

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

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 Trustee in these consolidated cases, Richard C. Breeden, has filed an Eighth Interim Application for an Order Allowing Interim Compensation and Reimbursement of Expenses (“Eighth Application”). The Eighth Application initially appeared on the Court’s calendar on November 12, 1998, and was consensually adjourned to December 3, 1998.

On December 3, 1998, the Court heard argument from the Trustee, the United States Trustee (“UST”), the Official Committee of Unsecured Creditors (“Creditors Committee”), as well as counsel for several bank creditors both in support of and in opposition to the Eighth Application.

The focus of most of the written objections and oral argument was not on the Eighth Application per se, but on the Trustee’s request contained therein for “an additional provisional payment of interim compensation” in the sum of \$500,000 (“special adjustment”).

Following argument, the Court requested that the parties file memoranda of law by December 31, 1998, and, thereafter, the Court agreed to issue a written decision.

JURISDICTIONAL STATEMENT

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

FACTS AND ARGUMENTS

On January 9, 1997, this Court issued a Memorandum-Decision, Findings of Fact, Conclusions of Law and Order (“January 9th Order”) which established a procedure whereby the Trustee of these consolidated cases was to be compensated during their pendency of the Chapter 11 case. *See In re Bennett Funding Group, Inc.*, 213 B.R. 227 (Bankr. N.D.N.Y. 1997). Pursuant to that Order, the Trustee was to receive the sum of \$600,000 annually (\$50,000 per month) plus out of pocket expenses not to exceed \$3,500 per month, which compensation was then subject to the Trustee filing quarterly applications for review by creditors and approval by this Court. Since his appointment, the Trustee has received \$1,215,000 in personal compensation.¹

In support of the special adjustment, the Trustee contends that as of December 11, 1998, he has collected \$393,715,000 and has distributed \$312,669,000, \$259,000,000 of which has been distributed since the January 9th Order. The Trustee also forecasts that as the result of a nearly consummated settlement with the Italian insurer, Assicurazioni Generali, S.P.A. (“Generali”) and an initial public offering of stock in Equivest Inc. (“Equivest”), which stock is owned by the consolidated estate, he will shortly realize approximately an additional \$225,000,000. Pursuant to a proposed plan of reorganization, the Trustee predicts that by the end of 1999 he will have distributed an additional \$200,000,000 to unsecured creditors. *See* Trustee’s Submission in Support of Trustee’s Eighth Interim Fee Application dated December 18, 1998 (“Trustee’s

¹ This amount is exclusive of any reimbursement for expenses. The Court notes that according to the UST, the Trustee has allegedly received in excess of \$1,315,000. *See* Objection of the UST dated November 20, 1998 (“UST Objection”), at 5 n.1.

Submission”), at 2 n.2.² The Trustee asserts that should the Court approve the Eighth Application , as well as the special adjustment, he will have been paid to date “approximately .4 of 1% of distributions already made to parties in interest.” *See* Trustee’s Response to the Objections of the United States Trustee to the Trustee’s Eighth Interim Fee Application dated December 2, 1998 (“Trustee’s Response”) at 2.

The Trustee also points to the uniqueness of this Chapter 11 case, describing it as the “bankruptcy equivalent of the Black Hole of Calcutta” and observing that out of such chaos “has come a case that in almost record time has returned tens of millions of dollars to unsecured creditors.” *See id.*

While the Creditors Committee neither objects to nor supports the Trustee’s request for a special adjustment, counsel for the various banks and other creditors raised several objections, including the lack of a plan and disclosure statement (now apparently moot), questionable inclusion of distributions to secured creditors as a basis for awarding any compensation to the Trustee under Section 326(a) of the Bankruptcy Code (11 U.S.C. §§ 101-1330)(“Code”), the as yet unconsummated Generali settlement and Equivest stock offering, the commencement of questionable and costly litigation by the Trustee against approximately 9,000 investor-creditors and an additional 1,100 adversary proceedings commenced against vendors and trade creditors, as well as alleged conflicts of interest resulting from the Trustee’s attention to the affairs of Equivest and Resorts Funding Inc. (“RFI”) two non-debtor companies.

