IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1] Debtors.	Chapter 11 Case No. 20-10343 (LSS) Jointly Administered
BOY SCOUTS OF AMERICA, Plaintiff, v. A.A., *et al*.,[2] Defendants.	Adv. Pro. No. 20-50527 (LSS) **Re: Adv. Docket Nos. 6, 54, 72, 77, 107, 109, 110, 111, 116**

BOY SCOUTS OF AMERICA'S BRIEF IN OPPOSITION TO MOTION FOR ORDER MODIFYING PRELIMINARY INJUNCTION TO ALLOW MOVANTS TO PROCEED WITH STATE COURT ACTIONS AS TO NON-DEBTOR DEFENDANTS

[1] The Debtors in the chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

[2] A full list of the Defendants in this adversary proceeding was included in redacted form on Exhibit A to the BSA's *Verified Complaint for Injunctive Relief* [Adv. D.I. 1] to protect the privacy interests of abuse victims. A revised proposed redacted version of the Complaint and Exhibit A thereto was filed on or about February 26, 2020 [Adv. D.I. 14-1]. An unredacted version of the Complaint and Exhibit A thereto have been served on each Defendant's counsel.

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The Boy Scouts of America (the "**BSA**"), the non-profit corporation that is, along with its affiliate Delaware BSA, LLC (collectively, the "**Debtors**"), a debtor and debtor in possession in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), respectfully submits this answering brief in opposition (the "**Opposition**") to the *Motion for Order Modifying Preliminary Injunction to Allow Movants to Proceed With State Court Actions As to Non-Debtor Defendants* [Adv. D.I. 109] (the "**Motion to Modify**" or the "**Motion**"), and further thereto, states as follows:

I.

PRELIMINARY STATEMENT

M.R., N.P., and Michael O'Malley (collectively, the "**Movants**") are plaintiffs in three actions brought in state court (collectively, the "**State Court Actions**") alleging abuse-related claims against the BSA and various non-debtor parties. The State Court Actions were each pending before commencement of these Chapter 11 Cases and are subject to the Preliminary Injunction[3] issued by this Court. Although Movants did not object to its issuance, they now seek to modify the Preliminary Injunction, asserting for the first time that their claims as against select non-debtor defendants can be litigated separately without affecting the BSA. That is simply not true. The claims against the defendants in each of the State Court Actions inextricably intertwine, and allowing the Movants to proceed as requested would adversely impact both the BSA itself and the Debtors' reorganization efforts more broadly. Because Movants fail to meet their burden and their arguments ultimately lack merit, the relief they seek cannot be justified, and their Motion should be denied.

[3] Capitalized terms used but not yet defined have the meanings later set forth in this Opposition. Capitalized terms used but not defined herein have the meanings set forth in *The BSA's Opening Brief in Support of Motion for Preliminary Injunction Pursuant to 11 U.S.C. §§ 105(a) and 362* [Adv. D.I. 7].

II.

FACTUAL BACKGROUND

A. FILING OF THE CHAPTER 11 CASES AND THIS ADVERSARY PROCEEDING

1. On February 18, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court. D.I. 1. The Debtors commenced these Chapter 11 Cases in pursuit of two goals: (1) to equitably compensate victims of abuse in Scouting, and (2) to ensure the BSA remains capable of continuing to fulfill its charitable mission.

2. Contemporaneously with the filing of the petitions, the BSA instituted this adversary proceeding (the "**Adversary Proceeding**") and filed its corresponding *Motion for a Preliminary Injunction Pursuant to Sections 105(a) and 362 of the Bankruptcy Code* [Adv. D.I. 6] (the "**Preliminary Injunction Motion**"), seeking to extend the automatic stay to actions against non-debtor defendants. *See* Adv. D.I. 1, 5, 6, 7. Specifically, the BSA sought to extend the stay to enjoin the prosecution of Pending Abuse Actions against itself and the BSA Related Parties, to the extent those actions were not already subject to the automatic stay. *See The BSA's Opening Brief in Support of Motion for Preliminary Injunction Pursuant to Sections 105(a) and 362 of the Bankruptcy Code* [Adv. D.I. 7] (the "**Preliminary Injunction Motion Opening Brief**") at 2.

3. The Pending Abuse Actions consist of suits filed against: the BSA; non-debtor Learning for Life, a non-stock organization affiliated with the BSA ("**LFL**"); and other related non-debtor entities that have been chartered by the BSA, including local councils that are independently incorporated under the non-profit laws of their respective states (collectively, the "**Local Councils**") and—of key importance here—community and religious organizations, businesses, and groups of citizens that organize Scouting units under the BSA charter (collectively, the "**Chartered Organizations**," and together with the Local Councils and LFL, the "**BSA**

Related Parties"). The Pending Abuse Actions are pending in state and federal courts across the country and allege sexual abuse or misconduct arising out of or otherwise related to the victim's involvement or connection with the BSA. *See* Prelim. Inj. Mot. Opening Br. at 9.

B. ISSUANCE AND EXTENSIONS OF THE PRELIMINARY INJUNCTION

4. On March 30, 2020, the Court entered the *Consent Order Pursuant to 11 U.S.C. §§ 105(a) and 362 Granting the BSA's Motion for Preliminary Injunction* [Adv. D.I. 54] (the "**Consent Order**"). The Consent Order stayed each of the Pending Abuse Actions identified on Schedule 1 attached thereto as to the BSA Related Parties identified on Schedule 2 thereto, through and including May 18, 2020 (as may be and has been extended, the "**Termination Date**"). Consent Order ¶ 7. The Consent Order also provided that the Preliminary Injunction issued pursuant thereto would not prohibit the filing of a complaint to commence an action against a BSA Related Party alleging claims substantially similar to those asserted by the plaintiffs in the Pending Abuse Actions (the "**Further Abuse Actions**"). *Id.*

5. The Consent Order provides for amendment of Schedules 1 and 2 in certain circumstances. As for Schedule 1, every thirty (30) days following entry of the Consent Order, the BSA is directed to file an amended Schedule 1 that includes additional Further Abuse Actions subject to the Consent Order. *Id.* ¶ 11. As for Schedule 2, additional parties (the "**Additional BSA Related Parties**") may be added with the consent of the BSA, the Official Tort Claimants' Committee ("**TCC**"), and the Official Committee of Unsecured Creditors ("**UCC**"), and as a result thereof be deemed beneficiaries of the Consent Order. *Id.* ¶ 10.

6. Both Schedules 1 and 2 have been amended on several occasions consistent with those provisions. *See* Adv. D.I. 68, 81, 91, 96, 101, 107-1, 118 (amended versions of Schedule 1); Adv. D.I. 92, 97, 107-1 (amended versions of Schedule 2). The latest version of Schedule 1 reflects

672 Pending Abuse Actions and Further Abuse Actions filed in approximately ninety (90) different state and federal fora around the country. *Declaration of Brian Whittman in Support of the BSA's Brief in Opposition to Motion for Order Modifying Preliminary Injunction to Allow Movants to Proceed With State Court Actions As to Non-Debtor Defendants* (the "**Whittman Declaration on Motion to Modify**") ¶ 8. Approximately 400 of those actions were instituted after the BSA filed the Preliminary Injunction Motion. *Id.*

7. On May 18, 2020, the Court entered the *Stipulation and Agreed Order By and Among the Boy Scouts of America, the Official Committee of Survivors of Abuse, and the Official Committee of Unsecured Creditors Extending the Termination Date of the Standstill Period Under the Consent Order Granting the BSA's Motion for a Preliminary Injunction Pursuant to 11 U.S.C. §§ 105(a) and 362* [Adv. D.I. 72] (the "**First Stipulation**"). The First Stipulation extended the Termination Date through and including June 8, 2020. *See* First Stipulation ¶ 3.

