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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: THE ROMAN CATHOLIC DIOCESE OF ROCKVILLE CENTRE, NEW YORK, Debtor.	Case No. 20-12345 (MG) Chapter 11

INTERSTATE INSURERS' OBJECTION TO DEBTOR'S MOTION (A) FOR AN ORDER (I) APPROVING DISCLOSURE STATEMENT, (II) APPROVING FORM AND MANNER OF SERVICE OF DISCLOSURE STATEMENT NOTICE, (III) ESTABLISHING PROCEDURES FOR SOLICITATION AND TABULATION OF VOTES TO ACCEPT OR REJECT PLAN OF REORGANIZATION, (IV) APPROVING RELATED NOTICE PROCEDURES, AND (V) SCHEDULING HEARING ON CONFIRMATION OF PLAN OF REORGANIZATION, OR (B) IN THE ALTERNATIVE, DISMISSING THE DEBTOR'S CHAPTER 11 CASE

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Fireman's Fund Insurance Company ("Fireman's Fund"), National Surety Corporation ("NSC"), and Interstate Fire & Casualty Company ("Interstate" and collectively with Fireman's Fund and NSC, the "Interstate Insurers") hereby oppose Debtor The Roman Catholic Diocese of Rockville Centre, New York's (the "Debtor" or the "Diocese") *Motion (A) For an Order (I) Approving Disclosure Statement, (II) Approving Form and Manner of Service of Disclosure Statement Notice, (III) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan of Reorganization, (IV) Approving Related Notice Procedures, and (V) Scheduling Hearing on Confirmation of Plan of Reorganization, or (B) in the Alternative, Dismissing the Debtor's Chapter 11 Case* [Dkt. No. 2697] (the "Objection" to the "Motion"). For the reasons set forth herein, the *Modified Disclosure Statement for First Amended Plan of Reorganization Proposed by The Roman Catholic Diocese of Rockville Centre, New York* [Dkt. No. 2755, pp. 144-235 of 333] (the "Modified Amended Disclosure Statement" or the "Disclosure Statement") in support of the *Modified First Amended Chapter 11 Plan of Reorganization for the Roman Catholic Diocese of Rockville Centre, New York* [Dkt. No. 2755, pp. 4-71 of 333] (the "Modified Amended Plan" or the "Plan") should not be approved because it fails to provide creditors and other interested parties with adequate information pursuant to 11 U.S.C. § 1125. In opposition to the Motion, the Interstate Insurers respectfully state as follows:

I. PRELIMINARY STATEMENT

Rather than seek a global resolution of this Bankruptcy Case with the Official Committee of Unsecured Creditors (the "Committee") and the Insurers,[1] the Debtor has filed a Chapter 11 Plan that lacks the recognized support of any major constituency and is subject to strong

[1] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Plan and the Disclosure Statement.

opposition by the Committee. At the same time, the Committee has spurned settlement negotiations with the Insurers in favor of putting forth a discredited process whereby it selected a sampling of its strongest cases to go to trial in order to provide all parties with "representative" claims values. [*See* Dkt. No. 2676.] Meanwhile, the Insurers continue to stand by waiting to mediate and attempt in good faith to reach a consensual resolution, just as the Interstate Insurers did in the *Diocese of Rochester* bankruptcy, a case that involved the very same Committee counsel. However, the Insurers cannot mediate by themselves and lack counterparties who are serious about reaching a consensual resolution in this case.

Even setting all of that aside, the Debtor's proposed Disclosure Statement cannot be confirmed because it relies upon varies pieces of information that have not been shared with any Insurers, or presumably creditors and other interested parties and, in all likelihood, do not yet exist. Specifically, the proposed Plan would create the Arrowood Settlement Trust to administer distributions to holders of Abuse Claims asserted against Arrowood Indemnity Company ("Arrowood") for claims arising from the inception of the Diocese until 1976, and the General Settlement Trust (collectively with the Arrowood Settlement Trust, the "Trusts") to administer distributions to holders of Abuse Claims asserted against the London Market Insurers (defined herein) and the Interstate Insurers for claims arising between 1976 and 1986 and to holders of Abuse Claims asserted against Ecclesia Assurance Company ("Ecclesia") for claims arising between 1986 and 2019. (*See generally* Disclosure Statement, § II(C)(4)(c)-(e), V(A)(1).) The Trust Assets would then be assigned from the Debtor to the Trusts along with certain Insurance Rights pursuant to an Insurance Rights Transfer. (*See id.* at §§ V(A)(2), V(A)(10).)

