

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Eighth Interim Fee Application (“Eighth Application”) of Simpson, Thacher & Bartlett (“STB”), attorneys for Richard C. Breeden as trustee in the consolidated case (“Trustee”). The Eighth Application seeks payment of professional fees in the amount of \$2,173,602 and reimbursement of expenses in the amount of \$201,397 incurred during

the period July 1, 1998 through October 31, 1998.<sup>1</sup> This Eighth Application was submitted to Stuart, Maue, Mitchell and James, Ltd. (“Fee Auditor”) in accordance with the Court’s Amended Order dated December 2, 1996, regarding Fee Applications subject to review by the Fee Auditor (“Amended Order”). The report of the Fee Auditor (“Auditor’s Report”) was filed with the Court on March 11, 1999. The Eighth Application came on for a hearing before the Court on May 13, 1999, at which time the Court approved a provisional award of \$1,500,000 in fees and \$150,000 in expenses to STB. Opposition to the Eighth Application was interposed by the United States Trustee (“UST”) and the Official Committee of Unsecured Creditors (“Committee”).

#### JURISDICTIONAL STATEMENT

The Court has core jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(A) and (O).

#### FACTS, ARGUMENTS AND CONCLUSIONS

Familiarity with the prior decisions of this Court which dealt with the first seven fee applications of STB is presumed and they will be referenced herein to the extent necessary.<sup>2</sup>

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<sup>1</sup>STB adjusted its fee and expense request as reflected on Exhibit A attached to its Response to Objections to Fee Auditor’s Review and Analysis of to the STB’s Eighth Interim Fee Application filed March 29, 1999 (STB’s “Response”). The net adjusted fee is \$2,173,355.50 and the adjusted expense total is \$200,999.03

<sup>2</sup> The Court entered Memorandum-Decisions, Findings of Facts, Conclusions of Law and Order dated February 5, 1997, August 13, 1997, March 20, 1998, August 6, 1998, November 16,

The Auditor's Report generally identifies entries in STB's time records offered in support of the Eighth Application as falling into seventeen general categories which "Appear to Violate Court Guidelines." In addition, the Auditor's Report isolates approximately seventy-eight much more specific and limited categories or tasks which it calls to the Court's attention for further review and analysis.

As indicated, STB provided specific replies to the Auditor's Report in its Response. In that Response, STB indicates that it voluntarily reduced the Eighth Application by the net sum of \$247.00, which was the result of inadvertent double billing entries and adjustments for travel time. STB has also conceded that its expenses should be reduced by \$398.41.

STB again challenges the Auditor's Report insofar as it identifies "Multiple Professionals at Events," "Claimed Administrative or Clerical Tasks and Paralegal Activities," "Travel Time," and "Blocked Billing Entries," making many of the same observations that it has made previously in criticizing the Auditor's Reports relating to its First through Seventh Fee Applications. Those criticisms need not be reiterated an eighth time in this decision.

With regard to the seventy-eight more specific categories identified by the Fee Auditor which "The Court May Wish to Examine for Relevance Necessity and Reasonableness," STB focuses its Response on the Fee Auditor's "Firm Staffing" to include "Long Billing Days," as well as "Intra-Office Conferences," and "Fee Applications." With regard to the "Long Billing Days" referred to in the Auditor's Report, STB offers no new explanation as to the length of these

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1998, June 1, 1999 and April 11, 2000. STB moved to reconsider the Order of August 13, 1997 and on February 9, 1998, the Court entered a Memorandum-Decision, Findings of Fact, Conclusions of Law and Order reconsidering that Order. Familiarity with that Memorandum-Decision is also presumed.

days. *See* STB’s Response to Fee Auditor’s Review and Analysis of Eighth Interim Fee Application (“STB Response”), ¶ C.1 at 12.

The Auditor’s Report identifies a total of 290.40 hours being consumed on these “Long Billing Days” for which a fee of \$80,745 is requested. (*See* Fee Auditor Report, Ex.K). In this current Eighth Application, as indicated, STB cites no particular event or circumstance that would warrant such long billing days. It simply declares, as it has in prior applications, that “[t] there is nothing wrong, or suspect, about working hard.” *See id.* As STB offers no explanation for these long billing days, the Court will reduce those fees associated with these so called “long billing days” by twenty-five percent or \$20,186.25. In doing so the Court has been careful not to exclude those same hours under other categories of services identified in the Auditor’s Report which were performed on the long billing days.

The Court once again considers STB’s time devoted to “Multiple Professionals at Events,” “Intra-Office Conferences,” and “Administrative” or “Miscellaneous Clerical Tasks”. Having written seven prior decisions dealing with each of the foregoing categories, the Court will not reiterate the basis for its adjustments except as set forth below.

#### Multiple Professionals at Events<sup>3</sup>

As reflected on Fee Auditor’s Exhibit B-1 - disallow \$9,364.

