

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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**MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS
AUTHORIZING THE DIOCESE TO (A) PAY PREPETITION COMPENSATION
AND REIMBURSABLE EMPLOYEE EXPENSES, (B) PAY AND HONOR MEDICAL
AND OTHER BENEFITS AND (C) CONTINUE EMPLOYEE BENEFIT PROGRAMS**

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 *Exhibits A* and *B*, respectively, authorizing, but not directing, the Diocese to (a) pay prepetition compensation, reimbursable business expenses, benefit plans, deductions and payroll taxes, all as described herein, (b) pay and honor medical and other benefit plans, on a post-petition basis, and (c) continue employee benefit programs. 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 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), 363(c), 507(a)(4), 507(a)(5), 541(b) and 1129(a)(9)(B) of the Bankruptcy Code, and Rules 6003 and 6004 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 respectfully requests that the Court enter interim and final orders authorizing, but not directing, the Diocese to (a) pay prepetition compensation, reimbursable business expenses, benefit plans, deductions and payroll taxes, all as described

herein, (b) pay and honor medical and other benefit plans, on a post-petition basis, and (c) continue employee benefit programs.

9. The Diocese's employees are essential to the administration of the Diocese's Chapter 11 Case, preservation of assets and continuation of the Diocese's mission. In addition to providing religious guidance and facilitating religious services and activities in the Diocese, the Diocese's employees also provide other critical functions including, without limitation, finance, human resources, risk management, informational technology, legal, catholic education, evangelization and catechesis, stewardship and communications, pastoral and clergy services, canonical tribunal, archives and building and grounds maintenance. Without these employees, the Diocese would be unable to provide these services to individuals of the Roman Catholic faith, parishes and schools within the Diocese and would also be unable to provide necessary support for a plan of reorganization to benefit all creditors.

10. The Diocese currently (i) employs 138 full-time employees including both non-clergy employees and active priests, and 51 part-time employees (collectively, the "Employees"); (ii) provides direct payments and benefits to 152 retired priests (the "Retired Clergy") and (iii) provides a stipend and benefits to 16 current seminarians (the "Seminarians"). Sixty (60) of the full-time Employees are salaried and 78 are paid on an hourly basis. Two of the part-time Employees are salaried, and 49 are paid on an hourly basis. The Diocese also employs 59 per diem employees paid on an hourly basis (the "Temporary Workers"). The Diocese has one Employee entitled to commissions as the Director of Camp Turner.¹

11. The vast majority of the Employees, Retired Clergy, Seminarians and Temporary Workers rely exclusively on the compensation and benefits they receive from the Diocese to

¹ The Director of Camp Turner is entitled to a commission for facility rentals in the amount of 25% of the gross paid rental receipts above the minimum annual rental receipts of \$32,000, subject to certain conditions.

provide for their daily living expenses and these Employees, Retired Clergy, Seminarians and Temporary Workers would be exposed to significant financial difficulties if the Diocese were not permitted to continue paying such compensation and benefits in the ordinary course of its business.

12. To minimize the personal hardship that the Employees, Retired Clergy, Seminarians and Temporary Workers would suffer if prepetition obligations are not paid when due or as expected, and to maintain morale and stability in the Diocese during this critical time, the Diocese seeks authorization to (a) pay and honor, in its sole discretion, certain prepetition claims for the following items, each as described below: Compensation, Reimbursable Business Expenses and Benefit Plans, together with all other benefits that the Diocese has historically provided to its Employees, Retired Clergy, Seminarians and Temporary Workers in the ordinary course of business (collectively, the “Employee Wages and Benefits”), (b) pay all administrative costs associated with Employee Wages and Benefits, (c) continue to pay and provide the Employee Wages and Benefits in the ordinary course of business on and following the Petition Date, and (d) withhold (as applicable) and remit Deductions and Payroll Taxes as described below.

13. **Compensation.** The Diocese’s Central Administrative Office non-clergy Employees and Temporary Workers are paid bi-weekly in arrears, through the end of the prior week. There are 4 days of wages earned by these Employees and Temporary Workers prior to the Petition Date that constitute prepetition wages which are due to be paid on March 12, 2020. Based upon historical data, the average bi-weekly aggregate payroll for the Diocese’s Central Administrative Office non-clergy Employees and Temporary Workers is approximately \$228,000, including applicable taxes and deductions. The Diocese estimates that \$91,200 in prepetition payment obligations to non-clergy Employees and Temporary Workers has accrued prior to the Petition Date and remains unpaid.

14. The Diocese's active clergy Employees (the "Active Priests"), are paid monthly in arrears. Based upon historical data, the average monthly aggregate payroll for the Active Priests is approximately \$110,000 including applicable taxes and deductions. The Diocese estimates that \$110,000 in prepetition payment obligations to Active Priests has accrued prior to the Petition Date and remains unpaid.

15. Retired Clergy receive monthly payments of approximately \$166,000 per month, inclusive of applicable taxes and deductions. The Diocese estimates that \$166,000 in prepetition payment obligations to Retired Clergy has accrued prior to the Petition Date and remains unpaid.

16. Seminarians average monthly aggregate stipends total approximately \$2,500, with no applicable taxes or deductions. The Diocese estimates that no prepetition stipends to Seminarians remains unpaid as of the Petition Date.

17. The Diocese estimates that total prepetition unpaid compensation for Employees (including Active Priests), Retired Clergy and Temporary Workers as of the Petition Date totals \$367,200 (the "Unpaid Compensation"). The Diocese believes that it does not owe any Employee, Temporary Worker or Seminarian a prepetition amount in excess of the \$13,650 cap on priority claim amounts imposed by section 507(a)(4) of the Bankruptcy Code. Accordingly, the Diocese is not seeking authority to pay any amount over the \$13,650 cap to any Employee, Temporary Worker or Seminarian.

18. Items of Unpaid Compensation were due and owing on the Petition Date because, among other things:

- a. the Chapter 11 Case was filed during the Diocese's regular payroll periods;
- b. some checks issued to Employees, Retired Clergy, Seminarians and Temporary Workers prior to the Petition Date may not have been presented for payment or

cleared the banking system and, accordingly, have not been honored and paid as of the Petition Date; and

- c. Employees, Retired Clergy, Seminarians and Temporary Workers have not yet been paid all their salaries and wages for services performed prior to the Petition Date because the Diocese pays payroll in arrears.

19. ***Reimbursable Business Expenses.*** Prior to the Petition Date and in the ordinary course of business the Diocese has reimbursed Employees for certain reasonable and customary expenses incurred on behalf of the Diocese (“Business Expenses”). As of the Petition Date, the Diocese’s unpaid Business Expenses for Employees total less than \$25,000. In addition, it is possible that certain Employees may have incurred prepetition Business Expenses for which they have not yet submitted requests for reimbursement and will submit such requests to the Diocese after the Petition Date.

20. The Business Expenses are incurred by Employees on the Diocese’s behalf and with the understanding that they will be reimbursed. Accordingly, to avoid harming Employees who may have incurred Business Expenses, by this Motion the Diocese requests the authority, to be exercised in its sole discretion, to: (a) continue paying Business Expenses in accordance with prepetition practices; (b) modify their prepetition policies relating thereto as they deem appropriate; and (c) pay all Business Expenses that relate to the prepetition period.

21. ***Benefit Plans.*** The Diocese provides eligible Employees and their eligible dependents with various employee benefits as follows (collectively, the “Benefit Plans”):

- a. ***Medical Plan: Employees.*** The Diocese’s health coverage is provided through an independent self-insured health plan (the “Self-Insured Health Plan”) for its eligible Employees, as set forth in greater detail in the Diocese’s *Motion for Entry of Interim and Final*

Orders (i) Authorizing the Continued Maintenance of the Diocese's Self-Insurance Programs; and (ii) Authorizing the Payment of Prepetition Obligations in Respect Thereof (the "Self-Insurance Motion"), filed contemporaneously herewith. The Diocese pays approximately \$98,000 monthly in advance to the Self-Insured Health Plan. As of the Petition Date, no payments are owed by the Diocese under the Self-Insured Health Plan.

b. *Medical Plan: Active Priests.* Employees who are Active Priests are separately insured through Blue Cross Community Blue, and the Diocese pays approximately \$155,000 per month to Blue Cross to cover these premiums for Active Priests. As of the Petition Date the Diocese believes that there are no premium payments owed to Blue Cross for insurance coverage for Active Priests.

c. *Medical Plan: Retired Clergy.* Retired Clergy are insured through Aetna Silver Script and Supplement Medical Benefit Plan. Retired Clergy are also reimbursed for Medicare supplement premiums. The Diocese pays approximately \$53,000 per month to Aetna to cover these premiums. Further, Medicare reimbursement obligations for Retired Clergy are paid monthly and total approximately \$22,000 per month, including supplemental pension payments. As of the Petition Date, the Diocese believes that there are no premium payments owed to Aetna. The Diocese anticipates that \$22,232 in payments are outstanding for Medicare reimbursements and supplemental pension payments to Retired Clergy as of the Petition Date.

d. *Dental Plans.* The Diocese provides dental coverage through Pro-Dental for its eligible Employees. Pro-Dental is paid by the Diocese in arrears based on claims processed, and the estimated amount owed by the Diocese as of the Petition Date is \$20,000. The Diocese pays the entire amount of these monthly premiums for single employees, and for family coverage, \$25.00 per month is collected from participating Employees through payroll deductions.