However, the scope of the Trustees' duties are governed by trust agreements for each of the Trusts that do not currently exist, and that may be provided with as little as one week of

advance notice prior to the deadline for parties to object to confirmation of the Plan. (*Id.* at § I(H).) Similarly, the identities of (1) the Trustees, who will be involved in assessing the value of Abuse Claims and attempting to resolve insurance coverage issues relating to the Abuse Claims; (2) the Litigation Administrator, who will be responsible for litigating Abuse Claims on behalf of the Trusts; and (3) members of the Trust Advisory Committee, with whom the Trustees and the Litigation Administrator must regularly consult and whose consent they must obtain, are undisclosed. (*See id.*) Thus, the creditors and other interested parties will be asked to decide whether to support or oppose the Plan without having even basic information upon which to make their decision.

Additionally, key provisions of the Plan are ambiguous, confusing, or misleading. Specifically, the purported "Insurance Neutrality" language within the Plan is rendered meaningless by broad, ambiguous carveouts that prevent the Insurers, creditors, and other interested parties from understanding what rights the Insurers will have in connection with the Plan and the Trust Distribution Procedures [Dkt. No. 2754, Ex. A] ("TDP"). Moreover, the Insurance Rights Transfer itself is improper because it does not contemplate the full transfer of Insurance Policies, it requires the transfer of non-debtors' interests in the Insurance Policies, and it attempts to declare that certain state law defenses are invalid even though the Bankruptcy Court lacks jurisdiction to make such rulings.[2]

The bottom line is that while all parties in this case are looking for a way to change its current trajectory and reach a consensual resolution, putting forward a Plan that lacks critical documents and the identities of relevant trust fiduciaries while also including provisions that are

[2] The Interstate Insurers reserve their right to assert objections to the Plan at a later date including, but not limited to, in opposition to the confirmation of the Plan.

ambiguous at best does not provide the adequate information that creditors and other interested parties need to make informed decisions about whether to support the Plan. Consequently, the Disclosure Statement does not satisfy the requirements of 11 U.S.C. § 1125 and the Motion must be denied.

II. FACTUAL BACKGROUND

A. The Interstate Policies

Interstate contracted with the Debtor to provide excess liability coverage on an indemnity-only basis from October 1, 1978 through September 1, 1986 (collectively, the "Interstate Policies"). True and correct copies of the Interstate Policies are attached as Exhibit 1 to the Declaration of Siobhain P. Minarovich in Support of the Objection, which is being filed contemporaneously herewith. The Interstate Policies are summarized in the following chart:[3]

Policy Number	Policy Period	Limits
83-152625	10/01/78–10/01/79	$4.8 million excess of $200,000
	10/01/79–10/01/80	$4.8 million excess of $200,000
	10/01/80–10/01/81	$4.8 million excess of $200,000
	10/01/81–10/01/82	$4.8 million excess of $200,000
83-0169764	10/01/82–09/01/83	$4.8 million excess of $200,000
83-0170072	9/01/83–9/01/84	$4.8 million excess of $200,000
	9/01/84–9/01/85	$4.8 million excess of $200,000
83-0172315	9/01/85–9/01/86	$800,000 excess of $200,000

In each policy period, the Interstate Policies provide second-level indemnity coverage, excess of both (i) the Debtor's self-insured retention ("SIR") and (ii) the limits of underlying

[3] NSC issued policies to the Debtor, which were in effect from December 1, 1982 to September 1, 1985, excess of $50 million in underlying SIRs (defined *infra*) and excess coverage. FFIC issued policies to the Diocese, which were in effect from September 1, 1989 to September 1, 1993, excess of $80 million in underlying SIRs and excess coverage. The FFIC policies and the Interstate policy in effect from September 1, 1985 to September 1, 1986 are subject to sexual abuse or molestation exclusions which bar coverage for sexual abuse claims.

insurance,[4] in that order. As second-level coverage, the Interstate Policies typically "followed form" to – that is, incorporated most terms, conditions, and definitions of – the underlying (LMI) policies. The Interstate Policies do not include a duty to defend. They instead provide only indemnification to the Debtor for "Loss" (as defined in the Interstate Policies) in excess of the SIRs and LMI's limits in connection with "occurrences" covered under the policies, upon a proof of loss occurring during the coverage period. Under this program, the Diocese is responsible for handling claims and potential liabilities. The Interstate Policies do, however, provide that Interstate at its own option may – but is not required to – participate in the investigation, settlement, or defense of any claim or suit against an insured.

B. The Child Victims Act

On February 14, 2019, the Child Victims Act ("CVA") was signed into law in New York. The CVA, among other things: changed the statute of limitations moving forward to allow victims to seek civil relief against abusers and enabling institutions until the victims turn 55 years of age; and opened a one-year, one-time look back window for victims with previously extinguished claims to seek compensation regardless of the abuse date. The window opened on August 14, 2019, and, following an extension, closed August 14, 2021. Following the enactment in 2019 of the CVA, 223 prepetition lawsuits were brought by abuse claimants against the Debtor. (Disclosure Statement, § II(C)(2).)