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<sup>3</sup> Much of the time disallowed on Exhibit B involved the multiple attendance of STB partners and associates at depositions, court hearings and meetings with the Trustee and the U.S. Trustee.

### Intra Office Conferences<sup>4</sup>

As reflected on Fee Auditor's Exhibit M-1 - disallow \$5,372.

### Administrative and Miscellaneous Clerical Tasks

As reflected on Fee Auditor's Exhibits C-1, C-5, and V-2, specifically Exhibits C-1, Filing/Organizing/Retrieving; C-5 Miscellaneous Clerical Tasks; and V-2, Transfer of Files to Saperston and Day, a combined disallowance, \$76,131.50. While the Court appreciates STB's contention that many of these tasks "entail the very essence of the para professional work that Simpson Thacher paralegals perform," the Court believes that many of these tasks are purely clerical requiring absolutely no formal training in the law, para professional or otherwise, and it cannot justify charging the creditors in this case tens of thousands of dollars because STB may choose to bill private clients in a similar fashion for these tasks.<sup>5</sup> In addition, the Court cannot justify charging the creditors for "Transfer of Files to Saperston & Day." The Court interprets this description to mean that STB is charging creditors at para-professional hourly rates for the simple task of organizing and placing avoidance action files into a box. The Court cannot justify such a charge.

### Fee Application

The Eighth Application seeks total fees of \$36,004.00 in connection with preparation and

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<sup>4</sup> Time disallowed on Exhibit M-1 resulted from intra-office conferences generally between three or more timekeepers, which in the Court's experience and familiarity with this case was an unnecessary overutilization of personnel.

<sup>5</sup> For example, voluminous entries described simply as "Reviewed and Organized Important Documents" and "Update Important Papers."

defense of STB's fee applications. The Court will disallow \$34,000.

Assist in Preparation of Documents and Assist in Service of Documents

The Fee Auditor identifies 254.40 hours which amount to \$24,701 which STB attributes to "Assist in Preparation of Documents" and 248.80 hours or \$23,829 which STB attributes to "Assist in Service of Documents." *See* Fee Auditor's Exhibit D-1 and D-2. The Court's Amended Order Appointing Fee Auditor and Directing Related Procedures and Standards Concerning the Interim Payment of Compensation and Consideration of Fee Application dated December 2, 1996 ("Court Guidelines") specifically states the following: "At a minimum, the task description should identify each service separately and in sufficient manner to permit the Court to ascertain the benefit derived from such service, and the time expended for each item of service." *See* Court Guidelines ¶ 9(a).

After reviewing Exhibits D-1 and D-2 of the Auditor's Report, the Court is unclear how STB personnel "assisted" in the preparation or the service of documents. Those narrative descriptions contained in Exhibits D-1 and D-2 are exceptionally vague. So vague, in fact, that the Court is compelled to conclude that the work described required no professional or para professional judgment. As these tasks required no professional or para professional judgment, these tasks should have been completed by clerical staff whose fees would have been incorporated in those expenses associated with overhead. Accordingly, those fees associated with assisting in preparation of documents will be reduced by \$15,035 and those fees associated with assisting in service of documents will be reduced by \$12,844.50. However, the Court makes these adjustments pending a further explanation by STB concerning these hours.

Lady Kathleen

The Court will once again disallow a fee of \$1,056 which is attributable to services rendered in connection with the yacht referred to as the Lady Kathleen which the Court has previously concluded was not an asset of the consolidated estate. (Fee Auditor's Exhibit Q-4).

Shamrock Holdings Group, Inc.

The Fee Auditor has identified 23.5 hours devoted to professional services rendered on behalf of "Harold's Club," a Shamrock Asset. (See Fee Auditor's Exhibit O-3). This work reflects a fee request of \$11,821. In addition, the Fee Auditor has isolated 81.90 hours for fees totaling \$32,892 as devoted to General Shamrock Bankruptcy matters. (See Fee Auditor's Exhibit V-7). Both the Committee and the UST contend, as they have in the past, that these services should not be billed to the creditors of this estate.

As in its response to criticism of its Seventh Interim Application, STB reminds the Court that the Trustee of these consolidated estates owns 100% of the stock of Shamrock and, therefore, is the beneficial owner of Harold's Club. As such, STB argues, its services clearly benefit these bankruptcy estates.<sup>6</sup> In addition, STB, again, cites to *In re Guyana Development Corp.*, 201 B.R. 462, 473 (Bankr. S.D. Tex. 1996) for the proposition that because the Trustee has effectively administered the estate, specifically with regard to the various assets of the estate, STB should be paid the above noted fees. After a review of the *Guyana* case, the Court finds that case is easily distinguishable from the instant matter. In *Guyana*, the Trustee was seeking compensation

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<sup>6</sup> On June 17, 1998, the firm of Phillips, Lytle, Hitchcock, Blaine & Huber, LLP ("Phillips Lytle") was appointed by Order of this Court to represent Shamrock.

for his activities on behalf of the estate. He was administering assets of the estate and that court did not indicate that there was a separate estate for the subsidiary. As Phillips Lytle had been appointed to represent Shamrock as counsel to the Debtor in that case, the Court finds no reason that STB should have been performing any work on behalf of that debtor. As a result, the Court will disallow \$43,226. The amount represents all fees associated with work performed with regard to the Shamrock estate during the period covered by the Eighth Application.

