IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

In re:	)	Chapter 11
	)	
ARCHDIOCESE OF MILWAUKEE,	)	Case No. 11-20059-SVK
	)	
Debtor.	)	
	)	

REPLY IN SUPPORT OF FIRST AMENDED APPLICATION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO FED. R. BANKR. P. 2014 FOR ENTRY OF AN ORDER AUTHORIZING AND APPROVING THE EMPLOYMENT OF BERKELEY RESEARCH GROUP, LLC AS FINANCIAL ADVISOR TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS NUNC PRO TUNC TO MARCH 3, 2011

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned case hereby submits this reply in support of the *First Amended Application of the Official Committee of Unsecured Creditors Pursuant to Fed. R. Bankr. P. 2014 for Entry of an Order Authorizing and Approving the Employment of Berkeley Research Group, LLC as Financial Advisor to the Official Committee of Unsecured Creditors Nunc Pro Tunc to March 3, 2011* (the "Application").

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I.
INTRODUCTION

The Debtor Archdiocese of Milwaukee (the "Debtor") raises four objections to the Committee's Application to employ Berkeley Research Group, LLC ("BRG") as financial advisors. None of these objections has any merit. First, the Debtor questions whether BRG intends to file fee applications in this case. The answer is an unqualified "yes" as set forth in the Application and the supporting Affidavit of Disinterestedness.

Second, the Debtor proposes a novel – and inappropriate – litmus test for the Committee's use of a financial advisor. The Debtor submits in its opposition to the Application (the "Opposition") that the *Debtor* should be the gatekeeper for any forensic financial analyses that the *Committee* undertakes. This position is based on the factually mistaken assertion that the Debtor is the exclusive party in interest that seeks to preserve estate assets by restricting professionals' fees. In reality, the Committee is equally, if not more so, inclined to preserve estate assets so that they can fund creditors' recoveries in this case. Next, the Debtor seeks to invade the Committee's attorney-client privilege with its counsel and the work product privilege by finding out the Committee's strategies for investigating assets. Moreover, the Debtor's role as gatekeeper of Committee investigations is not workable because the Debtor and the Committee do not have aligned interests and strategies with regard to asset analysis at this juncture. The Committee

believes that the Debtor may seek to protect certain potential avoidance action defendants such as the parishes from the Committee's efforts to maximize property of the estate. Finally, the Committee's ability to develop its legal strategies and theories in this case require the factual investigation of the Debtor's accounting records

Third, the Debtor objects to the payment of non-working travel time. As the Debtor's own authorities provide, the Seventh Circuit does not preclude the payment of non-working travel time to professionals retained in bankruptcy cases. In this case, BRG will implement its standard policy and charge 50% of its professionals' billing rate for non-working travel.

Fourth, the Debtor appears to argue that nunc pro tunc employment of BRG to March 3 does not satisfy the extraordinary circumstance test because the Application was filed on May 17. The Debtor misses the mark. The Committee filed and served on April 11 its original application to employ BRG. It then amended the application after consultation with the U.S. Trustee. The original application was filed on April 11 and not in March because BRG was indeed experiencing extraordinary circumstances. Effective March 1, 2011, BRG absorbed the group of professionals who the Committee seeks to have work on this bankruptcy case. As a result, in March and April, BRG was engaged in running conflict checks, working on employment applications in all of the cases it absorbed from its new professionals, and integrating this new group of forensic accountants into its business. The nunc pro tunc employment of

BRG is reasonable. The Committee respectfully requests that the Court approve the Application.

II.
PROCEDURAL BACKGROUND

On May 17, the Committee filed its first amended application to employ BRG as its financial advisor. On May 31, the United States Trustee filed a notice of non opposition to the Application. Also on May 31, the Debtor filed a limited opposition to the Application. The Court has set a hearing on the Application for June 22, 2011 at 11:00 a.m. CDT.

III.
ANALYSIS

None of the Debtor's four objections to the employment of BRG as financial advisor is sound.

A. BRG Will File a Fee Application

The Debtor asserts that the Application is vague as to whether BRG intends to file fee applications in this bankruptcy case as a condition of receiving payment. There is no basis for this objection. In its Application, the Committee makes clear that BRG will file fee applications. *See* Application, ¶10 ("BRG will seek compensation from the Debtor's estate . . . subject to Court approval after notice and a hearing); ¶13 ("Subject to Court approval in accordance with section 330(a) of the Bankruptcy Code, compensation will be payable to BRG. . . .). In addition, BRG itself

submitted papers stating that it will file fee applications in this case. *See* Affidavit of Disinterestedness (Docket No. 235-1), ¶7(iv) ("BRG will seek reimbursement of expenses at its cost or as otherwise allowed by the Court.); ¶8 ("BRG understands that all of its fees and expenses are subject to Court approval."). The Debtor's objection in this regard should be overruled.

B. The Committee Requires BRG to Perform Certain Tasks

The Debtor contends that BRG should not undertake certain forensic investigations before the Committee articulates to the Debtor its reason for doing so. In particular, AOM asserts that forensic accounting analysis into the Parish Deposit Fund and Faith in Our Future is premature.

The Debtor's position is untenable for several reasons. First, to the extent that the Debtor's position is based on a concern that property of the estate not be paid needlessly to professionals, the Debtor is certainly not alone in that concern. Indeed, the Committee has just as much concern as the Debtor, if not more, that estate resources be spent wisely because those funds will form at least part of the recovery for creditors in this bankruptcy case.

Second, by asserting that the Debtor should be the gatekeeper for the Committee's investigations, the Debtor improperly seeks Committee counsel's work product because the Committee, through its counsel, will direct BRG in the performance of all tasks and seeks to invade privileged communications.

Third, the Debtor posits a most perplexing relationship between itself and the Committee, implying the Committee's need to seek approval from the Debtor in order to investigate potential assets of the estate. While a debtor and a creditors' committee can be, and often are, allies during the progress of a bankruptcy case, just as frequently the means of exercising their respective fiduciary obligations or their particular strategies do not align. That appears to be the situation right now. The Committee does not, and cannot, "take the Debtor's word" as truth regarding the financial transactions in this case, particularly because the Committee believes that property of the estate was transferred to entities related to the Debtor (such as parishes) and whom the Debtor has reason to protect from potential avoidance actions that the Committee may seek authority to bring.

Fourth, the Committee's development of credible legal theories requires the development of facts. The Committee is entitled to, and indeed, has fiduciary obligations requiring it, to investigate the Debtor's representations concerning its assets in order to maximize assets in the estate. To that end, the Committee made requests for production pursuant to Rule 2004 relating to the Parish Deposit Fund and Faith in Our Future, among other items (Informal request sent to Debtor on March 10, 2011 meet and confer conducted March; request filed with Court on March 31). On June 13, the Debtor finally produced documents responsive to many of those requests.

With regard to the particular issues about which the Debtor expressed concern, the Committee notes the following facts.

1. <u>BRG must investigate the Parish Deposit Fund</u>

The Debtor objects to the Committee's inquiry into the ownership of more than $70 million of assets that the Debtor held in a so-called "Parish Deposit Fund" but that disappeared from the Debtor's financials in 2005. The Debtor asserts that it "has already thoroughly explained" where those funds were transferred. *See* Objection, ¶ 8. The Debtor's own explanations do not obviate the Committee's questions or its obligations to determine whether those funds can be recovered into the Debtor's bankruptcy estate for the benefit of creditors. In other bankruptcy cases, debtors have similarly contended that funds did not belong to the estate only for bankruptcy courts to rule to the contrary. For example, in the *In re Catholic Diocese of Wilmington, Inc.*, bankruptcy case, the debtor insisted that its joint investment fund contained assets that were not property of the estate. The committee in that case prevailed at trial that the full $120 million in that fund were, indeed, property of the estate. *See Official Committee of Unsecured Creditors v. Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.)*, 432 B.R. 135 (Bankr. D. Del. 2010).

Moreover, the Debtor does not prevail in its assertion that an avoidance action relating to the Parish Deposit Fund is time barred. First, pursuant to 11 U.S.C. §548(e)(1), if disbursement of the Parish Deposit Fund monies were made to a self-settled trust; the debtor made that transfer; the debtor was a beneficiary of that self-settled trust; and the debtor made the transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted, then the statute of limitations for avoidance of the payout of its funds is

extended to 10 years prior to the Petition Date, which would be January 4, 2001. *See* U.S.C. §548(e)(1). Because the approximately $70 million believed to be in the Parish Deposit Fund appear to have been paid out in 2005, a potential avoidance action brought under section 548(e)(1) would not be time barred because the transfer was made within the 10 years prior to the Petition Date.

Second, the statute of limitations applicable to a fraudulent transfer for actual fraud under Wisconsin law is subject to the "discovery rule" permitting the extension of the usual four-year statute of limitation. *See* Wis. Stat. 893.425(a) (providing that the four-year statute of limitations is extended until "within one year after the transfer or obligation is or could reasonably have been discovered."). The facts adduced thus far indicate that actual creditors had no means of knowing of the transfer more than a year before the commencement of the bankruptcy case. In addition, the estate has the benefit of the strong arm powers under Section 544 which created a hypothetical creditor as of the commencement of the case. Therefore, the statute of limitations under applicable state law therefore has not run.

For these reasons, the Committee's inquiry into the Parish Defense Fund is legitimate and reasonable. Part of that inquiry will involve BRG's forensic investigation into the establishment of the fund, the sources of funds, and the circumstances surrounding the 2005 payout of those funds.

2. BRG must investigate Faith in the Future

The Debtor also objects to BRG's investigation into the Faith in Our

Future Trust. The Debtor contends that the trust is an entity separate from the Debtor itself. However, the Committee believes that Faith in Our Future is a Debtor initiative that the Debtor controls and that exists for its financial benefit. Very recently, the Committee has learned that funds from the Faith in Our Future campaign are run though the Debtor's bank accounts. In fact, the Debtor has asked that bank statements it provides as part of its monthly operating reports not be publicly filed because, in part, that information reflects transactions regarding the Faith in our Future Trust.

C. BRG Should be Paid for Non-Working Travel

The Debtor seeks to prevent BRG from billing for non-working travel time. The very legal authorities that the Debtor cites in its Opposition provide that this Circuit has no rule against paying professionals for non-working travel time. Moreover, this Court has authorized payment for non-working travel in this bankruptcy case and in *In re Bulk Petroleum*. Nevertheless, BRG has a standard practice of billing clients 50% of the applicable hourly rate for non-working travel. BRG will implement that practice in this bankruptcy case, as well. *See* Affidavit of Matthew K. Babcock ("Babcock Affidavit"), filed concurrently herewith.

D. BRG's Nunc Pro Tunc Employment to March 3, 2011 is Warranted

The Debtor contends that there exist no extraordinary circumstances permitting nunc pro tunc employment for BRG because the amended Application was not

filed until May 17. The Debtor's objection is not well-taken. The Committee filed and served the initial Application on April 11. Due to concerns that the U.S. Trustee and the Debtor raised, the Committee amended the Application. To the extent that the Debtor objects that the Committee did not file the Application until April 11, there are, in fact, extraordinary circumstances for that timing. The forensic accounting group at BRG that is working on this case moved to BRG from another firm, effective March 1, 2011. During March and April 2011, BRG was busy absorbing that group, handling employment applications in many cases, and performing due diligence (including conflict checks) in many cases. *See* Babcock Affidavit. Accordingly, the Debtor's objection should be overruled.

IV.
CONCLUSION

For the foregoing reasons, the Committee requests entry of an Order substantially in the form attached to the Application, authorizing the Committee to employ and retain BRG as financial advisor to the Committee, *nunc pro tunc* to March 3, 2011, and granting such other and further relief as is just and proper.

Dated: June 20, 2011

Respectfully submitted,

PACHULSKI STANG ZIEHL & JONES LLP

By */s/*

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

In re:	)	Chapter 11
	)	
ARCHDIOCESE OF MILWAUKEE,	)	Case No. 11-20059-SVK
	)	
Debtor.	)	
	)	

AFFIDAVIT OF MATTHEW K. BABCOCK IN SUPPORT OF REPLY IN SUPPORT OF FIRST AMENDED APPLICATION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO FED. R. BANKR. P. 2014 FOR ENTRY OF AN ORDER AUTHORIZING AND APPROVING THE EMPLOYMENT OF BERKELEY RESEARCH GROUP, LLC AS FINANCIAL ADVISOR TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS NUNC PRO TUNC TO MARCH 3, 2011

I, Matthew K. Babcock, declare under penalty of perjury as follows:

1. I am a Senior Managing Consultant at Berkeley Research Group, LLC ("BRG"). My business address is Berkeley Research Group, LLC; 201 South Main, Suite 450; Salt Lake City, UT 84111. I am authorized by BRG to make this affidavit in support of the reply in support of BRG's employment as financial advisor to the Official Committee of Unsecured Creditors in the above-captioned bankruptcy case.

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2. I have personal knowledge of the facts stated in this affidavit. If called as a witness, I could and would testify competently to these facts, except where matters are stated on information and belief. As to those facts, I am informed and believe that they are true.

3. On or about March 1, 2011, R. Todd Neilson, myself, and members of our forensic accounting group/financial advisors ("Group") left our prior employment at LECG, LLC to join BRG. As part of the Group's transition to BRG, during March and April 2011, BRG was busy absorbing our Group, handling employment applications in many bankruptcy cases, and performing due diligence (including conflict checks) for all of the cases that the Group brought to BRG.

4. The Group has a standard practice of billing clients 50% of the applicable billing rate for non-working travel. BRG will implement that practice in this bankruptcy case, as well. Thus, for instance, while BRG will charge my standard hourly billing rate of $370 for work I perform in this case, BRG will charge $185 an hour for any non-working travel time I bill in this case.

Dated this 20TH day of June, 2011.

Matthew B Babcock

Subscribed and sworn to before me
this 20TH day of June, 2011.

Evelyn S. Perry
Notary Public, State of Utah
My commission expires: 11-08-2014

EVELYN S PERRY
Notary Public
State of Utah
Comm. No. 601737
My Comm. Expires Nov 8, 2014