

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

In re:

**ARCHDIOCESE OF MILWAUKEE,

Debtor.**

Case No. 11-20059-svk

Chapter 11

Hon. Susan V. Kelley

**DEBTOR'S LIMITED OBJECTION TO THE EMPLOYMENT OF BERKELEY
RESEARCH GROUP, LLC AS FINANCIAL ADVISOR TO THE COMMITTEE**

Archdiocese of Milwaukee, debtor and debtor in possession (the "Debtor" or "Archdiocese"), hereby submits this limited objection to the *First Amended Application of the Official Committee of Unsecured Creditors For Entry of an Order Authorizing and Approving the Employment of Berkeley Research Group, LLC ("BRG") as Financial Advisor to the Official Committee of Unsecured Creditors* [Docket No. 235] (the "Amended BRG Application") and in support of this limited objection, Debtor states as follows:

1. On May 17, 2011, the official committee of unsecured creditors comprised entirely of victims/survivors (the "Committee") filed the Amended BRG Application.
2. The Debtor recognizes the Committee's obligations under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"), including obligations under § 1103(c)(2) of the Bankruptcy Code to investigate the assets, liabilities and the financial condition of the Debtor, and by this objection does not intend to preclude such an investigation.

Daryl L. Diesing
Bruce G. Arnold
Michael E. Gosman
WHYTE HIRSCHBOECK DUDEK S.C.
555 East Wells Street, Suite 1900
Milwaukee, Wisconsin 53202-4894
Telephone: (414) 273-2100
Facsimile: (414) 223-5000
Email: ddiesing@whdlaw.com

3. The Debtor's objection to the Amended BRG Application relates principally to the following: (i) uncertainty whether BRG intended for its compensation to be subject to approval in accordance with § 330(a) of the Bankruptcy Code or § 328 of the Bankruptcy Code; (ii) BRG's anticipated performance of professional services relating to non-actionable claims; (iii) BRG's anticipated billing practices concerning non-working travel time; and (iv) approval *nunc pro tunc* to March 3, 2011.

I. Clarification That BRG's Compensation is Subject to Review by the Court in Accordance with § 330 of the Bankruptcy Code.

4. The Amended BRG Application only states that BRG is to be appointed pursuant to section 328 of the Bankruptcy Code. (*See* Amended BRG Application ¶ 2 [Docket No. 235].) At first blush, it would seem that BRG would not be subject to the standards of evaluation of compensation for other professionals under section 330 of the Bankruptcy Code. However, the Amended BRG Application later includes a reference to BRG's hourly compensation being subject to § 330(a) of the Bankruptcy Code. Standing alone, these references leave a lack of clarity within the BRG Application. The Debtor strongly believes that it should be clear that all fees of professionals in this case, including those of BRG, are subject to review by the Court under section 330 of the Bankruptcy Code.¹ (*See* Amended BRG Application ¶ 13 [Docket No. 235].)

5. In general, "a bankruptcy court must approve a professional's application for compensation either under the 'improvident' standard of § 328(a) or the reasonableness standard of § 330(a)(1) – not both." *F.V. Steel & Wire Co. v. Houlihan Lokey Howard & Zukin Capital, L.P.*, 350 B.R. 835, 839 (E.D. Wis. 2006). Moreover, "unless a professional's retention

¹ The retention of the noticing agent in this case, Kurtzman Carson Consultants LLC ("KCC") is an exception due to KCC's unique rate structure and services; KCC was retained under a special fee structure approved by the Committee, the U.S. Trustee, and the Court.

application unambiguously specifies that it seeks approval under § 328, it is subject to review under § 330.” *Id.* (citing *Circle K Corp. v. Houlihan, Lokey, Howard, & Zukin, Inc. (In re Circle K Corp.)*, 279 F.3d 669, 671 (9th Cir. 2002)).

6. The Debtor contacted counsel for the Committee on May 27, 2011, about this issue and was informed that the Committee intends that BRG will only be compensated in accordance with § 330(a) of the Bankruptcy Code with BRG’s fee applications fully subject to the standards and review contemplated under section 330. In accord with that position, the Debtor believes the standard of review of BRG’s fees should be clarified on the record or in the order approving BRG’s retention.

