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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

THE ROMAN CATHOLIC DIOCESE OF
ROCKVILLE CENTRE, NEW YORK,

Debtor.

Chapter 11

Case No. 20-12345 (MG)

**RESPONSE TO THE DEBTOR ROMAN CATHOLIC DIOCESE OF ROCKVILLE
CENTRE'S EIGHTH OMNIBUS CLAIM OBJECTIONS**

The Child Sexual Abuse Survivor who filed Claim No. 90100, [REDACTED] (the "Survivor"), through his undersigned counsel, files this Response (the "Response") to *The Debtor Roman Catholic Diocese of Rockville Centre's Eighth Omnibus Claim Objections* [Docket 1730] (the "Objection") and respectfully states as follows:¹

¹ Unless otherwise noted, capitalized terms used in this Response have the meanings ascribed in the Objection.

PRELIMINARY STATEMENT

1. The Survivor hereby requests that the Court overrule the Debtor Roman Catholic Diocese of Rockville Centre's (hereinafter "the Diocese" or "the Debtor") Objection to the Survivor's claim and allow his claim to proceed in the bankruptcy because 1) the Survivor alleges the Debtor knew or should have known that it was aware of the danger posed by Father Charles Kohli and failed to take reasonable steps to protect him from that danger, 2) the Survivor alleges the Debtor knew or should have known of the danger of child sexual abuse and failed to take reasonable steps to protect him from that danger, 3) the Court must accept all of the Survivor's allegations as true, including all reasonable inferences arising from those allegations, 4) the Court is not allowed to disregard the Survivor's factual assertions in favor of the Diocese's self-serving, unsupported assertions, 5) at most, the contrary assertions of the parties illustrates why the Court must accept the Survivor's allegations as true and allow him to pursue discovery to obtain evidence to prove them, and 6) the Objection overlooks and does not address the Debtor's duty to protect the Survivor from foreseeable harm, regardless of whether it knew of the specific danger posed by Father Kohli, a duty that has recently been re-affirmed (twice) by the New York appellate courts with regard to Child Victims Act claims against other Catholic entities.

2. As the Debtor directed, the Survivor's Sexual Abuse Proof of Claim form is supported by a copy of his complaint from his state court lawsuit against the Debtor and St. Joseph. That complaint spells out the Survivor's factual allegations against the Debtor and St. Joseph, including the very factual allegations that the Debtor asserts were missing from the Survivor's Sexual Abuse Proof of Claim form. If this was not an oversight by the Debtor, and if the Debtor maintains that the factual allegations in that complaint are not somehow part of the Survivor's

Sexual Abuse Proof of Claim form, the Survivor requests leave to amend their Sexual Abuse Proof of Claim form to remedy any alleged deficiencies in his factual allegations.

FACTUAL BACKGROUND

3. On May 25, 2020, the Survivor filed his state court lawsuit against the Diocese of Rockville Centre (“Diocese” or “Debtor”) and St. Joseph Roman Catholic Church (“St. Joseph”). *See generally* Summons and Complaint, Declaration of Jason P. Amala (“Amala Decl.”), Ex. 1. In that lawsuit, the Survivor alleged that the Debtor and St. Joseph negligently allowed him to be sexually abused by one of their priests, Father Charles Kohli (“Father Kohli”). *Id.* at ¶¶ 8, 16, 52-69, 77-85. The Survivor alleged that the sexual abuse occurred from approximately 1980 through 1983, when he was about 10 to 13 years old, and that the sexual abuse occurred at St. Joseph, including in the rectory of St. Joseph and during activities that were sponsored by the Debtor and St. Joseph, including spiritual counseling and youth group activities. *Id.* at ¶¶ 52-62.

4. Regarding his claim for negligence, the Survivor alleged two theories of liability for why the Debtor and St. Joseph are liable for allowing Father Kohli to sexually abuse him: 1) the Debtor and St. Joseph owed him a duty to supervise him and to protect him from foreseeable harm when he was a parishioner and minor child in their care, custody, or control, and 2) the Debtor and St. Joseph owed him a duty to supervise Father Kohli and to prevent their priest from using his position with them to sexually abuse him. Amala Decl., Ex. 1, at ¶¶ 77-85.

5. On June 4, 2020, just two weeks after the Survivor filed his lawsuit against the Debtor and St. Joseph, the Debtor filed a “Notice of Entry” and notified the Survivor that the state court overseeing his lawsuit had issued an Amended Decision and Order that implemented a Case Management Order applicable to his lawsuit and “all actions” commenced under the Child Victims

Act “where the Roman Catholic Diocese of Rockville Center is a named Party-Defendant.” Notice of Entry, Amala Decl., Ex. 2, at 1.

6. The trial court’s Case Management Order stated that one of its objectives was the “[s]tandardization of initial discovery so that the parties can obtain the necessary information to evaluate cases for possible settlement at minimum cost” and “[c]oordination of motion practice, discovery, and other matters ...” Case Management Order, Amala Decl., Ex. 3, at 1-2. To that end, the Case Management Order created separate “liaison counsel” to represent the interests of plaintiffs and defendants, and directed the liaison counsel to work together to propose “Standard Consolidated Disclosures” for all parties, including the Survivor, to exchange discovery. *Id.* at 2-4. The Survivor’s co-counsel, James Marsh, was appointed to serve on the Plaintiffs’ Liaison Counsel. *Id.* at 2.