The UST has strenuously objected to the special adjustment contending that there is

² On December 31, 1998, the Trustee in fact filed a Plan of Reorganization with the Clerk of this Court.

neither a reasonable basis nor legal authority for such compensation. He accuses the Trustee of “camouflaging” his request by including it within the Eighth Application rather than making a stand alone request and suggests that it should be subject to scrutiny by the Court appointed Fee Auditor.

The UST asserts that if the Trustee cannot support himself on the current compensation of \$600,000 annually, he should provide personal financial information from which the Court can make an appropriate analysis before awarding a special adjustment.

The UST reminds the Trustee that this court rejected the premise that it should award interim compensation to him based upon the formula found in Code § 326(a), citing the January 9th Order. Thus, argues the UST, the Court should ignore as irrelevant the relationship of the Trustee’s compensation to date to the actual distributions made to creditors. The UST points out that the amount of time the Court anticipated would be expended by the Trustee in its January 9th Order is still fairly accurate and the Trustee’s time would be better spent filing a plan and closing the case rather than seeking additional compensation which will be finally awarded at the end of the case.

The UST, relying on his own numbers, argues that to date “the Trustee’s appointed professionals have either billed or incurred fees in excess of \$30 million” and the “combined fees of Mr. Breeden and his professionals (exclusive of expenses aggregating in the millions of dollars) equate to 63% of the \$50 million distributed to the unsecured creditors.” *See* UST’s Objection at ¶¶ 38 & 39.

Finally, the UST intimates that potential overpayment to the Trustee should be seriously considered in light of the Trustee’s recent inability “upon information and belief” to disgorge

approximately \$160,000 to Deloitte & Touche (USA) as directed by the Court. *See id.* at ¶ 42.

The Trustee cites legal authority in support of the premise that this Court has wide discretion in awarding interim compensation to trustees and points to case law in which bankruptcy courts have fashioned various methods of arriving at the appropriate level of that compensation. Characteristically, the UST then attempts to distinguish the cases relied upon by the Trustee from the instant consolidated cases. Significantly, none of the parties cite to any authority which either supports or rejects the “special adjustment” sought herein.

DISCUSSION

Once again it appears that this Court is faced in these consolidated cases with the consideration of an issue for which there is little, if any, precedent. On the one hand, we meet the Trustee who argues to the Court that given his exemplary effort and his almost certain entitlement to a commission approximating many millions of dollars pursuant to Code § 326(a), he should not be financially penalized by being forced to plod along to the conclusion of these cases in return for a mere \$600,000 per annum.

Lined up across the courtroom are the opposing forces led by the UST who attempts to portray a much less optimistic picture of the Trustee and his efforts to date suggesting that the Trustee is engaging in somewhat of a “smoke and mirrors” exercise. When the smoke clears, one is left with the reality that to date the unsecured creditors have enjoyed an actual distribution of only \$36 million, albeit that in the vast majority of chapter 11 cases unsecured creditors see not dollar one until confirmation of a plan.

The Trustee, in seeking the special adjustment, is requesting that the Court “exercise its inherent discretionary powers to recognize in only a very small manner the Trustee’s distributions to creditors to date.” *See* Trustee’s Submission at 2. Code § 331 permits the Court to award interim compensation to the Trustee. Code § 330 requires that the compensation awarded be reasonable, and Code § 326 sets the maximum for such compensation based upon monies disbursed in the case. As noted in this Court’s prior decision, a trustee may be compensated “in the early stages of the case without regard to a percentage of funds actually disbursed.” *The Bennett Funding Group, Inc.* at 231 (citations omitted). It is on that basis that the Court made a provisional monthly award of \$50,000 to the Trustee, beginning in January 1997. To date, the Trustee has received payments totaling \$1,215,000.

As was noted by the Tenth Circuit Court of Appeals in *In re King Resources Company*, 651 F.2d 1349 (10th Cir. 1981),

Compensation is the lubricant which makes the bankruptcy machinery work when applied in the proper places in the proper amount. The expectation of compensation and the “right” to compensation of those who perform valuable services based on the provisions of the statute is . . . a substantive matter.