II. BRG’s Intent to Perform Professional Services Relating to Matters that Could Not Benefit the Chapter 11 Estate or its Creditors.

7. The Amended BRG Application enumerates several areas of inquiry relating to the finances of the Debtor for which BRG intends to provide professional services to the Committee. (*See* Amended BRG Application ¶ 8 [Docket No. 235].) Particularly troublesome is the fact that BRG anticipates providing professional services before there is an analysis by legal counsel as to whether such work could reasonably be expected to lead to assets or claims that will benefit the Chapter 11 estate or its creditors. Nothing in the Amended BRG Application indicates that BRG intends to direct its investigations to matters that have been determined by the Committee counsel to be legally relevant and, if such determination has been made, that the Debtor will be provided with time to provide the relevant information or a response that could expedite, minimize or alleviate BRG’s efforts.

8. For example, the Amended Application states that one of BRG’s intended efforts is to investigate transactions with Parishes of the Debtor occurring in 2004-2005 (e.g., a financial analysis of the so-called “Parish Deposit Fund”). (*See* Amended BRG Application ¶ 8(d))

[Docket No. 235].) However, the Debtor has already thoroughly explained that the Parish Deposit Fund was a joint investment fund administered by the Debtor as a fiduciary for Parishes and other Catholic entities who chose to invest. The Debtor has also provided to counsel to the Committee and the U.S. Trustee (i) a description of the Parish Deposit Fund from the Debtor's audited financial statements and (ii) the documents relating to the discontinuation of the Parish Deposit Fund and the return of the Parishes' own funds to the Parishes or, if elected by a Parish, the investment of the Parishes' funds in the Southeastern Wisconsin Catholic Parish Investment Management Trust, an investment fund created under the Investment Company Act of 1940, which utilizes U.S. Bank, N.A. as the Master Custodian. This was completed in 2005.

9. While the Debtor recognizes that the Committee seeks to mischaracterize the transfers from the Parish Deposit Fund as recoverable assets (which the Debtor believes is a waste of time and resources), the proposed financial investigation by BRG ignores the fact that if any of the Committee's claims or theories were true, the statute of limitations is long past to reverse any transfers (see, e.g., Chapter 242 of the Wisconsin Statutes which provides for a four year statute of limitations).

10. Similarly, BRG purports to investigate the Faith in Our Future Trust (the "Trust"). The facts surrounding the establishment of this Trust, which is not part of the Debtor, are well known. The Trust is a tax exempt charitable trust which supports Catholic education and faith formation in Southeastern Wisconsin. Before conducting an expensive investigation of the financial aspects of this Trust which likely are available through the Trust's counsel, Mr. Peter C. Blain, it should be determined if there is any viable legal theory which would make this Trust subject to the chapter 11 proceeding as property of the estate. The Debtor is unaware of any

theory that would lead to this result and consequently, BRG's efforts to investigate the finances of the Trust would be wasteful of the Debtor's resources.

11. Due to the limited funds of the Debtor's estate, the Debtor objects to the scope of the Amended BRG Application concerning BRG's performance of such unwarranted professional services before (i) a legal theory can be enumerated which suggests the professional services would be helpful, and (ii) provision of an opportunity to the Debtor or opposing counsel to provide appropriate information. This may eliminate the need for the expensive and unnecessary services of BRG at rates up to \$650 per hour.

III. The Amended BRG Application Fails to Specify Whether Portions of Non-Working Travel Time are Billable.

12. The Debtor acknowledges that a portion of a professional's travel time is reasonably necessary and billable due to the opportunity cost incurred by the professional. However, the Debtor does not believe it should bear the burden and expense of a professional's decision to fail to productively use those portions of travel and flight time in which it could be performing work for other clients.

13. The basis for a determination of professional and attorneys' fees is the "lodestar method", which requires that, to be compensable, such fees must be based on multiplying a reasonable number of hours by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

14. The Seventh Circuit has generally held that reasonable attorneys' fees include a presumption that reasonable travel time may be billed. *See Sweet v. Corporate Receivables, Inc.*, No. 05-CV-0779, 2008 U.S. Dist. LEXIS 61954, at *8 (E.D. Wis. July 29, 2008) (citing *Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984)). The rationale is that during an attorney's reasonable travel time, he or she incurs an opportunity cost equal to the fee the attorney could

have charged to another client. *Sweet*, 2008 U.S. Dist. LEXIS 61954, at *8-9. However, in *Henry*, Judge Shabaz qualified this rationale by noting that attorneys “invariably charge their clients for travel time, ... *except* when they are able to bill another client for part of the travel time (a lawyer might do work for client A while flying on an airplane to a meeting with client B).” *Henry*, 738 F.2d at 194 (emphasis added).

15. In this judicial district it has been common to limit travel time to true opportunity costs, thereby excluding time that otherwise would not be regularly worked, time where work could be done, but is not, and time where work is being done for another client. In light of prior questions relating to the billing of travel time in this case and because the Debtor anticipates that BRG professionals will continue to travel to and from Milwaukee, Wisconsin, over the coming months, the Debtor believes that the BRG Application should be granted with the qualification that travel time be limited to working travel time in accordance with Seventh Circuit standards or that the Court adopt specific guidelines covering all professionals in this case (such as the Second Circuit’s guideline allowing travel time at half time).

IV. The Amended BRG Application Requests Approval *Nunc Pro Tunc* to March 3, 2011.

16. The Amended BRG Application requests authorization and approval for the employment of BRG *nunc pro tunc* to March 3, 2011, as well as compensation from the Debtor’s estate relative to its then purported position as “proposed financial advisor” to the Committee. (See Amended BRG Application ¶ 20 [Docket No. 235].) However, the Committee did not file its original application to employ BRG as its financial advisor until April 11, 2011. (See Docket No. 188.)

17. Typically, the retention of professionals in a bankruptcy proceeding requires court approval in advance of the services to be performed so as to ensure that assets of the estate are

not wasted. *In re Renaissance Residential of Countryside, LLC*, 423 B.R. 848, 858-59 (Bankr. N.D. Ill. 2010).

18. In the Seventh Circuit, the retroactive employment of professionals in a bankruptcy proceeding is an equitable remedy that requires the presence of extraordinary circumstances. *Renaissance Residential*, 423 B.R. at 859 (citing *Gowan v. Lefkas Gen. Partners No. 1017 (In re Lefkas Gen. Partners No. 1017)*, 153 B.R. 804, 808 (N.D. Ill. 1993) (retroactive approval of employment is limited to cases in which prior approval would have been appropriate and extraordinary circumstances are present). “Mere oversight or inadvertence of counsel, however, does not constitute excusable neglect sufficient to relieve the parties of the consequences of their actions.” *Renaissance Residential*, 423 B.R. at 859 (citing *In re Arkansas Co.*, 798 F.2d 645, 649-50 (3d Cir. 1986); see also *In re Providence Television Ltd. P’ship*, 113 B.R. 446, 451 (Bankr. N.D. Ill. 1990) (“The fact that such services may have been beneficial or valuable to the estate and performed in good faith is immaterial...”). The Committee's failure to timely file the Amended BRG Application is particularly surprising given that Committee's counsel has a long history of employing BRG advisors.

19. In this case, nothing in the Amended BRG Application indicates that the Committee’s retention of BRG was subject to extraordinary circumstances or significant time constraints which might satisfy the standard for such equitable remedy.

20. In the absence of a purported basis regarding extraordinary circumstances which would have necessitated the Committee’s delayed filing of its application to employ BRG until April 11, 2011, the Debtor requests that this Court deny approval for the employment of BRG *nunc pro tunc* to March 3, 2011, and any compensation to BRG for services performed prior to April 11, 2011.

21. For the reasons set forth above, the Amended BRG Application should be approved only if conditioned upon compliance with the objections presented herein.

Dated this 31st day of May, 2011.

ARCHDIOCESE OF MILWAUKEE
Debtor and Debtor-in-Possession
by its counsel,
Whyte Hirschboeck Dudek S.C.

By: /s/ Daryl L. Diesing

Daryl L. Diesing
State Bar No. 1005793
Bruce G. Arnold
State Bar No. 1002833
Michael E. Gosman
State Bar No. 1078872

POST OFFICE ADDRESS:
555 East Wells Street, Suite 1900
Milwaukee, WI 53202
Telephone: (414) 273-2100
Facsimile: (414) 223-5000
Email: ddiesing@whdlaw.com
barnold@whdlaw.com
mgosman@whdlaw.com