Hearing Date: July 20, 2009 at 10:00 a.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	
COUDERT BROTHERS LLP,	:	Case Nos. 06-12226 (RDD)
	:	
Debtor.	:	
	:	

REPLY IN SUPPORT OF MOTION OF THE PLAN ADMINISTRATOR SEEKING ENTRY OF AN ORDER PURSUANT TO RULE 2004 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AUTHORIZING AND DIRECTING THE EXAMINATION OF STEVEN A. BECKER

The Plan Administrator responds as follows to the Objections of Becker and Baker & McKenzie ("Baker") both dated July 16, 2009 (ECF Docs. #1202, 1203)(the "Objections"):

1. Both Objections elevate form over substance and assert that Rule 2004 is an inappropriate method to obtain information relating to the issues with respect to the Former Coudert Clients.[1] In reality, the discovery sought by the Plan Administrator is focused on a very narrow issue (i.e., the contingency fees received by Baker and the status of expected future refunds) and not the broad "fishing expedition" discovery that generally takes place with Rule 2004 examinations. Nonetheless, although the Plan Administrator agrees that Rule 2004 is typically not employed where an adversary proceeding has been commenced, there are

[1] Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Motion.

compelling reasons (as set forth herein) why discovery on these matters should proceed in an expedited manner.[2]

2. Accordingly, given that: (i) Becker has now filed an answer to the Action commenced by the Plan Administrator[3]; (ii) Becker and Baker will be present at the July 20th hearing, and (iii) there are emergent and compelling issues (as set forth below), the Plan Administrator suggests that the Court treat the July 20th hearing as a Rule 16 conference on the Becker Action **and order expedited discovery** on the issues involved in the Black Lung Cases.

3. In Ayyash v. Bank Al-Madina, 233 F.R.D. 325, 326 (S.D.N.Y. 2005), Judge Lynch held that expedited discovery should be permitted where the plaintiff demonstrates good cause and when "it makes sense to examine the discovery request ... on the entirety of the record to date and the *reasonableness* of the request in light of all the surrounding circumstances." Id. (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor, 194 F.R.D. 618, 624 (N.D.Ill.2000)). Similarly, in Standard Inv. Chartered Inc. v. National Ass'n of Securities Dealers, Inc., 2007 WL 1121734 at 5 (April 11, 2007), Judge Kram echoed the "good cause" test and noted that "the intention of the [Federal Rules of Civil Procedure is] to confide the matter [of expedited discovery] to the Court's discretion, rather than to impose a specific and rather stringent test…" Id. (citing Ayyash at 326).

4. The Plan Administrator believes that there are three reasons that satisfy the "good cause" standard to order expedited discovery as follows:

A. Interests of Creditors

5. Since the inception of this case, the recoveries on account of the Special Contingency Fee Matters (as that term is used in the Disclosure Statement) have been a potential

[2] See In re Sun Med. Mgmt., Inc., 104 B.R. 522 (Bankr.M.D.Ga.1989)(permitting Rule 2004 examination to uncover possible fraud where adversary proceeding was pending but had not yet been answered); In re Analytical Sys., Inc., 71 B.R. 408, 413 (Bankr.N.D.Ga.1987) ("[t]he fact that there is pending litigation between the parties is not relevant to a decision to allow a Rule 2004 examination.").

[3] On July 13, 2009, Becker filed an answer in DSI v. Becker, Adv. Pro. No. 08-1426 (RDD) (the "Becker Action").

significant source of recovery to creditors.[4] The recovery of these fees will ensure a distribution to Coudert's creditors. Since April of this year, Baker has been and is continuing to receive payments from Former Coudert Clients (the total fees received by Baker to date are believed to be in excess of $5 million) and Baker has opted not to remit Coudert's portion to the Plan Administrator. The Plan Administrator does not believe that Baker has segregated these funds. Instead, it is simply pooling these receipts in its general operating account(s) and spending/distributing these funds as it deems appropriate.[5] Because the risk of non-recovery only increases the longer these issues remain unresolved, the Plan Administrator submits that discovery be expedited.[6]

