

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

In re:

The Diocese of Buffalo, N.Y.,

Debtor.

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)  
) Case No. 20-[10322 ]  
)  
) Chapter 11  
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**MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING  
THE DIOCESE TO PAY PREPETITION TAXES AND REGULATORY FEES**

The Diocese of Buffalo, N.Y. (the “Diocese”), by and through its undersigned counsel, hereby moves the Court (this “Motion”) for entry of interim and final orders, substantially in the form of the proposed orders attached hereto as *Exhibit A* and *B*, authorizing, but not directing, the Diocese to pay, in the ordinary course of the Diocese’s business, prepetition sales, gross receipts, utility-users, federal excise and use, and certain other governmental taxes, including any amounts subsequently determined to be owing upon audit (collectively, the “Taxes”), regulatory fees, including, but not limited to, federal, state and local regulatory fees (the “Regulatory Fees”), and permit or other licensing fees (the “Licensing Fees,” and together with the Taxes and Regulatory Fees, the “Taxes and Fees”) to the respective federal, state and local taxing authorities and other governmental agencies (each a “Taxing Authority” and collectively, the “Taxing Authorities”). In support of this Motion, the Diocese respectfully represents as follows:

**BACKGROUND**

1. On February 28, 2020 (the “Petition Date”), the Diocese filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (11 U.S.C. § 101 *et seq.*, the “Bankruptcy Code”) with the United States Bankruptcy Court for the Western District of New York (the “Court”), commencing the Diocese’s chapter 11 case (this “Chapter 11 Case”). The Diocese continues to operate its business and manage its properties as a debtor in possession

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pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for a trustee or examiner has been made in this Chapter 11 Case, and as of the date of this filing, no official committees have been appointed or designated.

2. Information regarding the Diocese's history, business operations and structure, and the events leading up to this Chapter 11 Case is set forth in the *Affidavit of Rev. Peter J. Karalus Regarding Structure and Pre-Filing History of The Diocese of Buffalo and in Support of the Chapter 11 Petition and First Day Pleadings* and the *Affidavit of Charles Mendolera Regarding the Diocese's Assets and Operations and in Support of the Chapter 11 Petition and First Day Pleadings*, each of which was filed on the Petition Date and is incorporated herein by reference.

### **JURISDICTION**

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
4. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
5. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).
6. The statutory and rule-based predicates for the relief requested herein are sections 105(a), 363(b), 507(a)(8) and 541 of title 11 of the United States Code (11 U.S.C. § 101, *et seq.*, the "Bankruptcy Code") and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

7. The Diocese does not, by filing its petition for relief and other documents in this Chapter 11 Case, waive any of its rights under any applicable law, including, without limitation, the Code of Canon law, the First Amendment of the United States Constitution, the Constitution for the State of New York, the Religious Freedom Restoration Act, the church autonomy doctrine, charitable trust law, New York trust law, and the rights to object to disclosure of information and to contend that certain assets which may be discussed in the Motion are not property of the estate.

## **RELIEF REQUESTED**

8. By this Motion, the Diocese hereby seeks authority to pay, in its sole discretion, in the ordinary course of its business and on its normal due dates, all undisputed prepetition Taxes and Fees owed to the Taxing Authorities, including all Taxes and Fees subsequently determined upon audit to be owed for periods prior to the Petition Date.

9. In the ordinary course of its business, the Diocese is required to pay Taxes and Fees. The Diocese must remit these Taxes and Fees to the various governmental entities of the jurisdictions in which the Diocese conduct business. The process by which the Diocese remits the Taxes and Fees varies, depending on the nature of liability at issue and the Taxing Authority to which the relevant payment is made.

10. As of the Petition Date, the Diocese believes that it is current with respect to the payment of Taxes and Fees except that approximately \$1,594.00 is owed for certain sales taxes incurred with respect to the Diocese's cafeteria operations and its purchasing division. Additionally, certain Taxes may have accrued prepetition but have not yet come due for payment.

11. The Diocese pays the Taxes and Fees to the Taxing Authorities on a periodic basis with funds drawn by checks or by means of electronic fund transfers whether sent directly to the Taxing Authorities or sent to a third-party administrator who pays the appropriate Taxing Authorities. Prior to the Petition Date, certain Taxing Authorities were sent checks or electronic transfers in respect of such obligations that may not have cleared the Diocese's banks or other financial institutions as of the Petition Date.

12. The Diocese further requests that all applicable banks and financial institutions be authorized and directed, when requested by the Diocese in its sole discretion, to receive, process, honor and pay any and all checks or electronic transfers drawn on the Diocese's accounts, to pay

all prepetition Taxes and Fees owed to the Taxing Authorities, whether those checks were presented prior to or after the Petition Date, and to make other transfers, provided that sufficient funds are available in the applicable accounts to make such payments. To the extent the Taxing Authorities have not otherwise received payment for all prepetition Taxes and Fees owed, the Diocese seeks authorization to issue replacement checks, or to provide for other means of payment to the Taxing Authorities, to the extent necessary, to pay all outstanding Taxes and Fees owing for periods prior to the Petition Date.

### **BASIS FOR RELIEF**

13. The Diocese hereby seeks entry of interim and final orders authorizing, but not directing, the Diocese to pay, in the ordinary course of the Diocese's businesses, all prepetition Taxes and Fees owed to the Taxing Authorities, including all Taxes and Fees subsequently determined upon audit to be owed for periods prior to the Petition Date.

14. The Court has several legal bases upon which to grant the requested relief. Pursuant to Section 105(a) of the Bankruptcy Code, the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

15. The purpose of Section 105(a) is to "assure the Bankruptcy Court's power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction." 2 COLLIER ON BANKRUPTCY ¶ 105.01 (16<sup>th</sup> Ed. Rev.). Thus, section 105(a) essentially codifies the bankruptcy court's inherent equitable powers and "grants bankruptcy courts the 'equitable power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.'" *See Schwartz v. Aquatic Dev. Group, Inc. (In re Aquatic Dev. Group, Inc.)*, 352 F.3d 671, 680 (2d Cir. 2003) (citation omitted) (Straub, J., concurring); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (recognizing that the use of section 105(a) equitable powers to

“authorize the payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept”); *In re James A. Phillips, Inc.*, 29 B.R. 391, 394-95 (S.D.N.Y. 1983).

16. The Court may also authorize the Diocese to pay the Taxes and Fees to the Taxing Authorities under section 363(b) of the Bankruptcy Code. Section 363(b) provides that a debtor “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Under this section, a court may authorize a debtor to pay certain prepetition claims. *See In re Ionosphere Clubs, Inc.*, 98 B.R. at 175 (authorizing payment of prepetition claims pursuant to section 363 of the Bankruptcy Code where the debtor articulates “some business justification, other than the mere appeasement of major creditors”); *In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (finding that the bankruptcy court could authorize payment of prepetition claims where such payment was necessary for the Diocese’s survival during chapter 11).

17. To the extent that payment of the Taxes and Fees would constitute a use of property outside the ordinary course of business, the payment of these obligations is justified pursuant to section 363(b) of the Bankruptcy Code. Although section 363 does not set forth a standard for determining when it is appropriate for a court to authorize use of a debtor’s assets, in applying this section, courts have deferred to the sound business judgment of the debtor. *See In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that a judge determining a section 363(b) application must find from the evidence presented before him a good business reason to grant such application); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (same); *In re Ionosphere Clubs, Inc.*, 98 B.R. at 175 (same); *see also Stephens Indus. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (holding that a “bankruptcy court can authorize a sale of all of a Chapter 11 Debtor’s

assets under § 363(b)(1) when a sound business purpose dictates such action”).

18. Section 507(a)(8) of the Bankruptcy Code gives priority to the Taxing Authorities’ claims for certain taxes. *See Bair v. Dep’t of Taxation (In re Bair)*, 302 B.R. 564, 567 (Bankr. N.D. Ohio 2003) (noting that sales taxes were entitled to priority under section 507(a)(8)). Certain of the prepetition obligations owed to the Taxing Authorities, therefore, are entitled to priority status and, as such, must be paid in full under any plan. *See* 11 U.S.C. § 1129(a)(9)(C). Thus, the payment of certain of the prepetition Taxes and Fees at this time would not prejudice the rights of other creditors, but merely would accelerate payments that otherwise would become due in connection with the Diocese’s reorganization. At the same time, payment would likely enable to Diocese to avoid conflict and administrative problems arising from actions the Taxing Authorities may take against the Diocese to collect due and owing Taxes and Fees.

19. Certain Taxing Authorities may assert that the Taxes and Fees are so-called “trust fund” taxes that the Diocese is required to collect from third parties and hold in trust for the benefit of such Taxing Authorities. *See* N.Y. TAX LAW § 1132(a); *Begier v. Internal Revenue Serv.*, 496 U.S. 53, 57-60 (1990) (holding that any prepetition payment of trust fund taxes is not an avoidable preference because such bonds are not property of the debtor’s estate); *DeChiaro v. New York State Tax Commission*, 760 F.2d 432, 433-34 (2d Cir. 1985) (sales taxes are trust fund taxes); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95-96 (3d Cir. 1994) (finding that withholding taxes are trust fund taxes); *In re Columbia Gas Sys., Inc.* 997 F.2d 1039, 1062 (3d Cir. 1993) (holding that refunds collected pursuant to federal law created trust funds that were not property of the debtor’s estate); *Shank v. Wash. Dep’t. of Revenue (In re Shank)*, 792 F.2d 829, 832-33 (9th Cir. 1986) (finding that sales taxes required by state law to be collected by sellers from its customers are trust fund taxes); *In re American Int’l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987)

(finding that excise and withholding taxes are trust fund taxes). Consequently, the Diocese would not have an equitable interest in such Taxes and Fees and, assuming they could be adequately identified and traced, such Taxes and Fees would not constitute property of the Diocese's estate and would not be subject to the automatic stay. *See Sharon Steel*, 41 F.3d at 95-96; *see also* 11 U.S.C. § 541(d). Further, because the Taxes and Fees may not be property of the Diocese's estate, these funds may not be available for the satisfaction of creditors' claims. Accordingly, the Diocese should be able to pay any Taxes and Fees that constitute trust fund taxes as they come due.

20. Furthermore, even if some of the Taxes and Fees would not ordinarily be considered "trust fund" taxes in a particular jurisdiction, payment of such Taxes and Fees should nevertheless be authorized because failure to pay the Taxes and Fees may adversely affect the Diocese's good standing in a jurisdiction, potentially impairing its ability to engage in certain transactions and continue to conduct its business. In addition, some Taxing Authorities may audit the Diocese, if such Taxes and Fees are not timely paid, which would needlessly divert the Diocese's attention from its reorganization efforts. Timely payment of the Taxes and Fees is necessary to avoid such distractions and is thus in the best interests of the Diocese and its estate.

21. Finally, many federal and state statutes hold officers, certain employees, and directors of collecting entities personally liable for certain taxes owed by those entities. *See* N.Y. TAX LAW § 1133. To the extent that any Taxes and Fees remain unpaid by the Diocese, the Diocese's directors and officers may be subject to lawsuits or criminal prosecution during the pendency of this Chapter 11 Case. Any such lawsuit or criminal prosecution (and the ensuing potential liability) would distract the Diocese and its leadership from effectuating the Diocese's reorganization, to the detriment of all parties in interest in this Chapter 11 Case.

22. Any delay in paying the obligations relating to the Taxes and Fees would be detrimental to the Diocese, its creditors, and its estate. Indeed, the Diocese's ability to manage and run its operations with as little disruption as possible requires, in part, that it remain in good standing with the relevant Taxing Authorities. For the foregoing reasons, the Diocese submits that the relief requested herein is necessary and appropriate and is in the best interests of the Diocese's estate, its creditors, and other parties in interest.

**BANKRUPTCY RULE 6003 IS SATISFIED**

23. Bankruptcy Rule 6003 provides that a bankruptcy court may approve a motion to “use, sell, [or] lease” property of the estate, or to “pay all or part of a claim that arose before the filing of the petition,” prior to twenty-one (21) days after the filing of the petition, “to the extent that relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. Immediate and irreparable harm exists where, as is the case here, the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't. Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of “immediate and irreparable harm” in the context of Bankruptcy Rule 4001). The Diocese submits that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Diocese, as described herein, and that cause exists under Bankruptcy Rule 6003 for the Court to grant immediate relief.

### **WAIVER OF NOTICE AND STAY REQUIREMENTS**

24. To implement the foregoing successfully, the Diocese seeks a waiver of the notice requirements under Bankruptcy Rule 6004(a) and any stay of an order granting the relief requested herein pursuant to Bankruptcy Rules 6004(h), 7062, 9014 or otherwise.

### **RESERVATION OF RIGHTS**

25. Nothing in this Motion, nor any payment made pursuant to the relief sought herein, if granted, is intended or should be construed as an admission as to the validity, priority or amount of any claim against the Diocese, a waiver of the Diocese's right to dispute any claim or an approval or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code and the Diocese expressly reserves its rights with respect thereto.

### **NOTICE**

26. Notice of this Motion will be given to (i) the Office of the United States Trustee for the Western District of New York, (ii) the Diocese's twenty (20) largest unsecured creditors as set forth in the list filed with the Diocese's petition, (iii) all required governmental agencies and (iv) the Diocese's banks. In light of the nature of the relief requested herein, the Diocese submits that no further notice is required.

### **NO PRIOR REQUEST**

27. The Diocese has not previously sought the relief requested herein from this or any other court.



**EXHIBIT A**

Proposed Interim Order

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

In re:

The Diocese of Buffalo, N.Y.,

Debtor.

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) Case No. 20-[ 10322 ]  
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) Chapter 11  
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**INTERIM ORDER AUTHORIZING  
THE DIOCESE TO PAY PREPETITION TAXES AND REGULATORY FEES**

Upon the motion of The Diocese of Buffalo, N.Y. (the “Diocese”) for entry of interim and final orders authorizing, but not directing, the Diocese to pay, in the ordinary course of the Diocese’s business, prepetition sales, gross receipts, utility-users, federal excise and use, and certain other governmental taxes, including any amounts subsequently determined to be owing upon audit, regulatory fees, including, but not limited to, federal, state and local regulatory fees, and permit or other licensing fees to the respective federal, state and local taxing authorities and other governmental entities [Docket No. \_\_\_\_] (the “Motion”);<sup>1</sup> and it appearing that the Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that venue of this Chapter 11 Case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that proper and adequate notice of the Motion has been given under the circumstances and that, except as otherwise ordered herein, no other or further notice is necessary; and the Court having reviewed the Motion and the record in this Chapter 11 Case and determined that granting the relief requested in the Motion on an interim basis is in the best interests of the Diocese, its estate, creditors and other parties in interest; and after due deliberation thereon, and good and sufficient cause appearing therefor;

<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

**IT IS HEREBY ORDERED THAT:**

1. The Motion is granted on an interim basis as set forth herein.
2. The Diocese is authorized, but not directed, to pay all undisputed prepetition Taxes and Fees, including all those Taxes and Fees subsequently determined upon audit to be owed for periods prior to the Petition Date to the proper Taxing Authorities in the ordinary course of its business and on its normal due dates.
3. All banks and financial institutions with which the Diocese maintains bank accounts or on which checks are drawn or electronic payment requests made in payment of the prepetition obligations approved herein are authorized and directed to continue to service and administer the Diocese's bank accounts without interruption in the ordinary course and to receive, process, honor and pay any and all checks and electronic payment requests when presented for payment, whether before or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make such payments, and all such banks and financial institutions are authorized to rely upon the Diocese's designation of any particular check or electronic payment request as being approved by this Interim Order.
4. The Diocese is authorized, but not directed, to issue postpetition checks or to affect postpetition fund transfer requests in replacement of any checks or fund transfer requests that are dishonored as a consequence of this Chapter 11 Case with respect to prepetition amounts approved to be paid by this Interim Order.
5. Nothing in this Interim Order nor any action taken by the Diocese in furtherance of the implementation hereof shall be deemed an approval of the assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code.

6. Nothing in the Motion or this Interim Order shall be construed as impairing the Diocese's right to contest the validity, priority or amount of any claim pursuant to applicable law or otherwise dispute, contest, setoff or recoup any claim, or assert any rights, claims or defenses related thereto.

7. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion or are otherwise deemed waived.

8. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, this Interim Order shall be effective and enforceable immediately upon its entry. Notwithstanding any objection to the Motion or this Interim Order, this Interim Order shall remain in effect until further order of this Court. Any subsequent modification or vacatur of this Interim Order shall not invalidate or impair any actions taken pursuant to this Interim Order prior to such modification or vacatur.