8. On June 9, 2020, the Court entered the *Second Stipulation and Agreed Order By and Among the Boy Scouts of America, the Official Committee of Survivors of Abuse, and the Official Committee of Unsecured Creditors Modifying the Consent Order Granting the BSA's Motion for a Preliminary Injunction Pursuant to 11 U.S.C. §§ 105(a) and 362 and Further Extending the Termination Date of the Standstill Period* [Adv. D.I. 77] (the "**Second Stipulation**"). The Second Stipulation extended the Termination Date through and including November 16, 2020. *See* Second Stipulation ¶¶ 5, 8, 12.

9. On October 22, 2020, the BSA, together with the TCC and UCC, filed a *Notice of Third Stipulation by and Among the Boy Scouts of America, the Official Committee of Survivors of Abuse, and the Official Committee of Unsecured Creditors Modifying the Consent Order Granting the BSA's Motion for a Preliminary Injunction Pursuant to 11 U.S.C. §§ 105(a) and 362*

and Further Extending the Termination Date of the Standstill Period [Adv. D.I. 107] (the "**Third Stipulation**"). On November 18, 2020, the Court approved the Third Stipulation, entering the *Order Approving Third Stipulation by and Among the Boy Scouts of America, the Official Committee of Survivors of Abuse, and the Official Committee of Unsecured Creditors Modifying the Consent Order Granting the BSA's Motion for a Preliminary Injunction Pursuant to 11 U.S.C. §§ 105(a) and 362 and Further Extending the Termination Date of the Standstill Period* [Adv. D.I. 116] (the "**Order Approving Third Stipulation**"). As a result, the Termination Date has now been extended through and including March 19, 2021. *See* Third Stipulation ¶ 3.

C. OTHER RECENT CASE DEVELOPMENTS

10. Meanwhile, the Debtors have continued to pursue their dual objectives behind the Chapter 11 Cases: equitably compensating victims of abuse in Scouting, while also ensuring that the BSA continues to fulfill its charitable mission. Toward that end and with the ultimate goal of emerging from bankruptcy by summer 2021, the Debtors have, among other things, pursued mediation to facilitate a global resolution of abuse claims, engaged in significant discovery, and—most recently—begun analyzing all claims timely filed against them in the bankruptcy.

1. The Mediation

11. The Debtors initiated the mediation process upon commencement of the Chapter 11 Cases. Specifically, on February 18, 2020, the Debtors filed their *Motion for Entry of an Order (I) Appointing a Judicial Mediator, (II) Referring Certain Matters to Mandatory Mediation, and (III) Granting Related Relief* [D.I. 17] (the "**Mediation Motion**"). On June 9, 2020, the Court entered an order on the Mediation Motion. *See Order Appointing Mediators, Referring Certain Matters to Mediation, and Granting Related Relief* [D.I. 812] (the "**Mediation Order**"). The Court appointed the Honorable Kevin Carey (Ret.), Paul Finn, and Timothy Gallagher as mediators

(collectively, the "**Mediators**") for the purpose of mediating a comprehensive resolution of issues and claims in these Chapter 11 Cases through a plan, which includes, without limitation, all matters that may be the subject of a motion seeking approval by the Court of solicitation procedures and/or forms of plan ballots, a disclosure statement, or plan confirmation. *See generally* Mediation Order.

12. As part of the Mediation Order, the Court referred the following parties (collectively, and subject to additions, the "**Mediation Parties**") to mediation: (a) the Debtors; (b) the Ad Hoc Committee; (c) the Future Claimants' Representative; (d) the TCC, including its members, professionals, and the individual members' professionals; (e) the UCC, including its members, professionals, and the individual members' professionals; and (f) each of the insurers set forth on Exhibit 1 to the Mediation Order (the "**Insurers**"). The Mediation Order further provided mechanisms by which additional parties may join the mediation. *See* Mediation Order ¶¶ 2-3.

13. Shortly after the Court appointed the Mediators, certain of the Debtors' insurers sought reconsideration of the Mediation Order, which the Court denied on July 14, 2020. *See* Order Denying Mot. for Recons., D.I. 1019. As a practical matter, only since then—a period of approximately four months—has the Mediation been up and running. Whittman Decl. on Mot. to Modify ¶ 3.

14. In addition, on August 26, 2020, the Coalition of Abused Scouts for Justice (the "**Coalition**") moved to participate in the Mediation. *See Motion of the Coalition of Abused Scouts for Justice to Participate in Mediation* [D.I. 1161] ("**Coalition's Participation Motion**"). On October 16, 2020, the Court granted the Coalition's Participation Motion. *See* D.I. 1539. The other Mediation Parties have a significant amount of work ahead of them to include and build

consensus with the Coalition in the mediation. *See Court-Appointed Mediators' Statement Related to Motions of the Coalition of Abused Scouts for Justice* [D.I. 1500].

15. There are currently eighteen (18) Mediation Parties, and the Mediators have set an ambitious schedule for negotiations. Whittman Decl. on Mot. to Modify ¶¶ 4, 6. Both the Mediators and the Mediation Parties are hard at work under tremendous time pressure, as the BSA undertakes every effort to emerge from bankruptcy in the summer of 2021. *Id.* ¶ 6. As recently as the November 18, 2020 omnibus hearing, key constituencies in these Chapter 11 Cases—including the Ad Hoc Committee of Local Councils, the Coalition, and the TCC—have stressed their commitment to the mediation process. *See* Nov. 18, 2020, Hr'g Tr. at 17:6-19, 19:7-20; 21:11-17.

16. The complexity and sheer number of issues that must be addressed in connection with a global resolution cannot be understated. Whittman Decl. on Mot. to Modify ¶ 6. The Debtors and the Mediators have been taking numerous steps, with the involvement of the other Mediation Parties, to address these issues as they prepare for intensive negotiations regarding the structure and terms of a chapter 11 plan. *Id.* The Debtors are committed to building consensus through mediated negotiations rather than value-destructive litigation. *See id.* ¶ 5. However, these negotiations could not progress in full until after the Bar Date, when the relevant parties obtained access to comprehensive and definitive information regarding abuse claims. *Id.* ¶¶ 5, 7.

2. Passage of the Bar Date

17. The Bar Date occurred on November 16, 2020 (the "**Bar Date**"). *See Order, Pursuant To 11 U.S.C. § 502(B)(9), Bankruptcy Rules 2002 And 3003(C)(3), and Local Rules 2002-1(E), 3001-1, and 3003-1, (I) Establishing Deadlines for Filing Proofs of Claim, (II) Establishing the Form and Manner of Notice Thereof, (III) Approving Procedures for*

Providing Notice of Bar Date and Other Important Information to Abuse Survivors, and (IV) Approving Confidentiality Procedures for Abuse Survivors [D.I. 695] (the "**Bar Date Order**"). As of the Bar Date, claimants had filed approximately 95,000 abuse claims against the Debtors—a significantly higher number than what the Debtors and other parties-in-interest originally anticipated. *See* Whittman Decl. on Mot. to Modify ¶ 7.

18. Reviewing the large volume of sensitive and fact-specific claims involved in this case will take significant time and resources. *Id.* As the Debtors and their professionals focus on this process over the coming weeks, it is essential that their attention remain undivided and free of unnecessary distraction. *See id.* ¶ 7.

19. The Debtors therefore need sufficient breathing room after the Bar Date to analyze abuse claims data with the assistance of their advisors, engage with their stakeholders in mediated plan negotiations, and prepare, file, and solicit a confirmable chapter 11 plan. *See id.* It is for those very reasons that the relevant parties recently agreed to extend the Preliminary Injunction, which remains as crucial as ever. *See id.*

3. Ongoing Discovery

20. Concurrently with other developments, the Debtors have been engaging in a process to provide parties in interest with necessary discovery. On September 29, 2020, the TCC filed a *Motion Pursuant to Rule 2004 for an Order Authorizing the Issuance of Subpoenas for Discovery from Debtors and Certain Local Councils* [D.I. 1379] (the **"2004 Motion**"). In the 2004 Motion, the TCC averred that it needed the requested information in order to participate in the Mediation. 2004 Mot. at 1 ("The TCC needs to review and analyze this information so that it can participate in substantive discussions regarding a possible global resolution among the Debtors, TCC, the Local Councils, and the other mediation parties."). The requested information was in

addition to a substantial volume of documents already made available in the Debtors' electronic data room. 2004 Mot. at 2, n.4.

21. The Debtors and the Ad Hoc Committee resolved the 2004 Motion and have provided the TCC with various additional information requested, including certain information on restricted and unrestricted assets and insurance policies. *See Certification of Counsel Regarding Stipulation Regarding TCC's 2004 Motion for Order Authorizing Issuance of Subpoenas from Debtors and Certain Local Councils* ("**Certification Regarding 2004 Motion Stipulation**") [D.I. 1479]; Whittman Decl. on Mot. to Modify ¶ 9.

22. The BSA and Local Councils continue to populate the electronic data room, available to the UCC and TCC under the Consent Order and its extensions, with documents. Whittman Decl. on Mot. to Modify ¶ 9.

D. THE MOTION TO MODIFY

23. On November 4, 2020, the Movants filed their Motion to Modify,[4] asking the Court to modify the Preliminary Injunction to allow them to proceed with the State Court Actions against select entities and individuals they refer to as the "Non-Debtor Defendants,"[5] which largely consist

[4] On November 5, 2020, the day after filing the Motion to Modify, the Movants filed a *Limited Objection to the Third Stipulation By And Among The Boy Scouts Of America, The Official Committee Of Survivors Of Abuse, And The Official Committee Of Unsecured Creditors Modifying The Consent Order Granting The BSA's Motion For A Preliminary Injunction Pursuant To 11 U.S.C. §§ 105(A) And 362 And Further Extending The Termination Date Of The Standstill Period* [Adv. D.I. 112] (the "**Limited Objection**"), as a reservation of rights with respect to their Motion to Modify. The Debtors and Movants resolved the Limited Objection before the hearing on the Third Stipulation, and the Court has since entered the Order Approving Third Stipulation. Adv. D.I. 116. The Court's order further extended the preliminary injunction to March 19, 2021, including as against the Movants, although subject to modification if Movants were to prevail on their Motion to Modify (which the BSA submits they should not). *See id.*; *see also* Nov. 18, 2020, Hr'g Tr. at 62:10-63:6.

[5] For purposes of responding to the Motion to Modify, for the Court's convenience, the BSA utilizes the "Non-Debtor Defendants" nomenclature used by the Movants to refer to certain (but not all) defendants in the State Court Actions besides the BSA. However, the "Non-Debtor Defendants" term is misleading—including some but not all defendants that are BSA Related Parties, as well as the "Alpine Scout Camp." The contradictions and deficiencies with the Movants' approach here are further detailed below.

of Chartered Organizations[6] and the alleged abusers.[7] *See Opening Brief in Support of Motion for Order Modifying Preliminary Injunction to Allow Movants to Proceed with State Court Actions as to Non-Debtor Defendants* [Adv. D.I. 111] (the "**Opening Brief in Support of Motion to Modify**" or "**Opening Brief**") at 5. Movants attached copies of complaints in the State Court Actions (the "**State Court Complaints**") to the *Declaration of Daniel K. Astin in Support of Motion for Order Modifying Preliminary Injunction to Allow Movants to Proceed with State Court Actions as to Non-Debtor Defendants* [Adv. D.I. 110] ("**Movants' Declaration**"), which, along with the Motion and Opening Brief, reveal a number of key details.

1. The Underlying State Court Actions

a) The *M.R.* Action

24. On October 21, 2019, M.R. commenced an action in New York state court (the "**M.R. Action**") against the BSA; the National Boy Scouts of America Foundation; Scouts BSA, the Greater New York Councils, Boy Scouts of America; Greater New York Council, Queens Council, Boy Scouts of America; Diocese of Brooklyn; St. Benedict Joseph Labre Church; St. Benedict Joseph Labre School; and James T. Grace Jr., asserting claims arising out of the alleged sexual abuse of M.R. by Grace. *See* Compl., *M.R. v. Boy Scouts of America, et al.*, No. 522910/2019 (N.Y. Sup. Ct.) (the "**M.R. Complaint**"), Ex. A to Movants' Decl.

[6] In the O'Malley Action, the Alpine Scout Camp is also named as a "Non-Debtor Defendant." *See infra* ¶¶ 32-33.

[7] The BSA has never sought to stay claims against the alleged abusers and has not included any abusers on its list of BSA Related Parties on Schedule 2 to the Consent Order and its subsequent amendments. *See, e.g.*, Am. Schedule 2, Notice of Third Stipulation, Adv. D.I. 107-1; Mar. 30, 2020 , Hr'g Tr. at 10:8-10 ("BSA makes clear that the consent order does not enjoin the underlying litigation as against alleged abusers."). Accordingly, there is no relief for the Court to grant in this respect.

25. Movants define the "Non-Debtor Defendants" named in M.R. Action as:[8] Grace; the Diocese of Brooklyn; St. Benedict Joseph Labre Church ("**St. Benedict Church**"); and St. Benedict Joseph Labre School ("**St. Benedict School**").[9] *See* Opening Br. in Supp. of Mot. to Modify at 4. Movants exempt from this definition, and thus do not seek permission to proceed with their claims against: the BSA; the National Boy Scouts of America Foundation; Scouts BSA; Greater New York Councils, Boy Scouts of America; and Greater New York Councils, Queens Council, Boy Scouts of America. *See id.* at 3-4.

26. In the complaint, M.R. alleges that he was abused by Grace, who was as an assistant Scoutmaster and later a Scoutmaster of a Boy Scout Troop that operated on the premises of St. Benedict Church and St. Benedict School. M.R. Compl. ¶¶ 57-59. Besides working with the Scouts, Grace worked in the St. Benedict Church and St. Benedict School, including as a coach in the Catholic Youth Organization ("**CYO**") sports program. *Id.* ¶ 62. Grace allegedly used his positions as a Scoutmaster and a CYO sports coach to abuse M.R. *Id.* ¶ 64. M.R. alleges that Grace abused him in the following locations: Scout camps, *id.* ¶ 96; the premises of St. Benedict Church *id.* ¶ 97; and the premises of St. Benedict School. *Id.*

27. The M.R. Complaint sets forth eight causes of action, bringing each against all named defendants: (1) statutory liability under Article 130 of the Penal Law of the State of New York; (2) negligence and breach of duty of care; (3) negligent supervision of M.R.; (4) negligent hiring, retention, and supervision of agents, servants, staff, and/or volunteers, including James T.

[8] Movants define the M.R. Action as "State Court Action No. 1" and these defendants particularly as "Non-Debtor Defendants No. 1." Opening Br. in Supp. of Mot. Modify at 3-4.

[9] The Diocese of Brooklyn, St. Benedict Joseph Labre Church, and St. Benedict Joseph Labre School are all "Named Chartered Organizations" on the list of BSA Related Parties. *See* Am. Schedule 2, Notice of Third Stipulation, Adv. D.I. 107-1.

Grace Jr.; (5) negligent infliction of emotional distress; (6) intentional infliction of emotional distress; (7) battery; and (8) assault. *See* M.R. Compl.

b) The *N.P.* Action

28. On October 11, 2019, N.P. commenced an action in New York state court (the "**N.P. Action**") against the BSA; St. Demetrios Greek Orthodox Church; Greek Orthodox Archdiocese of America; the Boy Scouts of America, Greater New York Councils; and Lawrence Svrcek, asserting claims arising out of the alleged sexual abuse of N.P. by Lawrence Svrcek. *See* Compl., *N. P. v. Lawrence Svrcek, et al.*, No. 717381/2019 (N.Y. Sup. Ct.) (the "**N.P. Complaint**"), Ex. B to Movants' Decl.[10]

29. The Movants define the "Non-Debtor Defendants" in this action as[11] the St. Demetrios Greek Orthodox Church and the Greek Orthodox Archdiocese of America.[12] Opening Br. in Supp. of Mot. to Modify at 4. Movants exempt from this definition, and thus do not seek permission to proceed with their claims against: the BSA; the Boy Scouts of America, Greater New York Councils; and Lawrence Svrcek.[13] *See id.* at 3-4.

30. In the N.P. Complaint, N.P. alleges he was abused by Lawrence Svrcek, who held multiple positions at St. Demetrios, N.Y. Day School (the "**St. Demetrios School**"), including: gym teacher, science teacher, and head of the summer school program. N.P. Compl. ¶¶ 4-5.

[10] On February 21, 2020, BSA removed the N.P. Action to the United States District Court for the Eastern District of New York, where the case remains pending. *See N.P. v. Svrcek et al.,* No. 20-cv-000942 (E.D.N.Y.).

[11] Movants define the N.P. Action as "State Court Action No. 2" and these defendants particularly as "Non-Debtor Defendants No. 2." Opening Br. in Supp. of Mot. Modify at 3-5.

[12] Both St. Demetrios Greek Orthodox Church and the Greek Orthodox Archdiocese of America are "Named Chartered Organizations" on the list of BSA Related Parties. *See* Am. Schedule 2.

[13] Movants do not include Svrcek, the alleged abuser, in their definition of the "Non-Debtor Defendants" against whom they wish to proceed. *See* Opening Br. in Supp. of Mot. to Modify at 4. Nevertheless, as BSA has previously explained, the Preliminary Injunction does not bar plaintiffs from pursuing claims against their abusers. *See* Mar. 30, 2020 , Hr'g Tr. at 10:8-10.

Svrcek was also a Scoutmaster of N.P.'s Scout troop, which was affiliated with St. Demetrios. *See id.* ¶¶ 7, 9. N.P. alleges that Svrcek abused him: in Svrcek's office at the St. Demetrios School, *id.* ¶ 6; at "various" Scout campsites, *id.* ¶ 8; on Scouting "outings and trips," *id.* ¶ 24; on the premises of the St. Demetrios School, *id.* ¶ 33; and on the premises of the St. Demetrios Greek Orthodox Church. *Id.*

31. The N.P. Complaint includes ten causes of action, each asserted against all named defendants collectively: (1) assault and battery, sexual molestation/abuse of a minor, and sexual battery; (2) negligent hiring; (3) negligent retention, supervision and/or direction; (4) intentional infliction of emotional distress; (5) negligence/gross negligence; (6) breach of fiduciary duty to N.P.; (7) breach of duty in loco parentis; and (8) breach of statutory duty to report abuse under N.Y. Soc. Serv. Law. §§ 413, 420; (9) premises liability; and (10) punitive damages. *See* N.P. Complaint; *see also* Opening Br. in Supp. of Mot. to Modify at 4 (stating the N.P. Complaint "alleges ten (10) causes of action against each of the defendants").

c) The *O'Malley* Action

32. On January 21, 2020, Michael O'Malley filed a complaint in New York State court (the "**O'Malley Action**") against the BSA; the Roman Catholic Diocese of Brooklyn, New York; the Church of the Holy Innocents; the Greater New York Councils of the Boy Scouts of America; Alpine Scout Camp; and Frank Pedone, asserting claims arising out of the alleged sexual abuse of Mr. O'Malley by Frank Pedone. *See* Am. Verified Compl., *O'Malley v. The Roman Catholic Diocese of Brooklyn New York*, (No. 518178/2019) (N.Y. Sup. Ct.) (the "**O'Malley Complaint**"), Ex. C to Movants' Decl.

33. The Movants define the "Non-Debtor Defendants" in this action as:[14] the Roman Catholic Diocese of Brooklyn, New York; the Church of the Holy Innocents;[15] Alpine Scout Camp;[16] and Frank Pedone. Opening Br. in Supp. of Mot. to Modify at 5. Movants exempt from this definition, and thus do not seek permission to proceed with their claims against the BSA and the Greater New York Councils of the Boy Scouts of America. *See id.* at 3, 5.

34. Mr. O'Malley alleges that he was abused by Frank Pedone, a Scoutmaster and an "agent, servant, and/or employee" of the Diocese of Brooklyn and the Church of the Holy Innocents. O'Malley Compl. ¶¶ 2, 7, 18, 24. The Complaint does not specify any other position held by Pedone with the Diocese of Brooklyn or the Church of the Holy Innocents beyond his role as Scoutmaster of the affiliated troop. *See id.* Per the complaint, Pedone allegedly abused Mr. O'Malley after Scout meetings; on camping trips; at school; on hikes; in Mr. O'Malley's home; and at "other locations." *Id.* ¶ 10.

