

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

The Diocese of Rochester,

Debtor.

Case No. 19-20905

Chapter 11

**MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING
DEBTOR 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 Rochester, the debtor and debtor-in-possession in the above-captioned chapter 11 case (the “Debtor” or “Diocese”), hereby moves this Court (this “Motion”) for entry of interim and final orders in substantially the forms attached hereto as *Exhibits A* and *B*, respectively, authorizing, but not directing, the Debtor 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 Debtor respectfully represents as follows:

BACKGROUND

1. On September 12, 2019 (the “Petition Date”) the Debtor commenced this case by filing a voluntary petition for relief under chapter 11 of the title 11 of the United States Code (the “Bankruptcy Code”). The Debtor is authorized to continue to operate its business and remain in possession of its property as a debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case, and as of the date of this Motion, no official committee has been appointed or designated.

2. Information regarding the Diocese's history, business operations, operational structure, facts supporting this Motion and the events leading up to the chapter 11 case can be found in the *Affidavit of Daniel J. Condon in Support of Chapter 11 Petition and First Day Pleadings* and the *Affidavit of Lisa M. Passero in Support of 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. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

4. 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").

RELIEF REQUESTED

5. The Debtor's employees are essential to the administration of the Debtor's chapter 11 case, preservation of assets and continuation of the Debtor's mission. In addition to providing religious guidance and facilitating religious services and activities in the Diocese, the Debtor'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 the employees, the Debtor 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.

6. The Debtor currently employs 86 full-time employees and 6 part-time employees (collectively, the “Employees”) and provides medical and dental benefits to an additional sixty-eight (68) retired priests and 2 former priests (the “Retired Clergy”). Seventy-four (74) of the Employees are salaried employees, and 18 are hourly employees. The Debtor also employs an independent contractor and 10 temporary workers employed through a staffing agency (collectively, “Temporary Workers”). The Debtor’s Employees serve both the Pastoral Center and Siena Catholic Academy. Six of the Employees are women of religious orders (“Women Religious”) who receive employee benefits and paid time off. Such Women Religious do not receive a salary or wages; instead payment is made to their Religious Order. The Debtor’s obligations also extend to the Retired Clergy who receive no wages but receive benefits through a Medicare Advantage plan and/or dental insurance.

7. The vast majority of the Employees and Temporary Workers rely exclusively on the compensation and benefits they receive from the Debtor to provide for their daily living expenses and these Employees and Temporary Workers would be exposed to significant financial difficulties if the Debtor were not permitted to continue paying such compensation and benefits in the ordinary course of its business.

8. In addition to customary Employee compensation and reimbursable expenses, the Debtor owes obligations to one priest who is not able to exercise an ecclesiastical office and to the Bishop Emeritus pursuant to Canon Law and guidance issued by the United States Conference of Catholic Bishops.

9. To minimize the personal hardship that the Employees, Retired Clergy and Temporary Workers would suffer if prepetition Employee-and related obligations are not paid when due or as expected, and to maintain morale and stability in the Diocese during this critical time, the Debtor 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 Debtor has historically provided to its Employees, Retired Clergy 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.

10. **Compensation.** The Debtor’s Employees are paid bi-weekly in arrears, through the end of the prior week. There are four (4) days of wages earned by the Employees prior to the Petition Date that constitute prepetition wages which are due to be paid on September 26, 2019. Based upon historical data, the average bi-weekly aggregate payroll for the Debtor’s Employees is approximately \$190,000. The average weekly aggregate costs for the Debtor’s Temporary Workers is approximately \$6,100. The Debtor estimates that approximately \$74,000 in prepetition wages, salaries, overtime pay and other cash compensation and approximately \$18,000 for Temporary Workers has accrued in the ordinary course prior to the Petition Date and remains unpaid (collectively, the “Unpaid Compensation”). The Debtor believes that it does not owe any Employee 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 Debtor is not seeking authority to pay any amount over the \$13,650 cap to any Employee.

