

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

The Roman Catholic Diocese of Syracuse,
New York,

Debtor.

)
)
) Case No. 20-30663 (MMC)

)
) Chapter 11
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)

**OMNIBUS REPLY TO PLEADINGS FILED IN RESPONSE TO
THE DIOCESE’S MOTION FOR ENTRY OF AN ORDER TO APPROVE
THE MEDIATION CONFIDENTIALITY AND FEE AGREEMENT PURSUANT
TO SECTIONS 105(a) AND 363(b) OF THE BANKRUPTCY CODE**

The Roman Catholic Diocese of Syracuse, New York (the “Diocese”), by and through its undersigned counsel, hereby submits this omnibus reply (this “Reply”) to the pleadings filed in response to the Diocese’s *Motion for Entry of an Order to Approve the Mediation Confidentiality and Fee Agreement Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code* [Docket No. 532] (the “Motion”) by (i) certain Underwriters at Lloyd’s, London, and London Market Companies (collectively “LMI”) [Docket No. 543] (the “LMI Objection”), (ii) Interstate Fire and Casualty Company, Fireman’s Fund Insurance Company, and National Surety Corporation (collectively “Allianz”) [Docket No. 547] (the “Allianz Objection”), (iii) Utica Mutual Insurance Company (“Utica Mutual”) [Docket No. 548] (the “Utica Mutual Objection”), (iv) Travelers Insurance Company Limited, Travelers Casualty and Surety Company and Traveler’s Indemnity Company (collectively, “Travelers”) [Docket No. 553] (the “Travelers Objection”), (v) Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America, ACE Property & Casualty Insurance Company, and Westchester Fire Insurance Company (collectively, “Century Indemnity Insurers”) [Docket No. 554] (the “Century Indemnity Insurers Objection”), (vi) The National Catholic Risk Retention Group, Inc. (“TNCRRG”) [Docket No. 555] (the “TNCRRG Objection”), (vii) The Andover Companies (“Andover”) [Docket No.

556] (the “Andover Objection”), (viii) Nationwide Mutual Fire Insurance Company, sued as Nationwide Insurance Company of America (“Nationwide”) [Docket No. 557] (the “Nationwide Objection”), (ix) Excelsior Insurance Company and General Insurance Company of America (collectively, “Liberty Mutual Insurers”) [Docket No. 558] (the “Liberty Mutual Insurers Objection”); (x) Hartford Fire Insurance Company (“Hartford”) [Docket No. 559] (the “Hartford Objection”), (xi) Merchants Mutual Insurance Company (“Merchants”), Michigan Millers Insurance Company (“Michigan Millers”), and New York Central Mutual Insurance Company (“New York Central”) [Docket No. 561] (the “Merchants Objection”), (xii) TIG Insurance Company (“TIG”), North River Insurance Company (“North River”) and U.S. Fire Insurance Company (“U.S. Fire”) [Docket No. 564] (the “TIG Objection”), and (xiii) QBE Insurance Corporation, as successor-in-interest to Unigard Insurance Company (as successor-in-interest to Jamestown Mutual Insurance Company) (“QBE”) [Docket No. 565] (the “QBE Objection”), and (xiv) Providence Washington Insurance Company and Zurich American Insurance Company (collectively, “Enstar” and collectively with LMI, Allianz, Utica Mutual, Travelers, Century Indemnity Insurers, TNCRRG, Andover, Nationwide, Liberty Mutual Insurers, Hartford, Merchants, Michigan Millers, New York Central, TIG, North River, U.S. Fire, and QBE, the “Objecting Insurers”) [Docket No. 566] (the “Enstar Objection” and collectively with the LMI Objection, the Allianz Objection, the Utica Mutual Objection, the Travelers Objection, the Century Indemnity Insurers Objection, the TNCRRG Objection, the Andover Objection, the Nationwide Objection, the Liberty Mutual Insurers Objection, the Hartford Objection, the Merchants Objection, the TIG Objection, and the QBE Objection, the “Insurer Objections”).¹ As and for its omnibus reply, and in further support of the Motion, the Diocese respectfully states as follows:

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

OMNIBUS REPLY

1. While the Objecting Insurers do not take exception to the proposed compensation, confidentiality, and other terms of the Fee Agreement, the Objecting Insurers assert that they should not be required to pay *any* of the fees and expenses related to the mediation. This position runs contrary to accepted custom and would fail to make the Objecting Insurers “invested” in the process of mediation.