Id. at 1352 (as cited by *In re New Life Fellowship, Inc.*, 198 B.R. 813, 815 (Bankr. W.D.Okl. 1996)).

In support of his request for a special adjustment, the Trustee directs the Court’s attention to a variety of benchmarks in the case which have occurred as a result of his efforts:

- 1) Formulation of a plan and disclosure statement and liquidating trust agreement;
- 2) Distribution of approximately \$312,669,000 in cash to banks, individual

investors, vendors and other parties in interest;³

- 3) Negotiation and settlement with Generali for \$125 million, subject to approval by this Court and the U.S. District Court for the Southern District of New York;
- 4) Liquidation of sixteen major assets for \$76.5 million, including “Mountaineer Gaming (\$11.2 million and climbing), Hotel Syracuse (\$16 million), the Speculator (sold twice, once for \$10.7 and the second time for \$8 million, subject to Court approval), Aroostock Mall (\$25.4 million), [and] the Mississippi Gold Shore casino (\$5.7 million)” *See* Trustee’s Response at 7;
- 5) Preparation for an underwritten public offering to sell the Estate’s interest in Equivest, which has involved “directing the overall business development of Equivest.”⁴ *See* Eighth Application at 12.

In determining whether to make a “special adjustment” to the Trustee’s compensation, as he describes it, it is necessary that the Court examine the totality of the circumstances. In this case, it is evident to the Court that the Trustee has performed necessary and valuable services on behalf of the Estate since his appointment almost three years ago as identified above. Of particular note is the \$50 million in interim distribution made to the unsecured creditors (granted that some of the monies were held in escrow pending resolution of claims). While the Trustee indicates that he has actually disbursed more than \$312 million, the amount of monies disbursed in the case and the method by which they were calculated for purposes of applying the formula

³ This includes a \$50 million interim distribution to unsecured creditors which was approved by the Court at a hearing on July 8, 1998, and memorialized in an order signed August 4, 1998. Actual distribution, according to the Trustee, was approximately \$37 million with the balance placed into escrow accounts pending “outstanding claims issues.” *See* Trustee’s Response at 9 n.5.

⁴ According to the Trustee, in 1995 Equivest had a net loss and for the first six months of 1998 reported \$4 million in pretax income. Under the Trustee’s direction, it is alleged that Equivest’s net worth has increased from \$4 million in January 1997 to more than \$50 million. *See* Eighth Application at 13.

set forth in Code § 326 is not an issue which the Court wishes to address at this time.⁵ The Court is inclined to maintain a level of compensation to the Trustee which is well below the maximum he may ultimately seek “in order to continue to provide an incentive to trustees to disburse and close cases as quickly as possible and in order to prevent the likelihood of disgorgement [sic] of any excessive interim compensation.” *In re Heatherly*, 179 B.R. 872, 875 (Bankr. W.D.Tenn. 1995). Applying the formula set forth in Code § 326(a), he would be entitled to a maximum of \$1.5 million based on the \$50 million in disbursements to the unsecured creditors. To date he has received \$1.215 million. The Court, therefore, finds it appropriate and reasonable to grant the Trustee’s application for a special adjustment to the extent of awarding him a one-time payment of \$285,000 to be credited against any amount he is finally awarded under Code § 326(a).

Based on the foregoing, it is hereby

ORDERED that the Trustee’s request for a special adjustment, as set forth in his Eighth Application, is granted to the extent of a one-time payment of \$285,000, to be paid from otherwise unencumbered funds of the Consolidated Estate and credited against any amount finally awarded pursuant to Code § 326(a), and it is further

ORDERED that the balance of the Eighth Application is approved subject to the rights of parties in interest to renew their objection at the time the Trustee seeks a final award of compensation pursuant to Code § 326(a).

⁵ Based on the opposition raised in connection with this and other applications made by the Trustee, there is little doubt that such issues should be preserved and will present themselves again for argument when the Trustee seeks final compensation. The Court agrees with the Trustee that his request for a special adjustment should not “become a vehicle for debating the final award to the Trustee.” *See* Trustee’s Submission at 2.

Dated at Utica, New York

this 11th day of February 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge