REBECCA J. WINTHROP (SBN 116386)
NORTON ROSE FULBRIGHT US LLP
555 South Flower Street, Forty-First Floor
Los Angeles, California 90071
Telephone: (213) 892-9200
Facsimile: (213) 892-9494
rebecca.winthrop@nortonrosefulbright.com

RYAN E. MANNS (*pro hac vice*)
JASON I. BLANCHARD (*pro hac vice forthcoming*)
NORTON ROSE FULBRIGHT US LLP
2200 Ross Avenue, Suite 3600
Dallas, Texas 75201
Telephone: (214) 855-8000
Facsimile: (214) 855-8200
ryan.manns@nortonrosefulbright.com
jason.blanchard@nortonrosefulbright.com

Attorneys for the Oakland Parochial Fund, Inc.

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re: THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole, Debtor.	Case No. 23-40523 WJL Chapter 11
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE ROMAN CATHOLIC BISHOP OF OAKLAND Plaintiff, vs. THE ROMAN CATHOLIC BISHOP OF OAKLAND, THE OAKLAND PAROCHIAL FUND, INC., AND JOHN DOE CHURCHES 1-82 Defendants.	Adv. Pro. No. 24-04051 WJL **THE OAKLAND PAROCHIAL FUND, INC.'S MOTION TO DISMISS** Date: March 5, 2025 Time: 10:30 a.m. Judge: Hon. William J. Lafferty, III Place: United States Bankruptcy Court Courtroom 220 1300 Clay Street Oakland, CA 94612

DOCUMENT PREPARED ON RECYCLED PAPER

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/2 2340523250127000000000011

TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE ROMAN CATHOLIC BISHOP OF OAKLAND:

PLEASE TAKE NOTICE that the Oakland Parochial Fund, Inc. ("OPF"), defendant in the above-captioned adversary proceeding, hereby moves this Court (the "Motion"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rules"), as incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure, to dismiss the *Adversary Complaint for Declaratory Relief* (the "Complaint") filed against OPF by the Official Committee of Unsecured Creditors of the Roman Catholic Bishop of Oakland (the "Committee"), on the grounds that the Complaint fails to state a claim upon which relief may be granted.

The Motion is based on the attached *Memorandum of Points and Authorities*, the *Declaration of Ryan E. Manns in Support of Motion to Dismiss* (the "Manns Declaration") and the *Notice of Hearing on the Motion of the Oakland Parochial Fund, Inc. to Dismiss Complaint*, both of which are filed concurrently herewith, the records and files in this bankruptcy case, this adversary proceeding and all related proceedings, and such other and further matters as this Court may consider at or before any hearing on this Motion.

Dated: January 24, 2025

REBECCA J. WINTHROP
RYAN E. MANNS (*pro hac vice*)
JASON I. BLANCHARD (*pro hac vice forthcoming*)
NORTON ROSE FULBRIGHT US LLP

By: */s/ Rebecca J. Winthrop*
REBECCA J. WINTHROP
Attorneys for the Oakland Parochial Fund, Inc.

Table of Contents

Page

I. PRELIMINARY STATEMENT 1

II. FACTUAL BACKGROUND 2

A. The Oakland Parochial Fund, Inc. 2

B. The Relationship Between the Debtor and OPF 3

1. The Roman Catholic Diocese of Oakland 3

2. Alleged Connections Between the Diocese, OPF, and the Debtor 3

3. The OPF Agreements 4

4. The Alleged Transfers of Deposit and Loan Funds 5

5. The OPF Term Loan Agreement 6

III. LEGAL STANDARD 6

IV. ARGUMENT 7

A. The Court Should Dismiss the Committee's Claim for Substantive Consolidation Against OPF (Count 6) 8

1. As a Non-Profit Entity, the Oakland Parochial Fund, Inc. May Not be Involuntarily Thrust into Bankruptcy Through Substantive Consolidation 8

2. The Committee Has Failed to Adequately Plead a Claim for Substantive Consolidation 11

B. The Committee Fails to State a Claim Against OPF that Proceeds of the Term Loan Agreement are Property of the Debtor's Bankruptcy Estate (Count Five) 15

V. CONCLUSION 17

DOCUMENT PREPARED ON RECYCLED PAPER

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 3 of 24

TABLE OF AUTHORITIES

Page(s)

Cases

In re Archdiocese of St. Paul & Minnesota,
553 B.R. 693 (Bankr. D. Minn. 2016) 9, 15

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 6

In re Augie/Restivo Baking Co.,
860 F.2d 515 (2d Cir. 1988) 11, 12, 13

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 6

In re Bonham,
229 F.3d 750 (9th Cir. 2000) 8, 9, 11, 12

Brown v. Viegelahn (In re Brown),
960 F.3d 711 (5th Cir. 2020) 10

Butler v. Candlewood Rd. Partners, LLC (In re Raymond),
529 B.R. 455 (Bankr. D. Mass. 2015) 17

Butner v. U.S.,
440 U.S. 48 (1979) 17

Clark's Crystal Springs Ranch, LLC v. Gugino (In re Clark),
548 B.R. 246 (B.A.P. 9th Cir. 2016) 12

