reviewing *de novo* any matter to which the parties object."[789]

Because the Plan asks for the Court to authorize the issuance of a Stipulation of Judgment by the Neutral, the Plan is not permitted by law and is therefore not confirmable.

VII. THE PLAN WAS NOT PROPOSED IN GOOD FAITH

Confirmation of the Plan must be denied because the Plan was not "proposed in good faith" under Section 1129(a)(3) of the Bankruptcy Code. Although "good faith" is not defined in the Bankruptcy Code, for purposes of confirmation it generally requires "that a plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code."[790]

But more fundamentally, good faith is an ***equitable*** inquiry[791] – one that is assessed not by an inflexible rule, but in light of the "totality of circumstances surrounding a plan."[792] Thus, the good faith analysis can be condensed down to two core elements which evaluate whether: (1) the proponent(s) of a plan acted equitably in proposing and prosecuting the plan;[793] and (2) the plan will achieve equitable results.[794] And as with all other subsections of Section 1129(a), the

[788] *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 33-34 (2014).
[789] *Stern*, 564 U.S. at 475.
[790] *Coram Healthcare Corp.*, 271 B.R. at 234 (internal citations and quotations omitted).
[791] *See In re Congoleum Corp.*, No. 03-51524, 2005 Bankr. LEXIS 556, at *10 (Bankr. D.N.J. Mar. 24, 2005) ("As the Supreme Court noted many years ago, the necessity of finding that a plan is fair and equitable before confirming it 'is not dependent on express statutory provisions' but is inherent in the very nature of bankruptcy jurisdiction." (quoting *Am. United Mut. Life Ins. Co. v. Avon Park*, 311 U.S. 138, 146 (1940)).
[792] *Coram Healthcare Corp.*, 271 B.R. at 234.
[793] *Cf. e.g.*, *Exide Holdings*, 2021 WL 3145612, at *11 ("Courts have also considered whether . . . the plan has been proposed with honesty and good intentions . . . and . . . there was fundamental fairness in dealing with the creditors.").
[794] *Cf., e.g., Coram Healthcare Corp.*, 271 B.R. at 234 ("The good faith standard requires . . . a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.").

proponent(s) of the plan bear the "affirmative burden of proving that [the] plan satisfies" the good faith inquiry under Section 1129(a)(3).[795]

The Debtor and Tort Committee fall woefully short of carrying this burden. The Debtor, in fact, provided ***no*** evidence – much less a preponderance of it – to prove that the Plan was proposed in good faith. On the contrary, the evidence now in the record proves conclusively that the Plan fails both prongs of the good faith inquiry: not only did the Plan Proponents engage in bad faith conduct throughout the entire Plan process, but also the Plan itself is designed to achieve inequitable results inconsistent with a proper bankruptcy purpose. For these reasons, and as set forth in greater detail below, the Plan was not "proposed in good faith" under Section 1129(a)(3) of the Bankruptcy Code and cannot be confirmed.

A. The Debtor Presented No Evidence that it Proposed the Plan in Good Faith

As a gating issue, this Court should find that the Plan is not proposed in good faith because the Debtor has provided no evidence to prove that it was. Like all other elements of Section 1129, the Debtor (as co-proponent) bears the burden of proving by a preponderance of the evidence that the Plan satisfies Section 1129(a)(3).[796] Meeting this burden requires the presentation of "adequate evidence"[797] to show that the fact in dispute is more likely to be true than not,[798] although the precise contours of this proof naturally vary from one case to another. In an uncontested

[795] *In re Union Meeting Partners*, 165 B.R. 553, 574 (Bankr. E.D. Pa. 1994).
[796] *Id.* ("[A] plan proponent has the affirmative burden of proving that its plan satisfies the provisions of § 1129(a) by the preponderance of the evidence."). Although FED. R. BANKR. P. 3020(b)(2) permits the determination that a plan "has been proposed in good faith and not by any means forbidden by law without receiving evidence on issues," that exception is applicable only if "no objection is timely filed," *id*., and therefore is inapplicable here.
[797] *Id.* (in the context of Section 1129(a)(7)).
[798] *BSA*, 642 B.R. at 553 n.226.

confirmation, for example, affidavits may suffice.[799] Contested confirmations typically require a more robust evidentiary offering.[800]

Here, the Debtor's first principal witness, Father Hughes, had no personal knowledge of what actually occurred in the discussions concerning the Tort Committee Settlement or regarding the contents of the TDPs.[801] Mrs. Montgomery, the Debtor's only other principal witness, testified to substantially the same lack of knowledge.[802]

Despite Mrs. Montgomery's and Father Hughes's complete unfamiliarity with both the terms of the TDPs and the course or conduct of the bargaining behind the Tort Committee Settlement, the Debtor produced no other witnesses on the subject. And while the Tort Committee tendered Mr. Prol, his testimony fails to bridge the gap. At best, Mr. Prol's testimony underscores the Debtor's total indifference to the structure of the Trust and TDPs (apart from demanding an

[799] *In re Abb Lummus Glob.*, Nos. 06-10401-JKF, 251, 2006 Bankr. LEXIS 1462, at *52 (Bankr. D. Del. June 29, 2006) ("The totality of the circumstances surrounding the formulation and proposal of the [p]lan, including, but not limited to, the uncontroverted affidavits presented at the [c]onfirmation [h]earing, evidence that the [p]lan . . . was proposed in good faith and not by any means forbidden by law.").

[800] *BSA*, 642 B.R. 504, is not to the contrary. There, Judge Silverstein ordered the Plan Proponents to remove from the proposed Plan certain "findings" designed to prejudice the insurers. *Id.* at 625-633. *BSA*, unlike the Debtor here, also presented evidence of its good faith in plan negotiations. *Id.* at 646-648. The bankruptcy court's good faith finding in *BSA* is currently on appeal with oral argument scheduled in the Delaware District Court on February 9 and February 10, 2023. *See National Union Fire Ins. Co. of Pittsburgh, PA v. Boy Scouts of America & Delaware BSA LLC (In re BSA)*, Case No. 1:22-cv-01237-RGA (D. Del.) [Dkt. No. 121].

[801] Nov. 9 Trial Tr. (Hughes), pp. 140:13-18, 184:7-12. *See also supra* Statement of Facts, §§ E(4), (F)(1) (documenting Father Hughes' lack of involvement with Tort Committee Settlement or drafting of the TDPs).

[802] Nov. 10 Trial Tr. (Montgomery), pp. 184:21-185:1 ("A: And other than that one conversation [prior to the Tort Committee Settlement, regarding the number and categorization of Abuse Claims] . . . you didn't have any other direct conversations with the TCC in connection with the [Tort Committee Settlement], did you? [Before April 11th?] A: No, no."), p. 186:1-4 ("Q: And just to be clear with Mr. Trenk, clarify it, you didn't directly negotiate the [Tort Committee Settlement] on April 11th, did you? A: I did not."). *See also id.* at pp. 189:15-190:24, 192:1-6. *See also supra* Statement of Facts, §§ E(4), (F)(1) (documenting Mrs. Montgomery's lack of involvement with Tort Committee Settlement or drafting of the TDPs).

indemnity).[803] At worst – or perhaps, more accurately – Mr. Prol's testimony confirms that, once the Debtor capped its liability via the Tort Committee Settlement, it "agreed that [counsel to the Tort Committee] would take the pen in drafting the TDP."[804]

In any event, the outcome is the same. Without testimony – ***evidence*** – of its good faith during the plan process, the Debtor necessarily has failed to "make a record to persuade the [C]ourt to overrule the [Insurers'] objection and confirm the [P]lan."[805] As such, the Debtor cannot carry its burden of proof under Section 1129(a)(3) and the Plan cannot be confirmed.

B. The Plan Proponents Engaged in Bad Faith Conduct During the Plan Process

The Plan is also not confirmable under Section 1129(a)(3) because the Plan Proponents' conduct throughout the negotiation and prosecution of the Plan evidences an absence of good faith and, in particular, a desire to deprive the Insurers of their contractual rights. A plan does not comply with Section 1129(a)(3) where there has been "misconduct in [the] bankruptcy proceedings," including "fraudulent misrepresentations" or "serious nondisclosures of material facts to the court."[806]

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[803] *See, e.g.*, Nov. 16 Trial Tr. (Prol), pp. 170:10-15, 173:2-11, 173:19-175:3, 177:10-15, 178:2-11, 180:15-18. *See generally, id*. at p. 183:17-20 ("Q: And isn't it true that you don't have a recollection of ever receiving a redline of the TDP with edits proposed by the Diocese? A: I don't recall."). *See also supra* Statement of Facts, § F(1)-(2) (discussing Debtor's indifference to terms of Plan or TDP, other than capping of its liability).

[804] Nov. 16 Trial Tr. (Prol), p. 161:23-24. *See also, id*. at pp. 161:22-162:6 ("Q: And in that time frame [April 11, 2022], isn't it true that the Diocese and the Tort Committee agreed that Lowenstein would take the pen in drafting the TDP [. . .]? A: Yes, it was agreed that Lowenstein would make the first edits to the - - would draft the first draft of the TDP, yes. Q: And isn't it true that the Diocese provided you with a Word copy of the [Fifth Amended Plan] so that Lowenstein could take the first cut at amending [it] to reflect the [Tort Committee Settlement] [. . .]? A: Yes.").

[805] *In re Lafferty*, No. 1:17-bk-02900-HWV, 2019 Bankr. LEXIS 3797, at *7 (Bankr. M.D. Pa. Dec. 16, 2019).

[806] *In re Draiman*, 450 B.R. 777, 804 (N.D. Ill. Bankr. 2011).

The negotiation and documentation of the Tort Committee Settlement demonstrates anything but "fundamental fairness" in the Plan Proponents' dealings with the Insurers. Consequently, the Plan Proponents' conduct warrants denying confirmation of the Plan.

1. The Debtor, with the Tort Committee's Assistance, Engaged in Bad Faith Conduct with Respect to the Insurance Settlement

The Plan Proponents first demonstrated a lack of good faith in their initial negotiations over the Tort Committee Settlement, where the Tort Committee and the Debtor contemplated a repudiation of the Insurance Settlement before the ink on it had even dried.

It is questionable whether the Debtor ever legitimately intended to perform its obligations under the Insurance Settlement, which was submitted for Court approval on January 5, 2022.[807] Prior to entering into the Insurance Settlement, the Debtor had an offer to settle with the Tort Committee for either $100 million paid on the effective date or $120 million paid over four years. Once the Debtor and the Insurers entered into the Insurance Settlement, they worked to defend it as adequate over the objections of the Tort Committee. The Insurance Settlement enabled the Debtor to propose the Fifth Amended Plan and its accompanying trust distribution procedures, which were funded by $90 million.[808]

"***The threat of having a plan supported by the Debtor and Settl*[*ed*]*Insurers gave the Debtor leverage in negotiations with the TCC.***"[809] The Insurers have calculated the value of this "leverage" to be $32.4 million, "the difference between the present value of the [Tort Committee's] $120 million settlement offer and the $87.5 million ultimate settlement with the TCC."[810]

[807] *See* [Dkt. No. 1087].
[808] McKnight Decl., ¶ 20. *See also supra* Statement of Facts, § D.
[809] McKnight Decl., ¶ 20 (emphasis added).
[810] McKnight Decl., ¶¶ 20, 23; *see also id.* at ¶¶ 21-22 (calculating $32.4 million valuation of leverage).

Having obtained the desired leverage from the Insurance Settlement, the Debtor immediately pivoted to negotiating with the Tort Committee. The Insurance Settlement was an obvious point of discussion between the Plan Proponents,[811] and the Tort Committee circulated a version of the January 6 Term Sheet the day after the 9019 Motion was filed[812] – in which it required the Debtor to adjourn the 9019 Motion "[w]ithin three (3) days of execution of this Term Sheet."[813] When Mr. Weisenberg later emailed the Court with the proposed terms of the Tort Committee Settlement (excluding the Insurers from the correspondence), he artfully omitted any discussion of the Insurance Settlement and instead vaguely referenced "staying all currently pending litigation,"[814] which Mr. Prol testified "loosely . . . covered" the 9019 Motion.[815] But even Mr. Prol acknowledged that Mr. Weisenberg's email lacked any "specific mention . . . of withdrawing the 9019 [Motion] or having it . . . adjourned."[816]

The Debtor has continued shroud its position on the Insurance Settlement in strategic ambiguity, up to and including the trial on the 9019 Motion and Plan Confirmation Proceedings. The day after the Tort Settlement was reached (*i.e.*, April 12, 2022), Mr. Trenk repeatedly indicated that "the Diocese will withdraw the pending 9019 motion to approve the insurance settlement."[817] Yet Father Hughes at his deposition obliquely said "the motion is before the court. If the judge

[811] *See supra* Statement of Facts, § E(5) (discussing how withdrawal from Insurance Settlement was always a condition to entry into Tort Committee Settlement).
[812] (JX 0419). *See also* Nov. 16 Trial Tr. (Prol), p. 136:4-14.
[813] (JX 0420) at p. 13. *See also* Nov. 16 Trial Tr. (Prol), p. 136:15-20.
[814] (JX 0422).
[815] Nov. 16 Trial Tr. (Prol), pp. 152:23-153:13.
[816] Nov. 16 Trial Tr. (Prol), p. 153:14-16.
[817] April 12 Hr'g Tr., p. 6:11-13. *See also id.* at p. 7:10 ("we will withdraw the 9019 motion that is pending"); *id.* at p. 17:19-20 ("we're going to withdraw the 9019 motion").

determines that that is the direction that it will go, then we will support it."[818] Father Hughes then reversed himself at trial, stating that the Debtor "would prefer the eighth amended plan."[819]

In tandem, the Plan Proponents, and particularly the Debtor, acted in bad faith with respect to the Insurance Settlement by encouraging the Insurers to incur $2.4 million negotiating and defending the Insurance Settlement, only to be thrown under the bus once they provided the Debtor with sufficient leverage to force the Tort Committee to decrease the amount of money required to cap the Debtor's liability within the Bankruptcy Case. All the while, the Plan Proponents were engaged in *ex parte* communications with the Court and shut the Insurers out of the settlement negotiations with the Tort Committee entirely. Thus, the Plan Proponents' collusive, inequitable behavior while negotiating and documenting the Plan cannot support a finding of good faith.[820]

2. Once the Debtor's Liability Was Capped, the Debtor Disengaged from the Negotiation Process and Allowed the Tort Committee to Control the Drafting of the Plan, the Trust Agreement, and the TDPs

The Plan Proponents also engaged in bad faith as they finalized the Tort Committee Settlement and the Plan Documents, with the consequence being the adoption of collusive, prejudicial terms designed to restrict the Insurers' contractual rights.

Once the Plan Proponents agreed to the terms of the Tort Committee Settlement and capped the Debtor's potential liability at $87.5 million, the Debtor checked out from the negotiations.[821] Effectively, this meant that the Debtor abdicated its responsibilities under the Insurance Policies and turned the drafting pen over to the self-interested Tort Committee to create biased claim valuation and allowance procedures.

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[818] Hughes Dep. Tr., pp. 56:22-25, 57:3-8, 57:11-14. *See also* Nov. 10 Trial Tr. (Hughes), pp. 34:19-35:7.
[819] Nov. 10 Trial Tr. (Hughes), p. 34:1-5.
[820] *See BSA*, 642 B.R. at 645-46 ("[C]ourts may find that a plan is not proposed in good faith if it is the product of, or allows for, collusion or if the record demonstrates a breach of fiduciary duty in connection with the plan.").
[821] *See supra* Statement of Facts, § F(1).

There is ample evidence that the only part of the Tort Committee Settlement in which the Debtor had an economic stake was the financial terms, i.e., setting a cap on the cash paid to the Trust.[822] By contrast, the Debtor did not have any particular interest in the procedures for allowing and valuing claims.[823] Thus, the allowance and valuation procedures that ultimately would become the TDPs were not even negotiated until after the Debtor reached agreement with the Tort Committee on the dollar amount of the Debtor's contribution to the Trust.[824] Yet once the Tort Committee agreed to cap at $87.5 million the Debtor's and the Other Catholic Entities' liability in the Bankruptcy Case, the Debtor lacked any incentive to negotiate the details of the claims allowance and valuation process. This, coupled with the Tort Committee's incentive to maximize insurance recoveries, resulted in a bargaining process between the Plan Proponents that was anything but hard fought or arms' length.[825]

Although the phrase was used repeatedly throughout trial, it was not an exaggeration to say that the Tort Committee took the pen to draft the Plan Documents. From the date of the Tort Committee Settlement, until May 31, 2022, counsel for the Tort Committee spent ***more than fifteen times*** as many billable hours drafting the Plan, Trust Agreement, and TDPs compared to the Debtor.[826] This imbalance is corroborated by emails, correspondence, and deposition

[822] *See supra* Statement of Facts, § (F)(2). *See also* Wilen Dep. Tr. II, p. 61:6-17; Nov. 14 Trial Tr. (Wilen), p. 75:5-8.
[823] Montgomery Dep. Tr., pp. 73:23-74:2.
[824] *See supra* Statement of Facts, § (F)(1). *See also* Nov. 9 Trial Tr. (Hughes), pp. 136:5-25, 188:20-189:1; Hughes Dep. Tr., p. 112:14-19; Harrington Decl., ¶ 41.
[825] *See* Hinton Decl., ¶ 50 ("In the tort system, the Diocese had a financial interest in ensuring that claimants did not receive excessive awards even when insurance was available to pay claimants. However, after the Debtor repudiated the settlement with the insurers in return for TCC support for a revised Plan, it had no economic interest in avoiding prejudice to the insurers through changes to the TDPs.").
[826] *See* McKnight Decl., ¶ 18 & Appx. C. *See also* Lowenstein Sandler April 2022 Fee Statement [Dkt. No. 1747] (IC 325); Trenk Isabel April 2022 Fee Statement [Dkt. No. 1588] (IC 326); Lowenstein Sandler May 2022 Fee Statement [Dkt. No. 1822] (IC 328); Trenk Isabel May 2022 Fee Statement [Dkt. No. 1730] (IC 329); Trial Transcript (Dec. 1, 2022) ("Dec. 1 Trial Tr.") (McKnight), p. 30:17-21 ("I think what comes into this is, how much time does it take to draft, you know, a TDP. And if you look at the amount of time spent, it's very clear that the [Tort Committee] spent the bulk of the time.").

testimony, all of which make "clear that the [Tort Committee] took the lead in drafting the updated Plan and TDPs, and that the Debtor was not heavily involved in the process."[827]

The Debtor's indifference to the Plan Documents and willingness to surrender drafting responsibilities to the Tort Committee had profound implications for the final versions of the Plan, the Trust Agreement, and the TDPs and the effect of those documents on the Insurers. Whereas the Term Sheets negotiated by the Plan Proponents in December 2021 and January 2022 provided for the treatment and liquidation of abuse claims, the funding of a Trust, the right of survivors to litigate their claims against the Debtor in state court, and the classification of abuse claims into seven different categories (mirroring the requirements of the IVCP),[828] they lacked many of the hallmarks of the Plan, including Stipulations of Judgments, Verdict Value Assessments, the Trust Administrator's appointment of a Neutral, or stripping away the Insurers' rights to consent to any settlements.[829] It was only after the Plan Proponents agreed that the Debtor and the Other Catholic Entities' payment would total $87.5 million paid out over four years that the Tort Committee started looking to the Insurance Policies as a basis to recover the money that it would not receive from the Debtor.[830]

Based on the features of the Eighth Amended Plan imposed by the Tort Committee, it would not be an exaggeration to say that the Plan and the accompanying TDPs are unprecedented because the Tort Committee cannot point to the use of similar provisions in other bankruptcy cases.[831] As such, the Debtor's decision to defer to the Tort Committee on all aspects of the Plan

[827] McKnight Decl., ¶ 19 (citing examples therein).
[828] (JX 0420). *See also* Nov. 16 Trial Tr. (Prol), pp. 132:1-135:6, 135:8-136:3.
[829] (JX 0420). *See also* Nov. 16 Trial Tr. (Prol), pp. 137:12-21, 145:16-146:6.
[830] *See supra* Statement of Facts, § F(1).
[831] *See* Weisenberg Dep. Tr., pp. 38:2-5 ("Q: Are you aware of the use of a Trust Oversight Committee in any other Diocese in bankruptcy case? A: No."); 147:12-15 ("Q: Is the TCC aware of another bankruptcy case where the court confirmed a plan with a TDP that will offer a stipulated judgment? A: I don't recall.").

except for the amount of its contribution to the Trust constituted collusion against the Insurers and a breach of its fiduciary duty, precluding a finding by the Court that the Plan is being proposed in good faith.