11. 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 Debtor's regular payroll periods;
- b. some checks issued to Employees 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 have not yet been paid all their salaries and wages for services performed prior to the Petition Date because the Debtor pays payroll in arrears.

12. ***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 August 9, 2019, the Debtor's unpaid Employee Business Expenses total less than \$100. 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 Debtor after the Petition Date.

13. All of the Business Expenses are incurred on the Debtor'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 Debtor 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.

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

a. *Medical Plan: Employees.* The Debtor’s health coverage is provided by Excellus BlueCross Blue Shield (“Excellus”) for its eligible Employees, and approximately 55 Employees elect this benefit. The Debtor pays Excellus approximately \$57,000 per month, in advance, in connection with the medical benefits plan. The Debtor pays approximately \$43,500 of these monthly premiums. The remainder of the premium is collected from participating Employees through payroll deductions. As of the Petition Date, no health insurance premiums are owed to Excellus by the Debtor.

b. *Medical Plan: Retired Clergy.* Retired Clergy are insured through a Medicare Advantage Plan, and the Debtor pays approximately \$14,900 per month to Excellus to cover these premiums. For one Retired Clergy living out-of-state, the Debtor reimburses Medicare Advantage Plan insurance on a monthly basis in the amount of \$179 per month to Univera Health Care-Direct. Another Retired Clergy is reimbursed directly for Medicare Advantage Plan Insurance in the amount of \$209.42 per month. In addition to the above medical benefits, \$1,100 per month is paid for five Retired Clergy living in the Sisters of Saint Joseph Assisted Living program (such amount is paid through ElderOne). As of the Petition Date, no premiums are owed to Excellus, Univera, or ElderOne. The Debtor owes the reimbursement of \$209.42 for September to one Retired Clergy.

c. *Dental Plans.* The Debtor provides dental coverage through Excellus for its eligible Employees, and approximately 50 Employees elect this benefit. The total monthly premium paid to Excellus is approximately \$3,000 and paid in advance. The Debtor pays approximately \$900 of these monthly premiums, and the remainder is collected from

participating Employees through payroll deductions. The Debtor also pays approximately \$2,300 per month for Retired Clergy dental insurance to Excellus. As of the Petition Date, no dental insurance premium is owed to Excellus by the Debtor.

d. *Vision Plan.* The Debtor sponsors a vision plan for its eligible Employees through EyeMed. Approximately 33 Employees elect this benefit and the entire amount of their monthly premium, approximately \$260, is paid by the Employees through payroll deductions. Additionally, the Debtor maintains Vision COBRA payments to EyeMed for terminated Employees. The terminated employees reimburse the Debtor for the premium. Currently, the COBRA Vision premium is \$27.84 for 3 terminated Employees. As of the Petition Date, no vision insurance or COBRA vision insurance premiums are owed to EyeMed by the Debtor.

e. *Paid Time Off (“PTO”).* The Debtor 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 Debtor’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 Debtor. The Debtor estimates that its Employees have accrued no greater than \$223,000 of accrued but unused PTO as of the Petition Date. This amount, however, is not a current cash payment obligation, as Employees are only entitled to cash payment for accrued and unused PTO when they use the PTO in the ordinary course of business or 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 Debtor 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 Debtor’s normal payroll obligations.

f. *New York State Short-Term Disability Insurance.* The Debtor provides short-term disability benefits for all of its Employees, and the Entities¹, as required by New York State law through Mutual of Omaha. The premiums are billed on a quarterly basis, and on average, the Debtor pays approximately \$13,000 quarterly in arrears. As of the Petition Date, the Debtor owes one quarter, approximately \$12,051, which is due to be paid in October 2019.