Coto Settlement v. Eisenberg,
593 F.3d 1031 (9th Cir. 2010) 7

Daniels-Hall v. National Educ. Ass'n,
629 F.3d 992 (9th Cir. 2010) 7

In re Gilead Scis. Sec. Litig.,
536 F.3d 1049 (9th Cir. 2008) 6

In re Giller,
962 F.2d 796 (8th Cir. 1992) 9

Harrington v. Purdue Pharma L.P.,
603 U.S. 204 (2024) 10

In re Howland,
674 F. App'x 482 (6th Cir. 2017) 8

In re Jackson,
548 B.R. 353 (Bankr. N.D. Ga. 2016) 17

DOCUMENT PREPARED ON RECYCLED PAPER

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 4 of 24

Khoja v. Orexigen Therapeutics, Inc.,
898 F.3d 988 (9th Cir. 2018) 7

Kismet Acquisition, LLC v. Icenhower (In re Icenhower),
757 F.3d 1044 (9th Cir. 2014) 8

Law v. Siegel,
571 U.S. 415, 134 S. Ct. 1188 (2014) 9, 11

Manzarek v. St. Paul Fire & Marine Ins. Co.,
519 F.3d 1025 (9th Cir. 2008) 6, 9, 11, 15

McHenry v. Renne,
84 F.3d 1172 (9th Cir. 1996) 16

Mendiondo v. Centinela Hosp. Med. Ctr.,
521 F.3d 1097 (9th Cir. 2008) 6

Morse Operations, Inc. v. Robins LE-COCQ, Inc. (In re Lease-A-Fleet, Inc.),
141 B.R. 869 (Bankr. E.D. Pa. 1992) 14

Official Comm. of Unsecured Creditors v. Archdiocese of St. Paul & Minneapolis,
562 B.R. 755 (D. Minn. 2016) 10

Official Comm. of Unsecured Creditors v. Archdiocese of St. Paul & Minneapolis (In re Archdiocese of St. Paul & Minneapolis),
888 F.3d 944 (8th Cir. 2018) 1, 9, 11

In re Owens Corning,
419 F.3d 195 (3d Cir. 2005) 8, 11, 12, 14

R2 Investments, LDC v. World Access, Inc. (In re World Access, Inc.),
301 B.R. 217 (Bankr. N.D. Ill. 2003) 13

Sprewell v. Golden State Warriors,
266 F.3d 979 (9th Cir. 2001) 6

In re Stayton SW Assisted Living, LLC,
2009 WL 5173512 (D. Or. Dec. 22, 2009) 12

Stokes v. Duncan (In re Stokes),
2013 WL 5313412 (B.A.P. 9th Cir. Sept. 23, 2013) 17

Swartz v. KPMG LLP,
476 F.3d 756 (9th Cir. 2007) (per curiam) 7

United States v. Mackenzie (In re Leite),
112 F.4th 1246 (9th Cir. 2024) 10

United States v. Ritchie,
342 F.3d 903 (9th Cir. 2003) 7

Rules and Statutes

11 U.S.C. § 105(a) 8, 9, 10, 11

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 5 of 24

11 U.S.C. § 303(a) 1, 8, 9, 10, 11
11 U.S.C. § 541 ..... 2, 16, 17
11 U.S.C. § 541(a)(2) 17
11 U.S.C. § 542 17
Cal. Corp. Code § 9132 13
Cal. Corp. Code § 9240 13
Fed. R. Bankr. P. 7001(9) 17
Fed. R. Civ. P. 8 16
Fed. R. Civ. P. 12(b)(6) 6, 17

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 6 of 24

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

The Committee asks this Court to wade into uncharted territory by forcing OPF – a nonprofit religious organization – into bankruptcy through the extreme remedy of substantive consolidation. No appellate court has approved this maneuver, and the only one to address this issue expressly rejected substantive consolidation of non-consenting nonprofit entities.

To be sure, the Ninth Circuit has authorized substantive consolidation of debtors and non-debtors (typically under limited circumstances involving overt fraud or complete domination and control by a debtor). But, it has not addressed whether a bankruptcy court may utilize its equitable powers under section 105 of the Bankruptcy Code (from which substantive consolidation is derived) to circumvent the Bankruptcy Code's express prohibition on involuntary bankruptcies against nonprofits. The Eighth Circuit has, however, decided this precise issue in *Archdiocese of St. Paul & Minneapolis*, a case with strikingly similar facts: a committee of unsecured creditors sought substantive consolidation of a Roman Catholic debtor corporation with numerous affiliated nonprofit and religious non-debtor organizations. The circuit court held that bankruptcy courts may not involuntarily thrust nonprofit non-debtors into bankruptcy through substantive consolidation because doing so "would effectively nullify the protections of § 303(a)" in violation of Supreme Court precedent. This Court should decide likewise and dismiss the Committee's substantive consolidation claim against OPF as a matter of law.

Even if the Committee could overcome this legal hurdle, it still must plead sufficient facts to state a claim for substantive consolidation by showing that either (1) creditors that actually dealt with the Debtor and Non-Debtor Defendants treated them as a single entity and did not rely on their separateness in connection with extending credit, or (2) their financial affairs are so hopelessly commingled that creditors would be harmed if the mess is not untangled for the creditors' benefit. The Committee fails to satisfy this high standard.