B. Potential Compromises By Baker

6. An email from Becker on November 18, 2008 (the "Becker email") notes:

> As a result of the work this firm performed over the course of the past several years, and the resulting federal legislation signed into law recently, we are very pleased that the various coal producers and exporters represented by Baker have had the opportunity to file claims for refunds, with interest, of Black Lung Excise Taxes paid to the IRS.
>
> These refund claims go as far back as the 4th quarter 1990. Assuming that the maximum amount of taxes are properly and timely claimed and refunded, and assuming, further, that the clients pay Baker all of the contingent fees that are due, such fees may total as much as approximately $17 million, subject, however, to the potential reduction described below. These fees could be received within the next year.
>
> The Baker-Coudert agreement calls for the contingent fees to be allocated as follows:

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[4] The potential receipts from these cases has been a continuous issue in this case. As recently as November 26, 2008, Debtor's counsel indicated at a hearing (ECF Doc. #1114) that:
"Your Honor…I did want to inform the Court of a recent post-confirmation development which was good news for the estate. You'll recall, Your Honor, the Supreme Court decision in the Black Lung Excise Tax case … Congress has now reversed the Supreme Court…We received an e-mail from Mr. Becker, who is now at Baker & McKenzie. He's the partner in charge of these representations. And according to Mr. Becker the Coudert estate may see between 5 million and as much as 11 million dollars from its various clients as a result of this. So that is good news, and we're hoping that it will, in fact, produce a recovery, an enhanced recovery, for creditors of the estate."

[5] Baker's fiscal year ended on June 30, 2009. The $5 million in contingency fees coupled with Baker's position that it is not obligated to turn over any portion of such fees to Coudert no doubt elevated its profits per partner.

[6] Alternatively, the Court could issue an Order under Section 105(a) directing that Baker segregate and escrow all fees received by Former Coudert Clients until such time as the Court's determines the proper entitlement.

> 1) Baker first receives payment for its time charges in the computer (approximately $2.2M, with additional amounts accruing), plus an additional $30,000 or so for disbursements (Estimate $2.5M total);
>
> 2) Baker and Coudert split equally the next $7 million;
>
> 3) Coudert receives all of the remaining proceeds, which may amount up to an additional $7.5 million.

See Exhibit "B" to Motion.

7. As noted by Becker, the total contingent fees received by Baker may amount to $17 million and was close to $5 million as of June 30, 2009. The $12 million shortfall is caused, in part, by one or more Former Coudert Clients which have refused to honor the engagement/retention agreement.[7] See Becker email. These non-paying Former Coudert Clients may be current clients of Baker on other engagements. As a result, there exists a real possibility that Baker has or will settle those potential fee disputes for a nominal sum without any input from the Plan Administrator.[8] This could cost the estate millions. Because Becker is aware of the position taken by each of the Former Coudert Client, his deposition is critical in order to determine whether the Plan Administrator should be: (i) commencing a turn over action against the non-paying Former Coudert Clients who received refunds; and/or (ii) seeking injunctive relief against Baker.

C. Integrity of the Process

8. The actions of Baker are completely at odds with page 31 of the Disclosure Statement[9] (which Becker edited and approved):

> [l]egislation has been introduced in the Congress…which would mandate refunds, with interest, of Black Lung Excise Tax principal in a total amount approximating the amount sought in the litigation….If this legislation is passed, Coudert would

[7] It is also believed that the shortfall is caused because the IRS has not agreed to the amount of certain claims.
[8] This concern is particularly acute if Baker believes (despite what it argues) that Schedule 2.5(c) does apply and it will receive no additional fees after total recoveries on the Black Lung Cases reach $9.5 million.
[9] Because it filed a proof of claim in this case (Claim #279), Baker received the Disclosure Statement.