g. *Life Insurance.* The Debtor sponsors basic life insurance for its eligible Employees. Approximately 68 Employees receive 1x Salary Life Insurance and 6 Employees receive 3x Salary Life Insurance. The Debtor pays Mutual of Omaha approximately \$1,320 per month, in advance, for this benefit. As of the Petition Date, no life insurance premium is owed to Mutual of Omaha by the Debtor.

h. *Long-Term Disability Insurance.* The Debtor sponsors long-term disability benefits covering approximately 80 Employees. The Debtor pays approximately \$1,100 per month, in advance, to Mutual of Omaha for this benefit. As of the Petition Date, no long-term disability insurance premium is owed to Mutual of Omaha by the Debtor.

i. *Supplemental Life and Accidental Death & Dismemberment Insurance.* The Debtor sponsors supplemental life and supplemental accidental death & dismemberment insurance for its eligible Employees through Mutual of Omaha. Approximately 19 Employees have elected to purchase supplemental life and supplemental accidental death & dismemberment insurance. The monthly premium remitted to Mutual of Omaha is approximately \$615 per month. The cost is collected from Employees through payroll deductions. As of the Petition

¹ In addition to Catholic parishes, the term “Entities” as used in this Wage Motion also includes Saint Bernard’s School of Theology & Ministry and Rochester Catholic Press Associated, Inc. (“Catholic Courier”). See the Accompanying Affidavit of the Reverend Daniel J. Condon for a detailed description of the legal organization of the Diocese and the Entities.

Date, no supplemental life and accidental death & dismemberment insurance premium is owed to Mutual of Omaha by the Debtor.

j. *Director Supplemental Long-Term Disability Insurance.* The Debtor sponsors supplemental long-term disability insurance for Diocesan directors through Provident Life & Accident Insurance Co. and 6 Employees receive this benefit. The Debtor pays \$536.05 per month, in advance, to Provident Life & Accident Insurance Co for this benefit. As of the Petition Date, no director supplemental long-term disability insurance premium is owed to Provident Life & Accident Insurance Co by the Debtor.

k. *Paid Family Leave.* The Debtor pays paid family leave withholdings for its Employees and the Entities. This is paid on a quarterly basis to Mutual of Omaha who administers the paid family leave program for the Debtor and its affiliated entities. The Diocese makes the payment and is reimbursed by the affiliated Entities on a quarterly basis. The approximate quarterly payment is \$14,300. The Debtor owes the quarterly paid family leave for its Employees and the Entities in the approximate amount of \$8,300, as of the pay period end date August 23, 2019, which will be due in October 2019.

l. *Flexible Spending Plans.* The Debtor sponsors flexible spending plans (medical/dental and dependent care) for its Employees and Entities. Lifetime Benefit Solutions, Inc. manages the flexible spending plan and charges the Diocese an administrative fee of \$2.75 per month for each participant. The approximate monthly cost for the administrative fees is \$53 for Employees and \$500 for Entities. The Debtor pays the administrative fees on a monthly basis and is reimbursed by the Entities on a quarterly basis. Additionally, the flexible spending employee reimbursements are fronted by the Debtor and reimbursed on a quarterly basis by the Entities. The approximate annual flexible spending withholdings for its Employees is \$26,000

and \$206,500 for the Entities. As of the Petition Date, approximately \$550 is owed to Lifetime Benefit Solutions for the month of September.

m. *403(b) Plan.* The Debtor also offers Employees² the opportunity to participate in a defined benefit qualified retirement plan under section 403(b) of the Internal Revenue Code. The Diocese matches one hundred percent (100%) up to two percent (2%) of a lay employee's individual compensation and up to \$600 per clergy participant. Burke Group administers the plan. As of the pay period end date of August 23, unpaid employer matches total approximately \$293,600 for lay employees and \$53,000 for clergy and are due to be deposited by the Debtor into these retirement accounts annually in March 2020.