A. The Insurers Should be Ordered to Pay 50% of the Mediation Fees and Expenses

2. In the LMI Objection, joined by all of the Objecting Insurers, LMI objects to shouldering any portion of the Mediator costs because “. . . the norm [in Roman Catholic Diocese cases] has been that the Debtor absorbs the costs and expenses incurred in mediation as an Administrative Expense. For example, this was done in connection with the Diocese of Rochester, New York.” *See* LMI Objection, ¶ 11.

3. LMI’s reliance on the Diocese of Rochester case to support its position is wholly misplaced. In fact, the Diocese of Rochester is an example of a Roman Catholic Diocese chapter 11 case in which a sitting bankruptcy judge was selected as the mediator.² In such circumstances, the mediator is not compensated for mediation services provided, and therefore there can be no fees or expenses to be shared.

4. In the present case, a private mediator, one whose selection was supported by LMI and various Insurers, was appointed by the Court. As a private mediator, Judge Fitzgerald is entitled to compensation as provided in the Fee Agreement.

² *See* Order Directing Mediation and Appointing Mediator at ¶ 1, *In re The Diocese of Rochester*, Case No. 19-20905, Adv. Proc. Case No. 19-02021 (Bankr. W.D.N.Y., Feb. 25, 2020) [Adv. Pro. Docket No. 39] (appointing United States Bankruptcy Judge Gregg W. Zive, a sitting bankruptcy judge from the United States Bankruptcy Court, District of Nevada, as mediator).

5. It is a normal and customary practice that the fees and expenses of a mediator are shared among the parties to an underlying dispute. That custom and practice is reflected in the NDNY Mediation Program rules.

6. Moreover, it has been the practice in certain other Roman Catholic Diocese cases where a private mediator has been appointed that the insurance carriers share in paying the costs of the mediation. *See e.g.* Order (I) Appointing Mediator, (II) Referring Certain Matters to Mediation, and (III) Granting Related Relief at ¶ 5, *In re The Diocese of Camden, New Jersey*, Case No. 20-21257 (Bankr. D. N.J., May 20, 2021) [Docket No. 640] (the “Diocese of Camden Mediation Order”). A copy of the Diocese of Camden Mediation Order is attached hereto as *Exhibit A*. It is noteworthy that LMI and certain other Objecting Insurers are parties to the mediation in the Diocese of Camden case.

7. The Diocese, as a debtor in a chapter 11 bankruptcy, should not be required to pay all of the fees and expenses of the Mediator, while the Objecting Insurers, financially solvent sophisticated businesses, get a free ride. Upon a successful mediation, all of the Objecting Insurers will benefit directly through reduced litigation costs, as well as settling significant potential liability under historic insurance policies. The Objecting Insurers should not escape financial responsibility for the Mediator’s fees and expenses solely because the Diocese is in bankruptcy.

8. The Objecting Insurers should be required to pay fifty percent (50%) of the mediation fees and expenses. Courts have long applied the American rule with respect to litigation costs, which requires each party to bear its own legal fees and expenses. *See Chapel v. Mitchell* *Chapel v. Mitchell*, 84 N.Y.2d 345, 349, 642 N.E.2d 1082, 1084 (1994); *see also Baker v. Health Mgmt. Sys., Inc.*, 98 N.Y.2d 80, 88, 772 N.E.2d 1099, 1104 (2002). Here, where mediation is

ordered by the Court, there can be no doubt that such legal expenses are properly attributable to the Objecting Insurers, not an expense to be borne fully by the Diocese's bankruptcy estate.