35. The O'Malley Complaint includes sixteen causes of action, of which the Movants claim ten are "separate and distinguishable" because they are brought against "Non-Debtor Defendants." Opening Br. in Supp. of Mot. to Modify at 5. Those ten claims are: (Count 1) negligence, against the Catholic Diocese of Brooklyn, New York; (Count 2) negligence, against

[14] Movants define the O'Malley Action as "State Court Action No. 3" and these defendants particularly as "Non-Debtor Defendants No. 3." Opening Br. in Supp. of Mot. Modify at 3-5. Together, Movants' defined terms of "Non-Debtor Defendants No. 1," "Non-Debtor Defendants No. 2," and "Non-Debtor Defendants No.3" (from each of the three State Court Actions) comprise the "Non-Debtor Defendants." *Id.* at 5.

[15] Both the Diocese of Brooklyn and the Church of the Holy Innocents are "Named Chartered Organizations" on the list of BSA Related Parties. *See* Am. Schedule 2.

[16] Alpine Scout Camp is not an entity that can be sued in tort; it is a piece of real property owned by the Greater New York Councils, an active Local Council against which the Preliminary Injunction applies. *See* Whittman Decl. on Mot. to Modify ¶ 10; Am. Schedule 2. The Movants *do not* seek to modify the Preliminary Injunction with respect to the Greater New York Councils, further demonstrating that, despite Movants' efforts to artificially separate them, the defendants and claims in this action remain intertwined. *See* Opening Br. in Supp. of Mot. to Modify at 3, 5.

the Church of the Holy Innocents; (Count 5) negligence, against Alpine Scout Camp; (Count 6) negligent hiring, retention, and supervision, against the Catholic Diocese of Brooklyn, New York; (Count 7) negligent hiring, retention, and supervision, against the Church of the Holy Innocents; (Count 10) negligent hiring, retention, and supervision, against Alpine Scout Camp; (Count 13) negligent infliction of emotional distress, against Alpine Scout Camp; (Count 14) assault, against Pedone; (Count 15) battery, against Pedone; and (Count 16) intentional infliction of emotional distress, against Pedone. *See* O'Malley Compl. at 9-27.

36. Thus, Movants seek permission to prosecute those ten claims, while the other six claims would remain stayed. *See* Opening Br. in Supp. of Mot. to Modify at 5. Those are: (Count 3) negligence, against BSA; (Count 4) negligence, against the Greater New York Councils of the Boy Scouts of America; (Count 8) negligent hiring, retention, and supervision, against BSA; (Count 9) negligent hiring, retention, and supervision, against the Greater New York Council of the Boy Scouts of America; (Count 11) negligent infliction of emotional distress, against BSA; and (Count 12) negligent infliction of emotional distress, against the Greater New York Council of the Boy Scouts of America. *See* O'Malley Compl. at 11-23.

37. Movants present no evidence beyond the State Court Complaints, each of which were filed before the Debtors brought these Chapter 11 Cases, before the BSA filed this Adversary Proceeding and the corresponding Preliminary Injunction Motion, and therefore before the Court granted the Consent Order issuing the Preliminary Injunction. Movants neither assert nor attempt to prove that any circumstances have changed since then. Nevertheless, they now seek to modify the injunction to allow these actions to proceed as against the "Non-Debtor Defendants."

III.

LAW & ARGUMENT

38. When deciding whether to issue a preliminary injunction, courts consider the following factors: (1) the likelihood of success on the merits; (2) the risk of irreparable harm without the injunction; (3) whether the balance of harms favors the injunction; and (4) whether injunctive relief is consistent with the public interest. *See, e.g.*, *W.R. Grace & Co. v. Chakarain (In re W.R. Grace & Co.)*, 386 B.R. 17, 33 (Bankr. D. Del. 2008). In the context of a section 105(a) injunction specifically, courts also look to whether "unusual circumstances" exist such that extension of the automatic stay to actions against non-debtor parties is equitable. *Am. Films Techs. v. Taritero (In re Am. Film Techs.)*, 175 B.R. 847, 853 (Bankr. D. Del. 1994) (citing *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986)) (granting debtor's motion for preliminary injunction); *see also* 11 U.S.C. § 105(a) (providing equitable powers to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"); Prelim. Inj. Mot. Opening Br. § II.A (further discussing the "unusual circumstances" test). Such unusual circumstances exist where either: (1) "the nondebtor and debtor share an identity of interest such that a suit against the nondebtor is essentially a suit against the debtor"; or (2) "the third-party action will have an adverse impact on the debtor's ability to reorganize." *W.R. Grace & Co. v. Chakarain*, 386 B.R. at 30. Courts employ a "broader view" when evaluating the impact on the debtor and consider factors such as collateral estoppel and record taint. *Id.* at 48. The critical inquiry is whether allowing the third-party action to continue would "defeat[] the very purpose and intent" of the automatic stay. *Midway Games, Inc. v. Anonuevo (In re Midway Games)*, 428 B.R. 327, 334 (Bankr. D. Del. 2010); *see also McCartney v. Integra Nat'l Bank North*, 106 F.3d 506, 511 (3d Cir. 1997) (stay applied to action against non-debtor where debtor would have been

a necessary party, which "would defeat the purpose of § 362 to centralize all prebankruptcy civil claims against a debtor in the bankruptcy court").

39. However, when considering whether to modify a preliminary injunction, the standard is different. In this context, the question becomes whether circumstances have changed sufficiently to make the injunction no longer equitable. *See Favia v. Indiana Univ.*, 7 F.3d 332, 337 (3d Cir. 1993) (refusing to modify injunction, explaining that: "Modification of an injunction is proper only when there has been a change in circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable."). When parties move to modify a section 105(a) injunction after its entry, they, "as moving parties" bear "the burden to demonstrate to the court that the Injunction was somehow improper as to them." *Gerard v. W.R. Grace & Co.*, 115 F. App'x at 568 (holding that state-court plaintiffs failed to show the injunction was improper and thus bankruptcy court did not err in denying a motion to modify); *Lane v. Phila. Newspapers, LLC (In re Phila. Newspapers, LLC)*, 423 B.R. 98, 107 (E.D. Pa. 2010) (citing *Gerard v. W.R. Grace & Co.*, 115 F. App'x at 568) (affirming bankruptcy court's decision to extend injunction and noting the decision of whether to modify a section 105(a) injunction is an equitable one and that movants had the burden to demonstrate the injunction was improper); *see also RoTech Med. Corp. v. Blount Mem'l Hosp. (In re Integrated Health Servs.)*, Ch. 11 Case Nos. 00-389 to 00-825 (MFW), Adv. No. A-00-145 (MFW), 2002 Bankr. LEXIS 345, *5-6 (Bankr. D. Del. April 12, 2002) (declining to modify injunction where movant failed to show changed circumstances); *In re Zenith Labs., Inc.*, 104 B.R. 659, 665-66 (Bankr. D.N.J. 1989) (affirming issuance of section 105(a) injunction citing factors such as the "quickly approaching deadline for filing the plan of reorganization," "the increasingly perilous financial position of the debtor," and "[t]he public interest in permitting the debtor the

space it needs in order to rehabilitate," and further reasoning that the opponents of the injunction "can always move to lift the stay when circumstances change").

40. Here, on March 22, 2020, the Debtors, the UCC, and the TCC—a separate official committee formed specifically for the purpose of protecting the interests of abuse claimants—all agreed, and after opportunity for objection, on March 30, 2020, the Court so ordered, that the elements for issuance of a preliminary injunction were satisfied. *See Certification of Counsel Regarding Proposed Consent Order Pursuant to 11 U.S.C. §§ 105(a) and 362 Granting the BSA's Motion for a Preliminary Injunction* [Adv. D.I. 46]; Consent Order at 6-7. Each of the State Court Actions was filed at that time, and none of the Movants objected. Because Movants show no change in circumstances sufficient to render the injunction inequitable, and because the injunction in fact remains equitable both generally and against these Movants specifically, modification is not warranted, and the Motion should be denied.

A. THERE ARE NO CHANGED CIRCUMSTANCES

41. The Movants fail to show any change in circumstances rendering the injunction inequitable as to them. *See Gerard v. W.R. Grace*, 115 F. App'x at 568; *Favia v. Indiana Univ.*, 7 F.3d at 337. Movants do not even argue there was a change in circumstances. *See generally* Opening Br. in Supp. of Mot. to Modify. Instead, Movants merely attempt to relitigate issues already decided, and as to which they previously failed to object. That is not appropriate. *See Favia*, 7 F.3d at 337 (noting that "an order granting a preliminary injunction is not indefinitely open to challenge" and a motion to modify cannot be used to "relitigate the original issue").

42. As described above, the State Court Actions were already pending when the BSA filed this Adversary Proceeding and the corresponding Preliminary Injunction Motion. In other words, the State Court Actions are all Pending Abuse Actions, which have been subject to the

Preliminary Injunction from day one. Movants could have opposed the injunction long ago. They did not. They now make no effort to explain why, nor contend circumstances have changed in any way. In short, they fail to carry their burden entirely. *See, e.g.*, *Gerard v. W.R. Grace & Co.*, 115 F. App'x at 568; *In re Integrated Health Servs.*, 2002 Bankr. LEXIS 345, at *5-6; *In re Phila. Newspapers, LLC*, 423 B.R. at 107.

B. "UNUSUAL CIRCUMSTANCES" STILL EXIST AND THE INJUNCTION REMAINS EQUITABLE

43. Although the analysis could end there, further consideration underscores that Movants are not entitled to the relief they seek. In fact, the Preliminary Injunction remains equitable, including as against Movants. This is true for the same reasons as when it issued, but also in light of more recent developments, including the mediation now fully progressing, the recent passage of the Bar Date, and ongoing discovery in the bankruptcy, just for example.

1. "Unusual Circumstances" Still Exist

44. In an attempt to persuade this Court otherwise, the Movants assert that the claims and issues are significantly different as against the "Non-Debtor Defendants" and that, as a result, allowing the State Court Actions to proceed against them alone will not adversely impact the Debtors or their ability to reorganize. That is, the Movants posit that no "unusual circumstances" exist supporting the injunction. In reality though, Movants' claims against the various defendants inescapably overlap, and there is no way to reasonably pursue claims against the "Non-Debtor Defendants" without impacting the BSA and these Chapter 11 Cases. The State Court Complaints themselves show this.

45. The State Court Actions generally follow a similar pattern: the accused abuser held dual positions of authority within Scouting on the one hand and a religious institution on the

other.[17] *Compare, e.g.*, M.R. Compl. ¶ 64 ("JAMES T. GRACE JR. used his affiliation and relationship and positions with the Boy Scouts and Cub Scouts, and with ST. BENEDICT JOSEPH LABRE CHURCH and ST. BENEDICT JOSEPH LABRE SCHOOL and their CYO Sports programs, to gain access to underage boys including but not limited to plaintiff M.R., who he would then sexually abuse."), *with* N.P. Compl. ¶ 4 ("SVRCEK [was] a gym and science teacher at St. Demetrios, N.Y. Day School, which was the parochial school of ST. DEMETRIOS GREEK ORTHODOX CHURCH, which was under the direction and control of the GREEK ORTHODOX ARCHDIOCESE OF AMERICA."), ¶ 7 ("SVRCEK was also N.P.'s Boy Scout Scoutmaster, Troop number 346, which was a part of THE BOY SCOUTS OF AMERICA, and THE BOY SCOUTS OF AMERICA GREATER NEW YORK COUNCILS."), ¶ 8 ("SVRCEK engaged in sexually explicit behavior and lewd and lascivious conduct with N.P. on multiple occasions . . . at St. Demetrios, N.Y. Day School and at various campsites including but not limited to, 10 Mile River and Alpine Scout Camp during Boy Scout trips."), *and* O'Malley Compl. ¶ 7 ("Pedone was an agent, servant and/or employee of the BSA, the Boy Scouts and/or the Diocese and utilized his position of authority with the BSA, the Boy Scouts and/or the Diocese to sexually abuse Mr. O'Malley.").

46. Although Movants would have this Court believe those roles can be easily separated, that is not the case. Movants fail to recognize the fatal flaw in their logic: each alleged abuser acted through his role as Scout leader *of a church-affiliated troop*. *Compare, e.g.*, M.R.

[17] The allegations in the M.R. Complaint and N.P. Complaint are clearer on this point, while the O'Malley Complaint alleges the abuser was an agent of both the BSA and Diocese but only specifically identifies his role as Scoutmaster, albeit of a church-affiliated troop. *See* O'Malley Compl. ¶ 5 ("At all times herein mentioned, Mr. O'Malley's troop in which Pedone was scout master was associated with the Holy Innocents."), ¶ 7 ("Pedone was an agent, servant and/or employee of the BSA, the Boy Scouts and/or the Diocese").

Compl. ¶ 59 ("From 1977 through 1982 . . . Boy Scouts Troop 273 as well as Cub Scouts Pack 273 operated within the confines of and on the premises of ST. BENEDICT JOSEPH LABRE CHURCH and ST. BENEDICT JOSEPH LABRE SCHOOL, with the permission, consent and approval of ST. BENEDICT JOSEPH LABRE CHURCH, ST. BENDICT JOSEPH LABRE SCHOOL and the DIOCESE OF BROOKLYN."); N.P. Compl. ¶ 15 ("SVRCEK was a teacher at St. Demetrios, N.Y. Day School, and a scoutmaster for THE BOY SCOUTS OF AMERICA during the periods of the molestations and abuse."); O'Malley Compl. ¶ 36 ("PEDONE sexually assaulted Mr. O'Malley while Mr. O'Malley was a young boy scout at Defendants THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK, CHURCH OF THE HOLY INNOCENTS, BOY SCOUTS OF AMERICA, GREATER NEW YORK COUNCIL OF THE BOY SCOUTS OF AMERICA and ALPINE SCOUT CAMP on their premises.").