> currently expect to recover in the area of $13 million in fees in this matter; however, there is no assurance that the proposed legislation will be passed.

Disclosure Statement at 31 (ECF Doc. #694).

9. In addition, the actions of Baker are completely at odds with the Becker email. Baker's position is premised on the argument that its agreement with Coudert only applies to fees recovered on the Black Lung Cases (which it argues are limited to fees recovered from the actual cases that were filed in the United States Court of Federal Claims).

10. Baker's reading of the Agreement is completely erroneous for at least two reasons. First, the definition of "Black Lung Cases" means "collectively, those actions brought on behalf of numerous US coal producers to obtain refunds of the Black Lung Excise Tax …**In addition to refunds that have been and will be issued in response to filings with the IRS of administrative claims,** the following court cases have been commenced….." See Exhibit "A" to Motion (emphasis supplied). Accordingly, Black Lung Cases are defined as "actions brought on behalf of clients to obtain refunds" which include such actions as filing refund claims (which is the specific action that has resulted in Baker recovering over $5 million to date) and are not limited to specific cases.

11. Second, paragraph 8 of Schedule 2.5(c) notes that if Baker:

> retains any co-counsel, local counsel, **lobbying firm**, or similar party compensated on a contingent basis in connection with any of the Contingency Fee Cases and the terms of such retention entitle such party to a share of the proceeds in such Contingency Fee Case materially in excess of the share customarily provided under similar arrangements entered into by Coudert… then Baker will be required to absorb any such excess out of its shares of the proceeds of any judgment, settlement **or other resolution**.[10]

(emphasis supplied). If Baker's position were correct that Black Lung Cases is limited to specific cases and did not include recoveries through legislation, why did paragraph 8

[10] Ironically, it is believed that Baker never sent a new engagement letter to the Coudert Former Clients following the transfer of these matters from Coudert to Baker. Accordingly, the original Coudert engagement letter is the operative document upon which Baker has received its contingent fees.

specifically note that compensation to a lobbying firm would be paid from the proceeds of any resolution?

12. Finally, the Plan Administrator believes that Baker has already paid a very large sum (from the contingency fees it has received) to Akin Gump for its efforts last year in arguing the Clintwood Elkhorn case before the Supreme Court. It is disingenuous at best for Baker to pay Akin Gump for its efforts and then tell Coudert that it is not obligated to turn over a cent because the recoveries were not on account of the "Black Lung Cases."

13. The Plan Administrator believes that the Becker email (and certain other actions of Becker) are binding admissions on Baker.[11] As a result, Becker is the most appropriate person to testify under oath.

14. Finally, in response to Baker's statement that the Motion is premature and that "it has repeatedly **signaled** its willingness to provide the Administrator with additional information" and "**engage** in a dialogue with respect to these matters" (see Baker Opposition at 3 (emphasis supplied)), the Plan Administrator believes that any such dialogue should be under oath in light of the positions taken by Baker.

15. For the reasons indicated above, the Plan Administrator believes it has satisfied the "good cause" standard that has been adopted by the Southern District of New York. See Ayyash v. Bank Al-Madina, 233 F.R.D. 325, 326 (S.D.N.Y. 2005); Standard Inv. Chartered Inc. v. National Ass'n of Securities Dealers, Inc., 2007 WL 1121734 at 5 (April 11, 2007). Accordingly, the Court should order expedited discovery on the issues identified in Exhibit "A" to the proposed order.

[11] See Partnership Law §22. See also Vogt v. Tully, 53 N.Y.2d 580 (1981)(admissions or representations made by a partner within scope of his authority may be used against the partnership).

CONCLUSION

WHEREFORE, due to the compelling and time sensitive issues identified herein, the Plan Administrator respectfully requests that the Court authorize expedited discovery and direct Becker to respond to the Document Requests identified in Exhibit "A" to the Proposed Order by August 7, 2009 and submit to a deposition under oath by August 10, 2009.

Dated: July 19, 2009
New York, New York

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