Instead, the Committee primarily alleges that Debtor (i.e. a corporation) which the Committee repeatedly conflates with the Diocese (i.e., a geographic unit in which the Debtor and

DOCUMENT PREPARED ON RECYCLED PAPER

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 7 of 24

other non-debtor Catholic entities serve the community) engaged in a series of sham transactions with OPF without proper written support designed to shield the Debtor's assets from the reach of creditors. When construing these facts in the Committee's favor and accepting them as true (as OPF concedes this Court must for the purpose of deciding the Motion), these allegations might make out a claim for avoidance of fraudulent transfers, a claim the Committee lacks standing to pursue. But, the allegations fall woefully short of the facts that must be pleaded to state a claim for substantive consolidation.

Furthermore, the Committee's claim that proceeds from a term loan agreement between OPF and the Debtor transferred into restricted bank accounts constitute property of the Debtor's bankruptcy estate is equally flawed. Section 541 of the Bankruptcy Code defines what constitutes property of a bankruptcy estate as of the commencement of a debtor's bankruptcy case (and by virtue of state law, what property rights the debtor has). The Complaint does not allege OPF is the recipient of the loan proceeds or that it has rights to the restricted accounts. But even if it did, section 541 does not give rise to an independent claim for relief by creditors to lay claim to OPF's property without an accompanying enforcement mechanism, *e.g.* a claim for turnover or avoidance and recovery of a fraudulent transfer. This claim too fails because the Committee has not plead a cognizable claim for relief.

For these reasons, and those more fully discussed below, the Committee's claims against OPF must be dismissed.

II.

FACTUAL BACKGROUND[1]

A. The Oakland Parochial Fund, Inc.

OPF is a California nonprofit religious corporation formed in 2014 "to support the religious missions and purposes, and teachings, beliefs and activities, of the Roman Catholic Church within the Roman Catholic Diocese of Oakland (the "Diocese"). (Compl. ¶¶ 13, 46; OPF AOI § II. B.).

[1] Unless stated otherwise, the summary below is based on the non-conclusory factual allegations in the Complaint, which OPF has assumed to be true solely for the purpose of the Motion, the documents incorporated by reference in the Complaint, which OPF has attached to the Declaration of Ryan E. Manns filed concurrently herewith, and matters of which this Court may take judicial notice.

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 8 of 24

According to OPF's formational documents, OPF was to be "operated, supervised or controlled" by the Debtor subject to the corporation's right to exercise "all the rights conferred by the Nonprofit Corporation Law of the State of California upon religious nonprofit corporations" and any other lawful activities "reasonably necessary to fulfill" its stated religious purposes. (Compl. ¶ 46; OPF AOI § II. B.). All of OPF's corporate property was irrevocably dedicated to the religious purposes for which it was formed. (Compl. ¶ 51; OPF AOI § II. B.). OPF's corporate affairs are managed by a board of directors, provided that any borrowing for capital needs, non-ordinary course transactions, and changes to OPF's governing articles of incorporation or bylaws are effective only upon the Debtor's written consent. (Compl. ¶ 52; OPF AOI § V.A.). Directors and officers are prohibited from receiving compensation for their services. (OPF AOI § IV.B.).

As a nonprofit entity organized and operated exclusively for religious purposes within the meaning of section 501(c)(3) of the Internal Revenue Code ("IRC"), OPF's articles of incorporation provide that upon its liquidation, dissolution, or abandonment, it shall distribute any assets that may remain following payment or provision of payment of its debts and obligations, to organizations organized and operated exclusively for Roman Catholic religious purposes within the Diocese, so long as the receiving organization remains a nonprofit entity qualified under section 501(c)(3) of the IRC. (*Id.* § III., VI.).

B. The Relationship Between the Debtor and OPF

1. The Roman Catholic Diocese of Oakland

The bishop (the "Bishop"), currently the Most Reverend Michael C. Barber, S.J., is the religious leader and chief administrator for the Diocese. (*See* Compl. ¶¶ 12, 16, 18). The Bishop is responsible for setting policy for the mission of the Roman Catholic Church within the Diocese and making diocesan personnel, budgetary, and financial decisions. (*See id.* ¶ 17).

2. Alleged Connections Between the Diocese, OPF, and the Debtor

Father Lawrence D'Anjou serves as OPF's Chief Executive Officer, a position for which he is not compensated. (*Id.* ¶ 22). He also serves as Vicar General for the Diocese and as a pastor of St. Bonaventure Church in Concord. (*Id.* ¶ 19). He receives compensation and health and other benefits from St. Bonaventure Church, which bills the Diocese for half of the amounts incurred.

(*Id*. ¶ 20).

Paul A. Bongiovanni was OPF's Chief Financial Officer and Secretary. (*Id.* ¶ 50). At the time he held those positions, he was also the Chief Financial Officer of the Roman Catholic Welfare Corporation of Oakland ("RCWC"), a California nonprofit religious corporation that oversees diocesan elementary schools and high schools. (*Id*. ¶¶ 23, 50). RCWC is not a defendant in this adversary proceeding.

Michael P. Canizzaro was the agent and incorporator identified in OPF's articles of incorporation. (*Id*. ¶ 53). [redacted]

The Debtor and OPF have the same business and mailing address. (*Id*. ¶¶ 11, 13). OPF has no employees (*Id*. ¶ 54). It serves as a "non-profit fund manager for investments" of the parishes within the Diocese and RCWC "to the extent they choose to participate." (*Id*. ¶ 55). "OPF relies on the Debtor for finance and accounting services related to the closing of books and maintaining its accounting records." (*Id*. ¶ 56).

3. The OPF Agreements

[redacted]

[redacted]

Mr. Bongiovanni signed the Investment Agreement, the Management Agreement, and the Parochial Fund Agreement on behalf of the Debtor and Fr. D'Anjou signed each on behalf of OPF. (*Id*. ¶ 61).

4. The Alleged Transfers of Deposit and Loan Funds

Before April 2023, the Diocese held and managed cash and investments allegedly related to or allegedly held in trust for churches and RCWC in the Diocese's deposit and loan fund (the "DLF"), parochial investment pools (the "Investment Pools"), and other Diocese general operating accounts. (*Id*. ¶ 79).

On April 1, 2023 and May 5, 2023, the Debtor made three transfers in the total aggregate amount of $106 million to OPF in connection with the Investment Agreement, Management Agreement, and the Parochial Fund Agreement. (*Id*. ¶ 80). The transfers were sourced from DLF and Investment Pool funds and made at a time when hundreds of litigation claims by claimants asserting sexual abuse claims were pending against the Debtor. (*See id*. ¶¶ 81, 82). The Debtor contends that these funds were transferred to OPF with liabilities in corresponding amounts to those owed by the Debtor to churches and RCWC; the Committee alleges these liabilities lack

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 11 of 24

documentary support. (*See id*. ¶ 84).

5. The OPF Term Loan Agreement

On or about April 28, 2023, the Debtor, as borrower, and OPF, as lender, entered into a term loan agreement (the "Term Loan Agreement") under which OPF agreed to loan the Debtor $35 million on an unsecured basis. (*Id*. ¶ 85). According to the Complaint, the Debtor transferred $8.3 million in proceeds from the Term Loan Agreement from the Debtor's unrestricted bank accounts into newly-created and purportedly restricted bank accounts. (*Id*. ¶ 87). The Debtor listed a debt to OPF in its schedules for amounts owed under the Term Loan Agreement. (*Id*. ¶ 86).

III.

LEGAL STANDARD

Rule 12(b)(6) authorizes the Court to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate if "the complaint lacks a cognizable legal theory" or "sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

To survive a Rule 12(b)(6) motion, a complaint must plead sufficient factual allegations sufficient to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. When deciding whether a claim is plausible, courts must generally accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the plaintiff. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But courts need not accept as true "a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678. Nor must courts "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

When deciding a Rule 12(b)(6) motion, a court may generally consider only the factual allegations contained within the four corners of the complaint, exhibits attached to the complaint,

and matters subject to judicial notice. *Swartz v. KPMG LLP,* 476 F.3d 756, 763 (9th Cir. 2007) (per curiam). However, documents a plaintiff refers to extensively or that form the basis for the plaintiff's claim may be incorporated by reference into the complaint and therefore considered part of the pleading. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). This "prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken – or doom – their claims." *Khoja v. Orexigen Therapeutics, Inc.,* 898 F.3d 988, 1002 (9th Cir. 2018). Ninth Circuit courts may additionally consider a document to be incorporated "in situations where the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, (9th Cir. 2010); *see also Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) ("Plaintiff directly quoted the material . . . thereby incorporating [the material] into the Complaint.").

IV.

ARGUMENT

The Court should dismiss both counts asserted against OPF in the Complaint. The sixth count, concerning substantive consolidation, is not legally viable because as a nonprofit entity, OPF may not be forced into the equivalent of an involuntary bankruptcy through substantive consolidation, and even if it could, the Complaint fails to plead sufficient facts to support substantive consolidation. The fifth count, concerning the Debtor's purported legal and equitable ownership of the proceeds of the Term Loan Agreement, also fails. As a companion claim for a determination of which property would be subject to substantive consolidation, dismissal of the substantive consolidation claim must lead to dismissal of this claim too. Alternatively, to the extent the Committee asserts this count as a stand-alone claim, the Complaint fails to state a cognizable claim for declaratory relief.

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 13 of 24

A. The Court Should Dismiss the Committee's Claim for Substantive Consolidation Against OPF (Count 6)

1. As a Non-Profit Entity, the Oakland Parochial Fund, Inc. May Not be Involuntarily Thrust into Bankruptcy Through Substantive Consolidation

Substantive consolidation is not a right or claim found in the text of the Bankruptcy Code. Rather, it is a judicially created equitable remedy derived from a bankruptcy court's "general equity powers" found "in §105(a) of the Bankruptcy Code." *In re Bonham*, 229 F.3d 750, 764 (9th Cir. 2000). When applied, the doctrine allows the bankruptcy court to disregard the corporate form of separate legal entities, treat them as if they were merged into a single surviving entity, and pool their combined assets and liabilities together into a combined fund so that the claims of creditors against the separate entities are transformed into claims against the consolidated survivor. *See id.* Non-debtors on the receiving end of a substantive consolidation order effectively become debtors before the bankruptcy court and their property becomes property of the bankruptcy estate. *See, e.g., Kismet Acquisition, LLC v. Icenhower (In re Icenhower)*, 757 F.3d 1044, 1050 (9th Cir. 2014) (finding that non-debtor's foreign real property became property of the bankruptcy estate as a result of substantive consolidation order).

Courts have characterized substantive consolidation as both "extreme" (it may seriously affect the rights of creditors and non-debtor third parties) and "imprecise" (the Bankruptcy Code and substantive state law afford more precise remedies, for example, in the form of fraudulent transfer law and veil piercing). *See In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005). Therefore, substantive consolidation should be used sparingly, particularly when directed against entities not already in bankruptcy, and even then, only as a "last resort after considering and rejecting other remedies." *Id.; see also In re Howland*, 674 F. App'x 482, 488 (6th Cir. 2017) ("Substantive consolidation is an 'extreme' measure, only to be used 'sparingly,' especially when consolidating a non-debtor entity."); *Bonham*, 229 F.3d at 767 ("'resort to consolidation . . . should not be Pavlovian,' but as almost every other court has noted, should be used 'sparingly,' and in keeping with the equitable nature of substantive consolidation.") (internal citations omitted).

The Ninth Circuit has on few occasions authorized substantive consolidation of non-debtor

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 14 of 24

entities and debtors. *See, e.g. Bonham*, 229 F.3d at 762 (authorizing substantive consolidation of two non-debtor companies with an individual debtor based on extensive findings she used the companies to perpetrate a Ponzi scheme). It has never done so, however in a case involving nonprofits. Indeed, only one appellate court, the Eighth Circuit Court of Appeals, has directly addressed the issue before the Court: whether a bankruptcy court has the power to order substantive consolidation of a debtor and nonprofit non-debtors. *See Official Comm. of Unsecured Creditors v. Archdiocese of St. Paul & Minneapolis (In re Archdiocese of St. Paul & Minneapolis)*, 888 F.3d 944 (8th Cir. 2018).

In *St. Paul*, the Eighth Circuit held that the bankruptcy court lacked the equitable authority under section 105(a) of the Bankruptcy Code to order substantive consolidation of a debtor with nonprofit non-debtors. *Id.* at 947-48. There, like here, the unsecured creditors' committee sought to substantively consolidate the debtor, a Roman Catholic diocese (the Archdiocese of St. Paul and Minneapolis), with numerous nonprofit entities affiliated with the debtor (diocesan parish corporations, schools, cemeteries, and other related Roman Catholic religious organizations). *Id.; see also In re Archdiocese of St. Paul & Minnesota*, 553 B.R. 693, 696-97 (Bankr. D. Minn. 2016). The Archdiocese and the non-debtor nonprofit entities opposed the committee's requested relief on the ground that substantive consolidation would violate 11 U.S.C. § 303(a)'s prohibition on involuntary bankruptcy cases against nonprofits.

The Eighth Circuit began its analysis by acknowledging its prior holding that section 105(a) provides the source of a bankruptcy court's equitable power to direct substantive consolidation. *See Archdiocese of St. Paul & Minneapolis* 888 F.3d at 951 (citing *In re Giller*, 962 F.2d 796, 799 (8th Cir. 1992)). The court recognized, however, that more recent Supreme Court precedent limits the statute's reach: "the broad, catch-all equitable powers conferred under 11 U.S.C. § 105(a) do not allow a bankruptcy court to 'override explicit mandates of other sections of the Bankruptcy Code.'" *Id.* at 952 (quoting *Law v. Siegel*, 571 U.S. 415, 134 S. Ct. 1188, 1194 (2014)). Against this backdrop, the court turned to the text of section 303(a) of the Bankruptcy Code, which prohibits the commencement of an involuntary bankruptcy case against "a corporation that is not a moneyed, business, or commercial corporation." *Id.* (quoting 11 U.S.C. § 303(a)). Based on the plain language

of section 303(a), its legislative history, and Black's law dictionary, the court interpreted this phrase to cover the modern-day equivalent of a nonprofit organization. *Id*. Having determined the non-debtor organizations qualified as nonprofits under applicable state law, the Eighth Circuit held they could not be forced into bankruptcy involuntarily through substantive consolidation because doing so "would effectively nullify the protections of § 303(a)." *Id*. at 953; *see also Official Comm. of Unsecured Creditors v. Archdiocese of St. Paul & Minneapolis*, 562 B.R. 755, 762-763 (D. Minn. 2016) ("Because substantive consolidation of a charitable organization against its will equates to forcing the entity into involuntary bankruptcy, it violates an explicit mandate of the Bankruptcy Code.").

St. Paul's reasoning is aligned with recent precedent from the Supreme Court, Ninth Circuit, and other circuit courts of appeal that prohibit a bankruptcy court from using its equitable powers under section 105(a) to side step the Bankruptcy Code's express requirements. *See, e.g., Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 217 n.2 (2024) (holding that "§105(a) alone cannot justify" the imposition of non-consensual third-party releases that extinguish claims against non-debtors without textual support from section 1123(b) or elsewhere in the Bankruptcy Code because section 105(a) serves only to "carry out" authorities expressly conferred in the Code) (internal citations omitted); *United States v. Mackenzie (In re Leite)*, 112 F.4th 1246, 1252 (9th Cir. 2024) (reversing district court's decision that the bankruptcy court had the equitable authority under section 105(a) to apply a method for allocating the proceeds of the sale of real property not found in the Bankruptcy Code in violation of sections 551 and 724(a) of the Bankruptcy Code); *Brown v. Viegelahn (In re Brown)*, 960 F.3d 711, 719-20 (5th Cir. 2020) (holding that the bankruptcy court committed reversible error when, based on its equitable powers under section 105(a), it imposed conditions for modification of a confirmed plan in contravention of the textual requirements of section 1329 of the Bankruptcy Code).

Here, OPF is a nonprofit entity organized under California law and qualified for tax exempt status under section 501(c)(3) of the IRC. (Compl. ¶ 46; OPF AOI § III., VI.). There can be no serious dispute that it is "a corporation that is not a moneyed, business, or commercial corporation" that may not be involuntarily cast into bankruptcy under section 303(a) of the Bankruptcy Code.

DOCUMENT PREPARED ON RECYCLED PAPER

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 16 of 24

See 11 U.S.C. 303(a); *St. Paul*, 888 F.3d at 951. Section 105(a) of the Bankruptcy Code – a provision designed to carry out the other mandates of the Bankruptcy Code – may not be used to circumvent this express prohibition. *Law*, 571 U.S. at 421 ("Section 105(a) confers authority to 'carry out' the provisions of the Code … it is quite impossible to do that by taking action that the Code prohibits."). It follows that the Court may not enlist the equitable remedy of substantive consolidation (whose power is derived from section 105(a)) to override the Bankruptcy Code's explicit protection of nonprofit entities from the equivalent of involuntary bankruptcy. *See St. Paul*, 888 F.3d at 952–43. For this reason, the Complaint fails to state a cognizable legal theory for substantive consolidation against OPF and must be dismissed.

2. The Committee Has Failed to Adequately Plead a Claim for Substantive Consolidation

Even if the Court had the authority to substantively consolidate OPF and the Debtor over their objections, the Committee has failed to allege sufficient facts to support substantive consolidation under the standard articulated by the Ninth Circuit. *In Bonham*, the Ninth Circuit established a two-part disjunctive test for courts to consider when deciding a request for substantive consolidation: "(1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors." 229 F.3d at 766 (adopting Second Circuit's test in *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988)).

The first factor is based on the notion that lenders "structure their loans according to their expectations regarding the borrower and do not anticipate either having the assets of a more sound company available in the case of insolvency or having the creditors of a less sound debtor compete for the borrower's assets." *Id*. (quoting *Augie/Restivo Baking Co.*, 860 F.2d at 518-19); *see Owens Corning*, 419 F.3d at 211, n.19 (explaining this factor is "meant to protect the prepetition expectations of those creditors" who in the typical scenario "have been misled by debtors' actions…and thus perceived incorrectly (and relied on this perception) that multiple entities were one."). The second factor supports substantive consolidation only where "the time and expense necessary even to attempt to unscramble [the debtors' affairs] is so substantial as to threaten the

realization of any net assets for all the creditors or where no accurate identification and allocation of assets is possible." *Id.* (*Augie/Restivo Baking Co.*, 860 F.2d at 519); *see Owens Corning*, 419 F.3d at 211, n.20 (where the entities assets have been "hopelessly commingled" substantive consolidation may be appropriate where without it "all creditors will be worse off (as Humpty Dumpty cannot be reassembled…."). Although "no uniform guideline" exists for ordering substantive consolidation, broadly speaking, courts should consider whether there has been a "disregard for corporate formalities or commingling of assets" by the targeted entities and "the benefits that substantive consolidation would bring against the harms that it would cause." *Bonham*, 229 F.3d at 765.

When applying these factors, Ninth Circuit courts have often pointed to instances of overt fraud, such as a Ponzi scheme, to support substantively consolidating debtors with non-debtors. *See, e.g., Bonham*, 229 F.3d at 762, n.6 (authorizing substantive consolidation of two non-debtor companies with an individual debtor based on extensive findings she used the companies to perpetrate a Ponzi scheme, the debtor commingled her assets with those of the non-debtors who had no separate existence of their own); *In re Stayton SW Assisted Living, LLC*, 2009 WL 5173512, at *5-6 (D. Or. Dec. 22, 2009) (permitting substantive consolidation of debtors with non-debtors where the principal of the debtor operated debtor and non-debtor entities in furtherance of a Ponzi like scheme that resulted in violations of federal and state securities laws and SEC receivership). Findings of complete dominion and control by the debtor over all aspects of the non-debtor are typically required for substantive consolidation of non-debtors. *See e.g., Clark's Crystal Springs Ranch, LLC v. Gugino (In re Clark)*, 548 B.R. 246, 255 (B.A.P. 9th Cir. 2016) (the court found "nothing in the record" distinguishing the non-debtor trust and a non-debtor LLC from the debtor, who used the trust and company to pay his personal expenses and those of his family members, kept no separate financial records, handpicked the trustee for the trust, and was the sole control person for the LLC's operations).

Not only does the Complaint fall woefully short of the requirements necessary to plead a plausible claim for substantive consolidation under *Bonham*, but it lacks many of the hallmarks that courts have found to support the extreme relief the Committee seeks—i.e. the existence of a