The present case is comparable to *In re ACandS*,[832] another Chapter 11 proceeding where a plan was rejected because the plan process was commandeered by a constituency, for such constituency's benefit, and to the detriment of other stakeholders. In *ACandS* the court denied confirmation of the debtor's plan, concluding that it "[f]ell] short of . . . [the good faith] standard in nearly every respect."[833] Judge Newsome based his decision on the overwhelming influence that certain asbestos claimants (via committee) exerted on the process, noting that "the plan was largely drafted by and for the benefit of the . . . committee"; and that the committee also "drafted . . . the . . . trust," "chose the trustee," and more generally "decided who was going to get what."[834] This "[u]nbridled dominance" and "obvious self-dealing that resulted" led Judge Newsome to determine that it was "impossible to conclude" the plan had been proposed in good faith under Section 1129(a)(3).[835]

The behavior of the Tort Committee here mirrors the behavior of the asbestos claimants committee in *ACandS*. Once the Debtor reached the Tort Committee Settlement and capped its liability, it ceded control of the drafting of the Plan Documents to the Tort Committee.[836] The Debtor itself admitted that it did not control the drafting or negotiating of the Plan provisions relating to Class 5, the Abuse Claimants.[837] Then, once the Tort Committee controlled the drafting

[832] 311 B.R. 36.
[833] *Id.* at 43.
[834] *Id.*
[835] *Id.*
[836] *See supra* Statement of Facts, § F(1)-(2).
[837] *See The Diocese of Camden, New Jersey's Memorandum of Law in Support of Confirmation of the Eighth Amended Plan of Reorganization and Omnibus Response to Objections Thereto* [Dkt. No. 2480], p.

process for the Plan, Trust Agreement, and TDPs, it crafted those documents in ways that are indisputably favorable to it by enhancing the prospects that either claim valuations will be inflated or otherwise non-compensable claims will be allowed.[838] Moreover, under the Plan Documents the Tort Committee directly selects the Trust Administrator, Abuse Claims Reviewer, and Trust Advisory Committee, and indirectly selects the Neutral. Combined, these individuals control the Trust, the evaluation and liquidation of Abuse Claims, and the pursuit or settlement of coverage against the Insurers through Offers within Limits and Stipulations of Judgment.[839]

Time after time, the Debtor simply did not inquire about self-interested provisions inserted into the Plan Documents by the Tort Committee. For example, the Tort Committee inserted language into the Plan that required it to approve any settlement with a Settling Insurer.[840] The Tort Committee's power to veto Insurance Settlement Agreements exceeds the authority granted to debtors under Federal Rule of Bankruptcy Procedure 9019, which specifies that courts may approve settlements or compromises "on motion by the trustee."[841] Further, the limitations on the Debtor's ability to settle claims constrain the Debtor from discharging its fiduciary duties.[842] Nonetheless, Mr. Weisenberg had no recollection of the Debtor raising any questions or voicing any objection about this highly controversial provision.[843] The Debtor's apparent willingness to relinquish to the Tort Committee the authority to make important decisions that are otherwise

25 ("[T]he Diocese, not the Tort Committee, controlled the negotiating and drafting of the Plan with respect to other creditor bodies *besides Class 5*." (emphasis added)).

[838] *See infra* § VII(C)(3)-(4).

[839] *See supra* § III(A). *See also* Plan, §§ 2.2.109, 2.2.2; TDPs, § 8(xii)-(xiii).

[840] Weisenberg Dep. Tr., pp. 34:9-35:2. *See also* (JX 0420), p. 3.

[841] FED. R. BANKR. P. 9019.

[842] *See In re Innkeepers USA Trust*, 442 B.R. 227, 233, 235-236 (Bankr. S.D.N.Y. 2010) (ceding control of settlement approval process to creditor prohibited debtors "from taking action consistent with their fiduciary obligations" and supported a finding that plan was not proposed in good faith).

[843] Weisenberg Dep. Tr., pp. 35:22-36:7 ("Q: My question is: Can you recall specific discussion as to the consent right that's set forth in this term sheet . . . A: I don't recall. Q: Do you recall any time after January fifth timeline where the Debtor voiced a concern about giving the Tort Committee a consent right over insurance settlements? A: I don't.").

vested with the Debtor under the Bankruptcy Code is precisely the type of "unbridled dominance" over the Plan that allowed the Tort Committee to be the sole arbiter in deciding "who [i]s going to get what."[844]

The process whereby the Tort Committee prepared the Plan Documents was collusive and a breach of the Debtor's fiduciary duty, much like the plan proposed and rejected in *ACandS*. This Plan likewise has not been proposed in good faith and cannot be confirmed by the Court.[845]

3. The Plan Proponents Engaged in Bad Faith Conduct in the Discovery Process

The Plan Proponents' bad faith conduct extended beyond the documentation of the Tort Committee Settlement. As the Insurers subsequently sought information about the negotiations leading up to the Tort Committee Settlement and the drafting of the Plan Documents, the Plan Proponents repeatedly stonewalled their efforts and made blatant misrepresentations to the Insurers as well as the Court about the documents and communications they possessed.[846]

A plan proponent who fails or refuses to disclose – or worse, misrepresents – relevant information can, and should be found to have acted in bad faith, rendering the plan unconfirmable under Section 1129(a)(3).[847] Stated another way, "the easiest way to fail the good faith test . . . is for a debtor to misrepresent, lie, or otherwise mislead the court."[848]

The Plan Proponents' conduct leading up to the Confirmation Hearing was replete with misrepresentations and deception. The Plan Proponents not only failed to timely disclose relevant

[844] *AcandS*, 311 B.R. at 43.
[845] *See* Insurer Confirmation Objection, pp. 55-58.
[846] *See supra* Statement of Facts, § I.
[847] *In re Frascella Enters.*, 360 B.R. 435, 449 (Bankr. E.D. Pa. 2007) (noting that, where "relevant disclosures have not been made," it is "hard to conclude that a plan has been proposed in good faith.") *See also Big Shanty Land Corp. v. Comer Props., Inc.*, 61 B.R. 272, 281 (N.D. Ga. 1985 (citing cases).
[848] *Meredith v. Roberts (In re Roberts),* No. 11-60690, 2013 Bankr. LEXIS 631, at *5 (Bankr. S.D. Ga. Jan. 24, 2013) (internal citations and quotations omitted).

(and requested) information to the Insurers, but they also repeatedly misrepresented the scope of their nondisclosures to both the Insurers and the Court. For example, the Tort Committee's statement in its August 1 letter that "there is no term sheet, plan support agreement, or other writing regarding the terms of the [Tort Committee] Settlement" is flatly contradicted by Mr. Weisenberg's email to the Court representing that the Plan Proponents had "agreed on a basic structure" for a potential settlement,[849] and Mr. Weisenberg's April 12, 2022, email outlining the terms of the parties' tentative settlement.[850] Mr. Weisenberg's emails likewise belie the Debtor's representation to the Court on August 10, 2022, that there was "no other document" to be had from the Debtor.[851]

The Tort Committee's Rule 30(b)(6) deposition testimony reveals similar problems with the Plan Proponents' representations to the Court on other matters. The Tort Committee's testimony that the Plan Proponents had discussions prior to April 11, 2022, on a variety of plan-related topics[852] stands in stark contrast to the Debtor's assertion at the September 14, 2022, hearing that "until April 11th . . there was no discussion with the [Tort Committee] about other than . . . they wanted to deal with the insurance."[853] The Tort Committee's claim at the same hearing that the Tort Committee Settlement was "a surprise to everyone"[854] is similarly difficult to square with the Tort Committee's later testimony that the Plan Proponents met in advance to discuss how to achieve a successful mediation on April 11.[855]

[849] (JX 0422) at PlanPro00000066. *See also supra* Statement of Facts, § E(2).
[850] *Compare* Kaplan August 1 Letter (IC 343) *with* TCC 00004682 (JX 0430). *Cf.* Weisenberg Dep. Tr., p. 82:15-24.
[851] Aug. 10 Hr'g Tr. (IC 234), p. 71:1-2.
[852] Weisenberg Dep. Tr., p. 35:13-21.
[853] Sep. 14 Hr'g Tr. (IC 239), p. 30:9-14.
[854] *Id.* at p. 32:3-4.
[855] Weisenberg Dep. Tr., p. 78:13-14.

Duplicity is troubling enough as a general matter. But it is particularly problematic within the greater context of the Bankruptcy Case, where the Plan Proponents made each misstatement in direct opposition to the Insurers' requests for relief: the First Motion to Compel, the Motion to Adjourn, and the Third Motion to Compel. Moreover, those responsible for the (at best) inaccurate statements were involved - often directly – with the underlying document or event related to the statement. For example, counsel for each of the Plan Proponents ***responded*** to the April 12 Exchange but later claimed it did not exist.[856] And nearly all of the concealed documents recounted or otherwise concerned prominent events in the Bankruptcy Case: the Term Sheet(s) provide for, among other things, the resolution of all three of the Tort Committee's suits against the Debtor;[857] the Settlement Correspondence recited the Tort Committee's "bottom line";[858] and the April 12 Exchange recapped the Tort Committee Settlement.[859]

As such, it is inconceivable that the Plan Proponents were ignorant of, or simply forgot about, these documents when professing their nonexistence. This is true notwithstanding the fact that the Plan Proponents ultimately produced the documents. As an initial matter, the productions occurred only reluctantly, after significant motions practice. Further, both the August 19 Production and the September 16 Production were made after the Court granted the Motion to Adjourn (thereby extending the schedule for fact discovery). This timeline suggests that the documents were withheld in the hopes that, by running out the clock on the original discovery schedule, they would never be released.

Finally, the Plan Proponents' August 19 Production included email correspondence between Mr. Weisenberg and Mr. Trenk discussing the fact that the Tort Committee was drafting

[856] *Compare* Kaplan August 1 Letter (IC 343) *with* TCC00004682 (JX 0430).
[857] *See, e.g.*, PlanPro00000089 (JX 0424).
[858] PlanPro00000152 (JX 0426).
[859] TCC00004682 (JX 0430).

a "Security Agreement" and an "Insurance Assignment Agreement" and a copy of the Security Agreement may have been shared with the Debtor.[860] Nonetheless, the Tort Committee never produced the Security Agreement to the Insurers.[861] Additionally, even though the Tort Committee contemplates that the Insurance Assignment Agreement will be executed by the Trust,[862] the Tort Committee has refused to disclose the contents of that agreement.[863] Thus, the Plan Proponents' efforts to conceal relevant information from the Insurers remain ongoing.

The fact that the Plan Proponents misled the Insurers and the Court about the existence of certain highly probative documents throughout the course of discovery provides a separate ground for their bad faith conduct in this Bankruptcy Case that in itself warrants denial of confirmation.

C. The Plan is Designed to Achieve Inequitable, and Improper, Results

Finally, the Plan was not proposed in good faith because its intended results are neither equitable nor appropriate in light of the objectives and purposes of the Bankruptcy Code. Put differently, the Plan was not proposed in good faith because it fails the second element of the good faith analysis, which evaluates whether or to what extent a plan will "fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code,"[864] such as: maximizing value to creditors, "discourag[ing] debtor misconduct," and "achieving fundamental fairness and justice."[865]

Two critical principles cabin this analysis. First, a plan may simultaneously fulfill one legitimate bankruptcy purpose while violating another. The fact that a plan may maximize value

[860] *See* Weisenberg Dep. Tr., pp. 162:19-25, 163:7-10, 163:19-164:5, 164:16-17 (referencing (JX 0439).
[861] *Id.* at p. 163:13-15 ("Q: Do you know whether that security agreement has been produced in this case? A: I do not."),
[862] *Id.* at p. 165:19-21.
[863] *Id.* at pp. 165:22-166:1 (objecting on grounds of work product doctrine).
[864] *Am. Capital Equip., LLC*, 688 F.3d at 158 (internal quotations and citations omitted).
[865] *Id.* at 157 (internal quotations and citations omitted) (alteration in original).

to creditors, for example, is neither dispositive nor (by itself) adequate.[866] Second, and relatedly, it is insufficient for a plan merely to achieve valid bankruptcy purposes; it must also do so ***fairly***.[867] This acts as an equitable backstop against confirmation of plans that rely on inappropriate means[868] or ultimately reach inequitable ends.[869]

The Plan fails this inquiry in every respect. To start, confirmation of the Plan will not, and cannot, accomplish (at least) one of the critical objectives of the Bankruptcy Code: discouraging debtor misconduct. On the contrary, there is a real and present danger that confirmation of this Plan will telegraph to other debtors – including the many other dioceses currently in Chapter 11 – the precise opposite message. That they, too, can leverage, and later functionally discard, a settlement when convenient;[870] or engage in dishonest discovery conduct;[871] or peddle control of the plan process to one constituency at the expense of another.[872] Preventing this corruption of purpose from spreading is reason enough to deny confirmation of the Plan.

Condoning the Plan Proponents' conduct in this case makes it ***less likely*** that insurers will pursue settlement in future bankruptcy proceedings out of fear that they will suffer the same

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[866] *Id.* at 160 n.8 ("Appellants argue that their plan is not in bad faith because it fulfills a purpose of the Bankruptcy Code (namely, maximizing value to creditors). [. . .] However, the fact that there is at least one valid purpose to the [p]lan is not dispositive as the [p]lan could fulfill one specific purpose of the [Bankruptcy] Code and yet be inconsistent with other overarching principles, or with the requirement that objectives and purposes of the Code must be fairly achieved.").

[867] *See Coram Healthcare Corp.*, 271 B.R. at 234 ("In evaluating the totality of circumstances surrounding a plan a court has 'considerable judicial discretion in finding good faith, with the most important feature being an inquiry into the fundamental fairness of the plan.'" (quoting *In re Am. Family Enters.*, 256 B.R. 377, 401 (D.N.J. 2000)).

[868] *See, e.g.*, *Am. Capital Equip., LLC*, 688 F.3d at 160 (finding a lack of good faith because, among other reasons, the trust distribution procedures "strip[ped] [the debtor's] [i]nsurers of certain procedural and substantive rights . . .").

[869] *See, e.g.*, *AcandS, Inc.*, 311 B.R. at 43 ("It is also impossible to conclude that this plan is imbued with fundamental fairness. Although the plan may meet the technical classification requirements [under the Bankruptcy Code], it is fundamentally unfair that one claimant [with one type of asbestosis] will be paid in full, while someone with [a different type of asbestosis] runs the substantial risk of receiving nothing.").

[870] *See supra* § VII(B)(1).

[871] *See supra* § VII(B)(3).

[872] *See supra* § VII(B)(2).

consequences that the Insurers face in this case. Bankruptcy courts in the Third Circuit have found that "settlements are an important part of resolving a bankruptcy case."[873] Thus, "the important policy of promoting settlements in bankruptcy proceedings"[874] is at risk if the Plan Proponents emerge from this Confirmation Proceeding unscathed and with a confirmed, self-serving, and insurance prejudicial plan.

But even if the Plan somehow could surmount these grave concerns, it still cannot be confirmed. Irrespective of whether the Plan realizes results consistent with the "objectives and purposes of the Bankruptcy Code" (and it does not), it will not "***fairly*** achieve" the results it reaches. Rather, there are at least four key features of the Plan that are inherently inequitable and prejudicial to the Insurers, rendering the Plan unconfirmable under the second prong of the good faith analysis.

1. The Plan and TDPs Employ Abuse Claims Valuation Methodologies Unequally

First, the valuation methodology applied under the TDPs to assess the Insurers' liability for Abuse Claims is incompatible with the approach used for every other relevant aspect of the Plan. Under the TDPs, Verdict Value Assessments are used for purposes of making coverage demands of the Insurers.[875] Verdict Value Assessments, in turn, are based on purported Verdict Values.[876] Thus, for purposes of coverage demands, the TDPs employ Verdict Values to determine the value of Abuse Claims.[877] This approach – using purported Verdict Values as a proxy for

[873] *Tindall v. Mavrode* (*In re Mavrode*), 205 B.R. 716, 719 (Bankr. D.N.J. 1997) (citing *In the Matter of Penn. Cent. Transp. Co.*, 596 F.2d 1102, 1113 (3d Cir. 1979)).
[874] *Law Debenture Trust Co. v. Kaiser Aluminum Corp.* (*In re Kaiser Aluminum Corp.*), 339 B.R. 91, 94 (D. Del. 2006).
[875] Hinton Decl., ¶ 19 ("The second valuation procedure contained in the Plan is the Verdict Value Assessment in which the Neutral would determine the [Verdict Value]. The [TDP] provides for the Trust Administrator to use the Verdict Values to make coverage claims against the insurers.").
[876] *Id.*
[877] *Id.*

liability – is identical to the methodology that Ms. McNally employed to value the Abuse Claims on behalf of the TCC.[878]

Curiously, however, this methodology was (and is) not applied to anyone or anything else outside of the Insurers. It was not, for example, used to determine the amount of the Debtor's and Other Catholic Entities' contribution to the Trust under the Plan[879] (and preceding Tort Committee Settlement).[880] Nor was it used to calculate the liquidation analysis for the Plan[881] or to determine the reserve for Abuse Claims carried on the Debtor's books prepetition.[882] Each of these instead

[878] *Compare id.* at ¶ 9 ("Ms. McNally values abuse claims based on verdicts that a jury or court may find the damages to be if a plaintiff were to prevail") (internal quotations and citations omitted) *with id*. ("This approach mirrors the Verdict Value Assessment contained in the Plan."). *See also* Comiter Decl., ¶ 62 ("[Ms. McNally's] valuation . . . uses only (a selection of) jury verdicts and disregards all historical settlements, as the underlying comparative dataset.").

[879] *Compare* McNally Decl., ¶ 217 (opining that, under her valuation methodology, "[a] reasonable range of claim value for all Valued Abuse Claims in the aggregate i[s] $398.4 million-$785.1 million.") *with* Plan, § 7.2.1 ("The Trust shall be funded with . . . $87.5 million by the Debtor and the Other Catholic Entities") *and* Nov. 10 Trial Tr. (Montgomery), p. 185:2-16 ("Q: And isn't it true that the 87 and a half million dollar settlement in your view is sufficient to fully and fairly compensate the [Abuse Claimants] for their losses?" . . . A: I believe that the 87.5 [million dollars] meets the criteria and meets the goal that we set out. And that was to be fair and equitable to the survivors and allow the Church to continue its mission."). *See also* Nov. 14 Trial Tr. (Wilen) p. 147:17-22 ("Q: Was the methodology that you used for allocating the $10 million, among the parishes, did that use the same methodology for valuing the claims that the Tort Claimants [Committee] advocated being used for valuing claims against the Diocese and the parishes? A: No.")

[880] *Compare* McNally Decl., ¶ 217 *with* (JX 428) (April 12, 2022 email from Brent Weisenberg stating: "Richard/Bobby, this confirms our settlement this evening of $87.5mm payable as follows . . .")

[881] Nov. 14 Trial Tr. (Wilen), pp. 108:20-109:5 ("Q: Looking at where it says on the demonstrative, page 4, estimated general unsecured claims, $97,392,526. A: Yes. Q: . . . That's inclusive of all unsecured claims, correct? A: That includes all unsecured claims, plus my valuation of the IVCP process for the Tort [Abuse] Claims. Q: So you're [*sic*] valuation to the IVCP was what was used to create that number? A: Yes . . .").