e. *Vision Plan.* The Diocese sponsors a vision plan for its eligible Employees through VSP Vision. The entire amount of their monthly premium, approximately \$8 per month for a single employee and \$21 for family coverage, is paid by participating Employees through payroll deductions. As of the Petition Date, no vision insurance premiums are owed to VSP Vision by the Diocese.

f. *Paid Time Off (“PTO”).* The Diocese provides PTO to its Employees, the amount and accrual rate of which is based generally on an Employee’s length of service and level within the Diocese’s organization. Ordinarily, when an Employee elects to take PTO, that Employee is paid his or her regular hourly or salaried rate. Employees are paid for unused PTO when they cease employment with the Diocese. The Diocese estimates that its Employees have accrued no greater than \$450,000 of accrued but unused PTO as of January 15, 2020. This amount, however, is not a current cash payment obligation, as Employees are only entitled to cash payment for accrued and unused PTO when employment is terminated. Any such payout of PTO to a terminated Employee would be subject to the cap imposed by section 507(a)(4) of the Bankruptcy Code for any pre-petition portion of this payment. Moreover, the Diocese anticipates that its Employees will utilize any accrued PTO in the ordinary course of business, which will not create any cash flow requirements beyond the Diocese’s normal payroll obligations.

g. *New York State Short-Term Disability Insurance.* The Diocese provides short-term disability benefits for all of its Employees as required by New York State law through ShelterPoint Life Insurance Co. The Diocese pays approximately \$300,000 in premiums to ShelterPoint Life Insurance Co. each year, in quarterly installments. As of the Petition Date, the Diocese is current with respect to its payment obligations for short-term disability benefits.

h. *Life Insurance.* The Diocese sponsors basic life insurance for its eligible Employees. Employees working more than 28 hours per week are eligible for this benefit, which is paid by the Diocese. Eligible Employees receive life insurance benefits of 1.5x their annual salary, rounded up to the nearest \$1,000, with a maximum benefit of \$150,000. The Diocese pays Renaissance Life Insurance approximately \$1,510 per month, in advance, for this benefit. As of the Petition Date, the Diocese is current with respect to its payment obligations to Renaissance Life Insurance.

i. *Long-Term Disability Insurance.* The Diocese sponsors long-term disability benefits covering those Employees working more than 28 hours per week. The Diocese pays approximately \$1,167.24 per month, in advance, to Northwestern Mutual Life for this benefit. As of the Petition Date, the Diocese is current with respect to its long-term disability insurance premium payments to Northwestern Mutual Life.

j. *Supplemental Life Insurance and Long-Term Care Insurance.* The Diocese sponsors supplemental life insurance and long-term care insurance for current and former Bishops through Security Mutual Life Insurance Company of New York. Only three (3) current and former Bishops receive this benefit. The Diocese pays a total of approximately \$10,000 annually, in quarterly increments, in advance, to Security Mutual Life Insurance Company of New York for this benefit. As of the Petition Date, no supplemental life insurance or long-term care insurance premium is owed to Security Mutual Life Insurance Company of New York by the Diocese.

k. *Paid Family Leave.* The Diocese pays paid family leave premiums for its Employees. This is paid on a quarterly basis to ShelterPoint Life Insurance Co., as administrator for the Diocese's paid family leave program. The approximate annual premium is \$200,000, paid

quarterly. The Diocese does not have any outstanding obligations for paid family leave premiums as of the Petition Date.

l. *Flexible Spending Plans.* The Diocese sponsors flexible spending plans (medical/dental and dependent care) for its Employees. P&A Group, Inc. manages the flexible spending plan and charges the Diocese an administrative fee of \$189 per month. The Diocese pays the administrative fees on a monthly basis. As of the Petition Date, approximately \$47,222 is owed to P&A Group, Inc. for withholdings and administrative fees under the Flexible Spending Plans.

m. *Health Reimbursement Account.* P&A Group, Inc. manages the Diocese's Health Reimbursement Account and charges the Diocese an administrative fee of \$166.50 per month for non-clergy Employees, \$390.00 per month for Retired Clergy and \$40.50 per month for Seminarians. The Diocese's monthly contribution to the Health Reimbursement Account on behalf of Employees, Retired Clergy and Seminarians is approximately \$5,000. As of the Petition Date, no administrative fees are outstanding to P&A Group, Inc. and approximately \$5,000 is owed to P&A Group, Inc. for the Diocese's contributions under the Health Reimbursement Account.

n. *403(b) Plan.* The Diocese also offers non-clergy Employees the opportunity to participate in a defined contribution qualified retirement plan under section 403(b) of the Internal Revenue Code. The Diocese makes a core contribution of between 2% and 6% based on the age and length of service for each non-clergy Employee, with a further matching contribution of 100% for Employees with 5 or more years of service. AIG Retirement Services administers the plan, and charges a quarterly fee of \$20,000, paid in arrears on April 1. As of the pay period end date of February 22, 2020, the Diocese's core contributions and employer matches under the 403(b) Plan were current, however quarterly fees remained outstanding in the amount of approximately \$6,600.

o. *Retirement Plans.* The Diocese sponsors and administers a Priests Retirement Plan, the Retirement Plan for Secular Priests of the Diocese of Buffalo, New York (Priest Plan) (the “Priest Plan”), a multi-employer, non-qualified defined benefit pension plan covering all priests incardinated in the Diocese of Buffalo. The Diocese also contributes to a defined benefit pension plan for lay employees, the Diocese of Buffalo New York Retirement Plan (Lay Plan) (the “Lay Plan”) that was frozen as of January 1, 2016. Upon freezing the Lay Plan, each participant’s annual accrued benefit at the normal retirement date would remain the same as it was as of December 31, 2015, except for participants not vested at that time, for which vesting service will continue to be credited beyond January 1, 2016. Contributions to the Lay Plan will continue at a reduced rate until the plan is fully funded. Each of the Priest Plan and the Lay Plan are managed by independent boards of trustees. Plan assets for the Priest Plan and the Lay Plan are invested in separate investment trusts. The Diocese makes contributions to the Priest Plan on a quarterly basis, and as of the Petition Date approximately \$700,000 is outstanding for this contribution. The Diocese makes contributions to the Lay Plan on a monthly basis in the amount of approximately \$61,300. The Diocese submits this monthly contribution amount, along with the collected contributions of other Lay Plan participants, to the Lay Plan. As of the Petition Date, no amounts are outstanding for the Diocese’s contributions to the Lay Plan.

22. *Workers’ Compensation.* The Diocese provides workers’ compensation benefits (“Workers’ Compensation Benefits”) to all of its Employees and Temporary Workers. These benefits are covered primarily under the Diocese’s self-insured workers’ compensation insurance program, which is administered by USI Insurance Services, LLC, for the first \$600,000 per occurrence with respect to any workers compensation claims. This benefit is also addressed in the Self-Insurance Motion, filed contemporaneously herewith. USI Insurance Services charges

\$742.50 per claim for indemnification and \$160 per claim for medical benefits as an administration fee for each self-insured claim, paid monthly in arrears. The Diocese anticipates that approximately \$3,000 in obligations to USI Services, LLC is owed as of the Petition Date.

23. Excess workers compensation coverage is provided by Star Insurance Company. The annual workers' compensation premium paid to Star Insurance Company is approximately \$130,000 and was paid annually in July for the Diocese's 2019-2020 fiscal year. The Diocese does not believe there are any outstanding payments due to Start Insurance Company for excess workers compensation coverage premiums.

24. Failure to maintain workers compensation insurance could result in the institution of administrative or legal proceedings against the Diocese and its officers. By this Motion, the Diocese seeks authority to continue paying and/or contesting in good faith, as appropriate in the Diocese's business judgment, all amounts related to workers' compensation claims that arose prior to the Petition Date, including, without limitation, any payments to insurers required as a result of such claims and wage loss makeup obligations, as they become due in the ordinary course of the Diocese's business.

25. ***Deductions.*** During each applicable pay period, the Diocese routinely withholds certain amounts from Employees' pay that the Diocese is required to transmit to third parties. Some examples of such withholding include HRA and FSA contributions, 403(b) contributions, United Way donations, child support payments, wage garnishments, and other pre-tax and after-tax deductions payable pursuant to certain of the benefit plans discussed herein (such as an Employee's share of health care benefits and insurance premiums, legally-ordered deductions, fees and assessments and miscellaneous deductions) (collectively, the "Deductions").

26. The Diocese forwards the Deductions to the appropriate third-party recipients. On average, the Diocese deducts approximately \$24,000 in non-tax items from its non-clergy Employees' paychecks each bi-weekly pay period and an additional \$4,000 in non-tax items from Active Priests' monthly paychecks. Retired Clergy's monthly Deductions are approximately \$55,000. Due to the commencement of the Chapter 11 Case, however, certain Deductions that were deducted from Employees', Active Priests' and Retired Clergy payments may not have been forwarded to the appropriate third-party recipients prior to the Petition Date.

27. *Payroll Taxes.* Further, the Diocese is required by law to withhold from its Employees' wages amounts related to federal and state income taxes and Social Security and Medicare taxes for remittance to the appropriate federal or state taxing authority (collectively the "Withheld Amounts"). On average, the Diocese pays approximately \$24,800 in payroll taxes, including deductions from its non-clergy Employees' paychecks and employer contributions, for each bi-weekly pay period and an additional \$17,000 for Active Priests for each monthly payroll. Approximately \$14,000 in payroll taxes, including deductions from Retired Clergy monthly payments and Diocese contributions, is paid for Retired Clergy. The Diocese must match from its own funds Social Security and Medicare taxes (collectively, the "Employer Payroll Taxes" and, together with the Withheld Amounts, the "Payroll Taxes"). The Diocese believes that accrued but unpaid Payroll Taxes as of the Petition Date totals \$56,000.

28. The Diocese believes that the Deductions and Payroll Taxes, to the extent that they remain in the Diocese's possession, constitute monies held in trust and therefore are not property of the Diocese's bankruptcy estate. Accordingly, by this Motion the Diocese seeks authorization, but not direction, to forward any unpaid Deductions and Payroll Taxes to the appropriate third-party recipients and taxing authorities and to continue to forward the Deductions and Payroll Taxes

to the appropriate third-party recipients and taxing authorities on a post-petition basis, in the ordinary course of business, as routinely done prior to the Petition Date.

29. To facilitate the other relief requested herein, the Diocese requests that the Court authorize and direct all banks and other financial institutions at which the Diocese maintains an account, to receive, process, honor and pay (provided that sufficient funds are on deposit in the applicable accounts to cover such payments) any and all prepetition and post-petition checks issued or to be issued, and fund transfers requested or to be requested, by the Diocese on account of Employee Wages and Benefits that were not honored or paid as of the Petition Date, whether presented or requested prior to or after the Petition Date. The Diocese also seeks the authority to issue new prepetition checks, or effect new fund transfers, to satisfy the Employee Wages and Benefits to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

BASIS FOR RELIEF

30. In order to retain Employees and Temporary Workers and support Retired Clergy and Seminarians in furtherance of the Diocese's mission, the Diocese must have authority to pay or otherwise satisfy the Employee Wages and Benefits as summarized above. The amounts requested to be paid pursuant to this Motion are reasonable compared with the importance and necessity of the Diocese's payments to Employees, Retired Clergy, Seminarians and Temporary Workers and the harm that these individuals and the Diocese would likely suffer if these amounts are not paid.

31. Additionally, the relief requested will significantly reduce the administrative burden which might otherwise be imposed in the Chapter 11 Case. For the Diocese to identify the extent to which individual Employees, Retired Clergy, Seminarians and Temporary Workers hold

priority or general unsecured claims for employee benefits, and to modify benefit policies to enforce these distinctions, would impose additional burdens of administration and expenses which are unwarranted under the circumstances.

32. Pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and the “necessity of payment” doctrine, the Diocese seeks authority to pay outstanding prepetition Employee Wages and Benefits up to the amounts in which those claims can be considered priority claims under section 507 of the Bankruptcy Code.

33. Under section 507(a)(4) of the Bankruptcy Code, an employee may be granted a priority claim for:

allowed unsecured claims, but only to the extent of \$13,650 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor’s business, whichever occurs first, for –

(A) wages, salaries, or commissions, including PTO, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor’s business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

11 U.S.C. § 507(a)(4). Likewise, under section 507(a)(5) of the Bankruptcy Code, employees ultimately may be granted a priority claim for:

allowed unsecured claims for contributions to an employee benefit plan –

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor’s business, whichever occurs first; but only

(B) for each such plan, to the extent of –

(i) the number of employees covered by each such plan multiplied

by \$13,650; less

- (ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(5).

34. The Diocese's books and records indicate that in no instance should the amount owing to any Employee on account of the Employee Wages and Benefits as of the Petition Date exceed the sum of \$13,650, which amount is allowable as a priority claim under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code. Moreover, the Diocese only seeks authority to make payments to Employees up to the combined statutory maximum of \$13,650 on account of wages and compensation earned within 180 days before the date of the filing of a petition, allowed as a priority claim under section 507(a)(4) and contributions to employee benefit plans allowed as a priority claim under section 507(a)(5).

35. As such, payment of the Employee Wages and Benefits in the ordinary course of business should neither prejudice general unsecured creditors nor materially affect the Diocese's estate, because section 507(a)(4) and section 507(a)(5) priority claims are already entitled to payment in full under a reorganization plan. *See* 11 U.S.C. § 1129(a)(9)(B).