47. As a result, the claims against the different defendants necessarily converge, if not entirely then still in significant part. In other words, although an abuser may have been a teacher, minister, or coach in addition to being a Scout leader, his role as Scout leader was inextricably intertwined with the religious institution serving as a Chartered Organization. There is therefore no way to effectively separate the church-affiliated defendants from the BSA or relevant Local Councils. These factual patterns necessarily involve risks of record taint, collateral estoppel, and evidentiary prejudice to the BSA if allowed to proceed against the "Non-Debtor Defendants." *See, e.g.*, *W.R. Grace & Co. v. Chakarain*, 386 B.R. at 48 (noting that "forcing the Debtors to now participate in the [State] Actions to prevent these adverse consequences" such as collateral estoppel and record taint "will encumber the estates with additional litigation burdens from which the stay specifically protects them"); *In re Am. Film Techs.*, 175 B.R. at 851 ("To avoid the collateral estoppel effect, [debtor] must participate in the defense of the state court case. That requires

[debtor] to do precisely what the automatic stay is intended to excuse it from doing."); *see generally* Mar. 30, 2020, Hr'g Tr.[18] at 18:19-23, 19:4-9 (observing that the factual and legal basis of a plaintiff's abuse claim against a local council is "identical" to and "inextricably intertwined" with that plaintiff's claim against the BSA, and finding that such similarity makes record taint, collateral estoppel, and evidentiary prejudice "material risks if the case goes forward").

a) The *M.R.* Action

48. Further examination of the individual complaints confirms the claims cannot be separated as Movants propose. For example, the M.R. Complaint uses group pleading to collectively accuse all defendants of eight counts, ranging from negligent supervision, to negligent hiring, to negligent and intentional infliction of emotional distress, to even assault and battery. *See, e.g.*, M.R. Compl. ¶ 104 (The "subject sexual offenses were committed forcibly by the *defendants and/or their agents, servants, staff, and/or employees* against the plaintiff . . . while under *defendants'* custody, supervision and/or control." (emphasis added)), ¶ 108 ("While M.R. was in the custody of and under the care and supervision of *defendants and/or each of them* . . .

[18] On March 30, 2020, the Court issued an oral ruling on the *Laraine Kelley, Esq. Affidavit in Opposition to (I) the BSA's Motion for a Preliminary Injunction; and (II) the BSA's Motion for an Order Appointing a Judicial Mediator* [Adv. D.I. 32] (the "**LG 37 Doe Objection**"). In the LG 37 Doe Objection, a plaintiff in a Pending Abuse Action objected to the Preliminary Injunction. LG 37 Doe's lawsuit brought abuse-related claims against an alleged abuser, the Greater Niagara Frontier Council, Inc. (the "**GNF Council**"), and the BSA. *See* Ex. A to LG 37 Doe Objection. The underlying complaint asserted various causes of action against the GNF Council and the BSA collectively. *See id.* The LG 37 Doe Objection argued, *inter alia*, that there were no "unusual circumstances" warranting an extension of the automatic stay, and that the traditional four-factor test did not support preliminary injunctive relief. The Court rejected those arguments and held that the Consent Order covers LG 37 Doe's claims against the GNF Council. Mar. 30, 2020 Hr'g Tr. at 7:18-23; 14:9-24 ("LG Doe's claims against BSA are inextricably intertwined with the claims against the [GNF Council]. This is evident from a reading of the complaint. The complaint makes no distinction between the actions of the Boy Scouts and the actions of the Greater Niagara Frontier Council accepted [sic] to their respective corporate forums [sic]. *The complaint lumps the Boy Scouts and the [GNF Council] together* . . . . LG 37 Doe alleges that both Boy Scouts and the [GNF Council] are liable for the same actions." (emphasis added)), 15:8-11 ("In this lawsuit, the evidence shows that the *legal claims against BSA are identical to those claims against the [GNF Council]* and are based on identical facts." (emphasis added)). The oral ruling was set forth in the Court's *Order Pursuant to 11 U.S.C. §§ 105(a) and 362 Granting the BSA's Motion for a Preliminary Injunction as to LG 37 Doe Abuse Action* [Adv. D.I. 62].

defendants stood in the place of M.R.'s parents (in loco parentis)…" (emphasis added)), ¶¶ 145-51 (alleging that battery was committed "intentionally by the defendants"). The use of group pleading demonstrates that Movants cannot readily separate the abuse alleged to have occurred in the perpetrator's capacity as a Scoutmaster at the church and school, from that in his capacity as a minister, coach or teacher *at the very same church and school*. In essence, the perpetrator's roles, although multiple, were nevertheless intertwined. Movants, as masters of their own pleadings, cannot now claim otherwise.

b) The *N.P.* Action

49. The N.P. Complaint presents similar issues. The alleged abuser in that case served in multiple roles out of the same church and school: gym teacher, science teacher, head of the summer camp, and Scoutmaster of a troop operating out of that church and school. Again, the N.P. Complaint groups the various defendants together and levies allegations against them as a collective. *See, e.g.,* N.P. Compl. ¶¶ 32, 44-46, 57, 62, 70, 85, 127-34.

50. Indeed, the N.P. Complaint defines and treats the church entities (including the school), the BSA, and the relevant Local Councils together as the "Supervisory Defendants." *Id.* ¶ 11. The complaint alleges a *conspiracy* existed among the Supervisory Defendants—allegations that by their very nature are impossible to litigate separately. *See, e.g.*, *id.* ¶¶ 104-05, 139 ("The Supervisory Defendants, by and through their agents representatives [sic], *conspired* to cover up incidents of sexual abuse . . . . [T]he Supervisory Defendants, by and through their agents and representatives, *conspired* for the unlawful purposed [sic] of concealing and suppressing information on the danger and [threat] that [Svrcek] posed . . . ." (emphasis added)). The N.P. Complaint even accuses the BSA of "operating or controlling" the premises of St. Demetrios Greek

Orthodox Church and St. Demetrios N.Y. Day School, *id.* ¶ 129—an allegation that directly entwines the BSA and the so-called "Non-Debtor Defendants."

c) The *O'Malley* Action

51. Finally, the O'Malley Complaint likewise shows that the various claims and defendants cannot be effectively separated. The O'Malley Complaint alleges the abuser, Frank Pedone, worked as a Scoutmaster and "agent, servant, and/or employee" of the church out of which the troop was based. O'Malley Compl. ¶¶ 2, 5, 7, 18, 24. The complaint alleges that the abuse occurred over the course of a four-year period in various locations including the school, O'Malley's home, and on Scouting trips. *Id.* ¶ 10. But the complaint does not allege that Pedone committed this abuse in any specific role other than as Scoutmaster. *See id.* ¶ 5 ("At all relevant times herein mentioned, Mr. O'Malley's troop in which Pedone was scout master was associated with the Holy Innocents."). Indeed, the complaint merely alleges that "Pedone was an agent, servant and/or employee of the BSA, the Boy Scouts and/or the Diocese and utilized his position of authority with the BSA, the Boy Scouts and/or the Diocese to sexually abuse Mr. O'Malley." *Id.* ¶ 7.