[4] The Interstate Policies are excess of the limits of the underlying policy(ies) from Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies (collectively, the "London Market Insurers" or "LMI")

C. The Bankruptcy Case

On October 1, 2020 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). [Dkt. No. 1.] Shortly thereafter, the United States Trustee appointed the Committee, which, upon information and belief, consists solely of sexual abuse claimants. [*See* Dkt. No. 71.]

On January 27, 2021, the Court entered the *Order Establishing Deadlines for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof* (the "Bar Date Order"). [Dkt. No. 333.] The Bar Date Order set the General Bar Date on March 30, 2021 and set the Sexual Abuse Bar Date on August 14, 2021. [*Id.* p. 2.] On May 24, 2022, the Adult Survivors Act ("ASA") was signed into law. The ASA provides survivors of adult sexual assaults with a one-year window to file civil lawsuits for their claims in New York, where such claims have already expired based on the current statute of limitations period. The one-year window opened on November 24, 2022. (Disclosure Statement, § II(C)(3).) On August 10, 2022, the Court entered an order establishing October 10, 2022, as the supplemental bar date to address ASA claims. [Dkt. No. 1262.]

D. The Insurance Coverage Litigation

On October 1, 2020, the Debtor commenced against its Insurers an adversary proceeding captioned *The Roman Catholic Diocese of Rockville Centre, New York v. Arrowood Indemnity Company et al.*, Adversary Proceeding No. 20-01227-mg (Bankr. S.D.N.Y.) (the "Adversary Proceeding" or "AP"). [*See* AP, Dkt. No. 1.] The Committee later moved to intervene, citing its "strong interest in this Adversary Proceeding." [AP, Dkt. No. 13 at ¶ 22.] On December 10, 2020, the Bankruptcy Court granted the Committee's motion. [AP, Dkt. No. 38.]

On December 28, 2020, LMI filed a motion to withdraw the reference from the Bankruptcy

Court. [AP, Dkt. No. 49.] The Interstate Insurers joined LMI's motion on the same day. [AP, Dkt. No. 57.] Two motions to withdraw the reference were subsequently granted by judges in the United States District Court for the Southern District of New York (the "District Court"). *See Roman Cath. Diocese of Rockville Ctr. v. Certain Underwriters at Lloyds, London & Certain London Mkt. Companies*, 634 B.R. 226 (S.D.N.Y. 2021); *Roman Cath. Diocese Of Rockville Ctr. v. Arrowood Indemnity Company*, No. 21-CV-07706, Docket No. 11 (S.D.N.Y. Oct. 18, 2021). The Interstate Insurers' adversary proceeding is pending in the District Court before Judge Alvin Hellerstein at Case No. 21-CV-07706. Accordingly, proceedings that will determine the extent of the Insurers' coverage obligations are currently pending in the District Court.

E. The Debtor's Plan and Disclosure Statement

The Debtor filed its initial *Chapter 11 Plan of Reorganization for the Roman Catholic Diocese of Rockville Centre, New York* [Dkt. No. 1614] (the "Initial Plan") and its *Disclosure Statement for Plan of Reorganization Proposed by The Roman Catholic Diocese of Rockville Centre, New York* [Dkt. No. 1615] (the "Initial Disclosure Statement") on January 27, 2023, but never moved for approval of the Initial Disclosure Statement. On October 19, 2023, Corrine Ball, counsel to the Debtor, filed a letter with the Court in which she indicated that in light of the failure of the Debtor and the Committee to agree to the terms of a consent plan, the Debtor would file its own amended plan which would be "its best and final offer to claimants." [Dkt. No. 2590.] Then, on November 27, 2023, the Debtor filed its *First Amended Chapter 11 Plan of Reorganization for the Roman Catholic Diocese of Rockville Centre, New York* [Dkt. No. 2695] (the "Amended Plan"), its *Disclosure Statement for First Amended Plan of Reorganization Proposed by The Roman Catholic Diocese of Rockville Centre, New York* [Dkt. No. 2696] (the "Amended Disclosure Statement") and the Motion to approve the Amended Plan and the

Amended Disclosure Statement. The Debtor noticed a response deadline to the Motion for January 5, 2024, and a hearing on the Motion for January 16, 2024. [Dkt. No. 2707, pp. 1-2.]

The Debtor then filed its Modified Amended Plan, Modified Amended Disclosure Statement, and Trust Distribution Procedures on December 22, 2023, two weeks prior to the response deadline over a period which included the Christmas and New Years holidays. [Dkt. Nos. 2754, 2755.]

III. ARGUMENT AND CITATION TO LEGAL AUTHORITY

A. Objection I – The Disclosure Statement Fails to Provide Adequate Information to Creditors

1. The Provision of Adequate Information is an Essential Requirement for the Approval of a Disclosure Statement Under the Bankruptcy Code

Pursuant to 11 U.S.C. § 1125(b) of the Bankruptcy Code, the Court cannot approve the Disclosure Statement unless it "contain[s] adequate information" to allow creditors to make reasonable and informed decisions about whether to accept or reject the Plan. The provision of adequate information in a disclosure statement is a key requirement of the Bankruptcy Code. Disclosure statements must feature "information of a kind, and in sufficient detail . . . that would enable such a hypothetical investor . . . to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1). *See also In re Avianca Holdings S.A.*, 632 B.R. 124, 130 (Bankr. S.D.N.Y. 2021) (a disclosure statement should "contain all material information relating to the risks posed to creditors and equity interest holders under the proposed plan of reorganization"). For example, creditors should have "financial information, data, valuations or projections" and disclosure "relevant to the risks posed to creditors under the plan." *Id.* It is the proponent's burden to establish that its disclosure statement is adequate.

2. The Disclosure Statement Fails to Include Essential Plan Documents That Are Necessary to Provide Creditors With Adequate Information to Assess Whether to Support or Oppose the Plan

The Motion seeks the approval of the Disclosure Statement notwithstanding the fact that it does not include documents essential to understanding the nature by which distributions will be made to holders of Abuse Claims under the Plan. Namely, according to the Disclosure Statement, holders of Arrowood Abuse Claims (Class 4) and London and Ecclesia Abuse Claims (Class 5) will receive "such distributions ***as provided in the Trust Documents***" with respect to either a "Settling Claim Subfund" or a "Litigating Claim Subfund." (Disclosure Statement, § I(A) (emphasis added).) Moreover, the Disclosure Statement provides that the Arrowood Settlement Trust and the General Settlement Trust "shall be administered and implemented . . . ***as provided in the Trust Documents***." (*Id.* at § V(B) (emphasis added).)

The "Trust Documents" are defined in the Plan to include, among other things, the "Arrowood Settlement Trust Agreement," the "General Settlement Trust Agreement" (collectively, the "Trust Agreements"), the TDP, and "any other agreements, instruments and documents governing the establishment and administration of the Trusts." (Plan, § I(A)(126).) Setting aside the fact that the distributions to Class 4 and Class 5 creditors could be determined by certain unnamed and undescribed "agreements, instruments and documents governing the establishment and administration of the Trusts," the two documents that are specifically identified have not yet been filed or shared with the creditors or other interested parties and, for all intents and purposes, do not currently exist. Rather, the Debtor says that both the Arrowood Settlement Trust Agreement and the General Settlement Trust Agreement will be "filed with the Plan Supplement." (*Id.* at §§ I(A)(10), (97).) In turn, the "Plan Supplement" is to be filed "no later

than seven (7) days before the deadline established by the Bankruptcy Court for filing objections to confirmation." (*Id.* at § I(A)(97).)

Thus, the Trust Agreements, which will serve as the governing documents for distributions to claimants in Class 4 and Class 5, do not yet exist and cannot be reviewed by creditors or interested parties. Without knowing the framework for the distributions to be received under the Trust Agreements, creditors cannot possibly have adequate information to make an informed decision about the Plan.

In a case previously decided in the United States Bankruptcy Court for the Southern District of New York, *In re Source Enterprises, Inc.*, No. 06-11707 (AJG), 2007 Bankr. LEXIS 4770 (Bankr. S.D.N.Y. July 31, 2007), Judge Gonzalez denied a motion to approve a disclosure statement under similar facts. In that case, the debtors included an amended disclosure statement, plan, and plan summary in their solicitation packages mailed to creditors, but they subsequently filed a variety of relevant documents, including a plan supplement, that "creditors were not able to consider . . . in determining whether to vote in favor of or against the Plan." *Id.* at *3-*4. The missing plan supplement included important information about relevant causes of action that would not vest with a trust created under the plan. *Id.* at *4-*5. The court noted that while the untimely submissions "did not necessarily materially alter the disclosures made in the Disclosure Statement they certainly provided amplification of the Debtors' financial circumstances that was necessary to provide adequate information." *Id.* at *4. The court further noted that the submissions were "material and not of an incidental nature." *Id.* Specifically, with respect to the trust, the court found that the disclosure statement needed to include information about the trust's assets, including the collectability of accounts receivable, and potential causes of action and defenses thereto that would vest in the trust. *Id.* at *10-*11.

Whereas the bankruptcy court in *Source Enterprises* rejected a disclosure statement that did not include relevant information about a trust's assets and causes of action, the Debtor in this Bankruptcy Case has omitted the trusts' governing document altogether, and therefore this case presents a more egregious instance where a disclosure statement fails to provide adequate information than *Source Enterprises*. Consequently, the Motion should be denied because "[a]lthough a denial of the relief herein will result in added costs to the Debtor[] to resolicit, the Debtor[] proceeded at their own risk and must have been aware of such risks." *Id.* at *3.

3. The Disclosure Statement Fails to Identify Key Players Who Will Be Responsible for Allowing and Valuing Claims and Making Distributions Under the Plan

In addition to failing to include either of the Trust Agreements that provide for how the Trusts will be administered and how distributions will be made to holders of Abuse Claims within the Bankruptcy Case, the Disclosure Statement also fails to provide the identity of every individual who will play a role in allowing claims, valuing those claims, and then making distributions to creditors. Creditors and other interested parties will not know the identity of the Arrowood Settlement Trustee, the General Settlement Trustee (collectively, the "Trustees"), the Litigation Administrator, or the initial members of the Trust Advisory Committee. (Plan, §§ I(A)(87), (97), (120).)

The Trustees' identities are critical to evaluation of the Plan because they are responsible for administering the Trusts, even though their precise duties cannot be known because they "shall have the functions and rights provided in the [yet to be disclosed] Arrowood Settlement Trust Agreement and the General Settlement Trust Agreement." (Disclosure Statement, § V(A)(5).) The Trustees will also play an important role under the TDP, where they are required to conduct a review of Settling Abuse Claims in Class 4 and Class 5 and Future Abuse Claims in Class 5 for

the purposes of making an Initial Determination, using certain criteria and evaluation factors set forth in the TDP. (*See* TDP, § 3.3.) Thus, whether the Trustees have potential conflicts or biases and the nature of their professional backgrounds are highly relevant undisclosed facts necessary to assess whether to support or oppose the Plan.

Similarly, the identity of members of the Trust Advisory Committee ("TAC") is important for all interested parties. Again, the Trust Advisory Committee's precise "functions, duties, and rights" will be spelled out in the Trust Agreements at some later date, and are therefore currently unknown, but the Trustees are required to "consult" with the TAC on matters pertaining to the administration of the Trusts and "must obtain the consent of the Trust Advisory Committee" in some unspecified way to be set forth in the Trust Agreements. (Disclosure Statement, § V(A)(6); TDP, § 2.1.) Thus, the uncertainties under the Disclosure Statement compound upon one another, as creditors and other interested parties do not know who the Trustees will be, who the members of the TAC will be, what powers or duties the Trustees or the TAC will have, and how the Trustees are required to consult and obtain the consent of the TAC in order to administer the Trusts.

Finally, the Litigation Administrator, whose responsibility it is to "administer the defense of the Litigating Abuse Claims" (i.e., to oversee all litigation involving claims asserted by holders of Abuse Claims against the Trusts) is an unknown quantity both because his or her identity has not been disclosed, but also because their authority is derived from the undisclosed Trust Agreements, which will define their "functions and rights". (Plan, § IV(P); *see also id.* at § I(A)(87).) Indeed, the Litigation Administrator's exclusive authority "to defend and object to all Litigating Abuse Claims" is "in accordance with the Trust Documents." (Disclosure Statement, § XII(B)(2)(a).) As with the TAC, the Trustees are required to "consult" with the Litigation Administrator on "matters pertaining to the administration" of the Trusts and "must obtain the

consent of the Litigation Administrator" in some unspecified way that will be set forth in the Trust Agreements. (*Id.* at § V(A)(14); Plan, § IV(P); TDP, § 2.1.)

In summary, creditors and other parties in interest do not know who the persons authorized to liquidate and value claims will be, nor do they know what powers and duties they will have. This does not provide adequate information under Section 1125 of the Bankruptcy Code. For example, in *In re Affordable Med Scrubs, LLC*, No. 15-33448, 2016 Bankr. LEXIS 2480 (Bankr. N.D. Ohio July 5, 2016), the bankruptcy court found that a disclosure statement failed to provide adequate information where it identified a liquidating trustee, but failed to provide "information regarding the Liquidating Trustee's experience and credentials and his relationship with [a secured creditor]." *Id.* at *4. Moreover, the bankruptcy court concluded that "[p]roviding the information regarding the Oversight Committee and a form of the Liquidating Trust Agreement in a plan supplement before a hearing on confirmation as contemplated in the Disclosure Statement is inadequate." *Id.* at *5. That impermissible conduct is exactly what is being contemplated in the Disclosure Statement in this case and the Court should therefore reach the same conclusion and deny the Motion.

B. Objection 2 – The Disclosure Statement Fails to Provide Adequate Information With Respect to the Insurers' Rights and Available Defenses

The Disclosure Statement should also not be approved because the Plan's insurance neutrality language contains a broad carveout that is sufficiently ambiguous to prevent creditors and other interested parties from knowing what exceptions exist to insurance neutrality and which of the Insurers' defenses survive under the Plan.

On its face, the Plan's insurance neutrality provision initially appears broad: "Unless otherwise expressly agreed to by an Insurer in writing, nothing in the Plan, the Plan Documents or the Confirmation Order shall alter, supplement, change, decrease or modify the terms (including

conditions, limitations and/or exclusions) of the Insurance Policies." (Plan, § V(P).) However, the Plan's insurance neutrality clause is then substantially qualified and narrowed:

> [N]otwithstanding anything in the foregoing to the contrary, the enforceability and applicability of the terms (including conditions, limitations and/or exclusions) of the Insurance Policies and thus the rights or obligations of any of the Insurance Companies, the Debtor, the Reorganized Debtor, the Trusts, and the Covered Parties arising out of or under any Insurance Policy whether before or after the Effective Date, ***are subject to the Bankruptcy Code and applicable law (including any actions or obligations of the Debtor thereunder), the terms of the Plan and the Plan Documents, the Confirmation Order (including the findings contained therein or issued in conjunction therewith) and, to the extent the Insurance Companies have or had adequate notice from any source, any other ruling made or order entered by the Bankruptcy Court whether prior to or after the Confirmation Date.***

(*Id.* (emphasis added).) Thus, the Insurers' rights under the Insurance Policies are preserved except as otherwise altered by (1) the Bankruptcy Code; (2) "applicable law"; (3) the Plan and the "Plan Documents"; (4) the Confirmation Order; and (5) "any other ruling made or order entered by the Bankruptcy Court". (*Id.*) Unfortunately, the exceptions swallow the rule as four of the five bases for altering the Insurers' rights are not completely defined or are otherwise unknown. First, the term "applicable law" is undefined within the Plan and therefore does not have a clear definition. Second, the "Plan Documents" include the undisclosed Trust Agreements. (*See id.* at § I(A)(96); *see also supra* § III(A)(2).) Third, a draft of the Confirmation Order has not been provided to the interested parties. Finally, the category of "any other ruling made or entered by the Bankruptcy Court" is ridiculously expansive and encompasses every order that has been entered among the nearly 2800 entries on the Court's docket in the more than three years since the Petition Date.

It is impossible to ask interested parties to discern what Insurers' rights are potentially altered by the Trust Agreements that have not been provided, and it is unfair and unreasonable to require interested parties to dig through the Court's docket and identify any potentially "applicable law" to determine how the Insurers' rights may have been altered.

The Plan's treatment of Insurers' rights elsewhere is similarly unclear. For example, while the Plan provides authority for the Reorganized Debtor, the Trustees, and the Litigation Administrator to object to claims, it does not appear to give any such rights to the Insurers. (*See* Plan, § VIII(A).) Similarly, the TDP does not appear to provide any way for the Insurers to participate in anything akin to discovery and/or depositions as part of the Trust Claim Submission process prior to their Document Submission Deadline in connection with the Trustee's Initial Determination. (*See* TDP, § 3.1.) This omission is inconsistent with the Insurers' rights under the Insurance Policies, which allow them to "participate in the investigation, settlement, or defense of any claim or suit against the insured." (*See e.g.*, Interstate Polices, DORVC IFC 0004 at 2.)

Finally, the ability of Trustees to pursue Responsible Insurers who do not agree to a Settlement Recommendation generated from an Independent Review is similarly unclear. In the event the applicable Trustee determines that a Settlement Recommendation is reasonable but the Responsible Insurer refuses to pay the Accepted Settlement Recommendation, the Trustee is authorized to "exercise any and all rights available to it, if any, ***under applicable law***." (TDP, § 4.8(d) (emphasis added).) Moreover, the TDP provides that "[t]he Trusts shall have the right to pursue the Accepted Settlement Recommendation through ***any appropriate legal mechanism***." (*Id.* (emphasis added).) Whether "applicable law" means state law, the Bankruptcy Code, the undisclosed Trust Agreements, or some combination of the three is unknown, and what exactly constitutes an "appropriate legal mechanism" available to the Trustees requires speculation and guesswork by creditors and interested parties alike. *See In re Howell*, No. 09-91538, 2011 Bankr. LEXIS 1146, at *6 (Bankr. N.D. Ga. Jan. 21, 2011) (denying approval of disclosure statement that required "rank speculation instead of adequate information").

Because there are many unknowns regarding whether and how the Insurers' rights have been altered and what role they will play in the Trusts' distribution procedures, the Disclosure Statement does not provide adequate information and cannot be approved.

C. Objection 3 – The Disclosure Statement Fails to Provide Adequate Information About the Insurance Rights Transfer

The Insurance Rights Transfer contemplated under the Plan and Disclosure Statement is problematic for numerous reasons, which precludes creditors and other interested parties from understanding what rights of the Debtor under the Insurance Policies are actually being transferred.

1. The Insurance Rights Transfer Improperly Attempts to Transfer the Rights of Non-Debtors Under the Insurance Polices

Under the Plan, "the Covered Parties (other than the Settling Insurers) shall irrevocably transfer, grant, and assign to the [Trusts], and the [Trusts] shall receive and accept, any and all of the Insurance Rights." (Plan, § IV(G)(1); *see also* Disclosure Statement, § V(A)(10)(a).) However, "Covered Parties" are defined to include the Debtor and the Reorganized Debtor as well as various non-debtor entities including the Parishes, any other Co-Insured Party, the Settling Insurers, the Settling IAC Affiliates and "such other Entity that is a co-defendant in a CVA Action that becomes a Covered Party pursuant to Article V.S of the Plan." (Plan, § I(A)(30).) Indeed, five of the six categories of Covered Parties are non-debtors. Thus, the Plan, and by extension the Disclosure Statement, contemplate the assignment of non-debtors' interests in the Insurance Policies. Such contemplated assignments are improper under the Bankruptcy Code.

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 of the Bankruptcy Code. 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." 11 U.S.C. § 541(a)(1)

(emphasis added). 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. *See Overton's, Inc. v. Interstate Fire & Cas. Ins. Co. (In re Sportsuff, Inc.)*, 430 B.R. 170, 178 n.15 (B.A.P. 8th Cir. 2010) ("while the bankruptcy court may exercise jurisdiction over (a liability insurance) policy, the interests of the co-insured, a nondebtor, are not property of the estate"). This very conclusion was reached by Judge Poslusny in the *Diocese of Camden* bankruptcy case. *See In re Diocese of Camden*, 653 B.R. 309, 352 (Bankr. D.N.J. 2023) ("this Court lacks jurisdiction to order or approve the transfer of the [non-debtors'] interest in the Policies, because the Court's jurisdiction is limited to property of the Debtor, or the estate").

2. The Insurance Rights Transfer Improperly Separates the Benefits from the Burdens of the Insurance Policies in Violation of Sections 363 and 365 of the Bankruptcy Code

The Insurance Rights Transfer is also problematic and its impact on the Plan and potential distributions to creditors is not fully understood because "the Insurance Rights Transfer is not an assignment of any insurance policy itself." (Plan, § IV(G)(7); *see also* Disclosure Statement, § V(A)(10)(g).)

The Insurance Rights Transfer is circuitously defined as "the transfer, assignment, and vesting of Insurance Rights described in Article IV.G." (Plan, § I(A)(78).) And Article IV(G), in turn, only defines the Insurance Rights in the negative as not being "an assignment of any insurance policy itself." (*Id.* at § IV(G)(7); *see also* Disclosure Statement, V(A)(10)(g).) Consequently, there is no way for a creditor or interested party to understand what constitutes the "Insurance Rights" or to distinguish what is and what is not being assigned from the Debtor to the Trusts.

Moreover, to the extent the Insurance Policies are not being transferred in full, the Insurance Rights Transfer does not meet the requirements of Section 363 or Section 365 of the Bankruptcy Code, the only sections under which the transfers can be made. *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) ("[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. If a contract is executory, the debtor must also comply with section 365 of the Bankruptcy Code, which provides special rules governing the transfer of rights and obligations under a contract.").

A transfer under Sections 363 and 365 must be made *cum onere*. *Id.* This principle requires "the rights and obligations under [an] agreement[] to be transferred together, if at all." *Id.* at 98. In other words, the benefits of a contract must travel with the burdens – and a debtor may not split one from the other. *Id.* "[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." *Id.* 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." *In re Amatex Corp.*, 107 B.R. 856, 865-66 (E.D. Pa. 1989), *aff'd*, 908 F.2d 961 (3d Cir. 1990). As such, a bankruptcy court cannot confirm a plan that excises provisions of insurance policies "because doing so would rewrite the [insurance] [p]olicies and expand the [d]ebtor['s] rights under them." *In re MF Glob. Holdings Ltd.*, 469 B.R. 177, 193 (Bankr. S.D.N.Y. 2012).

Because the Insurance Rights Transfer does not transfer the Insurance Policies themselves, the Plan aims to sever the benefits of the Insurance Policies (coverage) from certain of their burdens (conditions), including the insured's duty to handle and defend claims, provide notice to

its insurers, and the duty to cooperate. This violates the *cum onere* rule and results in an impermissible modification of the Insurance Policies. *Cf. id.* ("[T]he Court cannot modify [policy] rights pursuant to the Bankruptcy Code."). Thus, the Insurance Rights Transfer does not clearly indicate which Insurance Rights are actually being transferred and, to the extent it is less than all benefits and burdens under the Insurance Policies it is prohibited under Sections 363 and 365 of the Bankruptcy Code. Consequently, the Disclosure Statement does not provide an accurate description of the nature and extent of the Insurance Rights Transfer and cannot be approved under 11 U.S.C. § 1125.

3. The Disclosure Statement Does Not Appraise Creditors and Other Interested Parties of the Risk that the Insurance Rights Transfer May be Ruled Unenforceable Under State Law

The Plan is also misleading to creditors and other interested parties because it improperly deems that the Insurance Rights Transfer is valid notwithstanding any analysis of the relevant provisions under New York law and therefore omits any discussion of the possibility that the Insurance Rights Transfer may be struck down by a state court. (*See* Plan, § IV(G)(8); Disclosure Statement, § V(A)(10)(h).)

The Plan implicitly impairs Insurers' rights under the Insurance Policies. In particular, the Plan states that the Insurance Rights Transfer is "valid and enforceable in accordance with the terms of any Insurance Policy . . . notwithstanding any anti-assignment provision in or incorporated into any Insurance Policy." (Plan, § IV(G)(7); *see also* Disclosure Statement, § V(A)(10)(g).) Similarly, the Plan deems itself valid and enforceable notwithstanding "any cooperation clause of any Insurance Policy." (Plan, § IV(G); *see also* Disclosure Statement, § V(A)(10).)

Finally, the Plan and TDP continuously use the undefined phrase "applicable law". The Insurance Rights Transfer is made "to the maximum extent under ***applicable law***." (Plan,

§ IV(G)(5); *see also* Disclosure Statement, § V(A)(10)(e) (emphasis added).) Similarly, the TDP preserves Insurance Rights "***under applicable law*** and subject to the Plan." (TDP, § 1.5 (emphasis added).) The rights of Insurers under the TDP are determined "pursuant to the terms and provisions of the Insurance Policies and ***applicable law***." (*Id.* (emphasis added).) Further, the Trusts are obligated to satisfy retrospective premiums and SIRs "to the extent required under the relevant policies and ***applicable law***." (*Id.* (emphasis added).) Finally, the Insurers are not obligated to advance an SIR "unless otherwise required by ***applicable law***." (*Id.* (emphasis added).) The use of this phrase, as opposed to the phrase "applicable non-bankruptcy law," is problematic because it leaves open the possibility that the state law rights and defenses held by the Insurers may not be preserved.

By ignoring the implications of any cooperation clause and anti-assignment clause under state law, and by premising the Insurers' rights under the TDP on "applicable law," which may or may not mean state law, the Debtor is taking the position that the enforceability of the Insurance Rights Transfer under state law is irrelevant because the Plan simply invalidates any contractual provisions that would make the Insurance Rights Transfer otherwise unenforceable. This is misleading because it is premised on relief the Court lacks jurisdiction to provide, and it fails to provide creditors and interested parties with adequate information because it does not identify as a potential risk of Plan confirmation the possibility that the Insurance Rights Transfer may subsequently be invalidated by a state court.

Addressing a similar question in the *Diocese of Camden* bankruptcy, Judge Poslusny declined to determine whether an assignment of insurance interests was enforceable under state law. Instead, he held that "[e]ach contract will need to be interpreted under applicable law in the context of a specific dispute. All I can hold today is that, in the first instance, state law will

determine that question." 653 B.R. at 351. Similarly, in *In re Boy Scouts of America, Inc.* ("BSA"), Judge Silverstein determined that although she could approve a transfer of insurance rights under the Bankruptcy Code, another court in the future should determine on a case-by-case basis whether the transfers were permissible under state law. 642 B.R. 504, 669-71 (Bankr. D. Del. 2022).

Because the Plan fails to sufficiently address the enforceability of the Insurance Rights Transfer under state law, and the Disclosure Statement does not identify the invalidation of the Insurance Rights Transfer as a possible risk arising from Plan confirmation, the Disclosure Statement does not provide adequate information with respect to the Insurance Rights Transfer and cannot be approved. *See Avianca Holdings*, 632 B.R. at 130 ("A disclosure statement should likewise contain all material information relating to the risks posed to creditors and equity interest holders under the proposed plan of reorganization.") (internal citations omitted).

IV. CONCLUSION

For the reasons set forth herein, the Court should deny the Motion and decline to approve the Debtor's Disclosure Statement.

Respectfully submitted this 5th day of January, 2024,

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