B. The Court Should Use its Inherent Powers Pursuant to Section 105(a) of the Bankruptcy Code to Approve the Mediator Fee Agreement and Modify the NDNY Mediation Program

9. While very minor portions of the NDNY Mediation Program may not scale to a Chapter 11 Case of this size, the vast majority of the program is sufficient for mediation of the Adversary Proceeding. The NDNY Mediation Program includes a fulsome confidentiality protocol intended to allow all of the parties to participate in mediation without fear of information disclosed during the mediation being used against the parties. Only a small portion of the NDNY Mediation Program does not track with the mass-tort nature of this Chapter 11 Case. Those provisions were flagged in the original Motion filed by the Diocese, and include the direct cap on Mediator compensation of \$150 per hour with the Mediator serving on a *pro-bono* basis for the first six (6) hours, and the expectation that mediation will not exceed six (6) hours.³

10. The Court has the inherent power through sections 105(a) and 363(b) of the Bankruptcy Code to make minor modifications to the NDNY Mediation Program in order to fit the facts and circumstances of this Chapter 11 Case, by simply approving the Mediator Fee Agreement and ordering that in the event of a conflict between the Mediator Fee Agreement and the NDNY Mediation Program, the language in the Mediator Fee Agreement shall control. Section 105(a) of the Bankruptcy Code allows the Court to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” *In re Caesars Entertainment Operating Co., Inc.*, 808 F.3d 1186, 1188 (7th Cir. 2015). The Diocese respectfully

³ The Diocese would note that section 6.1(2) of the NDNY Mediation Program does allow for a mediation to continue beyond six (6) hours with the consent of the parties. The Diocese expects that mediation of the Adversary Proceeding will encompass numerous mediation sessions across several months.

submits that the Court has the power to approve the Mediator Fee Agreement, and should do so through a limited exercise of the authority granted to the Court by section 105(a) of the Bankruptcy Code.

C. The Committee and the Parishes Should Not be Required to Pay a Portion of the Mediator's Fees and Expenses

11. The fact that the NDNY Mediation Program includes a fee sharing provision indicates a preference in this Court to share mediation expenses amongst the parties. The NDNY Mediation Program also provides the Court with authority to order a different allocation of mediation fees, "in the interest of justice." NDNY Mediation Program, § 6.1(2). Here, justice requires a split of all mediation fees and costs equally among the Diocese and the Insurers, with no fees or expenses paid by the Committee or the Parishes.

12. While the Committee has been invited to participate in the mediation sessions, the Committee itself is not a party to the Adversary Proceeding. The Committee's participation in the mediation will presumably assist all parties in moving closer to a confirmable chapter 11 plan of reorganization, thereby allowing the Diocese to exit from bankruptcy. The Committee's participation in mediation should not obligate it to pay any portion of the Mediator's fees and expenses. As in all bankruptcy cases, any fees or expenses incurred by the Committee are an expense of the Diocese's chapter 11 estate. The assertion by the Objecting Insurers that the Committee should pay a portion of the mediation fees and expenses is a transparent attempt to force the Diocese to bear a higher proportion of the mediation fees and expenses while directly decreasing the contribution of the Insurers.

13. Similarly, the suggestion in the Insurer Objections that the Parishes should pay a portion of the Mediator fees and expenses is an attempt by the Objecting Insurers to push the obligation back upon the Diocese. It is likely that many or all of the Parishes would seek indemnity

from the Diocese related to the payment of the Mediator's fees and expenses through the previously approved insurance program of the Diocese (the "Insurance Program").⁴ Because of the way that the Insurance Program is funded, each of the Parishes has previously paid the Diocese a ratable portion of the overall costs associated with the Insurance Program. Pursuant to the Insurance Program, the Diocese is responsible for paying all expenses of defense, etc., and claims for losses by the Parishes, including any deductible, up until the point where insurance coverage becomes available.

14. Moreover, the Diocese respectfully asserts that requiring the Insures to contribute to the fees and expenses of the Mediator will have the practical effect of permitting the carriers to be "invested" in the mediation process. To the extent that all parties to the mediation share in the financial burdens of the mediation, such parties will be appropriately motivated to conduct the mediation in the most efficient and expeditious manner possible. Therefore, the Court should reject the Objecting Insurers' request, and instead approve the Mediator Fee Agreement, without any modifications.

D. The Insurers Should be Ordered to Reimburse the Diocese for all Fees and Expenses of the Mediator within Thirty (30) Days of Presentment

15. Finally, the Objecting Insurers assert that even if they are required to pay a portion of the Mediator's fees and expenses, such fees and expenses should not be due until after the conclusion of mediation. The Diocese notes that the proposed manner for seeking reimbursement under the Fee Agreement is similar to that directed by the Court in the Diocese of Camden Mediation Order. *See* Diocese of Camden Mediation Order, ¶ 5.

⁴ Approval of the Insurance Program was granted pursuant to the *Final Order (i) Authorizing the Continued Maintenance of the Diocese's Self-Insurance Programs; and (ii) Authorizing the Payment of Prepetition Obligations in Respect Thereof* [Docket No. 114].

16. The Diocese is required to pay the Mediator's fees and expenses as invoiced. If the Insurers are permitted to withhold reimbursement to the Diocese until the conclusion of mediation, the Diocese will essentially be forced to provide interest free financing of the portion of the Mediator's fees and expenses that are the responsibility of the Insurers. The Objecting Insurers attempt to justify this interest free loan from the Diocese by arguing that it is difficult to get the various Insurers to agree on an allocation of the fees and expenses. The Diocese respectfully submits that each of these Insurers is a sophisticated financial company. Upon information and belief, the Insurers calculate complex allocations of financial responsibility in the ordinary course of each Insurer's business. Upon information and belief, each of the Insurers currently employ analysts and actuaries who are specifically tasked with determining the Insurer's specific exposure with respect to any number of current or hypothetical claims. The Insurers should be able to come to an agreeable allocation of the Mediator fees. Alternatively, the Diocese respectfully submits that the Court can order an allocation simply splitting the fees and expenses evenly among all participating Insurers, if the Insurers are unable to resolve the issue without further assistance.

17. Most importantly, however, the Objecting Insurers will not be fully "invested" in the mediation if they are permitted to defer their payment of fees and expenses until the end of mediation. Instead, the sharing of costs will not have the desired effect.

WHEREFORE, the Diocese respectfully requests entry of an order, substantially in the form attached to the Motion as Exhibit B: (i) authorizing the Diocese to retain the Mediator pursuant to sections 105(a) and 363(b) of the Bankruptcy Code; (ii) approving the Fee Agreement; (iii) overruling all of the Insurer Objections, and (iv) granting such other and further relief as is just and proper.

Dated: July 7, 2021
Syracuse, New York

BOND, SCHOENECK & KING, PLLC

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EXHIBIT “A”

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY



Order Filed on May 20, 2021
by Clerk
U.S. Bankruptcy Court
District of New Jersey

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*Counsel to the Official Committee
of Tort Claimant Creditors*

In re:

THE DIOCESE OF CAMDEN, NEW JERSEY,

Debtor.

DATED: May 20, 2021

**ORDER (I) APPOINTING MEDIATOR, (II) REFERRING
CERTAIN MATTERS TO MEDIATION, AND (III)
GRANTING RELATED RELIEF**

The relief set forth on the following pages, numbered two (2) through five (5), is hereby

ORDERED.

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

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Debtor: The Diocese of Camden, New Jersey
Case No. 20-21257 (JNP)
Caption of Order: Order (i) Appointing Mediator, (ii) Referring Certain Matters to Mediation, and (iii) Granting Related Relief

THIS MATTER having been presented to the Court by The Diocese of Camden, New Jersey, debtor and debtor-in-possession (the “Diocese”), by and through its former counsel, McManimon, Scotland & Baumann, LLC, and the Official Committee of Tort Claimant Creditors (the “Tort Committee,” and together with the Diocese, the “Moving Parties”), by and through its counsel, Lowenstein Sandler LLP, upon the filing of a motion pursuant to section 105(a) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), for entry of an order (i) appointing one or more mediators to mediate any and all issues related to the comprehensive resolution of this bankruptcy case, (ii) referring this matter to mandatory global mediation, and (iii) granting related relief (the “Motion”)¹; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Standing Order of Reference to the Bankruptcy Court Under Title 11 of the United States District Court for the District of New Jersey*, as amended on September 18, 2012; and venue being proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and notice of the Motion being sufficient under the circumstances; and it appearing that no other or further notice need be provided; and the Court having determined that the relief sought in the Motion is in the best interests of the Diocese, its estate and creditors; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED as follows:

1. The Motion is **GRANTED** as set forth herein.

¹ Capitalized terms used but not defined herein shall have the same meaning ascribed to such term in the Motion.

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Debtor: The Diocese of Camden, New Jersey

Case No. 20-21257 (JNP)

Caption of Order: Order (i) Appointing Mediator, (ii) Referring Certain Matters to Mediation, and (iii) Granting Related Relief

2. The Honorable Jose L. Linares, Chief United States District Judge (ret.) is appointed as mediator (the “Mediator”) for the purpose of globally mediating any and all issues arising in the bankruptcy case and associated adversary proceedings (the “Mediation”), and shall be compensated at the rate of \$900 per hour.²

3. Except as otherwise provided herein, the following parties (collectively, the “Mediation Parties”) are referred to the Mediation: (a) the Diocese; (b) the Tort Committee, including its members, professionals, and the individual members’ professionals; (c) the Trade Committee, including its members, professionals, and the individual members’ professionals; (d) the Parishes; (e) the Other Catholic Entities; and (f) each of the Insurers. Any additional party or parties who wish to participate in the Mediation, including, without limitation, any additional insurers, shall be included in the Mediation if (i) all of the Mediation Parties agree to include such additional party or parties in the Mediation and (ii) the Mediator agrees that the participation of such additional party or parties is necessary or would be beneficial to the Mediation.

4. Upon entry of this Order, the Mediation Parties shall promptly contact the Mediator to schedule an organizational telephone conference among the Mediation Parties. The scheduling and location of all mediation sessions shall be determined by the Mediator. The Mediator shall consult with the Mediation Parties on the matters concerning the Mediation, including, without limitation: (a) the structure and timing of Mediation procedures, including, without limitation, the

² To the extent that other attorneys or staff members at McCarter & English participate or assist in the Mediation, they shall bill at their normal hourly rates.

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Caption of Order: Order (i) Appointing Mediator, (ii) Referring Certain Matters to Mediation, and (iii) Granting Related Relief

attendance of specific Mediation Parties at particular Mediation sessions; and (b) the timing, general content, and manner of any submissions to the Mediators.

5. The Diocese is responsible for timely payment of two-thirds (2/3) of the fees and costs of the Mediator, which shall be payable without further application to or order of the Court. The Insurers are collectively responsible for timely payment of one-third (1/3) of the fees and costs of the Mediator. To the extent practicable, the Mediator shall bill the Diocese for 100% of his fees and expenses incurred herein, which the Diocese shall timely pay, and the Insurers shall reimburse the Diocese their one-third (1/3) share within forty-five (45) days of receipt of the invoice from the Diocese. The Insurers shall determine among themselves the responsibility for their aggregate one-third (1/3) share of the Mediator's fees and costs. To the extent of a disagreement among the Insurers, the Court shall decide the division of responsibility among the Insurers for the Mediator's fees and costs. The Diocese shall not be responsible for billing the Insurers, who shall collectively determine the process for timely reimbursement of the one-third share to the Diocese in accordance with this Order.

6. All rights of the Mediation Parties are preserved and shall not be prejudiced by participation in the Mediation, including, without limitation, any rights to: (i) have final orders in non-core matters entered only after a de novo review by a District Court Judge; (ii) seek withdrawal of the reference of any matter subject to mandatory or discretionary withdrawal; (iii) seek remand of any removed matter; (iv) oppose venue transfer of any removed matter; (v) demand arbitration

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Debtor: The Diocese of Camden, New Jersey

Case No. 20-21257 (JNP)

Caption of Order: Order (i) Appointing Mediator, (ii) Referring Certain Matters to Mediation, and (iii) Granting Related Relief

or a jury trial in any proceeding; and (vi) contest the jurisdiction of this Court to enter any order concerning any alleged insurance coverage that is the subject of the Mediation.

7. Not later than seven (7) days after the conclusion of the Mediation, the Mediator shall file a mediation report with the Court reflecting the results of the Mediation.

8. The Mediator shall submit invoices to all parties-in-interest, including, but not limited to the Office of the United States Trustee, by posting a copy of each invoice on the docket in this matter. Any party-in-interest may object to such fees and request a hearing no later than fourteen (14) days following the filing of each invoice on the docket. If no such objection is made within the objection period, the Diocese is authorized to pay the invoice in accordance with this Order.

9. The Mediator shall submit a certification concerning his determination that there is no basis for disqualification and that no conflicts were found after a search was made in the manner prescribed by the applicable Rules of Professional Conduct for attorneys, and by the applicable rules pertaining to the profession of the mediator.

10. The Moving Parties are authorized to take all actions necessary or appropriate to effectuate the relief granted in this Order in accordance with the Motion.

11. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

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