7. The trial court’s Case Management Order also ordered all parties, including the Survivor, to make a good faith effort to coordinate depositions across multiple cases. Case Management Order, Amala Decl., Ex. 3, at Ex. 2, at 5-6. The Case Management Order directed all parties to refrain from “duplicative” or “repetitive” discovery, including depositions, and provided a mechanism for defendants to object if a plaintiff sought another deposition of the same witness – the plaintiff was required to “service notice of intent to take a non-repetitive deposition of a defendant’s representative pertaining to issues which were not covered or not adequately covered by prior depositions of that defendant.” *Id.* at 5-7.

8. On June 9, 2020, the Debtor moved to stay the Survivor’s lawsuit after the trial court denied the Debtor’s motion to dismiss that asserted the Child Victims Act was unconstitutional. *See generally* Notice of Motion for a Stay Pending Appeal, Amala Decl., Ex. 4.

9. On July 30, 2020, the trial court denied the Debtor's motion to stay the Survivor's lawsuit. *See generally* Decision and Order, dated July 30, 2020, Amala Decl., Ex. 5.

10. On August 3, 2020, the Survivor served the Debtor and St. Joseph with the "standard" Interrogatories and Notice to Produce documents that the trial court approved pursuant to the Case Management Order. *See generally* Plaintiff [REDACTED] s Standard Interrogatories to Defendant Diocese of Rockville Centre, Amala Decl., Ex. 6; Plaintiff [REDACTED] s Standard Interrogatories to Defendant St. Joseph Roman Catholic Church, Amala Decl., Ex. 7; Plaintiff [REDACTED] s Standard Notice to Produce to Defendant Diocese of Rockville Centre, Amala Decl., Ex. 8; Plaintiff [REDACTED] s Standard Notice to Produce to Defendant St. Joseph Roman Catholic Church, Amala Decl., Ex. 9.

11. These pattern Interrogatories and Notice to Produce asked the Debtor and St. Joseph to provide written discovery regarding the factual issues raised by the Debtor's objection to the Survivor's claim, including 1) whether the Debtor or St. Joseph knew or should have known that Father Kohli posed a danger to the Survivor and other children, 2) the Debtor and St. Joseph's policies and procedures regarding the danger of child sexual abuse, and 3) the relationship between the Debtor and St. Joseph as it pertains to the Survivor's claim, including their legal and financial relationship as well as their relationship "with regard to supervising and controlling" Father Kohli. *See generally* Amala Decl., at Exs. 6-9 and ¶ 14.

12. For example, Interrogatory No. 3 asked the Debtor and St. Joseph to describe and provide details regarding "each complaint or allegation that you received regarding inappropriate conduct" by Father Kohli; Interrogatory No. 11 asked the Debtor and St. Joseph to provide the name and contact information for any witnesses with knowledge that Father Kohli posed a danger to the Survivor; Interrogatory No. 13 asked the Debtor and St. Joseph to describe their policies and

procedures that existed at the time they had any relationship with Father Kohli; and, Interrogatory No. 18 asked the Debtor and St. Joseph to “describe the relationship between you and any other named defendant regarding [Father Kohli], including 1) any legal relationship, 2) any financial relationship, and 3) your relationship with regard to supervising and controlling [Father Kohli].” Amala Decl., Exs. 6-7.

13. Similarly, Request No. 1 in the Notice to Produce asked the Debtor and St. Joseph to produce “all documents related to each complaint or allegation that you received regarding inappropriate contact, including sexual abuse, by [Father Kohli]”; Request No. 2 asked the Debtor and St. Joseph to produce “all documents related to your employment of [Father Kohli]”; Request No. 3 asked the Debtor and St. Joseph to produce all documents that reflect any limitations that they imposed on Father Kohli’s duties, including “why such limitations were imposed”; Request No. 10 asked the Debtor and St. Joseph to produce “all documents reflecting the relationship between you and any other named defendant, including any legal or financial relationship”; and, Request No. 38 asked the Debtor and St. Joseph to produce “all documents relating to your policies and procedures relating to sexual abuse of minors” during the time that Father Kohli served them. Amala Decl., Exs. 8-9.

14. As dictated by the trial court’s Case Management Order, and as is common in most civil litigation, the Survivor intended to obtain written discovery from the Debtor and St. Joseph, move to compel any withheld written discovery, and then take depositions of witnesses. The scope of the written discovery and the depositions would have included the same factual issues raised by the Diocese in its objection to the Survivor’s claim, including 1) whether the Debtor or St. Joseph knew or should have known that Father Kohli posed a danger to the Survivor and other children, 2) whether the Debtor or St. Joseph’s took reasonable steps to protect the Survivor from the danger

of child sexual abuse, including the danger posed by Father Kohli, and 3) the relationship between the Diocese and St. Joseph, including their relationship with Father Kohli during the time that he served at St. Joseph, including who had the authority to supervise him during that time period, and whether the Debtor could be held vicariously liable for the negligence of St. Joseph in failing to protect the Survivor from Father Kohli, particularly if the parish acted as an agent of the Debtor. Amala Decl., at ¶ 15.

15. In response to the Survivor's discovery requests and those of many other plaintiffs who were suing it under the Child Victims Act, the Debtor generally refused to provide meaningful responses and withheld a significant amount of discovery, largely asserting the same positions and objections in each case. As a result, counsel representing the Survivor filed a number of exemplar motions to compel the withheld discovery, including withheld discovery regarding the Debtor's knowledge of the danger of child sexual abuse and the Debtor's knowledge of the danger posed by the specific perpetrator at issue, like Father Kohli. The purpose of these motions was to obtain guidance from the trial court regarding the scope of discovery in these cases, including the Survivor's case. Amala Decl., at ¶ 16; *see generally* Ex. 10, Motion to Compel from *Gerald Dacuk v. Diocese of Rockville Centre, et al.* (Nassau County Supreme Court Index No. 90072/2019); Ex. 11, Motion to Compel from *Paul Kustes v. Diocese of Rockville Centre et al.* (Nassau County Supreme Court Index No. 900070/2019).