n. *Retirement Plans.* The Diocese sponsors and administers a Lay Employees' Retirement Accumulation Plan (the "Lay Plan"); a multi-employer, non-qualified defined benefit pension plan, generally covering all participating employers' full-time employees. The Diocese also sponsors and administers a Priests' Retirement Plan (the "Priests' Plan"), a multi-employer, non-qualified defined benefit pension plan covering all priests incardinated in the Diocese of Rochester. Each participating employer contributes 12% of its employee's gross wages to this plan. The Debtor also contributes 12% of Employee gross wages for its Employees to this plan. The Diocese makes this contribution on a quarterly basis, and as of the petition date approximately \$132,250 will be due for this contribution, which will be made in October, 2019. Additionally, the Diocese pays 12% of its Women Religious gross wages to their Religious Order for their retirement plan. As of September 6, 2019, the Debtor owes

² This 403(b) Retirement Plan Benefit is provided to its Employees and employees of parishes and the Rochester Catholic Press Association.

\$1,266.51 to the Sisters of St. Joseph and \$3,316.24 to the Sisters of Mercy for their retirement plans contribution.

15. *Workers' Compensation.* The Debtor provides workers' compensation benefits ("Workers' Compensation Benefits") to all Employees and Entities. These benefits are covered primarily under the Debtor's workers' compensation insurance programs, which is insured and administered by Church Mutual Insurance Company. The annual workers' compensation premium is \$341,428 and was paid on July 12, 2019 for the Diocese's 2019-2020 fiscal year. This benefit is also addressed in the Debtor's Motion to Authorize Maintenance of the Protected Self Insurance Program. Failure to maintain this insurance could result in the institution of administrative or legal proceedings against the Debtor and its officers. By this Motion, the Debtor seeks authority to continue paying and/or contesting in good faith, as appropriate in the Debtor'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 Debtor's business.

16. *Deductions.* During each applicable pay period, the Debtor routinely withholds certain amounts from Employees' pay that the Debtor is required to transmit to third parties. Some examples of such withholding include FSA contributions,³ 403(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

³ The Debtor pays administrative fees to Lifetime Benefit Solutions for its Employees and on behalf of affiliates in the amount of approximately \$553. The Debtor is reimbursed by its affiliates for approximately \$500 of this amount.

Employee's share of health care benefits and insurance premiums, legally-ordered deductions, fees and assessments and miscellaneous deductions) (collectively, the "Deductions").

17. The Debtor forwards the Deductions to the appropriate third-party recipients. On average, the Debtor deducts approximately \$22,000 in non-tax items from its Employees' paychecks each pay period. Due to the commencement of the chapter 11 case, however, certain Deductions that were deducted from Employees' earnings may not have been forwarded to the appropriate third-party recipients prior to the Petition Date.

18. ***Payroll Taxes.*** Further, the Debtor is required by law to withhold from its Employee's 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"). The Debtor 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 Debtor is current with respect to all Payroll Taxes as of pay period end date September 6, 2019.

19. The Debtor believes that the Deductions and Payroll Taxes, to the extent that they remain in the Debtor's possession, constitute monies held in trust and therefore are not property of the Debtor's bankruptcy estate. Accordingly, by this Motion the Debtor 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.

20. To facilitate the other relief requested herein, the Debtor requests that the Court authorize and direct all banks and other financial institutions at which the Debtor 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 Debtor 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 Debtor 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

21. In order to retain their Employees and maintain the Debtor's mission, the Debtor 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 Employees and the harm the Employees and Diocese would likely suffer if these amounts are not paid.

22. Additionally, the relief requested will significantly reduce the administrative burden which might otherwise be imposed in the chapter 11 case. For the Debtor to identify the extent to which individual Employees and Retired Clergy 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.

23. Pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and the "necessity of payment" doctrine, the Debtor 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.

24. 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).

25. The Debtor'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 \$13,650.00, which amount is allowable as a priority claim under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code. Moreover, the Debtor only seeks authority to make payments to Employees up to the combined statutory maximum of \$13,650.00 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).

26. 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 Debtor'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).