DOCUMENT PREPARED ON RECYCLED PAPER

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 18 of 24

fraudulent scheme, total domination and control by a debtor over non-debtors, or hopeless commingling between the debtor and any non-debtor entities. Having omitted any allegations that would suggest a creditor treated the Debtor and OPF as a single enterprise when extending credit, the Committee's allegations may only survive if based on commingling. According to the Complaint, OPF and the Debtor conduct business from the same location and share a mailing address. (Compl. ¶¶ 24, 27, 29, 31). At times, OPF's officers also served as officers, directors, and in other capacities for the Debtor over the course of twenty years. (*Id*. ¶¶ 49, 50, 53). OPF has no employees. (*Id*. ¶ 54). In addition, OPF and the Debtor are parties to various agreements, including the Investment Agreement through which OPF serves as an investment manager for assets in which the Debtor holds record title, the Management Agreement, under which the Debtor provides finance and accounting services to OPF, and the Term Loan Agreement, by which OPF loaned the Debtor $35 million. (*Id*. ¶¶ 56, 63-67, 68, 72, 85). OPF's articles of incorporation require the Debtor's consent for certain limited actions, namely non-ordinary course transactions, borrowing money, or changing OPF's organizational documents. (*Id*. ¶ 52). OPF's delegation of this type of authority is authorized by California law. *See* Cal. Corp. Code § 9132 (The articles of incorporation of a nonprofit religious corporation may include a provision that requires approval by a specified person or persons other than the board for amendments to the articles or a repeal); *see also* Cal. Corp. Code § 9240 (expressly authorizing the directors of a nonprofit religious corporation to consider both the religious purposes of the corporation and applicable religious policy and authority).

These minimal allegations of interrelatedness between the Debtor and Non-Debtor Defendants do not begin to approach the "level of hopeless obscurity of interrelationships of the group" that warrant consolidation on an entanglement theory. *See Augie/Restivo*, 860 F. 2d at 515 (denying substantive consolidation due to lack of entanglement between the debtor and non-debtor entities where the available records permitted the identification of separately owned real property, and the calculation of separate account balances for inventories, liabilities, and receivables); *R2 Investments, LDC v. World Access, Inc. (In re World Access, Inc.)*, 301 B.R. 217, 276 (Bankr. N.D. Ill. 2003) (denying substantive consolidation despite (i) inter-company transfers and claims, (ii) incorporation of the subsidiary by the parent, (iii) consolidated financial statements, administrative

functions, and insurance, and (iv) common ownership, management, directors and officers); *Morse Operations, Inc. v. Robins LE-COCQ, Inc. (In re Lease-A-Fleet, Inc.)*, 141 B.R. 869, 878 (Bankr. E.D. Pa. 1992) (denying substantive consolidation notwithstanding allegations of overlapping directors, shared office space, intercompany loans, and the disregard of formalities when sharing services).

Moreover, the Committee's interpretation of the documents referenced in the Complaint are either contradicted by their plain language or lack common sense. For example, the Committee alleges that the Investment Agreement was structured in a way that Fund Participants – the parishes and schools whose assets the Debtor has record title – had no say in the terms of the Investment Agreement or over their investments. (Compl. ¶¶ 66-67). Effectively, the Committee suggests that the Debtor exerted absolute control over the Fund Participants and their assets and OPF was complicit with this arrangement. But, this position misconstrues the nature and purpose of the Investment Agreement as stated in the agreement itself. It's terms provide for an agreement between OPF and the Debtor (the record holder of the assets to be invested) to establish an investment program for Fund Participants to opt into (on a take-it or leave-it basis) according to investment guidelines aligned with the values of the Roman Catholic Church. (*See* Investment Agreement). The Investment Agreement is not a personalized investment contract for Fund Participants.

Furthermore, the Committee's allegations about "fraudulent" transfers are insufficient to state a claim for substantive consolidation. (*See* Compl. ¶¶ 79-84). The elements required to plead a fraudulent transfer and the remedy itself are quite different from substantive consolidation. Fraudulent transfers "bring back to the transferor debtor assets improperly transferred to another (often an affiliate)." *Owens Corning*, 419 F.3d at 206. By contrast,"[s]ubstantive consolidation goes in a direction different (and in most cases further) … it affects distribution to innocent creditors, and it mandates more than the return of specific assets to the predecessor owner. It brings all the assets of a group of entities into a single survivor. Indeed, it merges liabilities as well… [resulting] that claims of creditors against separate debtors morph to claims against the consolidated survivor." *Id*. (internal citations omitted).

DOCUMENT PREPARED ON RECYCLED PAPER

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 20 of 24

The deficient allegations in the Complaint are remarkably similar to those the court in *St. Paul* determined failed to state a claim for substantive consolidation. *See St. Paul & Minnesota*, 553 B.R. at 704. There, like here, the committee alleged the debtor and targeted entities shared board members, staff, headquarters, were answerable to the Archbishop who exercised certain managerial functions and oversight over the non-debtors and debtor alike, and in some instances over non-debtor assets, and had the authority to appoint board members for certain non-debtors. *Id.* at 702-03. In addressing these allegations, the court remarked: "There is no doubt that the Catholic Church is hierarchical in its organization and authoritarian in doctrinal matters. But those characteristics are insufficient for a court to ignore its corporate legal structure. The typical substantive consolidation is reserved for situations where the finances of two or more debtors are so confusingly intertwined that it is impossible to separate them. Nothing of the sort is alleged here." *Id.* at 703.

In summary, the non-conclusory facts alleged in the Complaint not otherwise contradicted by the documents incorporated by reference do not state a plausible claim for relief for substantive consolidation. Therefore, the Committee's claim for substantive consolidation against OPF must be dismissed.

B. The Committee Fails to State a Claim Against OPF that Proceeds of the Term Loan Agreement are Property of the Debtor's Bankruptcy Estate (Count Five)

The Committee effectively asserts a claim for the avoidance of a fraudulent transfer (a claim it lacks standing to bring)[2] in the form of a request for a declaratory judgment that $8.3 million in proceeds from the Debtor's Term Loan Agreement with OPF are property of the Debtor's bankruptcy estate. (*See* Compl. ¶¶ 87, 124-129). The Committee does not allege the nature of OPF's alleged interest in this property (or the bank accounts at which the loan proceeds are allegedly held). Instead, the Committee simply alleged that "upon information and belief" the loan proceeds "are not restricted pursuant to any valid governance document setting forth an intent to restrict the funds to a specific purpose." (*Id.* ¶ 113). Like the Committee's claim for substantive consolidation, this

[2] Audio. Tr. Jan. 21, 2025 (11:01-18:47) (Dkt No. 1656).

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 21 of 24

claim too must fail because it lacks a cognizable legal theory and sufficient facts to support a claim for relief.

To the extent the Committee asserts this claim solely for the purpose of determining whether this property would be subject to substantive consolidation, this claim fails because the Committee's claim for substantive consolidation fails for the reasons stated above.

As a stand-alone cause of action, this claim too must fail because it is procedurally improper, and lacks a cognizable legal theory and sufficient facts to support a claim for relief. Several related reasons support this conclusion.

First, this bare bones style of pleading has long been rejected by Ninth Circuit courts because it fails to apprise OPF of the claim against it sufficient to prepare a defense. *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996) (To comply with Rule 8, a complaint should clearly and fully set forth "who is being sued, for what relief, and on what theory, with enough detail to guide discovery"). In particular, OPF is mentioned nowhere in Count Five of the Complaint. (*See* Compl. ¶ 124-129). And in the factual discussion of the Term Loan Agreement, the Committee simply alleges that OPF loaned the Diocese money, but it otherwise does not allege that OPF has any custody, control, or ownership over the funds following the transfer to the Diocese. (*See id*. ¶ 85-87).

Second and relatedly, Count Five is based on the theory that the *Diocese* (not OPF) transferred funds from one *Diocese* (not OPF) bank account into another unspecified second account: "the Diocese transferred the Term Loan Proceeds from unrestricted Diocese bank accounts (including from the Diocese's general operating account) into newly-created and purportedly restricted bank accounts." (*Id*. ¶ 125; *see also id.* ¶ 87). The Committee never alleges that OPF is the custodian of the second account, the owner of the second account, or has anything whatsoever to do with the second account. Indeed, a fair reading of the Complaint is that the Diocese transferred funds from one of its accounts to another of its accounts.

Third, the Committee's request to determine that property in that second account (again, without identifying OPF as the owner or custodian of that property) constitutes property of the Debtor's estate under section 541 of the Bankruptcy Code is not a cognizable claim for relief.

Although a declaratory relief action may implicate and even require application of § 541, that section "defines property of the estate, but does not create a right to relief. It, therefore, follows that an action to enforce a right thereunder cannot exist." *Stokes v. Duncan (In re Stokes)*, 2013 WL 5313412, at *6 (B.A.P. 9th Cir. Sept. 23, 2013) (vacating and remanding bankruptcy court's denial of motion to dismiss a claim for declaratory relief under section 541 of the Bankruptcy Code on the ground that it lacked jurisdiction over the property at issue); *see also In re Jackson*, 548 B.R. 353, 380 (Bankr. N.D. Ga. 2016) (in rejecting the plaintiff's stand-alone claim for a determination that debtor and the estate lacked an interest in property subject to a constructive trust, the court reasoned that "[s]ection 541 defines property but it does not create a cause of action to determine what is and what is not estate property"); *see also Butler v. Candlewood Rd. Partners, LLC (In re Raymond)*, 529 B.R. 455, 470 (Bankr. D. Mass. 2015) ("section 541 of the Bankruptcy Code implicates trustees' duties under 11 U.S.C. § 704(a) to collect and reduce to money property of the estate, but it does not provide, in and of itself, a substantive claim for relief, absent invocation of the trustee's so-called 'strong arm' powers under 11 U.S.C. §§ 544-551 or 11 U.S.C. § 542."); *cf.* Fed. R. Bankr. P. 7001(9) (a proceeding to obtain a declaratory judgment is properly brought as an adversary proceeding with respect to 8 categories of relief, none of which refer to a determination of property of the estate under section 541 of the Bankruptcy Code).

Fourth, the Committee does not allege any facts that the Debtor holds legal or equitable title to OPF's property under applicable law. 11 U.S.C. § 541(a)(2) (defining property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case."); *Butner v. U.S.*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law."). Therefore, this claim too must fail.

V.

CONCLUSION

For the foregoing reasons, OPF respectfully requests its Motion to dismiss the Complaint for failure to state a claim for relief under Rule 12(b)(6) be granted with respect to the Fifth and Sixth Counts asserted in the Complaint.

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 23 of 24

Dated: January 24, 2025

REBECCA J. WINTHROP
RYAN E. MANNS (*pro hac vice*)
JASON I. BLANCHARD (*pro hac vice forthcoming*)
NORTON ROSE FULBRIGHT US LLP

By: */s/ Rebecca J. Winthrop*
REBECCA J. WINTHROP
Attorneys for the Oakland Parochial Fund, Inc.

DOCUMENT PREPARED ON RECYCLED PAPER

Case: 24-04051 Doc# 6 Filed: 01/24/25 Entered: 01/24/25 20:12:41 Page 24 of 24