16. The trial court did not make a ruling on these motions to compel before the Debtor filed this bankruptcy, which means the Debtor was largely able to withhold discovery regarding the factual issues raised in its objection to the Survivor's claim, including discovery regarding its knowledge of the danger of child sexual abuse, its knowledge of the danger posed by Father Kohli,

and whether it took reasonable steps to protect the Survivor and other children from those dangers. Amala Decl. at ¶ 19.

17. Unfortunately, the Survivor did not have a fair chance to pursue written discovery or depositions regarding those factual issues. On October 1, 2020, less than 60 days after the Survivor issued his written discovery to the Debtor and St. Joseph, the Debtor filed this bankruptcy, which triggered the automatic stay and led to the preliminary injunction. The automatic stay and the preliminary injunction have prevented the Survivor from pursuing the written discovery that he issued to the Debtor and St. Joseph regarding the factual issues raised by the Debtor's objection, including the factual issues outlined above, as well as depositions regarding those factual issues. The timeline outlined above shows that, before discovery was halted as a result of the automatic stay and preliminary injunction, the Survivor could not have more diligently pursued discovery regarding the factual issues that are raised by the Debtor's objection to his claim. Amala Decl., at ¶ 20.

18. The need for that discovery should not be discounted, particularly in light of the Debtor's self-serving representation that it has no records to indicate it knew or should have known that Father Kohli posed a danger to the Survivor before he sexually abused him. The Survivor's counsel has litigated hundreds of claims against Catholic entities on behalf of plaintiffs who were sexually abused as children. The Survivor's counsel estimates that in those cases, a Catholic entity defendant produces written discovery with "notice evidence" in approximately 5-10% of cases – in other words, in about 5-10% of such cases, written discovery yields a document that unequivocally states a defendant knew or should have known that the perpetrator posed a danger to children before the plaintiff was abused. The Survivor's counsel estimates that in another 15-20% of such cases, written discovery yields a document that *suggests* a defendant knew or should

have known that the perpetrator posed a danger to children before the plaintiff was abused, and a subsequent deposition confirms that a defendant knew or should have known the perpetrator posed such a danger. Finally, the Survivor's counsel estimates that in the remaining 70-80% of such cases, the only evidence that a defendant knew or should have known that the perpetrator posed a danger to children before the plaintiff was abused comes from depositions, usually after a defendant provides written discovery that contains the names of potential witnesses, like the names of other families at the parish, the names of other children who attended the school, or the names of other altar boys. Amala Decl., at ¶ 21.

19. The Survivor's counsel further states that out of hundreds of cases against Catholic entities where he represented a plaintiff who was a survivor of child sexual abuse, virtually none of his clients had evidence that the defendant knew or should have known the perpetrator posed a danger to them before they were sexually abused. However, given the above, as well as the publicly available information about the child sexual abuse scandal in the Catholic Church, the Survivor's counsel has a good faith basis (as required by FRCP 11) to allege that the defendant knew or should have known of the danger posed by the priest or the religious member, the defendant knew or should have known of the danger of child sexual abuse, and the defendant failed to take reasonable steps to protect his clients from those dangers. Despite rarely starting their lawsuits with such evidence, the Survivor's counsel estimates he has found evidence to support those factual allegations in more than 95% of those cases. The Survivor's counsel also notes that he has represented *many* abuse survivors who were the first to publicly accuse a priest or religious member of child sexual abuse, but during discovery in their case one or more other people come forward who were sexually abused by the same priest or religious member. Amala Decl., at ¶ 22.

20. To the extent the Debtor relies heavily on its own list of priests who have been credibly accused of child sexual abuse, the Survivor's counsel notes that similar lists of other Catholic dioceses have multiplied many times over. For example, the Archdiocese of Seattle's original list of credibly accused priests was less than 20, but today is *over 90* after almost two decades of survivors coming forward and identifying other perpetrators and/or those survivors filing lawsuits and obtaining discovery that corroborated their claims. Amala Decl., at ¶ 23.

21. On June 8, 2021, the Survivor submitted a Sexual Abuse Proof of Claim form in this bankruptcy for the damages he suffered as a result of being sexually abused as a child by Father Kohli. Sexual Abuse Proof of Claim Form, Amala Decl., Ex. 12.

22. Given the Debtor's objection asserts that the Survivor's Sexual Abuse Proof of Claim form did not allege it knew or should have known that Father Kohli posed a danger to him, or that it failed to take reasonable steps to protect him from the foreseeable harm of child sexual abuse while he was in its care, custody, or control, it is important to note that the Survivor complied with the Debtor's directions and attached the complaint from his state court lawsuit to his Sexual Abuse Proof of Claim form in support of his claim. *Id.* at Exhibit 1. More specifically, the Survivor attached that complaint as Exhibit 1 to his Sexual Abuse Proof of Claim form in response to "Part 4: Nature of Complaint" of the Sexual Abuse Proof of Claim form, which specifically instructed the Survivor to attach the complaint in support of his claim form. *Id.* The Debtor's assertion that the Survivor's Sexual Abuse Proof of Claim form did address the factual issues upon which its objection is based is not accurate.

JURISDICTION AND JURY TRIAL DEMAND

23. This Court has jurisdiction over this contested proceeding pursuant to 28 U.S.C. §§157(b)(1) and 1334, the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York* dated January 31, 2012, and Federal Rule of Bankruptcy Procedure 7001.