27. 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.⁴ The Bankruptcy Code further provides, in section 105(a), that: "[t]he 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). 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.

⁴ 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").

28. The relief requested in this Motion also is supported by the well-established “necessity of payment” doctrine.⁵ 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)).

29. 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

⁵ 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).

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”).

30. 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.

31. 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.

32. As part of the requested relief, the Debtor 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 Debtor's estate because they have been withheld from Employees' paychecks on another party's behalf. *See* 11 U.S.C. § 541(b). The Deductions principally represent Employee earnings which Employees have designated for deduction from Employee paychecks and payment to third-party recipients. The failure to pay the Deductions could result in hardship to certain Employees. It is even possible that garnishments from Employee wages result in funds that are not the Debtor's property, but rather must be withheld from Employee paychecks. Moreover, if the Debtor cannot remit these amounts, Employees may face legal action due to the Debtor's failure to make these payments. Additionally, the failure to pay Payroll Taxes may subject the Debtor 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 Debtor'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).

33. Based upon the foregoing, the Debtor respectfully requests that the Court enter an Order authorizing the Debtor 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 provide to the Debtor and ultimately, the Debtor's ability to successfully administer its chapter 11 case.

BANKRUPTCY RULE 6003 IS SATISFIED

34. 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 Debtor submits that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor, as described herein, and that cause exists under Bankruptcy Rule 6003 for the Court to grant immediate relief.

WAIVER OF NOTICE AND STAY REQUIREMENTS

35. Given the nature of the essential and critical relief requested herein, the Debtor respectfully requests a waiver of (a) the notice requirements under Bankruptcy Rule 6004(a), and (b) the 14-day stay under Bankruptcy Rules 6004(h), 7062, 9014 or otherwise.

RESERVATION OF RIGHTS

36. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtor, a waiver of the Debtor's rights to dispute any claim, or an approval or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code, nor does it waive its rights under the Code of Canon law, or any applicable State or Federal law.

NOTICE

37. 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 entities listed on the List of Creditors Holding the 20 Largest Unsecured Claims, (iii) all required governmental agencies and (iv) the Debtor's banks. Due to the urgency of the circumstances surrounding this Motion and the nature of the relief requested herein, the Debtor respectfully submits that further notice of this Motion is neither required nor necessary.

NO PRIOR REQUEST

38. The Debtor has not previously sought the relief requested herein from this or any court.

WHEREFORE, the Debtor respectfully requests that the Court enter interim and final orders in substantially the form attached hereto as ***Exhibit A*** and ***B*** respectively, granting the

relief requested herein and granting such other and further relief as the Court deems just and proper.

Dated: September 12, 2019

BOND, SCHOENECK & KING, PLLC

By: /s/ Stephen A. Donato

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*Proposed Attorneys for the Diocese of
Rochester*

Exhibit A

Proposed Interim Order

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

THE DIOCESE OF ROCHESTER,

Debtor.

Case No. 19-20905

Chapter 11

**INTERIM ORDER AUTHORIZING DEBTOR 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 Rochester (the “Debtor”), for entry of an order authorizing, but not directing, the Debtor: 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 (the “Motion”)⁶; and it appearing that this 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 this Court having determined that the relief requested in the Motion is in the best interests of the Debtor, its estate, its creditors and other parties in interest; 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 after due deliberation thereon; and good and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis as set forth herein.

⁶ Capitalized terms used but not defined herein shall have the meanings ascribed to them as in the Motion.

2. The Debtor is authorized, but not directed, to continue to honor and pay, upon entry hereof, the Employee Wages and Benefits in accordance with the Debtor'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 Debtor 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 Debtor is authorized, but not directed, to continue to provide in accordance with the Debtor's prepetition practices, and to pay prepetition amounts which may be owed with respect to, the Benefit Plans.