[882] Nov. 10 Trial Tr. (Montgomery), pp. 177:22-178:14 ("Q: And can you just tell the Court . . . how those reserves for abuse claims were set on the Diocese's financial statements . . .? Q: Okay, so our auditors wanted us to have a reserve on the books for at least those claims that had gone through the IVCP. So what we did was we took an average of the claims that were paid out and we multiplied that by the total number of claims that were in the IVCP program. Q: And so in connection with the reserve, the Diocese used the results from the IVCP program, correct? A: For that exercise, yes. Q: And then that number made its way into the Diocese's financial statements, correct? . . . A: Yes.").

either used[883] or at least paralleled[884] claim values derived from the Debtor's historical experience. As a result, "the Debtor's liability is fixed by one value and the [Insurers'] by another" under the TDPs.[885]

This defies both logic and basic principles of fairness. A defendant's liability for a claim either is one amount or it is another, but in no event can the ***same*** defendant's liability for the ***same*** claim be fixed at different amounts due solely to the identity of the liability payor.[886] Yet that is precisely what the TDPs dual-valuation framework achieves.[887] The Debtor's liability for an

[883] *See* Nov. 14 Trial Tr. (Wilen), p. 86:10-12 (Q: To the extent you're using the claims to determine the payments for the [P]arishes, were you using your IVCP analysis? [A:] Yes, I was.") (Wilen).

[884] *Compare* Plan, § 7.2.1 ("The Trust shall be funded with . . . $87.5 million by the Debtor and the Other Catholic Entities") *with* Eighth Amended Disclosure Statement, p. 76 ("[T]he Diocese retained Roux to provide a rebuttal expert report in connection with the insurance settlement. Roux determined that a reasonable estimate of the Diocese's Abuse Claim liability should range from approximately $71 million to ***$86 million***.") (emphasis added). *See also*, Hinton Decl., ¶ 19 ("The Plan includes two claim valuation procedures, one that was inherited from the Fifth Amended Plan that incorporated the prior settlement, which would allocate a share of the aggregate Debtor settlement to claimants based on a scoring system . . . Under this procedure, the average claim value would match that used to derive the Debtors' [*sic*] contribution to the prior $90 million settlement from its historical experience of resolving claims in the tort system.").

[885] Hinton Decl., ¶ 19. *See also* Nov. 16 Trial Tr.(Prol), pp. 124:15-125:11 ("Q: . . . And what – what does the plan say about [the liquidation of Abuse Claims]? A: The plan provides that – there were three different elements in terms of how claims are liquidated. First there's an expedited provision for small claims . . . Secondly, there is a tort claims reviewer that's appointed [who] will value the claims based upon factors that are set forth in the TDP . . . And that valuation is solely for purposes of distributing funds that the trust has. It has no impact upon the insurance carriers' liability under the plan. And the third mechanism is a verdict value assessment . . . And ultimately the neutral will come up to an recommendation [*sic*] with regard to . . . what a reasonable jury would award . . . The trust administrator will then make a demand on the carriers that might be responsible for that particular claim [. . .].").

[886] *E.g., Falkowski v. Johnson*, 148 F.R.D. 132, 136 (D. Del. 1993) ("Who would pay the judgment is irrelevant to the sole issue of damages. Whether plaintiff would be forced to squeeze 'blood out of a stone' or would be able to recover from some other source has no bearing on the amount of damages."). Notably, Rule 411 of the Federal Rules of Evidence forbids the use of liability insurance to prove fault at trial for this very reason. *See, e.g., id*. at 136 ("A jury would, within reasonable probability, inflate the amount of the award if it had reason to infer that an insurance company rather than defendants would pay an award. Indeed, the probability of jury prejudice when insurance coverage has been introduced was one of the reasons behind the prohibition of liability insurance as admissible evidence.").

[887] *See* Hinton Decl., ¶ 19 ("Thus, the Debtor's liability is fixed by one value and the insurers' by another.").

Abuse Claim has – by virtue of the Plan – been fixed at one value,[888] while an Insurer's alleged liability (for the ***same Abuse Claim***) will – through the Verdict Value Assessment – be fixed at an entirely different value.[889]

And the difference between the two valuations is utterly staggering. For purposes of fixing the Debtor's (and Other Catholic Entities') liability under the Plan, the Abuse Claims on average were valued at roughly double the historical baseline.[890] But applying Ms. McNally's methodology to estimate the average expected Verdict Value from the Verdict Value Assessment yields a result that is more than ***ten times*** the Debtor's historical baseline.[891] In other words, the Plan values each Abuse Claim at approximately $207,000 for purposes of fixing the Debtor's liability,[892] yet the TDPs likely will value that same Abuse Claim at anywhere from $1.2 million to $2.5 million for purposes of demanding coverage from the Insurers.[893] This is patently

[888] *See* Plan, § 7.2.2 ("Notwithstanding the foregoing, the Debtor and the Other Catholic Entities shall have no further financial obligations under this Plan or the Plan Documents other than the obligations required to be paid to the Trust in Section 7.2.2 of this Plan.").
[889] *See* Hinton Decl., ¶ 19.
[890] *Compare* Eighth Amended Disclosure Statement, p. 3 ("The Trust will be funded by $87,500,000 in cash from the Debtor and Other Catholic Entities. As of the date of this Disclosure Statement, 324 non-duplicative [Abuse] Claims have been filed, which will share collectively in the funds . . .") *with id*. at p. 35 ("From 1990 to 2019, the Diocese paid . . . approximately $102,222 per claim") *and id*. at p. 36 ("Through the IVCP . . . [the] average claim settled for approximately $114,000 [per claim]"). Dividing $87,500,000 by 324 equals approximately $207,000 per Abuse Claim, which is slightly less than double the combined (pre-IVCP and IVCP) historical average of approximately $108,000 per claim.
[891] Hinton Decl., ¶ 21 ("The expected value determined through the Verdict Value Assessment of between $1.2 million and $2.5 million, based on the values estimated by Ms. McNally, is more than ten times the average values of historical tort claims that settled prior to 2019, and the average value of subsequent settlements in the [IVCP].").
[892] *See supra* notes 752 & 890.
[893] Hinton Decl., ¶ 21.

prejudicial to the Insurers.[894] It is also a fundamentally unfair result that precludes a finding of good faith.[895]

2. The Plan is Designed to Impair the Insurers' Rights

Second, the Plan is designed to impair the Insurers' contractual rights under their respective Insurance Policies. This is clear from at least the following three facts.

At the outset, the Plan is devoid of any true insurance neutrality language providing for the unreserved preservation of the Insurers' rights under their Insurance Policies.[896] Further, the Trust is fundamentally – and unnecessarily – adverse to the Insurers. This adversity begins with the Trust Advisory Committee, which is comprised exclusively of Abuse Claimants (each of whom currently is a member of the Tort Committee). But it need not have been. The Tort Committee has the sole authority to appoint the Trust Advisory Committee and therefore had every opportunity to appoint one or more independent members.[897] It simply chose not to. The same is true with respect to the Abuse Claims Reviewer and the Trust Administrator. The Tort Committee has the exclusive power to name both the Abuse Claims Reviewer and Trust Administrator, and as such could have selected independent fiduciaries (*e.g.*, panel trustees). [898] But in each case, the Tort Committee exercised its power instead to select candidates with deep-rooted professional ties

[894] *Id.* at ¶ 19 ("This dual track valuation feature of the Plan is prejudicial to insurers because the verdict values are expected to be so much higher than the Diocese's historical experience of resolving claims in the tort system."). *See also id*. at ¶ 49 ("If [V]erdict [V]alues . . . were used to determine claim liability instead of the claim valuations the Diocese experts used to develop the substantial contributions of the Parishes, their proposed contributions would not represent a substantial proportion of liability. The discrepancy shows that the amounts the TDP procedures would generate against insurers is out of line with the amounts that the Diocese and [P]arishes would contribute in settlement and provides evidence of the prejudicial impact of the TDP on insurers.").
[895] *Cf. AcandS, Inc.*, 311 B.R. at 43 ("It is also impossible to conclude that this plan is imbued with fundamental fairness.").
[896] *See supra* § II(A).
[897] Trust Agreement at § 7.1.
[898] Plan at §§ 2.2.2; 2.2.109.

to the plaintiffs' bar[899] and was unable to offer any explanation for the choice.[900] Finally, the TDPs unnecessarily reinvent the claim resolution process for Abuse Claims in a manner that is intrinsically prejudicial to the Insurers.[901]

But, like the Tort Committee's selection of partisan fiduciaries, the TDPs could have been different. In fact, at one point, they were. The Term Sheets that the Plan Proponents exchanged in January 2022 included, among other things, proposed trust distribution procedures that contemplated the liquidation of Abuse Claims through the tort system instead of by using a Verdict Value Assessment, Stipulation of Judgment, or Neutral (none of which existed).[902] The Plan Proponents, however, decided to discard this substantially complete proposal in favor of the TDPs – a scheme that was cut from whole cloth,[903] is entirely without analog in the tort system,[904] and strips the Insurers of substantive and procedural rights.[905]

It beggars belief to suggest that any of these deficiencies – prejudicial TDPs, a biased Trust, the lack of insurance neutrality – was anything other than intentional. None of these problematic provisions in the Plan Documents are required under the Bankruptcy Code or otherwise[906] (except for insurance neutrality, which the Plan Proponents failed to include).[907] They are instead the product of voluntary choices. When making these choices, moreover, the Debtor had access to a

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[899] *See supra* Statement of Facts § G at notes 335-343 (documenting Abuse Claims Reviewer and Trust Administrator's connections with plaintiffs lawyers).
[900] Weisenberg Dep. Tr., pp. 190:12-22, 195:20-21.
[901] *See supra* § II(B)(3) (explaining how Plan and accompanying TDPs fundamentally impair Insurers' rights under Policies).
[902] *See, e.g.*, (JX 0420). *See also* Nov. 16 Trial Tr. (Prol), p. 137:12-21.
[903] *Compare* (JX 0420) *with* TDPs.
[904] Bitar Decl., ¶ 7.
[905] *Id.*
[906] *See* 11 U.S.C. §§ 1123, 1129.
[907] *Compare Combustion Eng'g*, 391 F.3d at 209 ("[R]ecognizing the Plan should not modify the contractual rights of insurers, the court added a provision to make clear the Plan did not alter the contractual rights of insurers under any insurance policy ….") *with Mission Prod. Holdings*, 139 S. Ct. at 1663 ("A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either.") (internal citations and quotations omitted).

financial advisor with substantial experience in trust governance and trust distribution procedures,[908] while the Tort Committee had the benefit of "one of the top lawyers in New Jersey dealing with insurance coverage matters."[909] Yet in spite (or perhaps because) of the Debtor's ability to seek advice, and the Tort Committee's benefit from it, the Plan Proponents at every opportunity selected the more prejudicial alternative. As such, the only credible explanation for the Plan's impairment of the Insurers' rights is that the Plan Proponents designed it to do so.[910] This informed and voluntary attempt to destroy the Insurers' rights is irreconcilable with good faith under Section 1129(a)(3).[911]

3. The Plan is Designed to Allow Non-Compensable Claims

The Plan and TDPs lack any provisions to root out fraudulent or otherwise non-compensable claims. Thus, the Plan TDPs are fundamentally flawed because they "operate from the presumption that all claims are valid and the defendant is liable, and focus almost entirely on the amount of money a claimant is to be paid."[912] This presumption has resulted in the absence of numerous procedural safeguards that otherwise exist in the tort system to identify non-compensable claims.

The absence of such safeguards is inconsistent with key provisions of the Bankruptcy Code, including at least the following: Section 502(b)(1), which provides for the disallowance of

[908] *See* Nov. 14 Trial Tr. (Wilen), pp. 57:8-58:11.
[909] Weisenberg Dep. Tr., p. 68:19-20.
[910] Although Mr. Prol suggested that the Debtor objected to the litigation of Abuse Claims in the tort system (as the Term Sheets contemplated), *see* Nov. 16 Trial Tr. (Prol), pp. 140:25-141:7, this testimony is not credible. It is corroborated by precisely zero documents in evidence, and Mr. Prol was unable to point to anything beyond the Plan itself (which contains the current TDPs as opposed to the previous mechanism) and some post-April 11, prior draft of the Plan (which he could not recall). *See id*. at pp. 141:8-143:14.
[911] *In re Surfango, Inc.*, No. 09-30972 (RTL), 2009 Bankr. LEXIS 4172, at *23 (Bankr. D.N.J. Dec. 18, 2009) ("The plan serves only as a litigation tactic for one faction . . . to case off the others. That does not serve a traditional bankruptcy purpose. [. . .] The proponents have not proved . . . that their plan was proposed in good faith.").
[912] Bitar Decl., ¶ 7. *See also* Nov. 30 Trial Tr. (Bitar), pp. 25:21-26:2 (citing Eighth Amended Plan).

claims that are "unenforceable against the debtor and property of the debtor, under any agreement or applicable law"; Section 704(a)(5), which requires the trustee to "examine proofs of claim and object to the allowance of any claim that is improper"; and the requirement under the Bankruptcy Code that "[a]ny defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy.[913]

a. The TDPs Lack an Adversary Process

First, the TDPs lack an adversary process that is necessary to dispense with non-compensable claims in which the Insurers are permitted to raise objections to an impartial adjudicator.[914] In the tort system, claims of sexual abuse "are subject to an adversarial process in which both sides are usually represented by counsel, and the case proceeds according to the applicable rules of civil procedure and evidence," with the plaintiff "bear[ing] the burden of proving each of the elements of his or her claim, and the defendant [having] the opportunity to disprove the elements of the claim, or to provide that an affirmative defense applies."[915] Under that system, "both parties are allowed the same opportunity to conduct discovery and present arguments and evidence to establish their claims or defenses."[916] An adversary process whereby another party is incentivized to challenge claims is necessary to prevent the Trust from paying out claims that are fraudulent or otherwise barred.[917]

However, under the TDPs no such process exists. Unlike the tort system, there are no defendants who can move for summary judgment to dispose of Abuse Claims lacking sufficient

[913] *Travelers Cas. & Sur. Co. of America*, 549 U.S. at 550 (citing 4 COLLIER ON BANKRUPTCY ¶ 1502.03[2][b] at 502-22 (15th ed. 1984)).
[914] *See supra* § II(B)(3).
[915] Bitar Decl., ¶ 26.
[916] Bitar Decl., ¶ 26.
[917] *See supra* Statement of Facts, § C(5) (discussing Debtor's acknowledgement of the existence of questionable or fraudulent claims).

evidence to support each element of the claim, including that the Debtor itself was negligent (as it is not strictly liable as the abuser's employer.[918] Similarly, "there is no mechanism in the TDPs for competing expert testimony."[919] Thus, "[t]he ability to present competing expert testimony to a factfinder is a critical competent of the tort system that is missing here."[920] Finally, the absence of an adversary process is perhaps most pronounced through the TDPs' use of Stipulations of Judgments whereby a judgment can be entered against the Insurers without their consent or the due process protections afforded to them under the tort system. The Stipulated Judgments are problematic because they do not seek input from the Insurers or give the Insurers an opportunity to vigorously defend themselves.[921]

b. <u>The Trust Fiduciaries are Provided With Too Much Discretion to Allow Claims Under the TDPs</u>

Second, the TDPs are likely to allow otherwise non-compensable claims because the Abuse Claims Reviewer and the Neutral (as applicable) are granted extremely broad discretion to evaluate, allow, and value such claims.

The Abuse Claims Reviewer is responsible for determining whether a claim is an "Allowed Claim" based on the information (if any) he receives from the Debtor, the Other Catholic Entities, the Insurers, or the Class 5 "Abuse Claimants," using certain "Evaluation Factors" set forth in the

[918] Bitar Decl., ¶ 35. *See also id.* at ¶ 27 ("As a general rule, an institution cannot be held vicariously liable, based on a theory of *respondeat superior*, for the alleged personally-motivated tortious conduct and acts of sexual abuse of its employee or other associated individual. . . . Thus, if the law is correctly applied, strict liability and *respondeat superior* claims generally do not survive a motion to dismiss. The TDPs do not appear to have a mechanism to ferret out these baseless claims").
[919] Bitar Decl., ¶ 61.
[920] Bitar Decl., ¶ 61.
[921] Nov. 30 Trial Tr. (Bitar), pp. 44:14-17, 44:25-14 ("A stipulation is put in front of the insurance company. They could either accept it or not, and then, if they don't, they can be - - the Trust Administrator can go to the State Court opinion, which . . . there's nothing like that in the tort system."). *See also supra* § IV at note 647 & § VI at note 783 (citing Nov. 30 Trial Tr. (Bitar), pp. 44:14-17, 44:25-45:20 (Bitar explaining why she would never advise a client to agree to a stipulated judgment in the tort system)).

TDPs.[922] However, "[t]he TDPs do not dictate what information may, or may not, be considered or how the Evaluation Factors are to be applied, and thus on their face allow the Abuse Claims Reviewer to ascribe whatever weight to the factors he wishes, and use whatever other information he may, in his sole discretion, choose to consider."[923]

The Eighth Amended Plan "doesn't define a procedure for how [the allowance of an Abuse Claim] will be determined"[924] – unlike the Fifth Amended Plan, which had explicit procedures for allowing claims.[925] Thus, "[t]he Abuse Claims Reviewer is permitted to determine whether an abuse claim should be allowed; yet the Trust Distribution Plan procedures do not set forth any criteria to be used in making such a determination."[926] Without specific criteria, there is no way for the Abuse Claims Reviewer to disallow a claim, so the default would be to allow every claim and then attribute some value to it using the TDPs' Evaluation Factors.[927] Consequently, "claimants without objectively meritorious claims could receive compensation at the discretion of the Abuse Claims Reviewer."[928]

Similarly, the Neutral, who conducts the Verdict Values Assessment, assumes all claims to be valid and must determine the amorphous concept of "what a reasonable jury might award" to the Abuse Claimant.[929] Even though this requires the Neutral to opine on questions such as

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[922] Bitar Decl., ¶ 10.
[923] Bitar Decl., ¶ 10. *See also supra* §§ IV(A), IV(D)(2) (discussing absence of well-defined allowance criteria within TDPs).
[924] Nov. 30 Trial Tr. (Hinton), pp. 66:1-7, 67:2-6. *See also id.* at pp. 130:20-23, 131:2-3 ("Q: Were you able to identify any criteria in your study of the TDP, the plan, the Trust Agreement, that set up what requirement this is or is there a requirement about whether non-compensable claims should be disallowed? . . . A: NO. I mean . . . there's no criteria, there's no guidance on that.").
[925] Nov. 30 Trial Tr.(Hinton), pp. 60:16-61:2, 62:3-6, 62:8-10, 62:14-16, 63:2-4, 63:6-8.
[926] Hinton Decl., ¶ 27.
[927] Nov. 30 Trial Tr. (Hinton), p. 67:7-13. *See also id.* at p. 66:21-24 ("when you look at the detail of the TDP, since there are no criteria for disallowing, the default is to allow, which would mean that all of them get allowed"); Dec. 1 Trial Tr. (McKnight), pp. 22:24-23:2 (Q: Is there a procedure in the TDP under which the Abuse Claims Reviewer can disallow claims? A: I would say no.").
[928] Hinton Decl., ¶ 27.
[929] Bitar Decl., ¶ 13.

proximate causation and joint and several liability, "the 'precise method, manner and procedures' he employs is within his sole discretion. In sum, the Neutral can make decisions on a record of his choosing, and weigh the evidence he receives in a manner of his choosing, and with respect to which only the Trust Administrator has the standing to appeal."[930]

For the Abuse Claims Reviewer and the Neutral, the only requirement for an "Allowed Claim" is that it be timely, but even then the Trust Administrator has the power to override and allow an untimely claim.[931] Thus, there are literally no guiding criteria for the allowance or disallowance of claims, yielding unlimited discretion to the Tort Committee-appointed Abuse Claims Reviewer and the Neutral who, as previously discussed, are subject to their own biases.[932]

c. <u>The TDPs Do Not Permit the Parties to Engage in Sufficient Discovery</u>

The TDPs are also likely to lead to the payment of otherwise non-compensable claims because they do not provide the parties with sufficient time to engage in fact finding through anything comparable to the discovery process in the tort system.

Under the TDPs, in connection with a Verdict Value Assessment, "[t]he Independent Review Claimholder and any potential Responsible Insurer . . . shall be entitled to discovery from the Trust . . . and from third parties, in accordance with procedures to be established by the Neutral; provided that discovery associated with review of any Independent Review Claim shall not exceed

[930] Bitar Decl., ¶ 13.
[931] *Id.* at ¶ 14 (citing Plan, § 2.2.11 ("Notwithstanding the foregoing, pursuant to the Trust Distribution Procedures, the Trust Administrator shall have the authority to deem any untimely Class 5 Claim Allowed even if such Claim was not filed by the Bar Date.")). Allen Wilen has testified that he could not think of any reason why allowing untimely claims would be a benefit to the Estate. Nov. 14 Trial Tr. (Wilen), p. 148:5-15.
[932] *See supra* § IV(A), IV(D)(2).

ninety (90) days barring exceptional circumstances which shall be determined in the sole discretion of the Neutral."[933]

The lack of any guaranteed discovery, the passage of significant periods of time since the events giving rise to the abuse claims occurred,[934] and a limit of 90 days to the extent any discovery is permitted by the Neutral at all deprives the Insurers of the benefit of a thorough factfinding process that they would otherwise enjoy in the tort system, where the discovery period in a New Jersey state court lawsuit can range between 150 days and 450 days, or up to five times as long as the longest discovery period permissible under the TDPs.[935] A thorough discovery period is necessary to ensure that an institutional defendant, such as the Debtor, has the ability to aggressively pursue materials, and "the court can play a critical role in requiring production from plaintiffs and of third-party documents not within possession of a plaintiff."[936] These documents "can rarely be secured by an institutional defendant in the 90-day window allowed for in the TDPs, even when the institution has the ability to subpoena such documentation, which subpoena power is missing from the TDPs."[937] Thus, "the TDPs present no mechanism to secure documents beyond what a plaintiff may have in their possession and, even when permitted, simply do not afford access to the third-party discovery available in the tort system."[938] While there could theoretically be some third-party discovery conducted in the 90-day time period, "it's . . . amorphous and unclear

[933] TDPs, § 8(iv). *See also* Bitar Decl., ¶ 13.
[934] Nov. 30 Trial Tr. (Bitar), p. 35:8-14 (stating that passage of time "prejudices an institutional defendant" and can have "enormous consequences").
[935] *See* N.J. CT. R. 4:24-1. *See also* Nov. 30 Trial Tr. (Bitar), pp. 33:15-34:4 (discussing on cross-examination that all discovery tracks in New Jersey state courts are longer than 90 days).
[936] Bitar Decl., ¶ 32.
[937] *Id.*
[938] *Id.* At ¶ 33. *See also* Nov. 30 Trial Tr. (Bitar), pp. 29:7-15, 30:9-12.

as to what that discovery may be, how it can be secured, [and whether there is a] right to subpoena."[939]

Without the protections of a thorough discovery process where the Insurer has the ability to subpoena third-party documents, the Insurer will not have the ability to contest the validity of claims, which it would otherwise have under the tort system.

d. <u>The "Expedited Distribution" Will Result in the Allowance of Non-Compensable Claims</u>

The Plan is also problematic because it allows for an "Expedited Distribution," in which any Abuse Claimant who (1) properly and substantially completes and files a Proof of Claim; (2) has personally signed his or her Proof of Claim attesting to the truth of its contents under penalty of perjury, or supplements his claim to provide such verification; and (3) elects to resolve his or her Abuse Claim for the Expedited Distribution shall be entitled to receive an expedited distribution of $2,500.00.[940] Abuse Claimants therefore may receive an Expedited Distribution of $2,500, without having to prove any part of their claim. "Each claimant who elects to do so effectively gets to unilaterally adjudicate whether or not his or her claim should be allowed."[941] Thus, whether the Abuse Claim is allowed lies solely within the discretion of the ***Abuse Claimant***, and not even the Abuse Claims Reviewer has an opportunity to review and rule on the merits of the claim.[942]

e. <u>The Debtor's Employees Have Presented No Evidence that the Plan Would Disallow Fraudulent Claims</u>

Finally, the Plan Proponents have presented no evidence that the Plan will address and disallow fraudulent or non-compensable claims. Father Hughes testified that he did not know what

[939] Nov. 30 Trial Tr. (Bitar), p. 31:6-19.
[940] Plan, § 8.3.
[941] Bitar Decl., ¶ 57.
[942] *Id.*

procedures were in place within the Plan to disallow such claims,[943] he was not aware of any provisions within the TDPs that the Tort Committee sought but the Debtor refused to include,[944] he could not identify any provision in the TDPs that required a claim to be disallowed where it was not compensable under New Jersey law,[945] he could not identify any due diligence undertaken by the Debtor to ensure that the procedures for allowing claims under the TDPs would disallow claims that were not compensable under New Jersey law,[946] and he could not point to anything in the TDPs "that would preclude a claim that's fraudulent from being allowed and paid by . . . the Trust."[947] Similarly, Mrs. Montgomery testified that she was not involved in any conversations with the Tort Committee to ensure that "only meritorious claims would be allowed,"[948] she was not aware that the Debtor had received assurances that the Trust would raise liability defenses against claims asserted against the Trust,[949] and she had no knowledge of any criteria within the TDPs that required the Abuse Claims Reviewer to disallow claims.[950] Even Mr. Prol confirmed that the Plan Proponents did not have any discussions about procedures within the TDPs to prevent the payment of non-compensable claims, the Debtor never inquired with the Tort Committee about such procedures, and the Debtor never discussed whether the Other Catholic Entities' legal responsibility should be included as one of the evaluation factors for the Initial Review Determination.[951]

[943] Hughes Dep. Tr., p. 124:3-8, 124:9-12, 124:15-19. *See also supra* § IV(D)(1) at note 698.
[944] Nov. 9 Trial Tr. (Hughes), p. 142:12-16.
[945] *Id.* at p. 142:21-24.
[946] *Id.* at pp. 142:25-143:3, 143:24.
[947] *Id.* At p. 144:1-4.
[948] Nov. 10 Trial Tr. (Montgomery), p. 187:12-17. *See also* Montgomery Dep. Tr., pp. 149:17-150:6.
[949] Nov. 10 Trial Tr. (Montgomery), p. 173:7-9.
[950] Montgomery Dep. Tr., p. 149:5-9.
[951] Nov. 16 Trial Tr. (Prol), pp. 174:17-24, 186:2-5, 187:20-23.

The lack of consideration by the Plan Proponents for the disallowance of Abuse Claims has resulted in TDPs that default to allowing all claims and then limit any avenue for their disallowance. As such, the Plan, as implemented by the TDPs, does not conform with the requirements of Sections 502(b)(1) or 704(a)(5) of the Bankruptcy Code as well as the principle that defenses to claims are preserved in bankruptcy. Because the Plan implements TDPs that will necessarily allow non-compensable claims, it fails to "achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[952] Thus, it is not proposed in good faith and it should not be confirmed.

4. The Plan is Designed to Allow Claims in Inflated Amounts

Third, the Plan lacks a finding of good faith because both the Plan and TDPs are designed to inflate the value of Abuse Claims.

a. The Eighth Amended Plan Marks a Dramatic Departure in the Way Abuse Claims are Valued Compared to the Fifth Amended Plan

A review between the Fifth Amended Plan and the Eighth Amended Plan shows the extent to which the claim valuation process changed in the Tort Committee's favor. Whereas the Fifth Amended Plan only provides one way in which claims are valued for the Debtor and Insurers alike, through a points system with points assigned by a Tort Claims Reviewer,[953] under the Eighth Amended Plan the Abuse Claims Reviewer assigns points, but a Neutral can separately conduct a Verdict Values Assessment used to pursue recoveries against the Insurers.[954] These Verdict

[952] *Am. Capital Equip., LLC*, 688 F.3d at 158.
[953] Nov. 30 Trial Tr. (Hinton), p. 134:10-17. *See also id.* at p. 133:14-16 (Stating with respect to Fifth Amended Plan, "there was one valuation methodology that was used to determine how much was going to be paid to claimants from the insurers and the Debtor . . . all together").
[954] *Id.* at pp. 72:19-73:5. *See also id.* at p. 158:8-9 ("the verdict value assessment is only being used to pursue recoveries from the insurers and . . . it's the verdict value assessment process that creates the higher values"); Hinton Decl., ¶ 8 ("the claim valuation procedure added to the Plan created a dual track for valuing

Values would then be used as the basis for Offers Within Limits, i.e., settlement demands made upon the Insurers, and then non-consensual Stipulations of Judgments that Independent Review Claimholders could seek to enforce in state court.[955]

In addition to the gating concerns about the use of Verdict Values, the manner in which those Verdict Values are determined and the valuation criteria and models put forth by the Plan Proponents provide no reassurance to the Insurers that the end result will not be artificially inflated claims that guaranty substantial payouts to the Tort Committee of as much as six, eight, or even ten times the values being used to award points for compensation from the Debtor paid through the Trust.[956] Such inflated claims are likely how the Tort Committee intends to compensate for the reduced payment over time from the Debtor and the Other Catholic Entities that it agreed to in the Tort Committee Settlement because none of these provisions was contained within the Fifth Amended Plan.[957]

b. <u>The TDPs' "Evaluation Factors" are Designed to Inflate Claims</u>

Before even considering the problems posed by the Verdict Values Assessment, the Initial Claim Review process under the TDPs in the Eighth Amended Plan separately places a weight on the scale in favor of larger recoveries.

First, all "allowed" claims under the Eighth Amended Plan (which is actually all Abuse Claims by default),[958] are automatically given a point value merely because a Proof of Claim has

claims and making coverage demands of insurers based on verdict values and that those provisions were prejudicial to insurers, inflated claims and contained no procedures for disallowing claims").

[955] *See* TDPs, §§ 8(xii), 8(xiii). *See also* McKnight Decl., ¶ 15; Nov. 30 Trial Tr. (Hinton), pp. 72:25-73:5.

[956] Nov. 30 Trial Tr. (Hinton), pp. 133:20-134:2, 158:12-20. *See also* Hinton Decl., ¶ 19 ("This dual track valuation feature of the Plan is prejudicial to insurers because the verdict values are expected to be so much higher than the Diocese's historical experience of resolving claims in the tort system."). *See also supra* § V(D).

[957] McKnight Decl., ¶ 15.

[958] *See* TDPs, § 11(iii).

been filed, even if the claimant suffered no injury.[959] Thus, the "free" 15 points provided to every Abuse Claim "likely provide for another automatic recovery with no analogous mechanism in the tort system"[960] and ensure that every Abuse Claim on file in the Bankruptcy Case is entitled to some compensation without even considering the claim's merits.[961]

Second, certain Evaluation Factors, such as the "Nature of Abuse & Circumstance," "center almost entirely on the conduct of the predator and barely touch on any allegation of negligence on the part of a defendant institution."[962] Indeed, "[t]he issue of the predator's propensity, or the institution's knowledge of such propensity," critical issues for assessing liability in the tort system, are "strikingly absent" and "factors relating to if the individual was on an accused list or a recidivist appear to be considered with the benefit of hindsight, not based on what the institution knew at the time, and with respect to which, under applicable law, they can be liable."[963] This "a significant departure from the tort system."[964] Similarly, the absence of any point allocation under the "Impact of Abuse" category would not result in a disallowance of the claim due to a lack of damages. "In the tort system this would be a basis for outright dismissal of the claim. Here it merely serves to decrease its value."[965] Finally, the Evaluation Factors allocate points for prior sex abuse litigation, which is not a factor that would be considered in the tort system.[966]

[959] *See* TDPs, § 11(iii). *See also* Bitar Decl., ¶ 14.
[960] Bitar Decl., ¶ 25.
[961] Nov. 30 Trial Tr. (Bitar), p. 28:18-23 ("Q: And is it possible, under the TDP, that a neutral might decide that an abuse claim has zero value? A: I don't believe that's correct.")
[962] *See* TDPs, § 11(1)(a). *See also* Bitar Decl., ¶ 48.
[963] Bitar Decl., ¶ 48.
[964] *Id.*
[965] *See* TDPs, § 11(1)(b). *See also* Bitar Decl., ¶¶ 49, 62.
[966] *See* TDPs, § 11(1)(c). *See also* Bitar Decl., ¶ 50.

In tandem, the Evaluation Factors do a poor job mirroring the considerations at play in the tort system, and will inflate any Initial Review Determination performed by the Abuse Claims Reviewer.

c. The Verdict Value Assessments are Inherently Biased and Will be Administered in a Manner Prejudicial to the Insurers

As previously discussed, the Verdict Value Assessments are a major component of the Eighth Amended Plan that were adopted following the Tort Committee Settlement. Yet the Plan Proponents cannot articular why a Verdict Value is even appropriate. Such values, assigned by the Neutral as an approximation for what "a reasonable jury would award," are not based on historical data or other criteria that the Neutral may use to assess the "reasonableness" of any verdict.[967]

The Debtor has never taken a case to verdict, so there are no "comparable" verdicts upon which the Neutral can make his or her decision.[968] Additionally, based on Mr. Hinton's review of the history of case resolutions by the Debtor, the average settlement values were "many times lower tha[n] the claims value estimates expected to be used to value insurer liabilities under the Plan."[969]

Even if the Neutral were to successfully apply the values of verdicts in other sexual abuse cases as part of the Verdict Values Assessment, the TDPs would not accurately estimate the Insurers' tort liability, because frequently there are lower-value cases brought in bankruptcy that would not be brought in the tort system since contingency fee attorneys would have insufficient incentive to take them on. However, even most cases that would be litigated outside of bankruptcy would not result in a verdict because they would be resolved prior to trial. "This means that the

[967] Bitar Decl., ¶ 14.
[968] Debtor's First RFA Resp. (IC 248), Nos. 12-13. *See also* Bitar Decl., ¶ 14.
[969] Hinton Decl., ¶ 21.

cases for which verdicts are observed historically are not representative of cases more generally."[970] Nonetheless, under the TDPs in the Eighth Amended Plan, the Neutral will value Independent Review Claims "as if they were all comparable to the small subset of actual cases litigated to trial."[971]

Additionally, the process of performing the Verdict Value Assessment is likely to yield inflated claims. While some discovery is permitted, it is "vague, ill-defined, and limited" and "[t]here is neither sufficient time nor a mechanism provided to conduct the robust discovery allowed under the tort system."[972] Even though the TDPs provide that "[a]ny Responsible Insurer shall be given a reasonable opportunity to participate in the Verdict Value Assessment at its sole expense" and "[a]ny Responsible Insurer who chooses to participate may raise and present any potentially applicable defenses to the Independent Review Claim to the Neutral," this is "a very narrow form of participation" because even the Responsible Insurers' participation would not be a "two-way activity" where they were engaging with the Independent Review Claimholder in wide ranging discovery.[973]

d. <u>The Purpose of the Claims Valuation Procedure in the Eighth Amended Plan is to Inflate Claims Against Insurers</u>

In tandem, the various provisions of the TDPs in the Eighth Amended Plan, including the amorphous Evaluation Factors for the Initial Review Determination and the byzantine Verdict Value Assessment, are designed to artificially inflate the value of claims that can be asserted against the Insurers in coverage actions or through Stipulations of Judgments, and the Plan Proponents fully expected this outcome as they were drafting the Plan.

[970] Hinton Decl., ¶ 39. *See also* Nov. 30 Trial Tr. (Hinton), p. 173:25-174:15 ("no one's asking the Judge to say what's the probability that this case could even get to trial").
[971] Hinton Decl., ¶ 39.
[972] Bitar Decl., ¶ 14.
[973] Nov. 30 Trial Tr. (Hinton), pp. 76:6-77:6 (citing TDPs, § 8(viii)(b)).

The Tort Committee worked closely with its state court counsel when drafting the Plan Documents, including individuals such as Jason Amala and Jeff Anderson.[974] Mr. Prol had multiple calls with the Tort Committee's state court counsel, including Mr. Amala, in April 2022 to discuss drafting the TDPs, the Plan, and Trust governance.[975] Once drafted, Prol asserted in various news articles that the Tort Committee Settlement would allow the Tort Committee to sue insurance companies for liability in the "hundreds of millions of dollars."[976] Applying the Claro Methodology used by Ms. McNally and Mr. Salisbury, this meant that the Tort Committee believed they would stand to receive as much as seven or eight hundred million in recoveries from the Insurers.[977] Consequently, Scott Harrington, one of the Insurers' experts, believed that confirming the Eighth Amended Plan would "transform the risk transfer agreements . . . and increase significantly the potential liabilities of non-settling insurers," which, in turn, would accomplish the Tort Committee's ultimate goal of "increase[ing] the Trust's leverage in any settlement negotiation."[978] In sum, the TDPs in the Eighth Amended Plan provide "incentives for the Trust to maximize payouts to claimants."[979]

For each of the reasons set forth above, the Verdict Value Assessment is unlikely to yield an accurate valuation of Abuse Claims in the Bankruptcy Case and will have the almost certain effect of inflating values to yield higher payouts to Abuse Claimants and their lawyers on the Tort

[974] Nov. 17 Trial Tr. (Prol), pp. 10:6-11:19.
[975] *Id.* at pp. 12:3-13:7.
[976] *Id.* at p. 26:5-25. *See also id.* at pp. 28:1-4 ("Q: And what you announced was positive to the TCC was that you could pursue the carriers for hundreds of millions of dollars, is that right? A: That we could continue to pursue the carriers, yes."); *id.* at 28:9-15 ("Q: So am I correct that one of the impacts of the Diocese walking away from the settlement agreement and going with the 8th Amended Plan was that, the TCC now thought - - now believed it can recover hundreds of millions of dollars from the insurers, right? A: [T]he Trust has the ability to obtain additional recoveries against the carriers, yes.").
[977] *Id.* at p. 28:16-20.
[978] Harrington Decl., ¶ 60.
[979] *Id.* at ¶ 61.

Committee. Accordingly, the proposed claim valuation procedure in the TDPs violates foundational principles of bankruptcy law underlying the allowance, denomination, and payment of claims.[980] The Plan therefore fails to "achieve a result consistent with the objectives and purposes of the Bankruptcy Code,"[981] cannot satisfy Section 1129(a)(3), and its confirmation must be denied.

D. Finding "B" in the Revised Proposed Confirmation Order is Inappropriately Broad

In addition to the Plan Proponents' lack of good faith in proposing the Plan, the "good faith" finding in Paragraph ¶ B of the Revised Proposed Confirmation Order is impermissibly overinclusive under Section 1129(a)(3) and cannot be made. In full, Section 1129(a)(3) provides, "The court shall confirm a plan only if . . . [t]he ***plan*** has been proposed in good faith and not by any means forbidden by law."[982] Key to this requirement is the word "***plan***." The only finding permitted or required under the plain language of Section 1129(a)(3), in other words, is that the plan was proposed in good faith – not that ancillary documents were.[983]

The court in *In re BSA* reached that conclusion after confronting this precise issue. The proposed confirmation order in *BSA* included, among other things, a finding that provided, "the [p]lan and the [t]rust [d]istribution [p]rocedures were proposed in good faith and are sufficient to satisfy the requirements of [S]ection 1129(a)(3) of the Bankruptcy Code" ("Finding Z").[984]

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[980] *See* 11 U.S.C. § 502(b) (""[T]he court . . . shall determine the amount of such claim in lawful currency of the United States . . ."); *Travelers Cas. & Sur. Co. of Am.*, 549 U.S. at 450 ("[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code") (internal citations and quotations omitted) (formatting in original); *Nuveen Mun. Tr.*, 692 F.3d at 295 ("[A] creditor cannot collect more, in total, than the amount it is owed.").

[981] *Am. Capital Equip. LLC*, 688 F.3d at 158.

[982] 11 U.S.C. § 1129(a)(3) (emphasis added).

[983] *See generally, BSA*, 642 B.R. at 621-633.

[984] *Id.* at 632.

Certain of the debtors' insurers in *BSA* objected to Finding Z (and other similar proposed findings) as inappropriate, arguing that they were "designed to prejudice their rights in future coverage litigation."[985] The plan supporters in response contended that Finding Z was proper because, among other things, "the entire framework of the [p]lan [wa]s a resolution of [abuse claims]."[986]

Judge Silverstein disagreed. After undertaking a thorough analysis of the Bankruptcy Code and the parties' positions, Judge Silverstein declined to make Finding Z.[987] In reaching her decision, Judge Silverstein concluded that Finding Z "d[id] not mirror the [Bankruptcy] Code" because its focus was the trust distribution procedures (not the plan), and Section 1129(a)(3) "does not justify a finding" that the trust distribution procedures were made in good faith.[988]

The same is true here. Like the debtors in *BSA*, the Plan Proponents have proposed a good faith finding that exceeds what the Bankruptcy Code permits. Specifically, the Revised Proposed Confirmation Order in relevant part provides, "The Plan ***and all documents and agreements necessary to implement the Plan, and all other relevant and necessary documents***, have been negotiated in good faith and at arm's length, do not conflict with applicable non-bankruptcy law, and shall, upon completion of documentation and execution, each be a valid, binding, and enforceable agreement."[989]

The Revised Proposed Confirmation Order thus purports to extend a finding of good faith to "all documents and agreements necessary to implement the Plan," along with "all other relevant and necessary documents"[990] – which presumably sweeps in the TDPs and Trust Agreement. Given its astonishing breadth, moreover, the good faith finding in Paragraph B potentially may

[985] *Id.* at 623.
[986] *Id.* at 632 (internal quotations omitted).
[987] *Id.* at 633.
[988] *Id.*
[989] Revised Proposed Confirmation Order, ¶ B (emphasis added).
[990] *Id.* (emphasis added).

apply to documents that neither this Court nor any party-in-interest have even ***seen*** (*e.g.*, the insurance assignment agreement that the Tort Committee has prepared but not shared externally[991]). Neither of these outcomes is at all appropriate or permissible under Section 1129(a)(3).[992] Accordingly, the Court should decline to make the finding in Paragraph B of the Revised Proposed Confirmation Order, along with any other similar language therein.

VIII. THE PLAN IS NOT FEASIBLE

The Plan cannot be confirmed as it is not feasible. Section 1129(a)(11) of the Bankruptcy Code codifies the feasibility requirement, permitting confirmation of a plan only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan …."[993] "[A] court cannot confirm visionary schemes which promise creditors . . . more under a proposed plan than the debtor can possibly attain after confirmation."[994]

The proponent of a plan bears the burden of establishing the plan's compliance with Section 1129 and "[a] debtor must prove a chapter 11 plan's feasibility by a preponderance of the evidence."[995] The Debtor cannot demonstrate by a preponderance of the evidence that the Plan is in fact feasible; instead, the evidence demonstrates the Debtor cannot meet its financial obligations.

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[991] *See* Weisenberg Dep. Tr., pp. 164:19-165:7 ("Q: So the Tort Committee has prepared an insurance assignment agreement? A: Correct . . . . Q: Has the Tort Committee shared a draft of the insurance assignment agreement with anyone other than its members or their state [court] counsel? A: No.").

[992] *BSA*, 642 B.R. at 633 ("[Section] 1129(a)(3) does not justify a finding that . . . the TDP[s] are appropriate or fair and equitable."). In addition to its unjustified breadth, Paragraph B is particularly inappropriate because it is unnecessary. The Plan does not include, as a condition precedent to effectiveness, that the Court make a good faith finding as to any of the other Plan Documents. *See generally*, Plan, § 14.1(viii).

[993] 11 U.S.C. 1129(a)(11).

[994] *In re Rack Engineering Co.*, 200 B.R. 302, 305 (W.D. Pa. 1996) (internal citation omitted).

[995] *In re Paragon Offshore PLC*, No. 16-10386, 2016 WL 6699318, at *17 (Bankr. D. Del. Nov. 15, 2016) (*citing In re T-H New Orleans Ltd. P'Ship*, 116 F.3d 801 (5th Cir. 1997)); *see also In re W.R. Grace & Co.*, 475 B.R. 34, 114 (D. Del. 2012) ("The debtor bears the burden of proof on this inquiry, and must show by a preponderance of the evidence that a reorganization plan is feasible.").

A. The Plan is Not Feasible as DOC Trust Lacks Sufficient Assets to Fulfill its Obligations Under the Plan and Related Documents

The Plan Proponents cannot demonstrate the feasibility of the Plan. The Debtor's own cash flow projections (the "Cash Flow Projections")[996] forecast negative net cash flows through fiscal year 2023 and negative cumulative net cash flow through fiscal year 2024.[997] The positive net cash flows in later fiscal years are unsupported by any evidence and the dramatic upturn in cash flow projected for 2025 is controverted by the Debtor's own analysis.

The Plan contemplates a loan from the DOC Trust (the "DOCT Loan") to assist the Debtor with the payment of the Initial Debtor Contribution. The Plan defines the DOCT Loan as a $15 million loan of non-restricted cash from DOC Trusts and conditions confirmation of the Plan on a finding that the DOCT Loan (among other things) provides significant and critical funding for the Plan and constitutes a substantial contribution to the success of the Plan.[998] The $15 million loan from DOC Trusts is accounted for in the Cash Flow Projections under Cash Sources in Year 2.

The Plan further provides that the Trust will be funded by the Additional Debtor Contributions; specifically that (i) no later than one year after the Effective Date, the Debtor shall transfer $10 million to the Trust, (ii) no later than two years after the Effective Date, the Debtor shall transfer an additional $10 million to the Trust, (iii) no later than three years after the Effective Date, the Debtor shall transfer an additional $10 million to the Trust, and (iv) no later than four years after the Effective Date, the Debtor shall transfer an additional $7.5 million to the Trust.[999]

The Cash Flow Projections include, under Plan Disbursements (as "Payments to Plan"): (i) a $10 million disbursement in Year 3, (ii) a $10 million disbursement in Year 4 and (iii) a $10

[996] (PP 0419).
[997] (PP 0419).
[998] *See* Plan, §§ 7.2.2, 14.1(b)(viii).
[999] *See id.* at § 7.2.2 (a) – (d).

million disbursement in Year 5. These "Payments to Plan" are on account of the ***Debtor's*** obligation to contribute the Additional Debtor Contributions provided for in Section 7.2.2. of the Plan.

While the Cash Flow Projections seemingly demonstrate positive Net Cash Flow in Year 3, Year 4 and Year 5, the Cash Flow Projections are only positive as the result of (i) $10 million in loan proceeds from DOC Trusts in Year 3, (ii) $10 million in loan proceeds from DOC Trusts in Year 4 and (iii) $10 million in loan proceeds from DOC Trusts in Year 5.

If the Cash Flow Projections included Year 6 the projections would include a $7.5 million Plan Disbursements (as "Payments to Plan") and a corresponding $7.5 million in loan proceeds from DOC Trusts to account for the Debtor's obligation to provide $7.5 million to the Trust no later than four years after the Effective Date.

The Debtor's own Cash Flow Projections demonstrate that the Debtor cannot meet its obligations under the Plan absent additional borrowing from DOC Trusts; additional borrowings that are not contemplated for or provided in the Plan and which are unlikely to be available to the Debtor as the DOC Trust lacks sufficient assets to actually make the disbursements required under the Plan and Cash Flow Projections.

The Eighth Amended Disclosure Statement provides the value of the DOC Trust assets "was $110,025,286 as of September 30, 2021.[1000] These assets are subject to market fluctuations."[1001] At the Confirmation Hearing, Mr. Wilen testified that the DOC Trusts held "a little over $100 million."[1002]

[1000] Eighth Amended Disclosure Statement, pp. 27-28.
[1001] *Id.* at pp. 22-23.
[1002] Nov. 14 Trial Tr. (Wilen), p. 37:3.

On November 22, 2022, the Debtor filed a *Motion for an Order Authorizing the Diocese to (I) Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 363, and 364 and (II) Granting Liens and Superpriority Claims to DOC Trusts Pursuant to 11 U.S.C. § 364(c)* (the "DIP Motion").[1003] While the Debtor initially offered no evidence in support of the DIP Motion, following objections from the Insurers, the Debtor filed the *Supplemental Certification of Laura J. Montgomery in Support* [STET] *Diocese's Motion for an Order Authorizing the Diocese to (I) Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 363 and 364, and (II) Granting Liens and Superpriority Claims to DOC Trusts Pursuant to 11 U.S.C. § 364(c)* (the "Supplemental Montgomery Certification.").[1004]

As set forth in the Supplemental Montgomery Certification, "DOC Trusts will contribute $10 million to the Trust under the Plan on the Effective Date, *which will have a significant impact on its investments*[]" and "DOC Trusts is already providing a secured loan to the Diocese in the amount of $14.75 million under the Plan on the Effective Date, *which will further impact its investments*."[1005] This $10 million contribution is set forth in the Plan as the DOCT Cash Contribution.

Like the Plan, the Supplemental Montgomery Certification fails to account for the additional $37.5 million to be loaned from the DOC Trusts to the Debtor as set forth on the Cash Projections, but presumably, three $10 million loans and one $7.5 million loan would also have a significant impact on the DOC Trust's investments, to the extent that the DOC Trust even possesses sufficient funds to provide such loans.

[1003] [Docket No. 2841].
[1004] [Docket No. 2919].
[1005] Supplemental Montgomery Certification, ¶ 5(a)-(b) (emphasis added).

On December 19, 2022, the Court entered the *Final Order (I) Authorizing Debtor to Obtain Postpetition Financing; and (II) Granting Liens and Superpriority Claims to DOC Trusts* (the "Final DIP Order").[1006] The Final DIP Order authorized the Debtor to obtain financing from DOC Trusts in the maximum amount of $12 million for the purpose of funding the Debtor's operating and working capital needs and payment of the administration expenses of the Debtor's Chapter 11 case. The DIP Motion failed to attach a budget (in violation of D.N.J. LBR 4001-3(b)); but presumably the Debtor will fully draw the available $12 million; thereby further impacting the DOC Trusts investments.

Under the Plan, the Cash Flow Projections, and the Final DIP Order the DOC Trusts obligations include:

	Contribution Detail	Amount
1.	DOCT Cash Contribution	$10 million
2.	DOCT Loan	$15 million
3.	DIP Financing	$12 million
4.	Year 3 Loan (DOC Trusts, Inc.)	$10 million
5.	Year 4 Loan (DOC Trusts, Inc.)	$10 million
6.	Year 5 Loan (DOC Trusts, Inc.)	$10 million
7.	Year 6 Loan (DOC Trusts, Inc.)	$7.5 million
Total DOC Trust Contributions		$74.5 million

However, as set forth in the Supplemental Montgomery Certification the "Diocese and DOC Trusts are required under its agreement with PNC Bank to maintain 200% of its outstanding loan amount in the Pledged Accounts (approximately $46 million)."[1007] As set forth in the Plan, "PNC Bank is an *unsecured* creditor of the Diocese but is *secured*, *inter alia*, by a Pledge

[1006] [Docket No. 2984].
[1007] Supplemental Montgomery Certification, p. ¶ 5(c).

Agreement and Guaranty by DOC Trusts."[1008] Therefore, it is DOC Trust that is required under loan documents with PNC Bank to maintain $46 million in the Pledged Accounts.

As Mrs. Montgomery testified at the Confirmation Hearing, the Debtor does not intend to repay the amounts owed to PNC; instead, the Debtor hopes to restructure its obligations under the PNC loan at a future date.[1009] The Cash Projections contemplate payments to PNC equal to (i) approximately $1 million in Year 3, (ii) approximately $2 million in Year 4 and (iii) approximately $2 million in Year 5. Thus, even if the Debtor makes the required payments to PNC Bank, after Year 5 the DOC Trusts must still maintain, at a minimum, approximately $36 million in the Pledged Accounts.

Therefore, the amounts required from the DOC Trust ($74.5 million in contributions under the Plan, the DIP Financing and the Cash Flow Projections) to fund the required distributions and to maintain the required reserves in the Pledge Accounts ($46 million in Year 1 and Year 2 and at least $36 million in Year 3, Year 4 and Year 5) exceed the value of the DOC Trust Assets set forth in the Eighth Amended Disclosure Statement and the value of the DOC Trust Assets as of the date of Mr. Wilen's testimony.

B. The Plan is Not Feasible as the Cash Flow Projections Rely on Unreasonable Assumptions

As set forth in the Eighth Amended Disclosure Statement, the Debtor's Gross Revenue for the fiscal year ending on June 30, 2019 was approximately $50.7 million, Gross Revenue for the fiscal year ending on June 30, 2020 was approximately $49.5 million and the Debtor's Gross Revenue for the fiscal year ending on June 30, 2021 was approximately $43.0 million.[1010]

[1008] Plan, § 5.2 (a).
[1009] Nov. 10 Trial Tr. (Montgomery), p. 137: 5-7 ("Q: So how does the Diocese intend to resolve that debt in five years or how do you believe it's feasible, if it is? A: We'll restructure it.").
[1010] Eighth Amended Disclosure Statement, p. 52.

The Cash Flow Projections provide that for Year 1 the Total Cash Inflows were approximately $49.7 million.[1011] Year 1 represents actual amounts received for the year ended June 30, 2022.[1012] In formulating the Cash Flow Projections the Debtor projected Year 2, Year 3, Year 4 and Year 6.

The Debtor's actual Total Cash Inflows in Year 1 were approximately $1 million less than the Gross Revenue for the fiscal year ending on June 30, 2019, a year unimpacted by the global pandemic. As Ms. Montgomery testified at the Confirmation Hearing, amounts collected on receivables in Year 1 were lower than the Debtor had anticipated, and the Debtor "tried to flow that through the remaining years."[1013]

Despite Mrs. Montgomery's testimony, the Debtor's Cash Flow Projections set forth an aggressive growth in Gross Revenue; compared to Year 1, the Cash Flow Projections forecast Gross Revenues will increase by:

- Approximately 9 percent for Year 2 to approximately $54 million (an amount that would exceed the Debtor's Gross Revenue for 2019 by approximately $3.3 million)
- Approximately 15 percent for Year 3 to approximately $57 million (an amount that would exceed the Debtor's Gross Revenue for 2019 by approximately $7.3 million)
- Approximately 21 percent for Year 4 to approximately $60 million (an amount that would exceed the Debtor's Gross Revenue for 2019 by approximately $10.3 million)
- Approximately 23 percent for Year 5 to approximately $61 million (an amount that would exceed the Debtor's Gross Revenue for 2019 by approximately 11.3 million).

[1011] (PP 0419).
[1012] Nov. 10 Trial Tr. (Montgomery), p. 145:21-23("Q: Okay. So the bottom line is you're saying based upon the time that's elapsed, the first column is actual? A: Yes.").
[1013] *Id.* at pp. 145:24-146:10 ("So the biggest changes that we made, unrestricted cash, we did lower that somewhat because of the amounts collected on receivables this year was lower than we had anticipated. So we tried to flow that through the remaining years.").

The Cash Flow Projections evidence negative Cumulative Net Cash Flow through Year 3 and absent explosive short-term growth in Cash Sources, the Debtor's Cumulative Net Cash Flow will remain negative in Year 4 and Year 5.

Further, the Debtor forecasts an incredibly aggressive growth in Cash Sources without offering any support for doing so despite a steady decline in church membership and the re-initiation of sexual abuse litigation under the terms of the Eighth Amended Plan.

Courts in this circuit routinely deny confirmation where the financial projections a debtor relies upon are incomplete or speculative as they are here.[1014] As outlined above, the Debtor's Gross Revenue has declined over the past three years and the Debtor has failed to provide evidence that congregational giving will increase let alone significantly increase in the coming years, particularly accounting for the potentially lasting impact of the sexual abuse allegations.[1015] In sum, Debtor has failed to meet its burden to show that "the things which are to be done after confirmation can be done as a practical matter under the facts." [1016]

C. All the Debtor's Projections Ignore the Impact of the Re-initiation of Abuse Claim Litigation Under the Eighth Amended Plan

While Section 1129(a)(11) does not require a guarantee of the plan's success, in determining whether a plan is feasible, the bankruptcy court must determine that the plan presents "a workable scheme of reorganization and operation from which there may be reasonable

[1014] *See Rack Engineering Co.*, 200 B.R. at 306-07 (denying plan confirmation where projections were speculative and plan did "not properly allow[] for unforeseen events."); *Surfango, Inc.*, 2009 WL 5184221, at *10-12 (finding plan was not feasible where plan proponents offered no evidence to support the company's financial viability); *In re Trigona*, 2009 WL 8556810, at *5-6 (Bankr. W.D. Pa. July 24, 2009) (denying plan confirmation where financing projections were "highly speculative."); *In re Chadda*, 2007 WL 3407375, at *5-6 (Bankr. E.D. Pa. Nov. 9, 2007) (denying plan confirmation where evidence of future financing was "too speculative to accept").

[1015] *See In re Charles Street African Methodist Episcopal Church of Boston*, 499 B.R. 66, 93, 108-09 (Bankr. D. Mass. 2013) (finding plan not feasible where it would place "extraordinary demands" on congregational giving to meet projected revenue.)

[1016] *In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985).

expectation of success."[1017] Here, the evidence proffered or adduced at the Confirmation Hearing by the Debtor is neither persuasive nor credible and is controverted by other evidence.

A core goal of the Diocese in filing for bankruptcy was to bring about an end to sexual abuse litigation against it and its parishes. The Insurance Settlement was designed to bring about a global settlement ending all litigation. In repudiating the Insurance Settlement and agreeing to cede control over the TDPs to the Tort Committee, the Debtor is now faced with a plan designed to re-initiate litigation over the abuse claims post-petition. While the debtor may not be liable for these claims, its membership, donations, and school enrollments will all be impacted by the continued publicity over abuse litigation. Yet, none of this is taken into account.

Courts are particularly skeptical of projections for non-profit organizations whose future revenue is speculative and heavily reliant on donations, as is the case here.[1018] *In re Archdiocese of Saint Paul and Minneapolis* is particularly illustrative on this issue.[1019] There, like here, the diocese filed for Chapter 11 in the wake of sexual abuse claims. The court found that the plan did not meet the feasibility requirement, and thus could not be confirmed, because the proposed financing was a "visionary promise to creditors" and lacked sufficient evidence that the debtor could attain such promise.[1020] As is the case here, the plan relied on unknown third-party sources to provide financing but failed to identify the amount or type of loan that the debtor must obtain.[1021]

[1017] *W.R. Grace & Co.*, 475 B.R. at 115; *see also In re Elec. Components Int'l*, No. 10-11054, 2010 WL 3350305, at *9 (Bankr. D. Del. May 11, 2010).

[1018] *See In re Save Our Springs (S.O.S.) Alliance, Inc.*, 632 F.3d 168, 172-73 (5th Cir. 2011) (finding nonprofit debtor reorganization plan was not feasible where voluntary pledges of donations were too speculative and there was no evidence of firm commitments); *In re Christian Faith Assembly*, 402 B.R. 794, 800-01 (Bankr. N.D. Ohio 2009) (church's plan was not feasible where financial projections were inadequate and excluded member tithes); *In re Archdiocese of Saint Paul and Minneapolis*, 579 B.R. 188, 204 (Bankr. D. Minn. 2017) (reliance on fundraising without "sufficiently firm commitment from its donors to contribute" did not meet feasibility requirement).

[1019] *In re Archdiocese of Saint Paul and Minneapolis*, 579 B.R. 188 (Bankr. D. Minn. 2017).

[1020] *Id.*

[1021] *Id.* at 203.

Funding also hinged on revenue from future litigation between claimants and the insurers, which the court found to be "at best speculative," and fundraising by the debtor.[1022] Without "evidence of sufficiently firm commitment from its donors to contribute," the court found the plan was not feasible and could not be confirmed.[1023]

The Plan proposed here contemplates a far more extreme "visionary promise." The Debtor's projection that its revenues will increase by upwards of twenty percent over a five year period do not take into consideration the impact of the continuation of high profile sexual abuse litigation under the Eighth Amended Plan. Nor do the Debtor's projections take into account whether PNC or another lender will be willing to extend credit in the future with sexual abuse litigation ongoing. The Debtor's projections simply assume a growth in membership and revenue as if there has been a global resolution of the sexual abuse claims litigation, but a plan is not feasible where its financial viability hinges on "future litigation that is uncertain and speculative."[1024]

While the Debtor may have thought that moving forward on a plan, even any plan, might lead to a global resolution, that is not the case here. As long as the Tort Committee believes that the Court will confirm a plan that allows it to dictate the terms for allowing and valuing their constituents' claims, the Tort Committee has no incentive to ever settle.[1025]

D. The Plan is Not Feasible Because the Trust is Not Adequately Funded

The Plan is also not feasible because the Trust is not adequately funded to defend the Abuse Claims. The Trust will be funded with a gross amount of $87.5 million. However, on the effective

[1022] *Id.* at 204.
[1023] *Id.* at 204.
[1024] *Id.* at 203.
[1025] Sep. 14 Hr'g Tr., p. 7:1-4 (Mr. Trenk: "It is my understanding that certain of the insurers, Century and Interstate, made an increase offer that the TCC was not prepared to consider and therefore, that was not successful and nothing was resolved in that course.")

date, the Trust would be funded with only $50 million in cash and the additional $37.5 million in funding would be contributed incrementally to the Trust in years two, three and four.[1026] The Plan and Trust Agreement do not account for the costs of defending the Abuse Claims to final judgment.

The SIRs under the LMI and Interstate Policies would, alone, reduce the amounts available to pay Abuse Claimants by as much as $25.5 million if there were an average of two $75,000 SIRs required to be paid for each of the approximately 170 Claimants who potentially allege abuse during the LMI and Interstate Policy periods, and an even higher amount if the average number of policy periods is more than two per Abuse Claimant.[1027]

The Plan utterly fails to provide for the performance of any SIR obligations by the Trust. The Plan seems to require that the Trust absorb the SIRs. However, the Plan contains no calculation of the likely amount of SIRs that the Trust would pay out of the $87.5 million fund. The crucial number of the amount of money left over after all SIRs are absorbed, if any, is absent from the Plan and no witness for the Plan Proponents has offered any evidence on that issue.

A simple calculation shows that the Trust's funding is inadequate to pay the costs of defending the Abuse Claims. The costs of defense can range from a low of $20,000 up to and exceeding $1.5 million.[1028]

325 abuse claimants filed 345 Abuse Claims before the bar date. Of those, 185 Abuse Claims allege sexual abuse potentially during the LMI policy periods or were tendered to LMI.[1029]

[1026] *See* Eighth Amended Plan, §§ 7.2.1-7.2.2.

[1027] *See* Hinton Decl., ¶¶ 40-44; *see also e.g.*, LMI 1980-1983 Policy (JX 0036), Part I (Aggregate Agreement), p. 4 (noting the $75,000 SIR payment).

[1028] Bitar Decl., ¶¶ 41-42. *See also* Phillips Dep. Tr., Ex. 3 (LMI 1190) (showing amount of defense costs incurred by the Debtor for prior abuse litigation).

[1029] After removing duplicates, the POC that allege abuse that occurred between November 27, 1972 and November 27, 1987, are Claim Nos. 61, 63, 82, 99, 101, 102, 103, 109, 110, 112, 114, 117, 118, 119, 121, 122, 124, 125, 127, 128, 132, 134, 135, 136, 139, 140, 141, 142, 143, 144, 145, 148, 149, 150, 152, 153, 154, 157, 160, 161, 162, 163, 165, 166, 168, 170, 171, 173, 178, 183, 185, 187, 189, 193, 197, 198, 200,

If all of those Abuse Claims were to be litigated, the total cost of defense could be as high as $277.5 million, or as low as $3.7 million. The median of $20,000 and $1.5 million, per claim, defense costs is $760,000. Multiplying that median number by the 185 Abuse Claims, for which LMI are asserted to be liable, yields $140,600,000, nearly double the amount of the Trust's *res*. This amount would need to be paid by the Debtor or the Trust before LMI will pay any indemnity costs, if applicable.[1030] Defending Abuse Claims implicating other insurers' policies would increase that amount substantially. In fact, Ms. Bitar estimates that the total defense costs could reach $450,000,000.[1031] As discussed above, depending on the number of SIRs required to be paid under the LMI Policies, $25.5 million or more, of the Trust's *res* would be paid to defense lawyers instead of Abuse Claimants.

In addition to the defense costs for Abuse Claims, the litigation of the Insurance Coverage Adversary Proceeding alone would cost the Trust, *i.e.*, the Abuse Claimants, $7 million to $10.6 million and would occur over three to five years.[1032] Those costs are not indemnifiable by any insurer. Moreover, many abuse claimants allege abuse prior to 1969 when there is no insurance, and there is no coverage for uncovered claims (*e.g.* claims for which there is an expected and intended defense, and punitive damages).

201, 202, 204, 209, 212, 213, 216, 218, 220, 221, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 237, 239, 241, 243, 244, 245, 246, 252, 253, 254, 255, 256, 260, 263, 266, 267, 270, 271, 272, 276, 283, 288, 320, 343, 351, 353, 354, 355, 368, 369, 374, 375, 376, 379, 381, 382, 383, 384, 385, 386, 394, 396, 398, 415, 416, 418, 419, 420, 423, 426, 427, 429, 430, 431, 433, 434, 435, 436, 438, 439, 440, 444, 446, 447, 449, 451, 452, 453, 456, 458, 460, 462, 463, 465, 466, 467, 468, 469, 470, 474, 476, 477, 478, 479, 482, 490, 492, 493, 495, 496, 497, 498, 499, 500, 501, 502, 505, 506, 507, 509, 510, 511, 513, 516, and 517.

[1030] *See* LMI 1980-1983 Policy (JX 0036), "Loss Payments Provision" at PAC-17 (The Loss Payment provision requires LMI to *reimburse* the Debtor only for "adjusted claims" in excess of the SIR, and only after there has been a determination that LMI is liable).

[1031] Nov. 30 Trial Tr. (Bitar), p. 41:7-12 ("Q: So if my math is correct, if there were 300 claims, rounding down, the cost of defending against those cases, alone, could exceed $450,000,000 correct? A: Your math is correct, and, yes, but again, some will be more money. Some could be as high as 1.5 million; some would be considerably less.").

[1032] *See* Salisbury Decl. ¶19.

It is unlikely that the Trust could pay any Abuse Claimants any money until all the Abuse Claims that go into the tort system are resolved, many years after Plan confirmation. Therefore, the Plan is not feasible because the Trust is not adequately funded.

E. The Debtor Lacks Funds Necessary to Address Administrative Claims

In addition to the issues with the Debtor's Cash Flow Projections and concerns with the Diocese's ability to continue operations, the Plan Proponents also have insufficient cash or a reserve to pay administrative expense claims on the Effective Date.[1033]

All administrative expenses must be paid on the Effective Date. Under Section 1129(a)(9) of the Bankruptcy Code, "the [Plan must provide] with respect to a claim of a kind specified in section 507(a)(2) . . . on the effective date of the plan, the holder will receive on account of such claim cash equal to the allowed amount of such claim," unless the holder of a particular claim agrees to different treatment with respect to such claim.[1034] However, the Insurers have not consented to different treatment than what is required by Section 1129(a)(9). The Insurers' Administrative Expense Claim would thus be entitled to priority status pursuant to Section 503(b)(1)(A), and to payment in full in order for the Debtor to confirm the Plan.[1035]

The obligation to pay the Insurers' Administrative Expense Claim in full on the Plan's effective date can be satisfied by setting aside a reserve.[1036] But the Plan does not establish a reserve to cover the potential Administrative Expense Claim resulting from the Debtor's breach of the Insurance Settlement. Even though the precise amount of the Insurers' Administrative Expense

[1033] The Insurers previously argued that the Plan's failure to include a reserve for their Administrative Expense Claim rendered it unconfirmable. *See Insurers' Preliminary Injunction to the Eighth Amended Plan of Reorganization for the Diocese of Camden, New Jersey* [Dkt. No. 2410], pp. 75-77.
[1034] 11 U.S.C. § 1129(a)(9)(A).
[1035] *See* 11 U.S.C. §§ 507(a)(2), 1129(a)(9)(A).
[1036] *Spansion, Inc.*, 426 B.R. at 146 (finding that a debtor can satisfy section 1129(a)(9) of the Bankruptcy Code by setting aside a reserve for administrative expense claims).

Claim is yet determined, there is sufficient evidence that it exceeds $2 million and could be many multiples of that number.[1037] Those fees and the basis for the Insurers' Administrative Expense Claim were outlined and reflected in Mr. McKnight's direct testimony.[1038] The "Insurers paid at least $2.4 million in legal fees and professional costs related to the Debtor's bankruptcy proceedings"[1039] and that amount does not include any other potential damages for the Debtor repudiating the Insurance Settlement. During the Plan Confirmation Proceedings, the Plan Proponents did not dispute that the Insurers hired and paid for experts and incurred significant legal fees in presenting and defending the Insurance Settlement. And they did not challenge Mr. McKnight's analysis and estimate of total fees requested as part of the Administrative Expense Claim.[1040]

Further, as previously set forth,[1041] due to the Debtor's unilateral decision to repudiate the settlement with the Insurers and subsequent failure to prosecute the 9019 Motion, the Insurers' Administrative Expense Claim includes any liability above and beyond the $30 million the Insurers' were required to pay under the Insurance Settlement. According to the Tort Committee's own estimate of the insurers' liability under the Plan, i.e., $123.5 million, the Insurers' Administrative Expense Claim (in addition to the fees and expense described above) would be at least $93.5 million, greater than the Debtor and Other Catholic Entities' total current contributions to the Plan.[1042] The Debtor willfully repudiated the settlement and intentionally declined to

[1037] *See* McKnight Decl., ¶ 7.
[1038] *See* McKnight Decl., ¶ 7, § IV.
[1039] *See id.* at ¶ 7.
[1040] During cross-examination, Mr. McKnight was asked briefly about his analysis of the legal bills for the Diocese and the Tort Committee. *See* Dec. 1 Trial. Tr. p. 19:4-6. At no point during the cross-examination of Mr. McKnight did the Plan Proponents challenge his analysis of the Insurers' legal fees.
[1041] *See supra* Statement of Facts, § D(5).
[1042] McKnight Decl., ¶¶ 7 16, 48; Hinton Decl., ¶ 15 (referencing testimony by Carl Salisbury). *See also id.* at ¶¶ 16, 47-48.

prosecute the 9019 Motion, and the Administrative Expense Claim was a foreseeable result of the Debtor's actions.[1043] The Debtor could, of course, mitigate the Insurers' Administrative Expense Claim arising from those decisions by reversing course and incorporating the terms of the Insurance Settlement into the Plan, or the Debtor could have taken other action to address the pending Administrative Expense Claim Adversary Proceeding. Rather than addressing the Administrative Expense Claim Adversary Proceeding, or quantifying the amount of the Administrative Expense Claim, the Debtor (with the support of the Tort Committee) sought to delay, and ultimately stay, the Administrative Expense Claim Adversary Proceeding. It is clear that the Court must take into account pending lawsuits and other claims in making its feasibility determination if such claims could compromise the ability of the Debtor to reorganize.[1044]

However, the record is devoid of evidence that the Debtor is establishing a reserve to satisfy the Insurers' Administrative Expense Claim. Father Hughes testified that he was not aware of any assessment or evaluation made by the Debtor of the value of the Insurers' Administrative Expense Claim for the alleged breach of the Insurance Settlement.[1045] Further, the updated cash flow projections prepared by Mr. Wilen presented at trial did not take into account the Insurers'

[1043] *See, e.g., Fin. of Am. v. Mortg. Winddown (In re Ditech Holding Corp.)*, No. 21-cv-10038 (LAK), 2022 WL 4448867, *9 n.59 (S.D.N.Y. Sep. 23, 2022) (debtor-in-possession induced post-petition benefits from a third-party but then repudiated the executory contract creating an administrative expense claim).

[1044] *See In re Pizza of Haw., Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985); *In re Nova Real Estate Inv. Trust*, 23 B.R. 62, 65 (Bankr. E.D. Va. 1982) (Section 502(c) mandates that a court has an affirmative duty, under proper circumstances, to estimate an unliquidated claim prior to confirmation where it could impact the feasibility of reorganization. The Court held if the unliquidated claim was not estimated prior to the voting deadline, the plan could not be confirmed based on 502(c)); *In re MacDonald*, 128 B.R. 161, 164 (Bankr. W.D. Tex. 1991) ("The estimation of an unliquidated or contingent administrative claim such as the post-petition tort claim is essential prior to the hearing on confirmation of a plan, in order for the court to evaluate the feasibility of the plan without unduly delaying the confirmation process."); *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 518 (9th Cir. 2007) ("a bankruptcy court cannot adequately determine a plan's feasibility for purposes of section 1129(a)(11) without evaluating whether a potential future judgment may affect the debtor's ability to implement its plan.") (affirming district court decision to vacate plan confirmation).

[1045] Nov. 9 Trial Tr. (Hughes), pp. 181:11-14, 183:18.

Administrative Expense Claim.[1046] Finally, the liquidation analysis prepared by Eisner for the Eighth Amended Disclosure Statement did not take into account the Insurers' Administrative Expense Claim.[1047]

Even when the Debtor filed its motion for additional DIP Financing, the Debtor did not contemplate or account for the potential Administrative Expense Claim. The Court approved additional DIP Financing of up to $12 million from the DOC Trusts. That amount is needed to pay "certain administrative expenses,"[1048] specifically the professional fees.[1049] Based on the evidence from the Plan Confirmation Proceedings, the Debtor will be unable to meet its financial obligations without a reserve. If the Insurers' Administrative Expense Claim is allowed, the Debtor has no way to pay it with the cash on hand.

Because the Plan fails to establish a reserve for the payment of allowed administrative expense claims, the Plan cannot satisfy Section 1129(a)(9) and is not feasible under Section 1129(a)(11) and cannot be confirmed.

IX. THE EXCULPATION CLAUSE AND JUDGMENT REDUCTION CLAUSE VIOLATE APPLICABLE LAW

Each of the Exculpation Clause and Judgment Reduction Clause is fatally flawed, rendering the Plan unconfirmable under Sections 1129(a)(1) and (3). As set forth in greater detail below, the Exculpation Clause and/or the Judgment Reduction Clause suffer from at least the

[1046] Nov. 10 Trial Tr. (Montgomery), p. 201:13-22 (referencing (PP 419)); Nov. 14 Trial Tr. (Wilen), p. 97:20-25 ("Q: [W]ere any administrative claims by the insurers factored into cash flow projections? A: No the[y] were not. Q: Were the insurers administrative claims factored into the plan disbursements under . . . page 3 of Exhibit 419? A: No, they were not.").
[1047] Nov. 14 Trial Tr. (Wilen), pp. 103:15-18, 106:2-12 ("Q: How much value if any is attributed to the insurers' administrative claims in the liquidation analysis you presented today? A: It's not.").
[1048] *See* [Dkt. No. 2877], at 3.
[1049] *See* Dec. 1 Trial Tr., p. 56:23-25 ("THE COURT: "All right. So let me back up. Is this $12,000,000 for professional fees only? . . . . MR. TRENK: Yes")

following deficiencies: (i) the Exculpation Clause is impermissibly overbroad; (ii) the Judgment Reduction Clause is facially inadequate; and (iii) both the Exculpation Clause and the Judgment Reduction Clause violate the Insurers' due process rights.

A. The Exculpation Clause Is Inappropriately Broad

Due to the overinclusive definition of "Exculpated Parties," the Exculpation Clause exceeds the limits for acceptable exculpations in Chapter 11 plans. The Third Circuit delineated these boundaries in *In re PWS Holding Corp.*,[1050] holding that a Chapter 11 plan "may exculpate a creditor's committee, its members, and estate professionals for their actions in the bankruptcy case, except where those actions amount to willful misconduct or gross negligence."[1051] The *PWS Holding* Court reached this conclusion primarily by analyzing Section 1103(c) and determining that it "impl[ies] . . . a limited grant of immunity to committee members . . . for actions within the scope of their duties" as fiduciaries.[1052] As such, courts within the Third Circuit have repeatedly found that *PWS Holding* permits exculpation only of estate ***fiduciaries***.[1053] More specifically, an exculpation clause "must be limited to . . . estate professionals, the [c]ommittees and their members, and the [d]ebtor[']s directors and officers."[1054]

The Exculpation Clause violates this cardinal rule. As set forth above, the Exculpation Clause through the definition of "Exculpated Party" sweeps in the "Estate" (defined to mean "the

[1050] 228 F.3d 224 (3d Cir. 2000).
[1051] *Id. at* 246.
[1052] *Id*.
[1053] *See, e.g., In re Wash. Mut., Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011) ("That fiduciary standard [under *PWS Holding*], however, applies only to estate fiduciaries. [. . .] The exculpation clause must be limited to the fiduciaries who have served during the chapter 11 proceeding."); *In re PTL Holdings LLC*, No. 11-12676 BLS, 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011) ("Accordingly, the exculpation clause here must be reeled into [*sic*] include only those parties who have acted as estate fiduciaries and their professionals."); *In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del. 2011) (holding that the exculpation clause "must exclude non-fiduciaries"). *Accord, In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) (approving an exculpation that had been "modified . . . so as to apply only to estate fiduciaries.").
[1054] *Wash. Mut.*, 442 B.R. at 350.

estate of the Debtor"[1055]) and members of the Finance Council and College of Consultors (collectively herein, the "Consultative Bodies"). But neither the Estate nor the various members of the Consultative Bodies is an estate professional, an official committee (or member thereof), or an officer or director of the Debtor.[1056] Put differently, neither the Estate nor any of the members of the Consultative Bodies is an estate fiduciary under the *PWS Holding* rubric. This alone warrants denial of the Exculpation Clause as written.[1057]

Counsel for the individual Committee members are also not estate professionals. For example, Jeff Anderson is not an estate professional by reason of his representation in their individual capacity of one or more of the members of the Tort Committee.

As a general matter, moreover, it is unlikely that the Estate or any member of the Consultative Bodies is a fiduciary ***at all***. At a minimum, a fiduciary relationship typically requires "an element of control . . . that makes one party vulnerable to the other and unable to protect itself."[1058] But the members of the Consultative Bodies do not have "control"[1059] over the Debtor (or the Estate). They instead simply provide "advice and counsel"[1060] to the Bishop, who is the ultimate – and occasionally, sole – decision-maker for the Debtor.[1061] The Estate likewise lacks the requisite control of a fiduciary; it is a legal construct that cannot act for or on behalf of itself

[1055] Plan, § 2.2.48.
[1056] *Cf. Wash. Mut.*, 442 B.R. at 350.
[1057] *Cf. id*.
[1058] *MBIA Ins. Co. v. Tilton (In re Zohar III)*, Nos. 18-10512 (KBO), 20-50776 (KBO), 2021 Bankr. LEXIS 1947, at *37 (Bankr. D. Del. July 23, 2021). In some contexts, particularly objections to discharge under Section 523(a)(4), the definition of a fiduciary is even narrower: it "must arise from an express or technical trust." *McCaffery v. McCaffery (In re McCaffery)*, Nos. 14-23687, 14-1887, 2016 Bankr. LEXIS 4319, at *3 (Bankr. D.N.J. Dec. 7, 2016).
[1059] *Zohar III*, 2021 Bankr. LEXIS 1947, at *37.
[1060] Nov. 9 Trial Tr. (Hughes), p. 171:17. *See also id*. at 171:14-18 ("A: One is the Finance Council, the other is the College of Consultors. Q: Okay. And those are the groups that the bishop goes to, to receive advice and counsel, right? A: Correct.").
[1061] *Id.* at p. 58:19-20 ("Every Bishop is we say, sui generis. They are the authority of their own territory."); *id*. at 34:19-22 ("Q: So both under New Jersey law and canonical law, who makes and made, in this case, the ultimate decision to file these proceedings? A: Bishop Sullivan.").

or anyone else.[1062] Thus, neither the Estate nor the members of the Consultative Bodies fits within the general meaning of fiduciary. And because the Exculpation Clause includes these parties, it is overbroad and cannot be approved.

B. The Judgment Reduction Clause Is Non-Compensatory and Punitive

While the Exculpation Clause reaches too far, the Judgment Reduction Clause falls short. It is riddled with conflicting language inconsistent with – and often, directly contrary to – the purpose of judgment reduction. In its simplest form, judgment reduction is a type of compensation afforded to litigants whose claims are forcibly (*i.e.*, nonconsensually) extinguished. This typically arises in the context of partial settlements in multiparty litigation, where defendants who wish to settle may face claims derivative of the underlying litigation (such as indemnity, contribution, or other related causes) brought or held by their co-defendants (generically, a "Derivative Claim").

For obvious reasons, defendants who wish to settle are unlikely to do so without some form of protection from these Derivative Claims. But for equally obvious reasons, the non-settling co-defendants are unlikely to voluntarily relinquish their valuable Derivative Claims. Settling defendants in multiparty litigation therefore often seek a bar order, which extinguishes the non-settling defendants' rights to recover their respective Derivative Claims from any settling defendants. To accomplish this task without offending principles of due process (*see infra*), however, the bar order must also adequately compensate the non-settling defendants for their extinguished Derivative Claims. That compensation ordinarily is judgment reduction. Judgment reduction generally provides for any judgment entered against a non-settling defendant to be decreased by the amount such defendant would have recovered on its Derivative Claims (were

[1062] *Cf.* 11 U.S.C. § 541. Further, the Estate is the entity to which the relevant fiduciaries owe their duty. It is nonsensical to suggest that the Estate is somehow a fiduciary to itself.

they still extant). Notably, this construct – and the point of judgment reduction overall – is ***compensatory*** in nature.

Here, the Plan, via the releases and injunctions, interferes with the Insurers' rights because it bars the Non-Settling Insurers from asserting Contribution Claims against any Settling Insurer. Proper judgment reduction must compensate the Non-Settling Insurers for the value of these barred Contribution Claims. But the Judgment Reduction Clause does not. While the Primary Reduction Provision ostensibly provides at least some (though still inadequate) compensation for Contribution Claims, it is countermanded by the remainder of the Judgment Reduction Clause – beginning with the Forced Reduction Provision.

The Forced Reduction Provision purports to reduce a Non-Settling Insurer's ***Contribution Claim*** rather than the judgment, if any, against the Non-Settling Insurer. Specifically, the Forced Reduction Provision states: "[If] a reduction is not made as described above, then any Contribution Claim by any Non-Settling Insurer against any of the Settling Insurers shall be reduced by the Reduction Amount." There are at least two problems with this.

First, it is absurd. Read literally, the Forced Reduction Provision requires a Contribution Claim to be "reduced by the Reduction Amount." But under the Primary Reduction Provision, "Reduction Amount" is defined as "the amount, if any, that any of the Settling Insurers is liable to pay [a] Non-Settling Insurer as a result of its Contribution Claim, so that the Contribution Claim is thereby satisfied and extinguished entirely." Reducing a Contribution Claim by the Reduction Amount therefore would zero out the Contribution Claim.

To illustrate: If an Alleged Insured asserts in an Action against a Non-Settling Insurer a claim worth $100, and the Non-Settling Insurer in that same Action asserts (and prevails upon) a Contribution Claim worth $100, then the Reduction Amount would equal $100. And under the

Forced Reduction Provision, this Reduction Amount is applied to the Non-Settling Insurer's ***Contribution Claim*** ($100). The Forced Reduction Provision thus reduces the value of a Contribution Claim by the value of that same Contribution Claim. This is completely circular.

More to the point, it is directly contrary to the primary objective of judgment reduction (*i.e.*, compensation for barred claims). To be at all compensatory in the above scenario, the Reduction Amount must be applied not to the Contribution Claim ***held by*** the Non-Settling Insurer, but to the ***judgment against*** the Non-Settling Insurer (here, $100). This proper application reduces to $0 the ultimate judgment against the Non-Settling Insurer, which (under these facts) compensates the Non-Settling Insurer for the full value of its barred Contribution Claim. Since the Forced Reduction Provision fails to do this and instead ***extinguishes*** the Contribution Claim, it clearly fails to compensate the Non-Settling Insurer(s) for the value thereof and is antithetical to the entire purpose of judgment reduction.

Equally problematic is the final segment of the Judgment Reduction Clause, the Reimbursement Provision. Under the Reimbursement Provision, a Non-Settling Insurer must "fully reimburse" a Settling Insurer's "costs and expenses, including legal fees, incurred in responding to the Contribution Claim Action" if "application of the Reduction Amount eliminates the Non-Settling Insurer's Contribution Claim." This makes little sense.

As a threshold matter, it is not clear how or why a Settling Insurer would incur any expense because of a "Contribution Claim Action." The Supplemental Settling Insurer Injunction enjoins (among other things) the "commen[cement] or continu[ation] . . . [of] any action or other proceeding . . . against the Settling Insurers,"[1063] specifically including Contribution Claims,[1064]

[1063] Plan, § 11.3(a).
[1064] *Id.* at § 11.3.

which the Channeling Injunction exclusively channels to the Trust.[1065] Thus, a Settling Insurer presumably could not be compelled to appear in an Action (involving a Contribution Claim or otherwise) – let alone incur any costs or fees because of one. That is, after all, the point of settling.

But even if a Settling Insurer were to incur expenses on account of a Contribution Claim, the Reimbursement Provision still would be inappropriate. Because of the circularity of the Forced Reduction Provision, application of the Reduction Amount would – practically as a matter of course – eliminate the Non-Settling Insurer's Contribution Claim under the Reimbursement Provision. The upshot of the Reimbursement Provision therefore is that a Non-Settling Insurer would be saddled with a Settling Insurer's costs and fees as a ***consequence*** of successfully asserting a Contribution Claim. The Reimbursement Provision, in other words, effectively penalizes Non-Settling Insurers for bringing (and prevailing upon) Contribution Claims. It is difficult to discern what possible purpose this serves, other than an underhanded attempt to prevent the Non-Settling Insurers from ever asserting a Contribution Claim.

It is, however, clear that neither the Reimbursement Provision nor the Forced Reduction Provision compensate the Non-Settling Insurers for the value of their Contribution Claims. As such, the Judgment Reduction Clause as a whole is facially inadequate and cannot be approved as written.

C. The Exculpation Clause and Judgment Reduction Clause Violate the Non-Settling Insurers' Due Process Rights

In addition to the specific defects described above, the Judgment Reduction Clause and the Exculpation Clause share a common flaw: both violate the Non-Settling Insurers' right to due process. Since the founding of the Republic,[1066] American law has prohibited any deprivation of

[1065] *Id.* at § 11.2(a)(i) ("Any and all Channeled Claims are channeled into the Trust . . ."); *id.* at § 2.2.21 (defining "Channeled Claim(s)" to include, among others, "Contribution Claims.").
[1066] *See* U.S. CONST. amend. V.

"life, liberty or property by adjudication" without due process.[1067] And as the Supreme Court has long held, "a cause of action is a species of property protected by the . . . Due Process Clause."[1068] The Due Process Clause thus imposes "constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."[1069]

The Exculpation Clause flouts this fundamental precept. Pursuant to the Exculpation Clause, the Debtor and its Estate (among others) are exculpated from "any liability" related to, among other things, the Chapter 11 Case or "the formulation, ***negotiation***, ***or pursuit of confirmation of [the] Plan*** [. . .]," with carveouts for certain claims like fraud or gross negligence. The Administrative Expense Claim Adversary Proceeding, however, is not specifically included within these carveouts. And the Administrative Expense Claim Adversary Proceeding seeks, among other things, damages for the Debtor's abandonment and resulting breach of the Insurance Settlement – which definitionally occurred "in connection with the Chapter 11 Case" and/or "the formulation, negotiation, or pursuit of confirmation" of the Plan. It is possible, in other words, that the Debtor will attempt to assert that the Exculpation Clause releases the Debtor and the Estate from any liability for the claims alleged in the Administrative Expense Claim Adversary Proceeding, thus extinguishing the action *ipso jure*. This offends basic notions of due process and, as a result, prevents confirmation of the Plan.[1070]

[1067] *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).
[1068] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950)). *See also United States v. Neff*, 787 F. App'x 81, 91 (3d Cir. 2019) ("An entitlement to a remedy is like an entitlement to money (the most common remedy).").
[1069] *Societe Internationale Pour Participations*, 357 U.S. at 209.
[1070] *Cf.* 11 U.S.C. §§ 1129(a)(1), (3). Notably, when confronted with a similar issue in *Washington Mutual*, Judge Walrath explicitly held that the exculpation clause "must carve out any claims related to the [pending adversary proceeding] until the meris of those claims are resolved." 442 B.R. at 351.

The Judgment Reduction Clause fails to satisfy the demands of due process for similar reasons. As set forth above, judgment reduction is (and must be) compensatory. This is grounded in due process: to enjoin one litigant's claim against another litigant, without consent or adjudication on the merits, a bar order must provide adequate compensation. In multiparty litigation involving Derivative Claims, this compensation typically takes the form of judgment reduction, which affords each non-settling defendant a judgment credit worth $X in return for eliminating its Derivative Claim worth $X – an even exchange. A defensive (offsetting) judgment reduction therefore typically is sufficient to adequately compensate the litigants whose Derivative Claims simply allocate proportional fault.[1071]

But not ***all*** Derivative Claims are so constrained. A non-settling defendant may have a Derivative Claim for relief beyond the apportionment of relative fault (*e.g.*, a claim for reimbursement). Put differently, a non-settling defendant may have a Derivative Claim for which the damages sought do not consist solely of "the non-settling defendant's liability to the plaintiff."[1072] And the value of that Derivative Claim may exceed such non-settling defendant's share of the underlying judgment – assuming the non-settling defendant suffers an adverse judgment to begin with. In either scenario, a purely defensive judgment reduction cannot compensate the non-settling defendant for the (full) value of her extinguished claim: it is only possible to set-off if (or to the extent that) the amount of the underlying judgment against such non-settling defendant is not less than the value of her Derivative Claim.[1073] Otherwise, an

[1071] *E.g.*, *Papas*, 728 F.3d at 579.
[1072] *Gerber*, 329 F.3d at 307.
[1073] *Cf. Papas*, 728 F.3d at 579 ("Ordinarily, the potential harshness of a bar order is mitigated by a judgment credit provision that protects a nonsettling party from paying damages exceeding its own liability.") (internal citations and quotations omitted).

offsetting judgment reduction shortchanges the non-settling defendant for the amount by which the latter exceeds the former.

As courts have held repeatedly, claims left uncompensated by a judgment reduction clause should not be extinguished.[1074] In *In re Fraser's Boiler Service, Inc*.,[1075] for example, the District Court for the Western District of Washington reversed a bankruptcy court order that, among other things, included an insufficiently compensatory judgment reduction clause. The *Fraser's Boiler Service* appeal arose out of a prebankruptcy settlement agreement (the "FBS Settlement") between a defunct manufacturer ("FBS") and some of its insurers (the "Settling FBS Insurers").[1076] The FBS Settlement provided for, among other things, the Settling FBS Insurers' buyback of their respective policies, with such sale to be "free and clear" under Section 363(f).[1077] To effectuate the "free and clear" nature of the buyback and sale, the FBS Settlement also contemplated a permanent injunction against claims related to the policies, including certain claims that FBS' remaining (non-settling) insurers (the "Remaining FBS Insurers") held against the Settling FBS Insurers (the "FBS Claims").[1078] After reaching the FBS Settlement with the Settling FBS Insurers, FBS filed a voluntary petition for relief under Chapter 11 and sought approval of the FBS Settlement and related injunction-in-aid.[1079]

[1074] *See Gerber*, 329 F.3d at 306 ("If, however, [non-settling defendant] . . . has not been compensated for those losses by the judgment credit . . . such claims should not be extinguished."). *See also id*. at 306-307 (citing cases from the 10th and 11th Circuits); *Papas*, 728 F.3d at 579 ("[C]ourts that have allowed bar orders have only barred claims in which the damages are measured by the defendant's liability to the plaintiff . . . This limitation makes sense because when the scope of a bar order is limited to claims for contribution or indemnity, the court can compensate the non-settling defendants for the loss of those claims by reducing any future judgment against them. [. . .] A bar order that enjoins independent claims and provides no compensation is problematic to say the least.") (internal citations and quotations omitted).

[1075] No. 3:18-CV-05637-RBL, 2019 WL 1099713 (W.D. Wash. Mar. 8, 2019).

[1076] *Id*. at *1.

[1077] *Id*.

[1078] *Id*.

[1079] *See id*.

The bankruptcy court thereafter approved the FBS Settlement over the Remaining FBS Insurers' objections and entered an order (the "Buyback Order") authorizing the transaction.[1080] As particularly relevant here, the Buyback Order also (i) permanently enjoined the FBS Claims and (ii) included judgment reduction language.[1081] This language (as follows, the "FBS Reduction") provided: "any judgment on any [FBS] Claim against one or more [Remaining FBS] Insurers shall be reduced by the adjudicated amount of any [FBS] Claim such [Remaining FBS] Insurer would have been able to successfully assert against the [FBS] Insurers."[1082] On appeal, FBS claimed that the Buyback Order should be affirmed because the FBS Reduction adequately protected the Remaining FBS Insurers' interests.[1083]

Judge Leighton disagreed.[1084] In a lengthy opinion reversing the Buyback Order, Judge Leighton analyzed the suitability of the FBS Reduction and found it wanting, holding that it "provide[d] almost no protection."[1085] He based this decision in part on the defensive-only (offsetting) nature of the FBS Reduction, which "only offset[] costs . . . [in the event of] a judgment against one of [the Remaining FBS Insurers]."[1086] As a result of this structure, "if the [Remaining FBS] Insurers were to ***successfully*** defend against a claim, there would be no way for them to offset such costs under the [FBS Language]."[1087] The operative judgment reduction, in other words, lacked any mechanism by which the non-settling defendants (the Remaining FBS Insurers) could recover on their Derivative Claims (the FBS Claims) that exceeded the underlying judgment.

[1080] *See id.*
[1081] *Id. See also id.* at *8.
[1082] *Id.* at *8.
[1083] *See id.*
[1084] *See id.* at *9.
[1085] *Id.*
[1086] *Id.*
[1087] *Id.* (Emphasis in original).

That is precisely the problem with the Judgment Reduction Clause here. The Judgment Reduction Clause, much like the FBS Language at issue in *Fraser's Boiler Service*, lacks any provision for the satisfaction of Contribution Claims that exceed the Non-Settling Insurer's share of the underlying judgment.[1088] Instead, the Judgment Reduction Clause only permits defensive offsets (*i.e.*, a credit up to the amount of the underlying judgment).[1089] After giving effect to the injunctions and releases in the Plan, the outcome is that any amount of a Contribution Claim greater than the underlying judgment (if any) against the applicable Non-Settling Insurer is extinguished without payment in return.[1090]

This is fundamentally inconsistent with the purpose of judgment reduction and the constitutional imperative on which judgment reduction is based.[1091] A payment worth less than the value of the property given up in exchange – or worse, no payment at all – is not adequate compensation.[1092] It is at best unfair, and at worst unconstitutional.[1093] But either way, no Non-Settling Insurer should be stripped of valuable Contribution Claims without fair compensation. Accordingly, the Plan should not be confirmed.

X. THE PLAN IS UNCONFIRMABLE AS IT WOULD ALLOW PERSONAL INJURY ATTORNEYS TO RECEIVE RECOVERIES BEYOND THAT PERMITTED UNDER NEW JERSEY LAW

[1088] *Compare id*. *with* Revised Confirmation Order, ¶ 51(b).
[1089] *See* Revised Confirmation Order, ¶ 51(b).
[1090] *Compare* Revised Confirmation Order, ¶ 36(b) (". . . [A]ll Persons that have held or asserted, that hold or assert, or that may in the future hold or assert any claim or cause of action . . . against any Insurance Company based upon, attributable to, arising out of, or in any way connected with any Abuse Insurance Policy or other insurance policy issued by a Setting Insurance Company covering Abuse Claims . . . shall be stayed, restrained, and enjoined . . .") *and id*. at ¶ 41 (Release) *with id*. at ¶ 51.
[1091] *Cf. Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297, 306 (2d Cir. 2003).
[1092] *Cf. Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297, 306 (2d Cir. 2003).
[1093] *Papas*, 728 F.3d at 579 ("A bar order that enjoins independent claims and provides no compensation is problematic to say the least.").

The Bankruptcy Code forbids confirmation of any Plan proposed "by any means forbidden by law."[1094] To meet the requirements of Section 1129(a)(3) the Plan must "fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[1095] The Eighth Amended Plan would have a result fundamentally at odds with the purposes of the Bankruptcy Code – it would permit an exorbitant amount of the Plan Trust to be captured by the Abuse Claimants' counsel, at the expense of the Abuse Claimants. Moreover, the Eighth Amended Plan would apparently permit out-of-state attorneys to charge fees above New Jersey's statutory cap on contingency fees, in violation of New Jersey law.

A. The Court is Responsible for Ensuring that Attorneys' Fees are Reasonable and do not Deplete the Plan Trust

This Court serves as a gatekeeper preventing unreasonable attorneys' fees from unduly depleting the resources available to Abuse Claimants in both bankruptcy and mass tort cases. Bankruptcy and mass tort cases, by their nature, create opportunities for unscrupulous professionals to drain their clients' assets. For that reason, "the bankruptcy court must protect the estate lest overreaching attorneys or other professionals drain it of wealth which by right should inure to the benefit of unsecured creditors."[1096]

The same principle applies to recoveries in mass tort cases, and the Plan Trust in this case. Unreasonable or excessive contingent fee agreements undermine public faith in the

[1094] 11 U.S.C. § 1129(a)(3).
[1095] *PWS Holding Corp.*, 228 F.3d at 242.
[1096] *In re Badyrka*, No. 5:20-03618-MJC, 2022 WL 4656034, at *6 (M.D. Pa. Sept. 30, 2022) (quoting *In re Busy Beaver Bldg. Centers*, 19 F.3d 833, 844 (3d Cir. 1994)); *Matter of Liberal Market, Inc.*, 24 B.R. 653, 657 (S.D. Ohio 1982) ("The Court is under a duty to determine independently the reasonableness of fees charged by professionals against a debtor's estate, even if there are no objections by parties in interest.") (collecting cases).

judicial system.[1097] To prevent both the diversion of fees away from claimants and the undermining of faith in the legal system, courts have recognized a responsibility, and an inherent power, to limit contingent fees.[1098] This responsibility is heightened when there is an inherent conflict of interest because "claimant's attorneys [are] unlikely to question the propriety of their own fees, and the defendant ha[s] no incentive to jeopardize the settlement agreement by raising the issue."[1099]

The Third Circuit, in particular, has admonished courts to apply "careful and comprehensive scrutiny" in overseeing mass tort bankruptcies.[1100] This close scrutiny is required, the court explained, because the issues that arise in resolving mass tort bankruptcies "are similar to those that arise in class actions for personal injuries," where settlement presents serious risks that class members' interests may be compromised by "lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class."[1101] "Correspondingly, the level of court supervision must be of a high order."[1102]

B. More Money will be Paid to the Claimant's Lawyers Under This Plan than will be Paid to Claimants

The Eighth Amended Plan facilitates the diversion of the proceeds of the bankruptcy to plaintiffs' lawyers, rather than survivors, on a scale contrary to New Jersey regulations governing

[1097] *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, No. 05-1708 (DWF/AJB), 2008 WL 682174, at *17-18 (D. Minn. Mar. 7, 2008) (finding that "this Court has the inherent right and responsibility to supervise the members of its bar in both individual and mass actions, including the right to review contingency fee contracts for fairness") (collecting cases).
[1098] *In re Vioxx Products Liability Litigation*, 650 F. Supp. 2d 549, 559-61 (E.D. La. 2009) (collecting authorities and finding that courts have inherent power and responsibility to limit contingent fee agreements in mass tort cases).
[1099] *Id.* at 554.
[1100] *Congoleum Corp.*, 426 F.3d at 693–94.
[1101] *Id.*
[1102] *Id.* at 693.

attorneys' contingency and referral fees and therefore cannot be confirmed. ***Anywhere from $28.9 million to $35 million of the $87.5 million that will be contributed to the Trust will be diverted to the Abuse Claimants' counsel if flat contingency rates of 33% to 40% are applied.***[1103] ***This is in addition to the $12 million plus already paid to the Tort Committee's counsel and its professionals.***[1104]

This amount is out of all proportion to the nominal (if any) work required of the Abuse Claimants' counsel under the terms of this Plan.[1105] Moreover, it conflicts with New Jersey laws that limit contingent fees to both a specific statutory cap and a general reasonableness requirement. The conflict with New Jersey law is not a minor oversight or technical flaw— it is at the heart of the strategy in this case to engineer support from out-of-state plaintiff counsel.

In the May 31, 2022 audio ruling requiring amendments to the Seventh Amended Disclosure Statement, the Court expressed concern about the means by which money was being diverted to counsel through contingency fees: "the potential for certain personal injury attorneys to receive a percentage for the recovery beyond that permitted under New Jersey law seriously concerns me. The Plan Proponents are correct, that these are not appropriately addressed at this stage of the case, but I am unlikely to confirm any Plan unless there is a method of informing claimants of the

[1103] These calculations assume that fees will be charged on the entire $87.5 million settlement amount – 0.33 times $87.5 million equals $28.9 million and 0.4 times $87.5 million equals $35 million.

[1104] *See* Lowenstein Sandler November 2022 Fee Statement [Dkt. No. 3004], p. 32 (fee statement showing Lowenstein Sandler has requested over $15 million in fees and received nearly $12 million through November 2022); *Second Interim Application of the Claro Group, LLC, as Expert Consultant and Witness, for Compensation for Service Rendered and Reimbursement of Expenses for the Period from May 1, 2022 through August 31, 2022* [Dkt. No. 2717], p. 1 (fee stating showing Claro Group has requested over $750,000 in fees through August 2022).

[1105] *See* Nov. 10 Trial Tr. (Montgomery), p. 41:25-42:3 ("Q: Okay. Now, the third bullet point of the pros on the eighth amended side is efficient and economic distribution of trust assets supported by the survivors, right? A: Correct."). *See generally*, TDPs.

maximum fees allowed to be charged under New Jersey law, and the potential that the fees being charged to them are unlawful."[1106]

The line added to the Eighth Amended Disclosure Statement, apparently in response to the Court's ruling, is wholly insufficient.[1107] It even fails to state the contingent fee cap under New Jersey law, instead recommending that the claimholders themselves interpret the New Jersey statute.[1108] If claimholders have questions or believe there has been non-compliance, the Disclosure Statement directs them to contact counsel for the Tort Committee rather than an independent entity such as the Office of United States Trustee for the District or the New Jersey Bar Committee.[1109]

C. New Jersey's Limits on Contingent Fees and Fee Sharing Apply to This Case

New Jersey Rule 1:21-7(c) governs the fee that an attorney may charge a client when the attorney represents the client in a personal injury action based on a contingent fee agreement. The following percentages are allowed based on the size of the recovery:

1. 33 and one-third percent on the first $750,000 that was recovered
2. 30 percent on the second $750,000 that was recovered
3. 25 percent on the next $750,000 that was recovered
4. 20 percent on the next $750,000 that was recovered

The United States District Court for the District of New Jersey has "incorporated New Jersey's contingency fee rule into its local rules through [D.N.J.] Local Rule 4(c), which provides that '[a] lawyer admitted pro hac vice [to the federal court] is deemed to have agreed to take no fee in any tort case in excess of the New Jersey State Court Contingency Fee Rule.'"[1110] Federal

[1106] Court's Audio Ruling (May 31, 2022) [Dkt. No. 1722].
[1107] *See* Eighth Amended Disclosure Statement, p. 4 (paragraph informing Abuse Claimants that New Jersey state law limits contingent fees, directing Abuse Claimants to statute, and stating that Abuse Claimants with questions "should contact counsel for the Tort Committee for additional information").
[1108] *See id.* at p. 9.
[1109] *See id.*
[1110] *Mitzel v. Westinghouse Elec. Corp.*, 72 F.3d. 414, 416 (3d Cir. 1995).

courts in the District of New Jersey are therefore required to apply N.J. Rule 1:21-7 in assessing whether a fee is reasonable.[1111]

Under the New Jersey Rules of Professional Conduct, attorneys are only permitted to charge referral fees or enter fee-splitting arrangements in very limited circumstances.[1112] The facts here do not give rise to either of these circumstances.[1113] Like the New Jersey Rule governing contingency fees, the New Jersey Rules of Professional Conduct are required to be enforced in New Jersey federal courts.[1114]

D. The 2019 Disclosures Filed by Claimants' Counsel Include Improper Referral Fees and/or Fee-Sharing Agreements

Rule 2019 of the Federal Rules of Bankruptcy Procedure requires counsel representing more than one claimant to file a verified Rule 2019 statement that, among other things, describes the terms of counsel's retention. Many of the disclosures filed by out-of-state counsel in this case violate the New Jersey rules that govern fee agreements or are so convoluted as to prevent

[1111] *See, e.g., Rudderow v. Boston Scientific Corp.*, 2022 U.S. Dist. LEXIS 85948, at *5 (D.N.J. May 11, 2022) (limiting fees in excess of 30% and noting that "New Jersey Rule 1:21-7(c) governs the fee that an attorney may charge a client when the attorney represents the client in a personal injury action based on a contingent fee agreement. The rule sets forth the maximum contingency fee an attorney may contract for in tort cases.").

[1112] "[T]he New Jersey RPCs essentially forbid fee-splitting or referral fees except in two circumstances: the first in circumstances where the division of fees is in proportion to the work performed by each attorney, the client is informed and consents to the participation of all the lawyers involved, and the total fee is reasonable; and the second in circumstances where by written agreement with the client, each lawyer assumes joint responsibility for the representation, the client is informed and consents to the participation of all the lawyers involved, and the total fee is reasonable." *Whitehead v. Stull, Stull & Brody*, No. 17-4704 (SRC), 2019 WL 1055756, at *7 (D.N.J. Mar. 5, 2019) (citing N.J. Rule of Professional Conduct 1.5(e)).

[1113] *See, e.g.*, [Dkt. No. 1516] (fees may be split between Andrews & Thornton, AAL, AAC and Ventura Law).

[1114] *See Rudderow*, 2022 U.S. Dist. LEXIS 85948, at *5; *Maldonado v. New Jersey ex rel. Administrative Office of Courts-Probation Division*, 225 F.R.D. 120, 137 n.13 (D.N.J. 2004) ("[T]he American Bar Association's Model Rules of Professional Conduct, as modified and adopted by the New Jersey Supreme Court, govern the ethical conduct of attorneys in this Court.").

any understanding of whether the Abuse Claimants' attorneys' compensation complies with New Jersey law.

No evidence has been provided that those fee sharing agreements comply with the requirements of Rule 1.5(e) of the New Jersey Rules of Professional Conduct. First, Rule 1.5(e) requires in all circumstances that the client is informed and consents to the participation of all counsel involved in the fee-sharing arrangement.[1115] There is no evidence that the claimants were informed of the fee-sharing in this case.

For example, Seidman & Pincus, LLC filed a disclosure statement that includes a fee-sharing agreement between Seidman & Pincus and the firm Hoffman DiMuzio.[1116] The fee sharing agreement is signed by an attorney from Hoffman DiMuzio "on behalf of the Claimant."[1117] The preface to the agreement states: "Hoffman has advised us that it is authorized to enter into this retainer agreement on behalf of the Claimant and it is our explicit understanding that Hoffman does so on the Claimant's behalf."[1118] The separate client agreement also filed as an exhibit to the disclosure is between the claimant and Hoffman DiMuzio only.[1119] The agreement with the claimant does not mention Seidman & Pincus, much less fully inform the claimant of the fee sharing arrangement. There is no evidence that the claimant was made aware of this fee sharing arrangement at all, as required by New Jersey law.[1120]

[1115] *See Whitehead*, 2019 WL 1055756, at *7.
[1116] [Dkt. No. 2197], p. 6-8.
[1117] *Id.* at p. 8.
[1118] *Id.* at p. 6.
[1119] *Id.* at pp. 10-12.
[1120] Numerous other firms in this case also filed disclosure statements that include fee-sharing arrangements without providing evidence that claimants were informed and consented to those arrangements. *See* [Dkt. No. 1715] (fees may be split among Fasy Law, PLLC; Tamaki Law Offices; The Law Office of Joseph A.

Second, Rule 1.5(e) also requires either (1) that the division of fees is in proportion to the work performed or (2) that each lawyer assumes joint responsibility for the representation.[1121] The claimant's counsel in this case have provided no evidence upon which this Court could find that the division of fees is proportionate to work performed or that each lawyer assumed joint representation.

E. Disclosures Filed by Claimants' Counsel Include Fees Above the Maximum Permitted by New Jersey Law

The docket also contains examples of multiple Abuse Claimants who were asked to sign retention agreements by out of state lawyers that state a 40% contingency and apply a 40% or higher lien. Some Abuse Claimants' attorneys have filed addenda to their fee statements only because Century raised this issue previously.[1122] Others have remained silent about their noncompliant fee provisions. Century asked the Tort Committee's counsel for permission to meet and confer with members of the Tort Committee to explain this problem and propose cures but the attempts to confer were rebuffed.[1123]

Many of the exemplar retention agreements misstate the law in asserting that a lower rate is contingent on a claimant's present state of residence or bankruptcy court approval. In footnote

Blumel; and Politan Law, LLC); [Dkt. No. 1560] (fees may be split among Ketterer Browne & Anderson, LLC; D. Miller & Associates, PLLC; Saunders & Walker, P.A.; and others); [Dkt. No 1516] (fees may be split between Andrews & Thornton, AAL, AAC and Ventura Law); [Dkt. Nos. 1441, 1493, and 1496] (fees may be split among Eisenberg, Rothweiler, Winkler, Eisenberg and Jeck, P.C.; Kosnoff Law; and AVA Law Group); [Dkt. No. 1466] (fees may be split between D'Arcy Johnson Day, P.C. and Matthews & Associates); [Dkt. No. 1424] (fees may be split between Rebenback, Aronow & Mascolo, LLP and Pfau Cochran Vertetis Amala PLLC); [Dkt. No. 1350] (fees may be split between Jeff Anderson & Associates, PA and Gianforcaro Law); [Dkt. No. 1346] (fees may be split among Levy Baldante Finney & Rubenstein, P.C.; Slater Slater Schulman; and others).

[1121] *See Whitehead*, 2019 WL 1055756, at *7.

[1122] *See Declaration of Tancred Schiavoni Describing Disclosures* [Dkt. No. 1691]; *Declaration of Andrew Van Arsdale* [Dkt. No. 1699]; *Supplemental Rule 2019 Disclosure of AVA Law Group* [Dkt. No. 1729].

[1123] *See* Letter from Tancred Schiavoni to Michael Kaplan dated May 18, 2022 [Dkt. No. 1691-5].

10 of the Insurers' Objection to the Seventh Amended Disclosure Statement,[1124] the Objecting Insurers provided citations to the docket where examples of retention agreements may be found that describe contingencies greater than the contingency set out in N.J. Rule 1:21-7.

One such agreement is the retention agreement Kosnoff Law, AVA Law Group and Eisenberg Rothweiler submitted as an exemplar for their retentions with their Rule 2019 Statement. The retention agreement states that claimants are bound by this retainer agreement to a 40% contingency as follows:

> III. In consideration for services rendered, **it is agreed that the undersigned will pay to said attorneys a sum equal to 40% of any amount recovered**, whether by compromise before suit is filed, or compromise or judgment after suit is filed. The 40% attorney's fee shall be split: 45% to Eisenberg Rothweiler, 45% to Kosnoff Law, and 10% to AVA Law Group.[1125]

Another is the retention agreement that the Falkowitz Law Firm submitted as an exemplar with its Rule 2019 Statement. The retention agreement states that claimants are bound to a contingency as follows:

> Contingency Fee. … If Attorneys obtain settlement or judgment for Client, ***Client will pay to Attorneys forty percent (40%) of the gross recovery***, before reimbursement of expenses, divided among the attorneys as follows: 50% to Falkowitz Law Firm, and 50% to AVA Law Group, Inc. Attorneys' compensation will not exceed any limits on compensation imposed by law. The fee set forth in this Agreement is not set by law but is negotiable prior to signing the Agreement.[1126]

While the Falkowitz retainer agreement states that Attorneys' compensation will not exceed "limits on compensation imposed by law," it does not disclose the maximum rate permitted in New Jersey. Instead, a 40% contingency fee is embedded in the agreement. Further, the retention

[1124] [Dkt. No. 2410].
[1125] [Dkt. No. 1441-2], p. 2.
[1126] [Dkt. No. 1441-3], p. 2.

agreement mandates a 40% lien on any settlement or judgment, without any carve-out for what is required by law. This section of the retention agreement provides:

> "If this Agreement is terminated before the case is resolved, Client gives attorneys a lien against any subsequent recovery in this case for Attorneys' time and expenses. If an offer has been negotiated, ***Attorneys will have a lien upon any subsequent recovery equal to 40% of the offer,*** or an amount to compensate for time and expenses, whichever is greater."[1127]

Kosnoff Law Group and AVA Law Group submitted another exemplar for their retention agreements in this case with their Rule 2019 Statement. The retention agreement states that claimants are bound by this retainer agreement to a contingency as follows:

> "Contingency Fee. … If Attorneys obtain settlement or judgment for Client, Client will pay to Attorneys forty percent (40%) of the gross recovery, before reimbursement of expenses, divided among the attorneys as follows: 50% to Kosnoff Law, and 50% to AVA Law Group, Inc. Attorneys' compensation will not exceed any limits on compensation imposed by law. The fee set forth in this Agreement is not set by law but is negotiable prior to signing the Agreement."[1128]

The retention agreement that Andrews & Thornton and Ventura Law submitted as an exemplar for their retention agreements in this case with their Rule 2019 Statement provides as follows:

> The Firms, and co-counsel if any, will assume joint responsibility for representation of the Client. Attorneys' fees due Firms will be a percentage of the recovery. In consideration of the services rendered, and to be rendered, to the Client by the Firms, the Client agrees to grant to the Firms for the Firms' compensation in handling the Client's claim the following present undivided interest and assignment in the claims as follows: Forty percent (**40%**).[1129]

The text of the agreement then goes on to suggest that a different contingency rate may only apply if the bankruptcy court rejects the 40% rate or a different rate applies in the state where

[1127] *Id.* at p. 3.
[1128] [Dkt. No. 1441-1], p. 2.
[1129] [Dkt. No. 1516-3], p. 3.

a claimant now resides.[1130] However, the retention agreement does not disclose the maximum contingency rate permitted in New Jersey. A 40% contingency fee is the only rate mentioned in the agreement.

The Kosnoff Law Group, AVA Law Group, The Falkowitz Law Firm, Andrews & Thornton, Ventura Law, and Eisenberg Rothweiler are out-of-state lawyers and/or law firms.

Many firms representing claimants did not comply with the Rule 2019 at all. Nothing was submitted by the lawyers who are stated to co-represent a claimant. Most of the lawyers who represent persons associated with proofs of claim did not submit exemplar engagement letters or retention letters despite the requirement of Rule 2019, even after Century sought to compel Rule 2019 disclosure statements.[1131] Because many firms did not file disclosures, no one can say that their retention agreements are compliant. Meanwhile, the voting agent did not report on compliance with Rule 2019. The Debtor stood aside and did nothing.

F. The Claimants' Attorneys' Fees are Unreasonable as a Matter of Law

While the plan should prohibit the diversion of funds to lawyers at amounts above the percentages set by New Jersey Court Rule 1:21-7 and bar any such disbursements, the amounts diverted to lawyers must also not be unreasonable in the context of this Plan.

The New Jersey Rules of Professional Conduct Section 1.5 requires that a "lawyer's fees shall be reasonable." Courts have an obligation to enforce this provision of the Rules of

[1130] *See id.* ("If contingent attorney's fees are limited by law in the state where Client resides or by a bankruptcy court, the percentage of the recovery Client owes will be the percentage allowed in Client's state of residence or the percentage allowed by the bankruptcy court, not to exceed the percentage set forth above. In all other instances, the percentages set forth above will be the percentage Client owes.")

[1131] *See Joint Motion to Compel the Claimants' Attorneys to Submit the Disclosures Required by Federal Rule of Bankruptcy Procedure 2019* [Dkt. No. 1311].

Professional Conduct.[1132] Here, as a matter law, the fees described in the 2019 disclosure statements are patently unreasonable.

Where, as here, the plan contemplates little or no work by lawyers for the claimants, a reasonable attorney's fee would be well below the maximum allowed by New Jersey law. For example, in *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation* (*In re Guidant Corp.*),[1133] the court capped individual Abuse Claimants' attorneys' fees at 20%. In a recent opioid-related case, the court limited fees to 15% and only allowed firms to enforce a fee contract at higher than 15% if they presented evidence of the exceptional work and extraordinary risk they undertook on a particular claim.[1134]

Based on the TDPs filed with the Eighth Amended Plan, claims will be valued with virtually no adversary process. Discovery is strictly limited to 90 days by the Verdict Value Procedures,[1135] and the Neutral is permitted to use their discretion to assign a value based on a record of their choosing.[1136] Thus, obtaining a recovery on a claim will require virtually no effort on the part of the claimant's attorney. Nonetheless, the fees disclosed in this case are at *or above* the maximum permitted by New Jersey law. The Eighth Amended Plan amounts to an attempt to divert the maximum recovery to counsel while requiring them to expend the minimum possible effort—a scheme that this Court should not endorse.

[1132] *See Nikoo v. Cameron*, No. 18-11621 (RBK/AMD), 2021 WL 672930, at *2-3 (D.N.J. Feb. 22, 2021) (limiting fee award to 25% after applying Rule 1.5). *In re O'Brien*, No. 03-17488, 2010 WL 1999611, at *3 (Bankr. D.N.J. May 18, 2010) (refusing to enhance fee after applying Rule 1.5).
[1133] *Guidant Corp.*, 2008 U.S. Dist. LEXIS 1735, at *46.
[1134] Order Limiting Fees at 1, *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio Aug. 6, 2021).
[1135] Eighth Amended Disclosure Statement, p. 101 ("discovery associated with review of any Independent Review Claim shall not exceed ninety (90) days barring exceptional circumstances which shall be determined in the sole discretion of the Neutral.").
[1136] Bitar Decl., ¶ 13.

G. Examples of Orders Entered *Sua Sponte* by Federal Courts in Other Mass Tort Cases Enforcing Contingency Fee Limitations

In *Vioxx Products Liability Litigation*[1137] after the parties reached a settlement the court issued a *sua sponte* order capping attorneys' fees at 32%.[1138] A group of five plaintiffs' firms filed a motion for reconsideration. The court issued a second order upholding its 32% cap.[1139] The order states:

> IT IS ORDERED that contingent fee arrangements for all attorneys representing claimants in the Vioxx global settlement shall be capped at 32% plus reasonable costs. IT IS FURTHER ORDERED that in the rare case where an individual attorney believes a departure from this cap is warranted, he shall be entitled to submit evidence to the Court for consideration.[1140]

Similarly, in *In re Guidant Corp.*,[1141] the plaintiffs' firms steering committee brought a motion seeking a determination of common benefit fee amounts (that motion did not raise the issue of a contingency fee cap). While considering the issue of common benefit fee amounts, the court *sua sponte* addressed whether contingent fees should be capped, and then capped fees at 20%.[1142] The court's order on contingency fees states:

> The Court hereby caps all individual case contingency fees at 20%. Parties may petition the Special Masters to have the 20% increased upward to a maximum of either 33.33%, the percentage previously agreed to in the individual cases contingent fee arrangement between the attorney and the client, or the limit imposed by state law, whichever of the three is less. The Special Master, upon review of the petitioner's file and submissions, shall make a recommendation to the Court as to what contingent fee percentage is reasonable under the circumstances of the particular case and the work completed by the individual attorney/firm on the case. The Court will thereafter approve or decline the recommendation upon review of the circumstances.[1143]

[1137] 574 F. Supp. 2d 606.
[1138] *Id.* at 618.
[1139] *In re Vioxx*, 650 F. Supp. 2d 549, 565 (E.D. La. 2009).
[1140] *Id.*
[1141] *Guidant Corp.*, 2008 U.S. Dist. LEXIS 1735.
[1142] *Id.* at *33-*34.
[1143] *Id.* at *65.

RESERVATION OF RIGHTS

The Insurers reserve the right to join in any argument or objection made by any other parties relating to the confirmability of the Plan. Moreover, nothing contained herein shall be deemed an admission by the Insurers as to the existence of coverage under any insurance policies alleged to have been issued by the Insurers.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Insurers respectfully request that the Court deny confirmation of the Debtor's Eighth Amended Plan and grant such other and further relief as the Court deems just and proper.

Dated: January 17, 2023

Respectfully submitted,

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