36. Section 363(b)(1) of the Bankruptcy Code authorizes a debtor in possession to use property of the estate other than in the ordinary course of business after notice and a hearing.² The Bankruptcy Code further provides, in section 105(a), that: "[t]he Court may issue any order,

² The Bankruptcy Code contemplates post-petition payments of prepetition claims in some circumstances. Section 549(a) of the Bankruptcy Code, which deals with post-petition transfers, provides that "the trustee may avoid a transfer of property of the estate . . . that occurs after the commencement of the case . . . that is not authorized . . . by the court." Thus, by necessary implication, a bankruptcy court may authorize limited post-petition payments to satisfy prepetition obligations. *See In re Isis Foods, Inc.*, 37 B.R. 334, 336 (Bankr. W.D. Mo. 1984) (noting in dicta that "the trustee may not avoid post-petition transfers if authorized by Title 11 or the bankruptcy court"); *see also* 11 U.S.C. § 363(b)(1) (allowing the trustee, after notice and hearing, to "use, sell, or lease, other than in the ordinary course of business, property of the estate").

process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Section 105(a) gives bankruptcy courts broad authority and discretion to enforce the provisions of the Bankruptcy Code either under specific statutory or equitable common law principles.

37. The relief requested in this Motion also is supported by the well-established “necessity of payment” doctrine.³ Numerous courts have used their section 105(a) powers to authorize payment of prepetition obligations where, as here, such payment is an essential element of the preservation of a debtor’s potential for rehabilitation. *See, e.g., In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“Under [section 105] the Court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.” (citation omitted)); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) (“[C]ourts have used their equitable power under section 105(a) . . . to authorize the payment of pre-petition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization.”); *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (reasoning that because the debtor in possession has fiduciary duties it must meet, it is logical that the bankruptcy court may “authorize satisfaction of the prepetition claim in aid of preservation or enhancement of the estate” under section 105(a)); *In re Synteen Techs., Inc.*, No. 00-02203-W, 2000 WL 33709667, at *2 (Bankr. D.S.C. Apr. 14, 2000) (Courts have permission to “allow payment of a prepetition claim ‘when essential to the continued operation of the debtor’” (citation omitted)).

³ The doctrine was first articulated by the Supreme Court in railroad reorganization cases, *See Miltenberger v. Logansport, C. & S.W. R. Co.*, 106 U.S. 286 (1882), and it has been held to be equally applicable to non-railroad debtor cases. *See, e.g., Dudley v. Mealy*, 147 F.2d 268, 271 (2d Cir. 1945); *In re Gulf Air, Inc.*, 112 BR. 152, 153 (Bankr. W.D. La. 1989).

38. In addition, it has been noted that the necessity of payment doctrine demonstrates the courts' understanding that "paying certain pre-petition claims may be necessary to realize the goal of chapter 11—a successful reorganization." *Just for Feet*, 242 B.R. at 825-26 (citation omitted); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (use of equitable powers to "authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept").

39. The necessity of payment doctrine is frequently invoked early in reorganization cases, during the so-called "breathing spell", when preservation of the estate is most critical and often extremely difficult. For example, in *In re Structurlite Plastics Corp.*, the Court embraced "the principle that a bankruptcy court may exercise its equity powers under [section] 105(a) to authorize payment of prepetition claims where such payment is necessary to 'permit the greatest likelihood of survival of the debtor. . .'" 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988) (quoting *In re Chateaugay Corp.*, 80 B.R. 279, 287 (S.D.N.Y. 1987)). The *Structurlite* court explained that "a per se rule proscribing the payment of pre-petition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code." *Structurlite*, 86 B.R. at 932. Flexibility of payment is particularly critical when the prepetition creditor provides vital goods or services to the debtor.

40. The Bankruptcy Court's exercise of its authority under the necessity of payment doctrine is appropriate to carry out specific statutory provisions of chapter 11, specifically, sections 1107(a), 1108 and 363(b)(1), which authorize a debtor in possession to maintain and operate the debtor's business and, after a notice and hearing, to use estate property out of the ordinary course of business. Indeed, a debtor in possession operating a business under section 1108 of the Bankruptcy Code has a fiduciary duty to protect and preserve its estate, including the

going concern value of an operating business. *See In re CoServ. L.L.C.*, 273 B.R. at 497 (“There are occasions when this [fiduciary] duty can only be fulfilled by the preplan satisfaction of a prepetition claim.”). A Bankruptcy Court’s exercise of its authority under section 105(a) is also necessary to carry out two central policies underlying chapter 11: (i) to permit the successful rehabilitation of the debtor and (ii) to preserve going concern value and maximize property available to satisfy all creditors. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. La Salle St. P’ship*, 526 U.S. 434, 453 (1999). Granting the relief requested in this Motion will enhance the likelihood of the successful administration of the Chapter 11 Case, the probability of maximizing the value of estate assets and, ultimately, the return to creditors.

