FOLEY & LARDNER LLP
Eileen R. Ridley (CA Bar No. 151735)
Tel: (415) 438-6469; eridley@foley.com
Ann Marie Uetz (admitted *pro hac vice*)
Tel: (313) 234-7114; auetz@foley.com
Matthew D. Lee (admitted *pro hac vice*)
Tel: (608) 258-4203; mdlee@foley.com
Thomas F. Carlucci (CA Bar No. 135767)
Tel: (415) 984-9824; tcarlucci@foley.com
Jeffrey R. Blease (CA Bar. No. 134933)
Tel: (617) 226-3155; jblease@foley.com
555 California Street, Suite 1700
San Francisco, CA 94104-1520

Counsel for the Plaintiff/Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re:

THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole,

Debtor.

THE ROMAN CATHOLIC BISHOP OF OAKLAND,

PLAINTIFF,

v.

PACIFIC INDEMNITY, a Delaware corporation; INSURANCE COMPANY OF AMERICA, a Delaware corporation; AETNA INSURANCE COMPANY, a Delaware corporation; TRAVELERS INSURANCE COMPANY, a Delaware corporation; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO SYNDICATES 2623 (AFB) AND 623 (AFB), a foreign organization; INSURANCE COMPANY OF NORTH AMERICA, a Delaware corporation; ACE LIMITED, a foreign organization; UNITED STATES FIRE

Chapter 11

Case No: 23-40523 WJL

Adversary Case NO.: 23-04028 WJL

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER

Judge: Hon. William J. Lafferty

Date: November 14, 2023
Time: 9:00 a.m.
Place: United States Bankruptcy Court
1300 Clay Street, Courtroom 220
Oakland, CA 94612

Case: 23-04028 Doc# 148 Filed: 11/09/23 Entered: 11/09 2340523231110000000000013

4892-8940-3791

INSURANCE, a Delaware corporation; EMPLOYERS REINSURANCE, a Delaware corporation; CNA INSURANCE COMPANY, a Delaware corporation; PACIFIC EMPLOYERS INSURANCE, a Delaware corporation; WESTCHESTER FIRE INSURANCE COMPANY, a Pennsylvania corporation; and the CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, a state entity,

DEFENDANTS,

AND

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

INTERVENOR.

The Roman Catholic Bishop of Oakland, the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding") and the debtor and debtor in possession in the underlying chapter 11 case (the "Debtor") hereby files its reply to the *Insurers' Objection to Plaintiff's Motion for Entry of Protective Order* [AP Dkt. 145] (the "Objection"), and in support of its *Plaintiff's Motion for Entry of Protective Order* [AP Dkt. 124] (the "Motion").[1]

I.

INTRODUCTION

There are competing motions for approval of a protective order before this Court: (1) the Debtor's Motion, supported by the Committee, which seeks approval and entry of the Proposed AP Protective Order, which would govern production of confidential material in this adversary proceeding consistent with the terms of the already approved Main Case Protective Order; and (2) the Insurers' motion filed in the main case, which seeks approval of a competing form of protective order that would impose new and

[1] Capitalized terms defined in the Motion shall have the same meaning herein.

Case: 23-04028 Doc# 148 Filed: 11/09/23 Entered: 11/09/23 17:59:40 Page 2 of 8
4892-8940-3791

inconsistent obligations, and fails to recognize the elevated level of sensitivity of the material at issue in this case (the "Insurers' Motion").[2]

Two core principles should guide evaluation of these competing motions: (1) the overarching need to protect the confidentiality of highly sensitive information, including the personal information of childhood sexual abuse claimants; and (2) the need for a consistent set of requirements governing production and use of confidential material. The Proposed AP Protective Order includes a higher level of protection for material that is particularly sensitive, which is essential in the particular circumstances of this case. Because it is substantively the same as the already approved Main Case Protective Order, it provides for consistent treatment of confidential material.

Three months after the Court approved the Main Case Protective Order, and after the Debtor has produced thousands of documents to the Committee pursuant to the terms of that order, the Insurers are seeking to impose their own preferred form, supplanting the already approved Main Case Protective Order, and forcing the Debtor to re-evaluate the designation of every document already produced. In the process, the Insurers have never explained how their proposed order will avoid imposing inconsistent obligations on the Debtor and other parties. Instead, the Insurers raise a host of generalized objections. The Court should reject the Insurers' objections and enter the Proposed AP Protective Order.

A. The Insurers' Arguments that the Proposed AP Protective Order is "Unworkable" Lack any Substantive Support

The Insurers provide no support for their argument that the Debtor's Proposed AP Protective Order is somehow not workable for a multi-party litigation.

Examination of Witnesses. First, the Insurers argue that the Proposed AP Protective Order will effectively grant the witness and the Debtor and/or the Committee a veto right over examination of any witness. *See* Objection, p. 2, ¶ 3. This is simply not true. It ignores the role of the Court in the discovery process, the paramount need for confidentiality, and the fact that the District Court's model form contains

[2] The Debtor has briefed the issues with the Insurers' Motion in its *Debtor's Objection to Moving Insurers' Motion For Court's Approval of Confidentiality and Protective Order* [Bankr. Dkt. 578], which is incorporated by reference.

4892-8940-3791 Case: 23-04028 Doc# 148 Filed: 11/09/23 Entered: 11/09/23 17:59:40 Page 3 of 8

a substantively similar provision. Certainly, the Proposed AP Protective Order does provide, as to "Highly Confidential Material," for the witness to sign a Declaration acknowledging its terms and recognizing that they are bond, and likewise provides for consent of the Designating party only as to documents to which the witness was not previously a party. *See* Motion, Ex. A, ¶ 11. This is both necessary and not the "veto" the Insurers make it out to be.

As an initial matter, the Insurers ignore the need for a heightened level of protection for certain materials. Documents designated as "Highly Confidential Material" in this case potential include information on childhood sexual abuse, including the identities of the victims. The need for parties given access to this information, including witnesses, to acknowledge the confidentiality obligations of the Proposed AP Protective Order is self-evident.

Further, there is no reason to suggest this creates a veto power for anyone. The Proposed AP Protective Order, like the Main Case Protective Order, expressly preserves the right of any party to "seek relief from the Court or any other applicable court from any provision of this Order by application on notice on any grounds." *See* Motion, Ex. A, ¶ 22. Thus, in the unlikely event that a witness unreasonably refuses to sign the Declaration, or a Designating Party unreasonably refuses to consent to use of a document in examination, the aggrieved party can make its case for relief from this Court, and the opposing party must justify its position to the Court.

Finally, this argument is disingenuous, because the District Court model protective order has a provision for witnesses to sign an agreement to be bound, a requirement not substantively different that the Declaration provided for in the Proposed AP Protective Order. Specifically, the District Court's model protective order provides for witnesses to sign an "Acknowledgement and Agreement to be Bound," unless otherwise agreed by the Designating Party or ordered by the court.[3] **The Insurers edited this provision out of their proposed form**.

Consistency With the Federal Rules. Second, the Insurers argue that the Proposed AP Protective Order "does not adopt [sic] the Federal Rules governing confidentiality made applicable by section

[3] *See* Model Protective Order, ¶ 7(f), located at: https://www.cand.uscourts.gov/forms/model-protective-orders/

Case: 23-04028 Doc# 148 Filed: 11/09/23 Entered: 11/09/23 17:59:40 Page 4 of 8
4892-8940-3791

107(b)(1) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 7026." *See* Objection, p. 3, ¶ 4. This is not true, either. The Bankruptcy Code and the Federal Rule of Bankruptcy Procedure apply regardless of whether they are "adopted" by a protective order. Further, the Proposed AP Protective Order expressly states that it is "pursuant to 11 U.S.C. § 107(b) and Rules 7026, 9014, and 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 26(c) of the Federal Rules of Civil Procedure" (*See* Motion, Ex. A, p. 2), and acknowledges that protection of confidential information is governed by the Code and applicable Rules (*See* Motion, Ex. A, ¶ 6.a.).

Consistency With the Northern District Form. Third, the Insurers argue that the Proposed AP Protective Order should be rejected because it deviates from the Northern District of California's model form, which they assert "has been adopted in other large chapter 11 cases in this District and tested on appeal." *See* Objection, p. 3, ¶ 5. This argument is misleading. Use of the Northern District's form is not mandatory. The circumstances of this case and the sensitivity of the material to be protected are very different from a routine commercial case. Indeed, the fact that the Northern District model form does not provide adequate protection for material with an unusually high level of sensitivity is expressly recognized by the fact that the District Court provides a separate model form for use in patent and intellectual property cases, incorporating a "Highly Confidential" designation similar to that used in the Proposed AP Protective Order.[4]

Consistent with the overall lack of specifics in the Insurers' Objection, the Insurers also fail to identify what differences between the Proposed AP Protective Order and the District model form are objectionable. Instead they merely point to the fact that the model form has been used in other large cases. That is not a reason to scrap the Main Case Protective Order in favor of the Insurer's preferred order. Cases like PG&E do not share the extraordinary need for protection of private sensitive information here. Further, the Insurers' citations do not actually support their claim that the District form has been "tested on appeal." *See* Objection, p. 3, ¶ 5 and fn. 3. Debtor's counsel has reviewed the appeals from each of

[4] *See* Model Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade Secrets, located at: https://www.cand.uscourts.gov/forms/model-protective-orders/

the three bankruptcy cases cited by the Insurers, and none of the appeals involved any challenge to the protective order. Finally, and once again, the Insurers fail to disclose that the one substantive issue they raise with the Proposed AP Protective Order – the requirement for witnesses to sign an acknowledgement that they are bound – is actually contained in the District model form, but edited out of the Insurers' proposed protective order.