52. Though the O'Malley Complaint separately lists the claims against the various defendants, the counts against the "Non-Debtor Defendants" mirror those against the BSA. For example: Count 1, alleging negligence against the Diocese of Brooklyn, states that the Diocese owed a duty of care to keep "the young boy participants of the boy scouts safe from sexual abuse *by its Scouts Masters*." *Id.* ¶ 47 (emphasis added). The negligence counts against the church, the relevant Local Councils, the Alpine Scout Camp, and the BSA itself all contain the same assertion—that the defendants owed a duty of care *regarding Scouting operations*. *Id.* ¶¶ 55, 63,

71, 79. Thus, allegations regarding abuse in Scouting activities are at the heart of all the claims in the action, even those against the "Non-Debtor Defendants."

53. Indeed, if there were any doubts of the intertwined nature of Movants' claims, the O'Malley Complaint would resolve them decisively. That complaint alleges not only that various defendants, including the BSA, the diocese, and the church, were each other's agents, but that they were also each other's *alter egos*. *Id.* at ¶ 34. How Movants can now maintain the claims against these defendants bear no relation is beyond comprehension. Movants cannot have it both ways. Based on their own allegations, modification of the injunction cannot be justified.

54. Besides the Movants' own allegations in the State Court Complaints, the Non-Debtor Defendants' submissions in this Court further show that modifying the injunction would not be appropriate. The Non-Debtor Defendants have submitted Proofs of Claim against the BSA for indemnification for costs and other liabilities related to the State Court Actions. *See Declaration Of Catherine Nownes-Whitaker In Support Of The BSA's Brief In Opposition To Motion For Order Modifying Preliminary Injunction To Allow Movants To Proceed With State Court Actions As To Non-Debtor Defendants* ("**Nownes Decl.**"), Exhibits A-D (Proofs of Claim filed by or on behalf of the Roman Catholic Diocese of Brooklyn, the Parishes of the Roman Catholic Diocese of Brooklyn (which Parishes include Holy Innocents Parish and St. Benedict Joseph Labre Parish), St. Demetrios Greek Orthodox Church, and the Greek Archdiocese of America). Indemnity obligations are a well-established basis for finding unusual circumstances, and courts have sustained injunctions even where there is merely the potential for indemnification by the debtors. *See, e.g.*, *In re Phila. Newspapers, LLC*, 423 B.R. at 105 ("[T]he Debtors could have an obligation to indemnify. This obligation to indemnify, if triggered, would affect the property of the Debtors' estates.").

55. Ultimately, as both the Movants' and the Non-Debtor Defendants' allegations show, the Movants' claims against the various defendants are not, as they now contend, "significantly different" such that they would involve different witnesses and documentary evidence. To the contrary, each State Court Action would involve witnesses and evidence relevant to the claims against the BSA and the "Non-Debtor Defendants" alike. And all of the State Court Actions would require discovery from the BSA. Courts have repeatedly acknowledged that pursuing non-bankruptcy discovery from a debtor can interfere with its ability to reorganize. *See, e.g.*, *Gerard v. W.R. Grace & Co.*, 115 F. App'x at 569 (observing that, if the court allowed litigation against the debtor's co-defendant to proceed, "discovery from [the debtor] would be needed," and rejecting the argument that it would not be "so much [discovery] that it would 'disrupt the reorganization process'"); *In re Am. Film Techs.*, 175 B.R. at 851 (noting that attending "depositions and otherwise participating in the litigation to protect its interests" is "precisely what the automatic stay is intended to excuse [debtor] from doing"); *In re Phila. Newspapers, LLC*, 423 B.R. at 102 (affirming bankruptcy court's decision, which acknowledged if plaintiff "were permitted to conduct discovery with respect to Non-Debtor defendants in the [action] then litigants in other cases may seek to assert the same privilege, such that the 'cumulative effect and drain on the Debtors of handling such discovery and motion practice could be enormous'").

56. As noted above, the Bar Date occurred just recently on November 16, 2020. As of that date, claimants had filed approximately 95,000 abuse claims against Debtors. *See supra* ¶ 17. If Movants are allowed to proceed with their actions, then the other approximately 95,000 claimants will no doubt seek the same privilege, such that the collective effect would be enormous. *See In re Phila. Newspapers, LLC*, 423 B.R. at 102. With the extensive amount of abuse claims filed, Debtors need sufficient breathing room to review the claims, engage in mediated plan

negotiations, and prepare, file, and solicit a confirmable chapter 11 plan. Opening the floodgates now would not only seriously imperil the Debtors' chances of timely emerging from bankruptcy, but could jeopardize their ability to do so entirely.

57. The Debtors are already involved in the Mediation process, with the TCC, the UCC, and over a dozen other Mediation Parties. *See supra* ¶ 15. The Mediators have set an aggressive schedule for negotiations from now through January 2021. *See id*. Now is not the time to divert the Debtors' attention and frustrate the Mediation Proceedings. Considering the adverse impacts that would follow if the Motion were granted, and the interconnected interests amongst the various defendants in the State Court Actions, the requisite unusual circumstances continue to exist, and the Motion should be denied.

C. TRADITIONAL FACTORS STILL SUPPORT THE INJUNCTION

58. The traditional four-factor test also continues to support the Preliminary Injunction. Although the Movants do not dispute this, the BSA will nevertheless highlight why it remains true. Under the four-factor test, courts consider whether there is a reasonable likelihood of the debtor successfully reorganizing; the imminent risk of irreparable harm to the debtor's estate in the absence of an injunction; the balance of harms between the debtor and parties opposing the injunction; and the public interest in an injunction. *See W.R. Grace & Co. v. Chakarain*, 386 B.R. at 33; *see also Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (applying traditional four-factor test and remanding with instructions that the district court enter a preliminary injunction).

59. Here, the Debtors have begun undertaking crucial steps toward a successful reorganization, and various parties in interest are actively working together toward that end. *See supra* ¶¶ 11-22. There is imminent risk of irreparable harm without the injunction, from substantial

risks of collateral estoppel, record taint, and evidentiary prejudice, to the distraction and drain resulting from potential participation in hundreds (if not thousands) of lawsuits around the country. *See supra* ¶ 6. The balance of harms supports the injunction, since the significant harm to the Debtors outweighs the minimal harm to plaintiffs arising from the temporary stay of their claims. Finally, the public interest, including the interest in supporting successful reorganizations, overwhelmingly supports the injunction. *A.H. Robins*, 788 F.2d at 1008 (the "unquestioned public interest in promoting a viable reorganization of the debtor can be said to outweigh any contrary hardship to the plaintiffs"); *In re Am. Film Techs.*, 175 B.R. at 849 ("In the context of bankruptcy proceedings, the 'public interest' element means 'the promoting of a successful reorganization.' It is 'one of the paramount interests' of this court to assist the Debtor in its reorganization efforts." (citations omitted)); Mar. 30, 2020, Hr'g Tr. 21:15-16 ("[T]here is a strong public policy interest in giving BSA space to see if a consensual resolution can be achieved with all victims of abuse."). The BSA's longstanding charitable mission and important role in our society further support this conclusion. The injunction remains warranted—indeed necessary. Modification is not appropriate.

IV.

CONCLUSION

For the above reasons, the BSA respectfully requests this Court deny the Motion to Modify and grant BSA all other or further relief as is just and proper.

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Dated: December 2, 2020
Wilmington, Delaware

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