41. As part of the requested relief, the Diocese also seeks authority to pay the Deductions and Payroll Taxes to the appropriate third-party recipients and taxing authorities. Indeed, certain of these amounts are not property of the Diocese’s estate because they have been withheld from paychecks on another party’s behalf. *See* 11 U.S.C. § 541(b). The Deductions principally represent earnings which Employees, Retired Clergy, Seminarians and Temporary Workers have designated for deduction from Employee paychecks and payment to third-party recipients. The failure to pay the Deductions could result in significant hardship. It is even possible that garnishments from wages result in funds that are not the Diocese’s property, but rather must be withheld from paychecks for payment to third parties. Moreover, if the Diocese cannot remit these amounts, Employees, Retired Clergy, Seminarians and Temporary Workers may face legal action due to the Diocese’s failure to make these payments. Additionally, the failure to pay Payroll Taxes may subject the Diocese and its officers to federal or state liability. *See City of Farrell v. Sharon Steel Corp. (In re Sharon Steel Corp.)*, 41 F.3d 92, 94-96 (3rd Cir. 1994) (state

law requiring debtor to withhold city income tax from its employees' wages created trust relationship between debtor and city for payment of withheld taxes); *DuCharmes & Co. v. Michigan (In re DuCharmes)*, 852 F.2d 194, 195-96 (6th Cir. 1988) (noting the special liabilities for failure to pay trust fund taxes). Because such funds are not property of the Diocese's estate, the funds are not subject to the normal bankruptcy prohibitions against payment. *See Begier v. IRS*, 496 U.S. 53, 67 (1990) (debtor's payment of employee withholding for federal income and Social Security taxes was not a preferential transfer because amounts withheld were held in trust for taxing authority and not a part of debtor's estate); *Old Republic Nat'l Title Ins. Co. v. Tyler (In re Dameron)*, 155 F.3d 718, 721 (4th Cir. 1998).

42. Based upon the foregoing, the Diocese respectfully requests that the Court enter an Order authorizing the Diocese to pay or otherwise satisfy, in the ordinary course of business, the Employee Wages and Benefits. Such relief is justified because the failure to pay any such amounts will likely disrupt the services that the Employees, Retired Clergy, Seminarians and Temporary Workers provide to the Diocese and ultimately, the Diocese's ability to successfully administer its Chapter 11 Case.

BANKRUPTCY RULE 6003 IS SATISFIED

43. 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

44. 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

45. 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

46. 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

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

WHEREFORE, the Diocese respectfully requests that the Court enter interim and final orders, substantially in the form of the proposed orders attached hereto as *Exhibits A* and *B* respectively, granting the relief requested herein and providing such other and further relief as the Court deems just and proper.

Dated: February 28, 2020

BOND, SCHOENECK & KING, PLLC

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*Proposed Attorneys for The Diocese of
Buffalo, N.Y.*

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 (A) PAY
PREPETITION COMPENSATION AND REIMBURSABLE
EMPLOYEE EXPENSES, (B) PAY AND HONOR MEDICAL AND OTHER
BENEFITS AND (C) CONTINUE EMPLOYEE BENEFIT PROGRAMS**

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 (a) pay prepetition compensation and reimbursable employee expenses, (b) pay and honor obligations relating to medical and other employee benefits and (c) continue its employee benefit programs on a post-petition basis [Docket No. ___] (the “Motion”);¹ 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;

¹ 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 continue to honor and pay, upon entry hereof, the Employee Wages and Benefits in accordance with the Diocese's policies and prepetition practices, including, but not limited to, payment of prepetition Unpaid Compensation to the Employees; provided, however, that payments to each Employee after the Petition Date on account of amounts accrued prior to the Petition Date shall not exceed amounts afforded priority status by section 507(a)(4) or section 507(a)(5) of the Bankruptcy Code and Unpaid Compensation shall only be paid in the amount earned within 180 days prior to the Petition Date.
3. The Diocese is authorized, but not directed, to continue to honor its prepetition policies and practices, and to pay prepetition amounts that it may owe, with respect to PTO and reimbursement of Business Expenses.
4. The Diocese is authorized, but not directed, to continue to provide in accordance with the Diocese's prepetition practices, and to pay prepetition amounts which may be owed with respect to, the Benefit Plans.
5. The Diocese is authorized, but not directed, to continue to allocate and distribute in accordance with the Diocese's policies and prepetition practices, and to pay prepetition amounts which may be owed with respect to, the Deductions and the Payroll Taxes.
6. In accordance with this Interim Order and any other order of the Court, the Diocese is authorized, but not directed, to pay any and all processing fees associated with, and all costs incident to, payment or provision of the Employee Wages and Benefits and allocation and distribution of the Deductions and Payroll Taxes, including all administrative and processing costs and payments to outside professionals in the ordinary course of business.

7. 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.