Risk of Potential Criticism. Finally, lacking any material objection to the Proposed AP Protective Order on the merits, the Insurers raise the specter of public criticism of the bankruptcy process and potential "bad precedent." *See* Objection, p. 3, ¶ 6. Once again, the Insurers speak in unsupported generalities. Why would the Proposed AP Protective Order subject the parties or the Court to public criticism, when it mirrors the Main Case Protective Order entered months ago? What California statutes involving confidentiality agreements does it "implicate"? What exactly is the "bad precedent" that would be set by entering a protective order that mirrors one this Court already entered, after noting at the July 18 hearing that it found there to be nothing "atypical, "unusual," or "problematic" about the Main Case Protective Order? *See* July 18, 2023 Hrg. Tr. at 18:17-19:1. The Insurers provide no answers to any of these questions, because the issues they suggest are not real.

The absurdity of the notion that the Proposed AP Protective Order could subject the parties, much less the Court, to accusations of some kind of cover-up is underscored by the fact that it was the product of negotiation with the *Committee* as the statutory representative of sexual abuse claimants in this bankruptcy case. Likewise, while the form was originally negotiated between the Debtor and the Committee, the Main Case Protective Order is expressly an order of this Court, as will be the Proposed AP Protective Order if adopted, not just a "two-party agreement."[5]

The Insurers are wrong that the Proposed AP Protective Order somehow gives short shrift to California SB 331 (the "Silenced No More Act"), or California SB 820 ("Stand Together Against Non-Disclosure (STAND) Act"). These California laws generally limit use of non-disclosure, non-

[5] The Court's *Order Approving Revised Confidentiality Agreement and Stipulated Protective Order* [Bankr. Dkt No. 331], expressly states: "The terms and provisions of the Stipulated Protective Order shall be effective upon entry of this Order, and shall be enforceable as an order of this Court."

Case: 23-04028 Doc# 148 Filed: 11/09/23 Entered: 11/09/23 17:59:40 Page 6 of 8

4892-8940-3791

disparagement, and similar provisions in settlement agreements and severance agreements related to sexual harassment and other discrimination. This is completely inapplicable to a protective order governing discovery in bankruptcy or litigation generally, which in no way attempts to or purports to silence any victim or claimant. Nor do the Insurers provide any explanation of how exactly their proposed order safeguards these laws better than the Proposed AP Protective Order.

B. The Insurers Had Ample Opportunity to Seek Changes to the Proposed AP Protective Order But Refused to Participate

The Insurers make much of the notion that the Proposed AP Protective Order is the product of negotiations between the Debtor and the Committee, to their exclusion. This omits two things. One, it omits the fact that the Insurers objected to the Main Case Protective Order on which the Proposed AP Protective Order is based, including on the issue of requiring witnesses to sign the form confidentiality agreement before being shown confidential documents. That and other of their objections were overruled, but the Court did, in fact, accept their insistence on greater protections for documents in which they claim a privilege right. Two, it omits the fact that in the 24 days between receiving the Proposed AP Protective Order and sending the Debtor their own form, the Insurers never identified – and still do not identify – anything in the Proposed AP Protective Order that they think should be changed. *See* Motion, ¶¶ 7-12.

If the Insurers had any actual, specific concerns with the form of the Proposed AP Protective Order, they had ample opportunity to raise them and propose edits. Instead of doing that, the Insurers did the most unreasonable thing possible: demand the Debtor accede to an entirely different protective order, with different confidentiality designations and different protection protocols, without regard to the cost to the estate of such a transition. All because the Insurers simply do not like the existing order.

C. The Insurers' Proposed Protective Order Would Impose Inconsistent Requirements, Creating an Enormous and Unnecessary Burden on the Estate.

In the Motion, the Debtor set out in detail many of the numerous inconsistencies between the Main Case Protective Order and the Insurers' proposed protective order. *See* Motion, ¶¶ 13-20. The Insurers do not even attempt to address these issues in their Objection, effectively acknowledging that their proposed order would impose inconsistent requirements on the Debtor and substantially increase the

estate's costs. The Court has already approved the Main Case Protective Order, and the Debtors have produced thousands of documents to the Committee pursuant to its provisions. The Insurers demand access to the same documents as the Committee, but under an entirely new and different protective order. This is an absurd result that the Court should avoid at all costs.

II.

CONCLUSION

For the reasons set forth above, in the Debtor's Motion, and in the Debtor's objection to the Insurers' Motion, the Court should: (i) Grant the Motion, (ii) require the Moving Insurers to sign declarations agreeing to be bound to the Main Case Protective Order if they want access to discovery in the main chapter 11 case, (iii) deny the Insurers' Motion, and (iv) award such other and further relief as the Court deems just and necessary.

DATED: November 9, 2023

FOLEY & LARDNER LLP
Eileen R. Ridley (CA Bar No. 151735)
Ann Marie Uetz (admitted *pro hac vice*)
Matthew D. Lee (admitted pro hac vice)
Thomas F. Carlucci (CA Bar No. 135767)
Jeffrey R. Blease (CA Bar No. 134933)
Shane J. Moses (CA Bar No. 250533)

/s/ Shane J. Moses
Shane J. Moses

Counsel for the Plaintiff/Debtor
and Debtor in Possession