24. Venue in this judicial district is appropriate pursuant to 28 U.S.C. §1409.

25. This contested proceeding is not a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B).

26. The Survivor does not consent to entry of final orders or a final judgment by this Court in this contested proceeding.

27. The Survivor asserts a right to jury trial in this contested proceeding and does not consent to the Bankruptcy Court conducting a jury trial in this contested proceeding.

LEGAL ARGUMENT

28. The Court should overrule the Debtor's objection to the Survivor's claim and allow the Survivor to pursue discovery regarding the factual issues raised in the objection because 1) the Survivor alleges the Debtor knew or should have known that it was aware of the danger posed by Father Charles Kohli and failed to take reasonable steps to protect him from that danger, 2) the Survivor alleges the Debtor knew or should have known of the danger of child sexual abuse and failed to take reasonable steps to protect him from that danger, 3) the Court must accept all of the Survivor's allegations as true, including all reasonable inferences arising from those allegations, 4) the Court is not allowed to disregard the Survivor's factual assertions in favor of the Diocese's self-serving, unsupported assertions, 5) at most, the contrary assertions of the parties illustrates why the Court must accept the Survivor's allegations as true and allow him to pursue discovery to

obtain evidence to prove them, and 6) the Objection overlooks and does not address the Debtor's duty to protect the Survivor from foreseeable harm, regardless of whether it knew of the specific danger posed by Father Kohli, a duty that has recently been re-affirmed (twice) by the New York appellate courts with regard to Child Victims Act claims against other Catholic entities.

29. As noted above, the Survivor attached the complaint from his state court lawsuit as Exhibit 1 to his Sexual Abuse Proof of Claim, which it instructed him to do under the heading "Part 4: Nature of Complaint." It is unclear what additional factual allegations the Survivor could make in support of his claim given he followed the Debtor's instructions and literally attached his complaint, with attendant allegations, to his Sexual Abuse Proof of Claim. However, given the Debtor's objection asserts that the Survivor did not make the factual allegations that plainly exist in that complaint, it appears the Debtor is ignoring the factual allegations that are contained in his complaint. If the Court agrees with the Debtor that the factual allegations in his state court complaint should be ignored even though they were attached to his Sexual Abuse Proof of Claim as instructed, the Court should grant the Survivor leave to amend his Sexual Abuse Proof of Claim so that he can make those same factual allegations on the face of the form itself (which makes little sense since the same instructions state the Survivor should "[a]ttach additional separate sheets if necessary").

A. The Debtor Fails to Meet Its Burden of Showing that the Survivor's Claim Must be Disallowed, Particularly Given the Survivor Has Not Had a Full or Fair Opportunity to Pursue Discovery Regarding the Factual Issues Raised by the Debtor's Objection

30. The Court should overrule the Debtor's objection to the Survivor's claim because it has failed to meet its burden of showing that the claim must be disallowed, particularly given the Court must accept all of the Survivor's factual allegations as true, the Survivor has not had a

full or fair opportunity to pursue discovery to prove those factual allegations, and the Debtor concedes the Survivor's claim is viable if his factual allegations are proven true.

31. Federal Rule of Bankruptcy Procedure §3001(f) provides that a proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure shall constitute *prima facie* evidence of the validity and amount of the claim. Fed. R.Bankr. P. 3001(f). This evidentiary presumption remains in force even after an objection is filed, and an objecting party “must come forth with evidence which, if believed, would refute at least one of the allegations essential to the claim.” *In re Aguila, Inc.*, No. 21-11776 (MG), 2022 Bankr. LEXIS 2384, at *11 (Bankr. S.D.N.Y. Aug. 30, 2022) (quoting *Sherman v. Novak (In re Reilly)*, 245 B.R. 768, 773 (2d Cir. B.A.P. 2000)). Additionally, the Claims Objection Procedures Order states that the “legal standard of review that will be applied by the Court at a Sufficiency Hearing will be equivalent to the standard applied by the Court upon a motion to dismiss for failure to state a claim upon which relief can be granted, in accordance with Bankruptcy Rule 7012(b).” Claims Objection Procedures Order, para. 3(g)(iii).

32. Under Fed. R. Civ. P. 12(b), made applicable through Bankruptcy Rule 7012(b), the Court must accept all of the Survivor's allegations as true, as well as all reasonable inferences from those allegations. “A claim has facial plausibility,” and thus survives a motion to dismiss, “when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662 [2009]. On a Rule 12(b)(6) motion to dismiss, the court must accept all material facts alleged in the complaint as true and must construe them in the light most favorable to the plaintiff. *Knivel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). “Dismissal with prejudice and without leave to amend is not appropriate unless it is clear ... the complaint could not be saved by amendment.” *Eminence*

Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). The court should grant relief under Rule 12(b)(6) only if the complaint lacks either a “cognizable legal theory” or facts sufficient to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

B. The Survivor is Entitled to Pursue Discovery Regarding His Factual Allegation that the Debtor Knew or Should Have Known that Father Kohli Posed a Danger to Him and Other Children

33. The Court should deny the Debtor’s objection to the Survivor’s claim because the Survivor is entitled to pursue discovery to prove his factual allegation that the Debtor knew or should have known that Father Kohli posed a danger to him and other children.

34. First and foremost, the Debtor is simply wrong when it asserts that the Survivor’s Sexual Abuse Proof of Claim did not contain factual allegations that 1) the Debtor knew or should have known that Father Kohli posed a danger to him before he sexually abused him and it failed to protect him from that danger, and 2) the Debtor knew or should have known of the danger of child sexual abuse and it failed to take reasonable steps to protect him from that danger while he was in its care, custody, or control.

35. Part 4 of the Debtor’s Survivor’s Sexual Abuse Proof of Claim form is titled “Nature of Complaint” and includes a number of questions about the Survivor’s claim against the Debtor, including whether the Survivor ever told anyone about the abuse or whether anyone witnessed the abuse. Amala Decl., Ex. 12, 8-11. The form specifically instructed the Survivor to “[a]ttach additional separate sheets if necessary” and “IF YOU HAVE PREVIOUSLY FILED A LAWSUIT AGAINST THE DIOCESE IN STATE OR FEDERAL COURT, PLEASE ATTACH THE COMPLAINT.” *Id.* at 8.

36. The Survivor followed those instructions and attached a copy of his complaint from his state court lawsuit, which contained his factual allegations for why the Debtor is liable for his

claim in this bankruptcy. Amala Decl., Ex. 12, at Ex. 1. The Survivor's complaint contains the very factual allegations that the Debtor's objection claims are missing from his Sexual Abuse Proof of Claim:

60. Father Kohli used his position of trust and authority as a priest of the Diocese and of St. Joseph's to groom [REDACTED] and to sexually abuse him multiple times, including when [REDACTED] was under the supervision of, and in the care, custody, or control of, the Diocese, St. Joseph's, and Father Kohli.

61. The sexual abuse of [REDACTED] by Father Kohli occurred at St. Joseph's, including in the rectory of St. Joseph's.

62. Father Kohli's sexual abuse of [REDACTED] occurred during activities that were sponsored by, or were a direct result of activities sponsored by, the Diocese and St. Joseph's, including during spiritual counseling sessions and church youth group activities.

63. Prior to the times mentioned herein, Father Kohli was a known sexual abuser of children.

64. At all relevant times, defendants, their agents, servants, and employees, knew or should have known that Father Kohli was a known sexual abuser of children.

65. At all relevant times, it was reasonably foreseeable to defendants, their agents, servants, and employees that Father Kohli's sexual abuse of children would likely result in injury to others, including the sexual abuse of [REDACTED] and other children by Father Kohli.

66. At certain times between 1980 and 1983, defendants, their agents, servants, and employees knew or should have known that Father Kohli was sexually abusing [REDACTED] and other children at St. Joseph's and elsewhere.

67. The defendants, their agents, servants, and employees knew or should have known that the sexual abuse by Father Kohli of [REDACTED] was ongoing.

68. The Diocese and St. Joseph's, their agents, servants, and employees, knew or should have known before and during Father Kohli's sexual abuse of [REDACTED] that priests, clergy, teachers, school administrators, employees, and volunteers, and other persons serving the Diocese and St. Joseph's had used their positions with those defendants to groom and to sexually abuse children.

69. The Diocese and St. Joseph's, their agents, servants, and employees, knew or should have known before and during Father Kohli's sexual abuse of [REDACTED] that such priests, clergy, teachers, school administrators, employees, and volunteers, and other persons could not be "cured" through treatment or counseling.

...

78. The Diocese and St. Joseph's had a duty to take reasonable steps to protect plaintiff [REDACTED] a child, from foreseeable harm when he was under their supervision and in their care, custody, and control, including when he was their parishioner and Father Kohli sexually abused him.

79. The Diocese and St. Joseph's also had a duty to take reasonable steps to prevent Father Kohli from using the tasks, premises, and instrumentalities of his position with the defendants to target, groom, and sexually abuse children, including [REDACTED]

80. These circumstances created a special relationship between the Diocese and [REDACTED] and between St. Joseph's and [REDACTED] which imposed on each of those defendants a duty to exercise the degree of care of a parent of ordinary prudence in comparable circumstances.

81. The Diocese and St. Joseph's breached each of the foregoing duties by failing to exercise reasonable care to prevent Father Kohli from harming [REDACTED] including sexually abusing him.

Amala Decl., Ex. 12, at Ex. 1, at 9-12.

37. Second, but related, the Debtor is incorrect when it asserts that the Survivor's factual allegations that it knew or should have known that Father Kohli posed a danger to him are somehow insufficient. If the Debtor's view of the law was correct, no plaintiff could ever bring a lawsuit unless the plaintiff had specific evidence of the defendant's wrongdoing. If a plane crashed, the passengers could not file a lawsuit alleging the manufacturer knew or should have known of a defect that caused the plane to crash – their lawsuit would be dismissed because such an allegation would be a "bare legal conclusion" with "no facts." The manufacturer could simply file a self-serving motion to dismiss asserting it had no notice of the defect (even if it did) and claim the plaintiff's allegation was a "bare legal conclusion."

38. This is not the law, of course, and it is why the Court at this stage must accept all of the Survivor’s factual allegations as true, including “every possible favorable inference” that could be drawn from those allegations. One reason for this standard is to avoid a situation where a plaintiff’s claims are prematurely dismissed before the plaintiff has the benefit of discovery to prove their allegations and to challenge the moving party’s denials or assertions. *See* CPLR 3211(d). Courts have specifically ruled that a plaintiff opposing a motion to dismiss “need only demonstrate that facts ‘may exist’ whereby to defeat the motion. It need not be demonstrated that they *do* exist. This obviously must await discovery.” *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466 [1974] (emphasis in original) (motion to dismiss held “in abeyance” because plaintiffs were “entitled to the disclosure expressly sanctioned by CPLR 3211(subd. [d])”); *Cerchia v V.A. Mesa, Inc.*, 191 AD2d 377, 378 [1st Dept 1993] (“a plaintiff opposing a motion to dismiss need only show that facts unavailable to the plaintiff *may* exist which will justify denial of the motion, and need not demonstrate the actual existence of such facts”); *Lemle v Lemle*, 92 AD3d 494, 499-500 [1st Dept 2012] (dismissal of claims prior to discovery would be inappropriate); *Halmar Corp. & Defoe Corp. v Hudson Foundations, Inc.*, 212 AD2d 505, 506 [2d Dept 1995] (motion to dismiss denied until completion of discovery); *W. Mtn. Corp. v Seasons of Leisure Intern., Inc.*, 82 AD2d 931, 932 [3d Dept 1981] (trial court “erred in failing to grant discovery (pursuant to CPLR 3211, subd [d]) to [third-party plaintiff], to obtain facts needed to oppose [defendant’s] motion to dismiss (made pursuant to CPLR 3211, subd [a]))); *Cosmos Mason Supplies Inc. v Lido Beach Assoc. Inc.*, 95 AD2d 818 [2d Dept 1983] (benefit of the doubt and opportunity for discovery should be given to a plaintiff when facts necessary to properly oppose a motion are within sole possession of movant); *Cantor v Levine*, 115 AD2d 453, 454 [2d Dept 1985] (same); *Maddicks v Big City*

Properties, LLC, 163 AD3d 501, 503 [1st Dept 2018], *affd*, 34 NY3d 116 [2019] (it is premature to rule out claims in entirety before discovery).

39. To that end, a motion to dismiss should be denied “where knowledge is a key fact at issue, and peculiarly within the possession of the movant himself.” *Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252, 262 [2d Dept 1984]; McKinney, N.Y. C.P.L.R. 3212 Commentary C3212:19, main volume, at 29 (“[w]hen the movant holds the sole key to a material fact, it is too easy for her to state the fact as she wishes in the moving affidavit. She should be required to testify to it in open court, and then submit to that most probing of truth-discerning devices: the cross-examination.”). The Second Department in New York agrees:

[S]elf-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts.

Quiroz v 176 N. Main, LLC, 125 AD3d 628, 631 [2d Dept 2015]; *Penato v. George*, 52 A.D.2d 939, 942 [2d Dept 1976] (where “defendants are in control and possession of the facts which are decisive [] discovery should be permitted” especially with respect to the “relationship” between defendants).

40. While the standard the Court must apply is universal, a New York appellate court recently reversed a trial court who granted a motion to dismiss on the pleading after concluding that an abuse survivor’s allegations against a Catholic religious order were not pleaded with sufficient specificity. In *Novak v. Sisters of Heart of Mary*, 210 A.D.3d 1104, 1105, 180 N.Y.S.3d 187, 189 (2022), the Court concluded that the abuse survivor’s complaint sufficiently pled negligence when he alleged a Catholic religious order “had knowledge that the priest was abusing students, including the plaintiff, or that he had the propensity to abuse.” The Court reversed the trial court’s dismissal of the plaintiff’s lawsuit because “[h]ere, at the pleading stage of the

litigation where the plaintiff's allegations in the complaint are treated as true and are accorded the benefit of every possible favorable inference, the complaint is sufficiently pled as to the causes of action to recover damages for negligence, including the negligent hiring, retention, and supervision of the priest, and inadequate supervision of the plaintiff." *Id.* In concluding the plaintiff's allegations were sufficient, the Court noted that "the parties will have the opportunity to engage in discovery and ultimately the plaintiff will have the burden of proving his allegations as true." *Id.* at 1106.

41. Finally, the Debtor's self-serving assertion that it "had no notice that [Father Kohli] had the propensity to engage in the alleged conduct that caused the alleged injury" is not enough to ignore the Survivor's factual allegations and disallow his claim, particularly when the Debtor's self-serving assertion is not based on any sort of legally sufficient foundation and amounts to nothing more than a denial of the Survivor's factual allegations. For example, nowhere does the Debtor represent to the Court that it has reviewed all documents that may contain such "notice" evidence, and that the Debtor has interviewed all witnesses who may testify that the Debtor received such "notice" evidence, and that after that exhaustive review there is no evidence that it knew or should have known that Father Kohli posed a danger to the Survivor.

42. The Debtor actually provides *no evidence* to support its self-serving assertion that it neither knew nor should have known that Father Kohli posed a danger to the Survivor – nowhere does it represent to the Court that it is not withholding documents or witnesses regarding this issue. Instead, the Debtor *speculates* that no such evidence exists because Father Kohli is not identified on certain lists, the Survivor's proof of claim form does not contain such evidence (which was not requested on the form), the Survivor did not report the abuse to the Debtor at the time of the abuse, or the Survivor is not aware of someone who witnessed the abuse. *None* of those points means the

Debtor did not know that Father Kohli posed a danger to children before he sexually abused the Survivor, and the Debtor's assertion to the contrary is somewhat galling when it filed for bankruptcy within 60 days of when the Survivor started pursuing discovery on these very issues.

43. The Court is required to accept all of the Survivor's allegations as true, and it plainly may not ignore those allegations in favor of the Debtor's self-serving allegations. At most, the Debtor's assertions illustrate why its objection must be denied so that the Survivor can pursue discovery to prove his factual allegations – if the Debtor wants the Survivor's claim to be disallowed over a lack of evidence, then the Debtor should have no problem with the Survivor pursuing discovery to find that evidence. If he fails, the Debtor can renew its objection.

44. The Debtor's motion illustrates why courts are required to accept the plaintiff's allegations as true on a 12(b)(6) motion: if the plaintiff's allegations would expose the moving defendant to liability, if proven true, the plaintiff is entitled to pursue discovery to prove them. Once discovery is over, the moving defendant can move for summary judgment and test the plaintiff's evidence. The need for that standard is particularly apparent in a case like this where the Debtor filed for bankruptcy within 60 days of the Survivor issuing written discovery to the Debtor and St. Joseph, and the automatic stay and preliminary injunction have prevented the Survivor from pursuing that written discovery or depositions regarding the factual issues raised in the Debtor's objection.

C. The Debtor's Objection Ignores Its Duty to Protect the Survivor from the Danger of Child Sexual Abuse When He Was In Its Care, Custody, or Control, a Duty that Does Not Require Evidence It Knew Father Kohli Posed a Danger to Children

45. The Court should overrule the Debtor's objection because it ignores the duty it had to protect the Survivor from foreseeable harm while he was in its care, custody, or control. As a result of that duty, which arises from its special relationship with the Survivor, the Debtor is liable

for failing to exercise reasonable harm to protect the Survivor from the danger of child sexual abuse even if the Debtor was not specifically aware of the danger posed by Father Kohli.

46. New York has long recognized that a party who has care, custody, or control of a child has a duty to protect that child from foreseeable harm. For example, in *Garcia v City of New York*, 222 AD2d 192, 195 [1996], a jury found in favor of a kindergarten student who was sent to the bathroom alone and unsupervised, where he was then sexually assaulted by another student. On appeal, the court held that because the school was aware of the generalized risk of sexual assault to “unescorted students,” a “jury could reasonably have come to the conclusion that the danger of the assault which occurred was foreseeable and preventable by proper supervision.” *Id.* at 197.

47. As *Garcia* makes clear, the legal duty in that situation is one owed to the child (to protect them from foreseeable harm) – whether that harm is an attack by another child or an attack by another adult. The status of the attacker is irrelevant – what is relevant is whether the attack was reasonably foreseeable. If so, then a defendant who has care, custody, or control of a child must take reasonable steps to protect the child from that foreseeable harm. If the attacker in *Garcia* had been a school employee (rather than another student), then the *Garcia* plaintiff would have had two separate claims for negligence: (1) a claim for breaching the duty to prevent its employee from using his position to harm children at the school (negligent supervision or retention of the employee), and (2) a claim for breaching the duty to protect the children in its care, custody, or control from foreseeable harm (negligent supervision of the child).

48. Similarly, in *Logan v City of New York*, 148 AD2d 167 [1st Dept 1989], a student was raped in a school stairway after being sent alone to a classroom without supervision. Refusing to dismiss the plaintiff’s claims, the Court held that the question was “whether the [defendant] had

notice, actual or constructive, that a child was at risk of attack if left unescorted.” *Id.* at 171-72. See e.g., *Coon by Fontana v Bd. of Educ. of City of New York*, 160 AD2d 403, 403 [1st Dept 1990] (“[w]here duty to supervise is mandatory, notice is not an issue.”); *Hoose v Drumm*, 281 NY 54, 57-58 [1939] (defendant “owes it to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances”); *Shante D. by Ada D. v City of New York*, 190 AD2d 356 [1st Dept 1993], *affd*, 83 NY2d 948 [1994] (upholding jury verdict against school which negligently supervised student in its custody and control, who was assaulted by two fellow students).

49. Similarly, the Restatement (Second) of Torts § 302B (1965) states the Debtor can be held liable for exposing the Survivor to a dangerous person if it “realizes or should realize that it involves an unreasonable risk of harm to another.” As stated in Comment e to Restatement (Second) of Torts § 302B (1965), this rule reflects that there are “situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise ... where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.” For example, liability may exist “[w]here the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.” *Id.* Liability may also exist “[w]here the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others.” *Id.*; see also Restatement (Second) of Agency § 213 (1958) (liability can attach for giving improper orders or failing to make proper regulations, improper supervision, or in permitting negligent conduct upon premises within

defendant's control); Restatement (First) of Torts § 308 (1934) (it is negligence to allow a third person to use instrumentalities or engage in an activity if it is known or should be known such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others).

50. New York law makes clear that a child who is harmed while in the care, custody, or control of a defendant is only required to show that the defendant failed to protect the child from foreseeable harm – not a specific “known” harm. If the Debtor was correct, any entity who has care, custody, or control of children could ignore a foreseeable harm, knowingly refuse to adopt policies and procedures to address that foreseeable harm, and allow a child to be injured by the harm. Then, only after such an injury would the defendant have any duty to protect the children in their care from the harm, but only as to the individual perpetrator who harmed the first child. Taken to its logical end, if a child was sexually abused by an unidentified stranger a defendant would never have a duty to change its policies and procedures because, by definition, that defendant would not be aware of the propensities of the specific perpetrator. While such a conclusion defies common sense, it is the conclusion that would naturally result from the position advocated by the Debtor. This “first one is free” view is not supported by New York law.

51. Indeed, in *N.X. v Cabrini Med Ctr.*, 97 NY2d 247 [2002], the Court of Appeals held that a hospital could be vicariously liable for the acts and omissions of its employees and agents who allowed a patient to be assaulted while in the hospital's care, custody, or control. The court concluded that the hospital owed a duty to the plaintiff “once there were acts or events suggesting that an assault or unauthorized ‘examination’ was about to take place – and did take place – in their presence.” *Id.* at 253. Noting that such a rule is “commonsense,” the Court of Appeals held “that observations and information known to or readily perceivable by hospital staff that there is a

risk of harm to a patient under the circumstances can be sufficient to trigger the duty to protect.”
Id. at 255.

