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Trustee for The Tulving Company, Inc.

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8 **UNITED STATES BANKRUPTCY COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **SANTA ANA DIVISION**

11 In re:

12 THE TULVING COMPANY, INC., a  
13 California corporation,

14 Debtor.

Case No.: 8:14-bk-11492-ES

Chapter 11

**REPLY OF PACHULSKI STANG ZIEHL &  
JONES LLP TO NOTICE OF OPPOSITION  
AND REQUEST FOR HEARING RE:**

**APPLICATION OF THE CHAPTER 11  
TRUSTEE FOR THE TULVING COMPANY,  
INC., FOR ORDER APPROVING  
EMPLOYMENT OF PACHULSKI STANG  
ZIEHL & JONES LLP AS GENERAL  
BANKRUPTCY COUNSEL TO THE  
TRUSTEE *NUNC PRO TUNC* TO MARCH 25,  
2014**

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21 Pachulski Stang Ziehl & Jones LLP (“PSZ&J” or the “Firm”), proposed Counsel for R. Todd  
22 Neilson, the duly appointed chapter 11 trustee (the “Trustee”) for the estate of The Tulving  
23 Company, Inc. (the “Debtor”), hereby replies to the *Notice of Opposition and Request for a Hearing*  
24 (the “Opposition”) [Docket No. 47], filed by John Frankel, in response to the *Application of the*  
25 *Chapter 11 Trustee for The Tulving Company, Inc., for Order Approving Employment of Pachulski*  
26 *Stang Ziehl & Jones LLP as General Bankruptcy Counsel to the Trustee Nunc Pro Tunc to March*  
27 *25, 2014* (the “Application”) [Docket No. 37] and respectfully states as follows:  
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**I.**  
**DISCUSSION**

The Opposition is based solely on Mr. Frankel’s opinion that the Firm’s hourly rates are too high. Mr. Frankel seems to suggest that the Trustee should have employed less qualified counsel to render services at a lower rate. However, there is no assurance that the retention of alternate counsel would result in a cost-savings to the estate. The Firm’s breadth of experience in cases of this type makes it able to deliver services in an effective, efficient and timely manner which will result in a benefit to the creditors of this estate.

This Court should not sanction the replacement of the Trustee’s judgment regarding the selection of its counsel, a judgment that is to be given great deference, with Mr. Frankel’s judgment on that issue. Neither should the Court pre-judge the amounts PSZ&J will charge for its services before any required fee application has been filed.

PSZ&J requests that the Court overrule the Opposition and approve its employment as the Trustee’s counsel on the terms outlined in the Application without a hearing. However, should the Court determine to set a hearing on the Opposition, the Firm requests that it be allowed to appear telephonically at such hearing in order to limit administrative costs.

**II.**  
**LEGAL AUTHORITY**

**A. The Court Should Not Interfere with the Selection of Counsel Except in the Rarest of Cases.**

Courts should give the judgment of a trustee significant deference regarding the selection of counsel. “Only in extraordinary instances may the client be deprived of the privilege of selecting and continuing with his own counsel. This rule applies in bankruptcy cases as in other legal proceedings.” *In re Heck’s, Inc.*, [83 B.R. 410, 423](#) (Bankr. S.D. W. Va. 1988); see also, *In re Christ’s Church of the Golden Rule*, [157 F.2d 910](#) (9<sup>th</sup> Cir. 1946) (“Only in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel...”); *United States Trustee v. S.S. Retail Stores Corp. (In re S.S. Retail Stores Corp.)*, [211 B.R. 699, 701](#) (9<sup>th</sup> Cir. BAP 1997) (Code provides the debtor the freedom to select its counsel of choice); *In re Huntco Inc.*, [288 B.R. 229, 232](#)

1 (E.D. Mo. 2002) (“A bankruptcy court, however, should give the debtor in possession significant  
2 deference in its selection of counsel to represent it under § 327(a); *In re Creative Restaurant*  
3 *Management, Inc.*, [139 B.R. 902, 909](#) (Bankr. W. D. Mo. 1992) citing 2 King et al., *Collier on*  
4 *Bankruptcy* ¶ 327.03, at 327-19 (15<sup>th</sup> ed. 1992) (“A trustee may select his own attorney, accountant  
5 or other professional person without interference from creditors. The selection is, however, subject  
6 to approval of the court. ‘Only in the rarest cases’ will the trustee be deprived of the privilege of  
7 selecting qualified counsel....”).

8 There is no basis for this Court to ignore the Trustee’s reasoned judgment in the employment  
9 of counsel and replace that judgment with that of Mr. Frankel. This case is not one of those  
10 “extraordinary instances” where the Court should deprive the Trustee of its selected counsel. On the  
11 contrary, PSZ&J meets the requirements of the Bankruptcy Code for employment by the Trustee and  
12 its employment is in the best interest of the Debtor’s estate.

13 **B. The Opposition is Premature.**

14 The Opposition is really nothing more than a premature objection to PSZ&J’s fees without  
15 the benefit of consideration of what work will have been done by PSZ&J, the results of that work, or  
16 the amount that actually will be billed for the work performed. The Court in *Heck’s* found that an  
17 objection to the employment of competent counsel of the equity committee’s choice that was based  
18 on improper and excessive requests for compensation, among other things, was not appropriate but  
19 that such objection should have been raised in an objection to the fees. *In re Heck’s, Inc.*, [83 B.R.](#)  
20 [410, 423](#).

21 At such time as PSZJ seeks Court approval of its fees, both Mr. Frankel and this Court will  
22 have an opportunity to review the work done by PSZ&J and the actual fees charged. Mr. Frankel  
23 will be free to object to those fees if he deems such objection appropriate. However, Mr. Frankel’s  
24 attempt to interfere with the Trustee’s selection of its counsel on the basis of PSZ&J’s billable rates  
25 is not appropriate and should not be allowed.

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**III.**  
**CONCLUSION**

PSZ&J requests that the Court overrule the Opposition and approve its employment as the Trustee's counsel on the terms outlined in the Application without a hearing. However, should the Court determine to set a hearing on the Opposition, the Firm requests that it be allowed to appear telephonically at such hearing in order to limit administrative costs.

WHEREFORE, for all of the forgoing reasons, and the reasons set forth in the Application, PSZ&J respectfully requests that (a) the Opposition be overruled; (b) the Application be approved; and (b) it and the Trustee be granted such other and further relief as may be appropriate under the circumstances.

Dated: April 15, 2014

PACHULSKI STANG ZIEHL & JONES LLP

By: /s/ Linda F. Cantor

Linda F. Cantor (SBN 153872)

Attorneys for R. Todd Neilson, Chapter 11 Trustee



1 **1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):**

2 **8:14-bk-11492-ES Notice will be electronically mailed to:**

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