

<p>Attorney or Party Name, Address, Telephone &amp; FAX Nos., State Bar No. &amp; Email Address</p> <p>M. Candice Bryner, State Bar No. 192462 LAW OFFICES OF M. CANDICE BRYNER, APC 900 Roosevelt Irvine, CA 92620 (949) 371-9056 - Tel. (949) 679-2492 - Fax candice@brynerlaw.com</p> <p><input type="checkbox"/> Individual appearing without attorney <input checked="" type="checkbox"/> Attorney for: Creditors Eshbaugh, Assaley, etc.</p>		<p>FOR COURT USE ONLY</p>	
<p><b>UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA DIVISION</b></p>			
<p>In re: THE TULVING COMPANY, INC., a California corporation</p> <p>Debtor(s).</p>		<p>CASE NO.: 8:14-bk-11492-ES CHAPTER: 11</p> <p><b>NOTICE OF OPPOSITION AND REQUEST FOR A HEARING</b></p>	

1. TO (*specify name*): The Chapter 11 Trustee, its Proposed Counsel, the Debtor and All Interested Creditors
2. NOTICE IS HEREBY GIVEN that Willis Eshbaugh, Kristian & Jennifer Assaley, Radovan Rusinovic, Nelson Espiritu a party in interest, hereby opposes the following request (*specify that which is opposed*):
  1. Application of the Chapter 11 Trustee for the Tulving Company, Inc. for Order Approving Pachulski Stang Ziehl & Jones, LLP as General Counsel for the Trustee
  2. Application of the Chapter 11
3. This opposition is based upon the following grounds (*specify grounds*):

Hourly rates of \$850 for an attorney, \$265 for a paralegal, and \$210-\$600 for 7 different professionals is excessive and poses a substantial risk that all funds recovered for the Estate will be used to pay for lawyers and accountants. Further, retention of a law firm in Santa Monica will result in unnecessary expenditures of fees at the hourly rate of \$850 to travel to/from Santa Monica to Orange County (3-7 hrs). Further, \$850 per hour seems excessive and there is no evidence that this is a reasonable rate in the legal community for this type of work. The Creditors would be better served if the Trustee retained counsel on a contingency basis (at a higher contingency rate based on the risk involved), or at an hourly rate more aligned with the hourly rate of experienced bankruptcy counsel in Orange County or Los Angeles. This Opposition is made in good faith and premised on the legitimate concern that creditors who were ripped off will be left with nothing after the professionals are compensated.

This form is optional. It has been approved for use in the United States Bankruptcy Court for the Central District of California.

4. Attached hereto are the following documents in support of this opposition which are admissible under the Federal Rules of Evidence (*specify declarations and exhibits by name or description*):

Declaration of M. Candice Bryner

5. ☐ (*Optional*) Attached hereto is a Memorandum of Points and Authorities upon which opposing party will rely.

6. Total number of attached pages of supporting documentation: 4

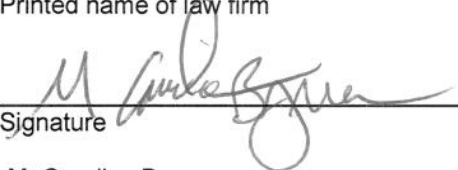
Any reply to this opposition must be filed with the court and served on this opposing party not later than 7 days prior to the hearing on the motion.

WHEREFORE, the undersigned prays that this court deny the subject request and set this matter for a hearing.

Date: 04/17/2014

Respectfully submitted,

Law Offices of M. Candice Bryner, APC  
Printed name of law firm

  
Signature

M. Candice Bryner  
Printed name

Attorney for: Creditors Eshbaugh, Assaley, Rusinovic

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9 Attorneys For Creditors  
10 Willis Eshbaugh, Kristian Assaley, Jennifer Assaley,  
11 Radovan Rusinovic, and Nelson Espiritu

12 **UNITED STATES BANKRUPTCY COURT**  
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
14 **(SANTA ANA DIVISION)**

15 In Re:	) Chapter 11 Case No. 8:14-11492-ES
16 THE TULVING COMPANY, INC.,	)
17 Debtor	) <b>DECLARATION OF M. CANDICE</b>
	) <b>BRYNER IN OPPOSITION TO THE</b>
	) <b>CHAPTER 11 TRUSTEE'S</b>
	) <b>APPLICATIONS TO 1) APPOINT</b>
	) <b>PACHULSKI STANG ZIEHL &amp; JONES,</b>
	) <b>LLP AS COUNSEL FOR THE TRUSTEE;</b>
	) <b>AND 2) APPOINT BERKELEY RESEARCH</b>
	) <b>GROUP, LLC AS ACCOUNTANTS AND</b>
	) <b>FINANCIAL ADVISORS</b>
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**DECLARATION OF M. CANDICE BRYNER IN OPPOSITION TO CHAPTER 11 TRUSTEE'S  
APPLICATIONS TO EMPLOY PROFESSIONALS**

1 I, M. Candice Bryner, declare as follows:

2 1. I am an attorney licensed to practice in all the Courts in the State of California. I  
3 am the principal of the Law Offices of M. Candice Bryner, APC and I am counsel of record for  
4 Creditors Willis G. Eshbaugh, Kristian Assaley and Jennifer Assaley who are identified as some  
5 of the 20 largest unsecured creditors on Debtor the Tulving Company's Bankruptcy Petition. I  
6 am also counsel for creditor Nelson Espiritu who advises me that the Tulving Company stole  
7 \$165,000 from him, and creditor Radovan Rusinovic who advises me that the Tulving Company  
8 stole \$175,158.00 from him. I have personal knowledge of the facts set forth herein and if called  
9 to testify thereto, I could and would competently do so based upon my personal knowledge. I  
10 make this Declaration in support of my clients' Oppositions to the Chapter 11 Trustee's  
11 Applications to 1) Employ Pachulski Stang Ziehl & Jones ("Pachulski Firm") as Bankruptcy  
12 Counsel and 2) Employ Berkeley Research Group, LLC as Accountants and Financial Advisors.

13 2. In addition to the creditors I represent, I have also spoken to approximately 30  
14 other creditors who paid money to the Tulving Company for which they never received the  
15 commodities they ordered. These creditors' claims exceed \$1,000,000. In addition to this, I  
16 have spoken to counsel who has a list of approximately 30 other creditors whose claims against  
17 the Tulving Company exceed \$1,000,000. These creditors do not include approximately 20 other  
18 creditors who signed Declarations in the Class Action lawsuit against the Tulving Company  
19 which is pending in the U.S. District Court in the Northern District of California. All of the  
20 persons to whom I have spoken have expressed a concern that they will receive little to nothing  
21 in the way of a distribution in this Bankruptcy proceeding.

22 3. I have reviewed the Tulving Company's Bankruptcy Petition. Based on the  
23 information in this Petition, the Tulving Company *purportedly* has less than \$50,000 in assets. I  
24 have also reviewed the Chapter 11 Trustee's Applications to: 1) Employ Pachulski Stang Ziehl  
25 & Jones as General Bankruptcy Counsel; and 2) Employ Berkeley Research Group, LLC, of  
26 which the Trustee is a Member, to provide accounting and financial services.

27 4. The Pachulski Firm proposes to charge \$850 for attorney Linda Cantor and \$265  
28 for paralegal Michael Matteo. Further, according to the Declaration of R Todd Neilson in Reply

1 to Support the Application (Dckt # 49), Richard Pachulski may also be performing services on  
2 this case at the hourly rate of \$1,095.00 per hour. Based on these proposed hourly rates, my  
3 clients are highly concerned that there will be virtually no monies left to pay the creditors after  
4 the professionals have been paid from any funds recovered for the Bankruptcy Estate.

5 5. According to Mr. Neilson's Declaration, he suggests that employment of  
6 bankruptcy counsel who charges less than \$850 per hour means that the Trustee would be forced  
7 to retain "a low cost firm unfamiliar with the complexities of the Bankruptcy system." (Dckt #  
8 49 at ¶5). However, I do not believe this is a fair or accurate assessment. According to her  
9 resume, Ms. Cantor graduated from the University of Michigan and has been practicing law  
10 since 1990. I know of several law firms and attorneys in both Los Angeles and Orange County  
11 who are highly qualified and have similar experience representing Bankruptcy Trustees,  
12 including Chapter 11 Trustees in complex matters, and whose hourly rates are substantially  
13 lower than those Ms. Cantor or Mr. Pachulski. I have also discussed this action with several of  
14 those attorneys and I have no reason to believe that the Trustee would have a difficult time  
15 finding qualified and competent Bankruptcy counsel willing to represent him at a lower hourly  
16 rate.<sup>1</sup> Further, based on Mr. Neilson's significant experience as a Trustee, I assume that he is  
17 well acquainted with numerous qualified bankruptcy attorneys.

18 6. In point of fact, in my seventeen years of business litigation experience, I have  
19 never heard of an attorney in either the Los Angeles or Orange County charging \$850 per hour,  
20 or \$1,095 per hour. Further, \$265 per hour for a paralegal seems excessive as this is very close  
21 to the average hourly rate charged by many attorney's in Southern California, albeit possibly ill-  
22 qualified to appreciate the complexities of the Bankruptcy system.

23 7. Furthermore, Ms. Cantor and the lawyers at the Pachulski Firm are located in  
24 Santa Monica. This means any time there is a hearing which requires counsel's attendance, the  
25 attorneys from the Pachulski Firm will be driving 1.5 hours to 3 hours each way to and from  
26

27 <sup>1</sup> I am not disclosing the identity of any of these attorneys or law firms as this might convey the  
28 impression that the purpose of this Opposition is to promote the retention of any  
particular firm.

1 Orange County depending on traffic. Paying \$850 per hour for a lawyer to sit in traffic is not a  
2 cost effective use of Estate assets, regardless of counsel's qualifications.

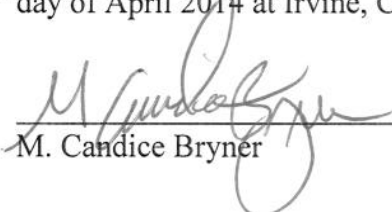
3 8. These same arguments hold true for the professionals at Berkeley Research  
4 Group, LLC. The Declaration of Adam Tenenbaum (Dckt # 45) identifies 17 professionals who  
5 may perform services on the case, and 7 professionals who are anticipated to do so. The 7  
6 professionals anticipated to work on the matter propose to bill out at hourly rates of \$600 and  
7 \$570 (for Directors Judd and Calder), \$390 and \$385 (for Managing Consultants Larsen and  
8 Troszak), \$285, \$280 and \$210 per hour (for Senior Associate Dahl, Consultant Ferrero, and  
9 Associate Kramer). The employment of so many professionals at such high hourly rates poses a  
10 significant risk that the funds recovered for the Estate will be drained to compensate these  
11 professionals.

12 9. I understand that it is often justifiable to charge a higher hourly rate to  
13 compensate counsel and/or professionals for the risk of not being paid. However, there are other  
14 ways to compensate professionals for such risks which will not deprive the creditors of the  
15 opportunity to recover the monies that they have lost. For example, in such cases, it may be  
16 appropriate for the attorney to represent the Trustee on a contingency basis. Depending on the  
17 nature of the risk, the attorney may recover a higher contingency percentage. Such  
18 compensation, at least ensures that not all funds recovered for the Estate will be paid to the  
19 professionals.

20 10. The Trustee also claims that any objection to the terms of retention or the hourly  
21 rates of the attorneys at the Pachulski Firm or the professionals at Berkeley is premature and  
22 should be postponed until after these professionals have already invested significantly more time  
23 into the case and submit their applications for compensation. However, the very purpose of  
24 filing an Application for Employment of Counsel is to provide the creditors or any other  
25 interested parties the opportunity to object to the terms of representation and/or compensation.  
26 Indeed, if the creditors did not object at this early stage to these proposed terms, they very likely  
27 would be later accused of having waived this issue.  
28

1 11. I have reviewed the Trustee's Declaration in support of his Reply in support of the  
2 Application to Employ the Pachulski Firm in which he suggests that creditor counsel Laurence  
3 Nokes' objection to the employment of the Pachulski Firm was not filed in good faith. I do not  
4 know Mr. Nokes at all, nor do I know the reasons that he filed an Opposition to the Trustee's  
5 Application to Employ Counsel other than what is stated in in his Declaration. However, based  
6 on his Declaration, I do not see how a creditor's concern that (based on the proposed hourly  
7 rates), it is likely that most of the funds recovered for the Estate will be drained to pay  
8 professionals who are billing at hourly rates substantially higher than other qualified attorney's is  
9 made in bad faith. I, too, share in these concerns expressed by Mr. Nokes and bring these issues  
10 to the Court's attention, not in bad faith, but due to a genuine desire to ensure that something will  
11 be left for the creditors to recover.

12 I declare under penalty of perjury under the laws of the United States of America that  
13 the foregoing is true and correct. Executed this 17<sup>th</sup> day of April 2014 at Irvine, California.

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16 M. Candice Bryner  
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## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled: **Notice of Opposition and Request for a Hearing** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 04/17/2014, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL:**

On (date) 04/17/2014, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☒ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) 04/17/2014, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

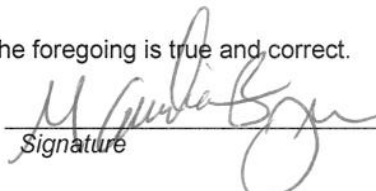
The Hon. Erithe A. Smmith, United States Bankruptcy Court - Central District of California (Santa Ana Div.)  
411 W. Fourth St., Suite 5040, Courtroom 5A, Santa Ana, CA 92701

☒ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

04/17/2014  
Date

M. Candice Bryner  
Printed Name

  
Signature

This form is optional. It has been approved for use in the United States Bankruptcy Court for the Central District of California.



TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING

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