52. Nor would any other rule make sense. As noted above, absurd results would follow if the rule was that a defendant tasked with the care, custody or control of a child is only responsible for the sexual abuse of the child when it can be shown that the defendant knew that a specific perpetrator had a propensity to abuse children. For example, if a defendant boarding school left its doors unlocked every night and a child was sexually assaulted by a passerby, the defendant could assert it had no duty to protect the child because it did not know the specific propensities of the perpetrator. If the perpetrator’s identity remained unknown, the defendant could leave its doors open. This is not and cannot be the law. Instead, such a defendant could be held liable if the child shows the defendant knew or should have known of the danger of leaving its doors unlocked at night – that the children in its care could be sexually assaulted by a passerby.

53. If the Survivor’s arguments regarding this issue sound familiar, it is because they are the same arguments that were made and accepted by two different appellate courts in New York in cases brought under the Child Victims Act. In both of those decisions, the appellate courts confirmed that a Catholic entity who had care, custody, or control of a child has a duty to protect that child from foreseeable harm, including the danger of child sexual abuse, even if the entity was not aware of the danger posed by the specific perpetrator at issue.

54. In *Harmon v. Diocese of Albany*, 204 A.D.3d 1270 (2022), the trial court ordered the Diocese of Albany to produce (1) the “secret files” of priests who abused children before or during the plaintiff’s abuse, (2) the “sexual deviancy” treatment records of priests that were shared with the Diocese, and (3) the Independent Mediation Assistance Program (IMAP) files of those abused by the same perpetrator. The Court recognized that, as an issue of fundamental fairness,

the Diocese could not assert that it acted reasonably to protect the plaintiff from the danger of child sexual abuse given what it knew about that danger while simultaneously withholding evidence regarding its knowledge of that danger. For that reason, the Third Department held that the plaintiff was entitled to discovery regarding the Diocese's knowledge of the danger of child sexual abuse, including its "secret files" regarding other priests who were alleged to have sexually abused children before or during the time of the plaintiff's abuse. *Harmon v. Diocese of Albany*, 204 A.D.3d 1270, 1274, 167 N.Y.S.3d 601, 606–07 (2022).

55. Similarly, in *Novak*, the trial court granted a motion to dismiss on the pleadings because it concluded the plaintiff failed to specifically allege how the Sisters of the Heart of Mary knew that a priest posed a danger him. 210 A.D.3d at 1104. In reversing, the appellate court correctly held that the defendant owed the plaintiff two separate duties, one of which does *not* require evidence that the defendant knew of the danger posed by the priest at issue: 1) a duty to protect the plaintiff from its employee if it "knew or should have known of the employee's propensity for the conduct which caused the injury" (the sole focus of Debtor's objection), and 2) a duty to protect the plaintiff from "foreseeable injuries proximately related to the absence of adequate supervision." *Id.* at 1105.

56. The Court should overrule the Diocese's objection to the Survivor's claim because it does not dispute the Survivor's allegations that the Diocese knew of the danger of child sexual abuse and failed to take reasonable steps to protect the Survivor from that danger when he was in its care, custody, or control. The Court must accept those factual allegations as true and allow the Survivor to pursue discovery regarding the same. Given the vast number of priests who the Diocese *does* admit were credibly accused of child sexual abuse before and during the Survivor's abuse by Father Kohli, it seems fairly clear the Survivor will not have much difficulty proving that

this Diocese was well aware of the danger of child sexual abuse before he was abused and failed to take reasonable steps to protect him from that danger.

D. The Debtor's Assertion of "Special Considerations" is Misplaced

57. The Debtor's assertion that "special considerations" warrant the Court granting its objection to the Survivor's claim is misplaced. In a nutshell, the Debtor asserts that the Court should grant its objection because the Survivor has been unable to pursue *any* discovery to prove his factual allegations. That is simply not the law, and the argument is directly contrary to why the Court is required to accept all of the Survivor's factual allegations as true and allow him to pursue discovery to prove them. The Debtor's argument on this point illustrates why its objection lacks merit in the first place. Nowhere does the Debtor represent to the Court that it should disregard the Survivor's allegations because it has conducted an exhaustive review of its records and its records do not contain any evidence that it knew or should have known of the danger posed by Father Kohli or the danger of child sexual abuse. Similarly, nowhere does the Debtor represent to the Court that it has identified all possible witnesses regarding those factual issues, that it interviewed them (let alone done so under oath), and that they have no evidence to offer on those issues. The Survivor is ready to pursue such discovery and was in the process of doing so when the Debtor filed for bankruptcy and brought discovery to a halt.

58. If the Debtor wants to argue that "special considerations" exist to warrant the dismissal of the Survivor's claim, its objection should be denied without prejudice and the Court should afford the Survivor the opportunity to pursue that discovery. If the past is prologue, it is highly likely that the Survivor will find the very evidence that the Debtor demands in its objection.

CONCLUSION

59. The Survivor respectfully requests the Court overrule the Debtor's objection and allow the Survivor to proceed with discovery to prove his factual allegations. Alternatively, if the Court concludes that the Survivor's factual allegations are insufficient because they are largely contained in the state court complaint that was attached to his Sexual Abuse Proof of Claim, the Survivor requests leave to amend his Sexual Abuse Proof of Claim so he can plead those facts on the face of the form.

CONTACT

The Debtor must return any reply to this response to Counsel Jason P. Amala of Pfau Cochran Vertetis Amala PLLC, and James R. Marsh of Marsh Law Firm PLLC, at: 31 Hudson Yards, 11th Floor, New York, New York, 10001, jason@pcvalaw.com, jamesmarsh@marsh.law. Counsel is also the appropriate party to contact regarding reconciling, settling, or otherwise resolving the claim. The Survivor has ultimate authority to reconcile, settle, or otherwise resolve the claim but no other case party is permitted to contact the Survivor directly and such contact should only occur through Counsel at the previously stated address.

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