9. A final hearing on the Motion (the "Final Hearing") shall be held on [\_\_\_\_], 2020 at [\_\_:\_\_] [a.m./p.m.] (prevailing Eastern time). Any objections or responses to the Motion shall be filed and served as required by the Local Rules on or before on [\_\_\_\_], 2020 at 4:00 p.m. (prevailing Eastern time). This Interim Order, and all acts taken in furtherance of or reliance upon this Interim Order, shall be effective notwithstanding the filing of an objection. In the event no objections or responses are timely filed and served in accordance with the foregoing, the Court may grant the relief requested in the Motion on a final basis without holding a Final Hearing.

10. The Diocese is hereby authorized to take all actions it determines are necessary to effectuate the relief granted pursuant to this Interim Order.

11. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Interim Order.

Dated: \_\_\_\_\_, 2020  
Buffalo, New York

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Hon. Carl L. Bucki  
United States Bankruptcy Judge

**EXHIBIT B**

Proposed Final Order

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

In re:

The Diocese of Buffalo, N.Y.,

Debtor.

Case No. 20-[10322 ]

Chapter 11

**FINAL ORDER AUTHORIZING  
THE DIOCESE TO PAY PREPETITION TAXES AND REGULATORY FEES**

Upon the motion of The Diocese of Buffalo, N.Y. (the “Diocese”) for entry of interim and final orders authorizing, but not directing, the Diocese to pay, in the ordinary course of the Diocese’s business, prepetition sales, gross receipts, utility-users, federal excise and use, and certain other governmental taxes, including any amounts subsequently determined to be owing upon audit, regulatory fees, including, but not limited to, federal, state and local regulatory fees, and permit or other licensing fees to the respective federal, state and local taxing authorities and other governmental entities [Docket No. \_\_\_\_] (the “Motion”);<sup>1</sup> and it appearing that the Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that venue of this Chapter 11 Case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that proper and adequate notice of the Motion has been given under the circumstances and that no other or further notice is necessary; and an order granting the relief requested in the Motion on an interim basis having been entered on [\_\_\_\_\_], 2020; and the Court having reviewed the Motion and the record in this Chapter 11 Case and determined that granting the relief requested in the Motion on a final basis is in the best interests of the Diocese,

<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

its estate, creditors and other parties in interest; and after due deliberation thereon, and good and sufficient cause appearing therefor;

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED on a final basis as set forth herein.
2. Any objections to the Motion, or to the relief requested therein, that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, are hereby overruled and disallowed on the merits.
3. The Diocese is authorized, but not directed, to pay all undisputed prepetition Taxes and Fees, including all those Taxes and Fees subsequently determined upon audit to be owed for periods prior to the Petition Date to the proper Taxing Authorities in the ordinary course of its business and on its normal due dates.
4. All banks and financial institutions with which the Diocese maintains bank accounts or on which checks are drawn or electronic payment requests made in payment of the prepetition obligations approved herein are authorized and directed to continue to service and administer the Diocese's bank accounts without interruption in the ordinary course and to receive, process, honor and pay any and all checks and electronic payment requests when presented for payment, whether before or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make such payments, and all such banks and financial institutions are authorized to rely upon the Diocese's designation of any particular check or electronic payment request as being approved by this Final Order.
5. The Diocese is authorized, but not directed, to issue postpetition checks or to affect postpetition fund transfer requests in replacement of any checks or fund transfer requests that are

dishonored as a consequence of this Chapter 11 Case with respect to prepetition amounts approved to be paid by this Final Order.

6. Nothing in this Final Order nor any action taken by the Diocese in furtherance of the implementation hereof shall be deemed an approval of the assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code.

7. Nothing in the Motion or this Final Order shall be construed as impairing the Diocese's right to contest the validity, priority or amount of any claim pursuant to applicable law or otherwise dispute, contest, setoff or recoup any claim, or assert any rights, claims or defenses related thereto.

8. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, this Final Order shall be effective and enforceable immediately upon its entry. Any subsequent modification or vacatur of this Final Order shall not invalidate or impair any actions taken pursuant to this Final Order prior to such modification or vacatur.

9. The Diocese is hereby authorized to take all actions it determines are necessary to effectuate the relief granted pursuant to this Final Order.

10. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Final Order.

Dated: \_\_\_\_\_, 2020  
Buffalo, New York

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Hon. Carl L. Bucki  
United States Bankruptcy Judge