8. The Diocese is authorized, but not directed, to issue post-petition checks or to affect post-petition fund transfer requests in replacement of any checks or fund transfer requests that are dishonored as a consequence of the Chapter 11 Case with respect to prepetition amounts approved to be paid by this Order.

9. Notwithstanding the relief granted herein and any actions take hereunder, nothing contained in the Motion or this Interim Order, or any payment made pursuant hereto, shall constitute, nor is it intended to constitute, a finding of the Court or an admission by the Diocese as to the validity, priority or amount of any claim against the Diocese, a waiver of the Diocese's right to subsequently dispute such claim or an assumption or an authorization to assume any executory contract or agreement, including, but not limited to, any benefit plans, employment agreements, or severance agreements to which the Diocese is a party.

10. The requirements set forth in Bankruptcy Rules 6003(b) and 6004(a) are satisfied by the contents of the Motion or are otherwise deemed waived.

11. 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.

12. 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 enter an Order granting the relief requested in the Motion on a final basis without holding a Final Hearing.

13. The Diocese shall serve a copy of the Motion, this Order, and notice of the Final Hearing upon the parties identified in paragraph 46 of the Motion by depositing the same in first class mail, postage prepaid, not later than 5:00 p.m. on the third business day following entry of this Order.

14. The Diocese is hereby authorized to take all actions it determines are necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion.

15. 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

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.

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) Case No. 20-[10322]
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) Chapter 11
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**FINAL ORDER AUTHORIZING THE DIOCESE TO (A) PAY
PREPETITION COMPENSATION AND REIMBURSABLE EMPLOYEE
EXPENSES, (B) PAY AND HONOR MEDICAL AND OTHER
BENEFITS AND (C) CONTINUE EMPLOYEE BENEFIT PROGRAMS**

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 (a) pay prepetition compensation and reimbursable employee expenses, (b) pay and honor obligations relating to medical and other employee benefits and (c) continue its employee benefit programs on a post-petition basis [Docket No. ____] (the “Motion”);¹ 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, its estate, creditors and other parties in interest; and after due deliberation thereon, and good and sufficient cause appearing therefor;

¹ 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 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 continue to honor and pay, upon entry hereof, the Employee Wages and Benefits in accordance with the Diocese's policies and prepetition practices, including, but not limited to, payment of prepetition Unpaid Compensation to the Employees, Retired Clergy, Seminarians and Temporary Workers; provided, however, that payments to each Employee after the Petition Date on account of amounts accrued prior to the Petition Date shall not exceed amounts afforded priority status by section 507(a)(4) or section 507(a)(5) of the Bankruptcy Code and Unpaid Compensation shall only be paid in the amount earned within 180 days prior to the Petition Date.
4. The Diocese is authorized, but not directed, to continue to honor its prepetition policies and practices, and to pay prepetition amounts that it may owe, with respect to PTO and reimbursement of Business Expenses.
5. The Diocese is authorized, but not directed, to continue to provide in accordance with the Diocese's prepetition practices, and to pay prepetition amounts which may be owed with respect to, the Benefit Plans.
6. The Diocese is authorized, but not directed, to continue to allocate and distribute in accordance with the Diocese's policies and prepetition practices, and to pay prepetition amounts which may be owed with respect to, the Deductions and the Payroll Taxes.

7. In accordance with this Order and any other order of the Court, the Diocese is authorized, but not directed, to pay any and all processing fees associated with, and all costs incident to, payment or provision of the Employee Wages and Benefits and allocation and distribution of the Deductions and Payroll Taxes, including all administrative and processing costs and payments to outside professionals in the ordinary course of business.

8. 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 Order.

9. The Diocese is authorized, but not directed, to issue post-petition checks or to affect post-petition fund transfer requests in replacement of any checks or fund transfer requests that are dishonored as a consequence of the Chapter 11 Case with respect to prepetition amounts approved to be paid by this Order.

10. Notwithstanding the relief granted herein and any actions take hereunder, nothing contained in the Motion or this Order, or any payment made pursuant hereto, shall constitute, nor is it intended to constitute, a finding of the Court or an admission by the Diocese as to the validity, priority or amount of any claim against the Diocese, a waiver of the Diocese's right to subsequently dispute such claim or an assumption or an authorization to assume any executory contract or

agreement, including, but not limited to, any benefit plans, employment agreements, or severance agreements to which the Diocese is a party.

11. The requirements set forth in Bankruptcy Rules 6003(b) and 6004(a) are satisfied by the contents of the Motion or are otherwise deemed waived.

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

13. The Diocese is hereby authorized to take all actions it determines are necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

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

Dated: _____, 2020
Buffalo, New York

Hon. Carl L. Bucki
United States Bankruptcy Judge