5. The Debtor is authorized, but not directed, to continue to allocate and distribute in accordance with the Debtor's policies and prepetition practices, and to pay prepetition amounts which may be owed with respect to, the Deductions and the Payroll Taxes as limited to payments otherwise afforded priority status under sections 507(a)(4) and (a)(5) of the Bankruptcy Code.

6. In accordance with this Order and any other order of the Court, the Debtor 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 Debtor 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 Debtor'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 Debtor's designation of any particular check or electronic payment request as being approved by this Order.

8. The Debtor 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 taken 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 Debtor as to the validity, priority or amount of any claim against the Debtor, a waiver of the Debtor'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 Debtor is a party.

10. The requirements set forth in Local Rule 9013-1(A) and (B) are satisfied.

11. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied.

12. The requirements set forth in Bankruptcy Rule 6004(a) are satisfied.

13. A final hearing on the Motion shall be held on October __, 2019 at ____:____ a.m./p.m. prevailing Eastern Time (the "Final Hearing"). Any objections or responses to the Motion shall be filed on or before _____, 2019 at 4:00 p.m. and served on parties in interest as required by the Local Rules. 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.

14. The Debtor shall serve a copy of the Motion, this Order, and notice of the Final Hearing upon the parties identified in paragraph 41 of the Motion by depositing the same in first class mail, postage prepaid, not later than 5:00 p.m. on the first business day following entry of this Order.

15. This Order is immediately effective and enforceable, notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or otherwise. Any subsequent modification or vacatur of this Order shall not invalidate any action taken pursuant to this Order prior to the modification or vacatur of the Order.

16. The Debtor is authorized and empowered to take all actions it determines are necessary to effectuate the relief granted pursuant to this Final Order in accordance with the Motion.

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

Dated: September __, 2019
Rochester, New York

Hon. Paul R. Warren
United States Bankruptcy Judge

Exhibit B

Proposed Final Order

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

THE DIOCESE OF ROCHESTER,

Debtor.

Case No. 19-20905

Chapter 11

**FINAL ORDER AUTHORIZING DEBTOR 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 Rochester (the “Debtor”), for entry of an order authorizing, but not directing, the Debtor: 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 (the “Motion”)⁷; and it appearing that this 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); an interim order having been entered with respect to the Motion on _____, 2019; and this Court having determined that the relief requested in the Motion is in the best interests of the Debtor, its estate, its creditors and other parties in interest; 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 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

⁷ Capitalized terms used but not defined herein shall have the meanings ascribed to them as in the Motion.

2. All objections to the Motion or the relief requested therein that have not been made, withdrawn, waived, or settled, and all reservations of rights included therein, are overruled and disallowed on the merits.

3. The Debtor is authorized, but not directed, to continue to honor and pay, upon entry hereof, the Employee Wages and Benefits in accordance with the Debtor'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.

4. The Debtor 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 Time, Leaves of Absence and reimbursement of Business Expenses.

5. The Debtor is authorized, but not directed, to continue to provide in accordance with the Debtor's prepetition practices, and to pay prepetition amounts which may be owed with respect to, the Benefit Plans.

6. The Debtor is authorized, but not directed, to continue to allocate and distribute in accordance with the Debtor'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 Debtor 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 Debtor 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 Debtor'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 Debtor's designation of any particular check or electronic payment request as being approved by this Order.

9. The Debtor 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 taken 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 Debtor as to the validity, priority or amount of any claim against the Debtor, a waiver of the Debtor'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 Debtor is a party.

11. The requirements set forth in Local Rule 9013-1(A) and (B) are satisfied.

12. This Order is immediately effective and enforceable, notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or otherwise. Any subsequent modification or vacatur

of this Order shall not invalidate any action taken pursuant to this Order prior to the modification or vacatur of the Order.

13. The Debtor is authorized and empowered to take all actions it determines are necessary to effectuate the relief granted pursuant to this Final 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: October __, 2019
Rochester, New York

Hon. Paul R. Warren
United States Bankruptcy Judge