### Depositions

According to the Auditor's Report, the instant application includes 123.2 hours and \$34,443.50 in fees devoted to depositions. *See* Auditor's Report at 29. As was the case with the Seventh Application, the Court will make no disallowance in the Eighth Application, but again emphasizes that any fee awarded in this regard is subject to being adjusted in the future if determined to be warranted.

### Conflict of Interest

Both the UST and the Committee have again restated their objection to approval of fees that relate to STB's services rendered to two non-debtors, Equivest Finance, Inc. ("Equivest") and Resort Funding, Inc. ("RFI"), as well as services provided to the Trustee which they assert were of a personal nature.

The Fee Auditor has identified these so-called conflict issues primarily on four exhibits: Exhibit Z-1, STB Conflicts Check; Exhibit Z-2, First Star Transaction Disclosure; Exhibit Z-3, STB Supplemental Disclosures of Potential Conflicts; and Exhibit Z-4 Trustee/Deloitte

Consulting Agreement. These four exhibits reflect a total of 305.1 hours and \$73,042. As it has in the past, the Court, rather than analyzing each of these alleged conflicts, will, with the exception of Exhibit Z-2 and Exhibit Z-4, simply award the requested fees without prejudice to the rights of either the UST or the Committee or any other party in interest seeking disgorgement of said fees and expenses at a later point in time based on an alleged conflict of interest.

As to Exhibits Z-2 and Z-4, however, the Court finds little justification for charging the creditors of the estates with \$38,335.62 of legal fees incurred primarily to defend the Trustee's initially undisclosed agreement to work for Deloitte & Touche (USA), LLP as a consultant outside the scope of his appointment by this Court as Trustee for these Estates.

With regard to the remaining objections asserted by the UST and the Committee, the Court has considered the same in light of STB's Response to the objections of the UST and the Committee and as indicated above has determined to make no further adjustments to the Eighth Application based upon those objections in connection with this Application.

#### Use of Paralegals

In addition to the specific disallowance of paralegal or paraprofessional time herein, the Court notes that both the UST and the Committee continually object to what they contend is the overuse of paralegal/paraprofessionals to perform "clerical and administrative tasks" while billing the estate \$100 per hour on average. (*See* Objections of the UST Filed April 22, 1999 at ¶ 12).

STB responds by asserting that the Fee Auditor has mischaracterized many of the hours attributable to paralegal/paraprofessionals. The Court reserves to itself the ultimate decision on whether the creditors of this estate should bear this expense because STB chooses,

notwithstanding how it bills private clients, to routinely utilize paralegal/paraprofessionals to perform such tasks. The Court makes no adjustment at this time.

### Expenses

The Fee Auditor has identified \$517.85 in unreceipted travel and meal expenses. STB's Response provides at Exhibit B copies of receipts which appear to satisfy this criticism.

The instant Eighth Application again seeks reimbursement for expenses identified as "Word Processing," "Proofreading," "Desktop Publishing," "Overtime Transportation," "Overtime Meals," and "Restaurant/STB Cafeteria." These expenses total \$34,431.99 and shall be disallowed consistent with prior decisions.

In summary, the Court makes the following reductions to fees and expenses sought in the Eighth Application:

<u>Total Requested Fees</u> (as adjusted)_____	\$2,173,602.00
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### Disallowances:

Long Billing Days	20,186.25
Multiple Professionals at Events	9,364.00
Intra Office Conferences	5,372.00
Administrative and Clerical Tasks	76,131.50
Fee Application	34,000.00
Assist in Preparation and Service of Documents	28,494.00
Lady Kathleen	1,056.00
Shamrock Bankruptcy	43,226.00
Conflicts of Interest	38,335.62
Provisional Fee Award granted on May 13, 1999	\$1,500,000.00

<u>Net Total Fee Allowed</u>	\$ 417,436.63
<u>Total Requested Expenses (as adjusted)</u>	\$ 201,397.00
<u>Disallowances:</u>	
Office Overhead	34,431.99
Provisional Expense Award pursuant to Order dated May 13, 1999	150,000.00
<u>Net Total Expenses Allowed</u>	\$ 16,965.01

Based on the foregoing, it is

ORDERED that the fees and expenses requested by STB in its Eighth Application shall be allowed and disallowed as detailed above; and it is further

ORDERED that payment of the remaining balance of allowed fees and expenses totaling \$434,401.64 shall not be made from encumbered assets of the consolidated Estates.

Dated at Utica, New York

this 12th day of July 2000

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge