

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 Court considers herein the Third Interim Fee Application (“Third Application”) of Coopers & Lybrand L.L.P. (“C&L”), accountant and financial advisor to Richard C. Breeden as trustee in the consolidated case (“Trustee”).

The Third Application seeks payment of professional fees in the amount of \$1,728,983

and reimbursement of expenses in the amount of \$106,619 incurred during the period December 1, 1996 through April 30, 1997. The Third Fee Application was submitted to Stuart, Maue, Mitchell & 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.¹ The report of the Fee Auditor (“Report”) was filed with the Court on July 30, 1997 and argument on the applications was held on August 12, 1997, at which time the Court awarded C&L a provisional award of \$450,000 on the Third Application. The Court then reserved on the balance of the Third Application as of that date.

JURISDICTIONAL STATEMENT

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

FACTS AND ARGUMENTS

This Court previously entered two Memorandum-Decisions, Findings of Fact, Conclusions of Law and Order (“Memo Decisions and Orders”) in the jointly administered case

¹ The Order of October 15, 1996 appointed the Fee Auditor in the Bennett cases. That appointment was not extended to the Aloha cases. On December 2, 1996, the Court amended the October Order.

in connection with C&L's first two interim fee applications.² Familiarity with those two Memo Decisions and Orders is presumed and they will be referenced herein only to the extent necessary.³

In considering the Third Application, the Court will focus on the Report, together with the Reply to Report filed by C&L on August 5, 1997 ("Reply"), as well as the Objections of the United States Trustee ("UST") and the Official Committee of Unsecured Creditors ("Creditors Committee"), filed August 1, 1997 and August 7, 1997 respectively.⁴

C&L's Reply to the Report criticizes it in several areas asserting generally that the Fee Auditor ignored the impact of C&L's voluntary fee reductions totaling \$122,662 and that the Fee Auditor erroneously included the same time entries in more than one category of proposed disallowance due to alleged violation of Court guidelines. The Reply also challenges areas of specific criticism contained in the Report with regard to both time entries and expense reimbursement.

C&L has also responded to the UST's Objections which, while adopting the criticisms of the Fee Auditor, focus primarily on what it asserts was some \$79,651 being charged by C&L for administrative/clerical tasks as well as significant overstaffing and double billing for office conferences and exorbitant charges in connection with preparation of its fee application. A

² By Order dated July 25, 1997, the Bennett and Aloha jointly administered cases were substantively consolidated into a single case.

³ The Court's Memo-Decision and Order pertaining to C&L's First Interim Fee Application is dated February 5, 1997, while the Memo Decision and Order pertaining to the Second Interim Fee Application is dated August 13, 1997.

⁴ C&L also filed a Reply to the objections of the UST and the Creditors Committee on August 12, 1997.

response has also been interposed to the Objections of the Creditors Committee which focus primarily on what the Creditors Committee asserts is the misuse of C&L personnel to operate the day-to-day business of the Debtors, excessive billing generally to include an average hourly rate that exceeds the composite rate proffered by C&L in seeking appointment, \$76,651 in administrative/clerical billings and excessive billings in connection with the preparation and defense of its fee applications despite a voluntary reduction by C&L.

C&L in its Reply to the UST and the Creditors Committee challenges both entities criticism of what the Fee Auditor identifies as Administrative/Clerical Tasks performed by C&L. Distilling C&L's responses to both the UST and the Creditors Committee, it relies on what it refers to as "bank litigation" which for the most part occurred during the instant application period, C&L contends that the bank litigation required the performance of numerous tasks on the part of C&L personnel which were mischaracterized by the Fee Auditor as administrative but which were, in fact, substantive in nature. As to criticism of time consumed in the fee application process, C&L asserts that both the UST and the Creditors Committee overlook the voluntary reduction of \$122,662 taken by C&L which represents an amount in excess of a voluntary 5% cap on total fees incurred. It also argues that the time devoted to the preparation of the fee application was necessitated by the unclear nature of the Report which led to C&L having to review, analyze and resubmit information to the Fee Auditor.

With regard to overstaffing and its excessive composite hourly rate alleged by both the UST and the Creditors Committee, C&L responds that it reduced its staff, a core team of professionals, and, in fact, during the current application period it has sharply reduced the number of personnel committed to the Bennett cases as compared to its first two fee applications. C&L

also dispute the composite hourly rate calculated by the UST and the Creditors Committee, asserting that the rate is actually \$233.60 per hour when one considers C&L's voluntary reductions and the inclusion of time consumed by associates and paraprofessionals. Once again C&L disputes the UST's criticism of double billing for intra-office conferences for which the Report computes a total fee of \$22,579.50. C&L argues that due to the complexity of the assignment, these conferences, which were attended by numerous C&L personnel, were a critical component of managing the process.

Finally, C&L defends its role in providing services to Resorts Funding Inc. ("RFI"), a non-debtor, which was objected to by the Creditors Committee. C&L argues that it was acting at the request and in the interest of the Trustee as RFI, was acknowledged to be the Trustee's most important and valuable ongoing business.⁵

DISCUSSION

The general discussions contained in the Court's first two Memo-Decisions and Orders are incorporated by reference herein to the extent they are pertinent to the Court's conclusions.

Duplicate Double Billing Entries

The Fee Auditor identifies a number of entries which appeared to be duplicate or double billings for the same services. Upon review of the Fee Auditor's Report and the amended

⁵The Court notes that this Report does not separately identify time devoted by C&L to RFI. In fact, C&L indicates that the majority of its activities at RFI took place during the summer and early fall of 1996, the period covered by C&L's Second Interim Application.

explanation attached to C&L's Reply to Report of Fee Auditor, filed August 5, 1997, C&L agrees that 9.7 hours or \$1,504.50 of fees represents over billings; C&L disputes the remainder of alleged duplicate entries. The Court will deduct only the \$1,504.50 in this category.

Administrative/Clerical Tasks

The Court has reviewed Exhibit C to the Fee Auditor's Report, which is entitled "Administrative/Clerical Tasks," in light of the observations made in its first two Memo-Decisions and Orders and identifies time attributed to two C&L employees whose activities during this reporting period clearly were administrative/clerical in nature. The first was 36.60 hours expended by Terrence Gerchberg for a total of \$5,673. The second employee was Leo Mateo who expended 112.60 hours with attendant fees of \$14,075. C&L contends that no adjustment should be made for Mateo because his time was related solely to preparation of C&L's Second Interim Fee Application for which C&L has agreed to a voluntary reduction of \$122,662 to bring its fees for fee application preparation within the so-called "5% cap." Thus, the Court will disallow \$5,673 in this category.⁶

Administrative Work for the Trustee

In its Memo-Decision and Order addressing C&L's Second Interim Fee Application, the Court explained its justification for disallowing 50% of time entries categorized by the Fee Auditor as "Administrative Work for the Trustee." Despite the Court's observation that

⁶A close review of the Fee Auditor's Exhibit C does not support the observation that the services reflected on the Exhibit are primarily administrative/clerical

apparently the Trustee had hired a full time employee to handle matters formerly handled by the C&L employee, the current application again contains 17.50 hours or \$2,243.50 for identical services. C&L argues that not all of the services this employee rendered to the Trustee were administrative in nature. This argument misses the mark. What this Court will not tolerate is a C&L employee billing his time at \$125 per hour while acting as a personal advisor to the Trustee. Thus, the Court will disallow \$2,232.50 in this category identified on Exhibit D to the Fee Auditor's Report

Non-working Travel Time

The Fee Auditor Report has identified 447.10 hours of non-working travel time for which fees in the amount of \$52,567 are requested. C&L contends that it has taken a voluntary fee reduction of \$52,467 for travel time. Thus, the Court will make no adjustment in this category.

Long Billing Days

The Fee Auditor has identified certain days in which C&L employees individually logged more than 10 hours. During the period covered by the Third Application, the Auditor identifies 158 instances of a C&L employee billing more than 10 hours per day, exclusive of travel time, for a total of 1,892.70 hours or \$476,130. The Fee Auditor points out that on two days in particular, December 4, 1996 and March 6, 1997, a total of 17 C&L "timekeepers" logged a total of 207.20 hours. In addition, the Fee Auditor has identified four separate segments during the current reporting period where long billing days were prevalent. These four segments account for approximately 71% of the total hours billed on these days. C&L responds that the long billing

days were required in order to meet Court mandated deadlines and informational needs of the Trustee. C&L also questions, somewhat disingenuously, why the Fee Auditor did not identify this category for review by the Court on its first two fee applications. The Court appreciates that during the current reporting period the so-called “bank trials” began necessitating an increased burden on C&L to provide the Trustee with expert testimony on lease stream valuation and certain other pertinent issues. However, it seems to stretch credibility, for example, that between March 24, 1997 and March 28, 1997 nine C&L employees devoted a total of 324.60 hours on 25 long billing days within a 5 day period. Nevertheless, a detailed review of the C&L time records fails to provide any rational basis to challenge these long billing days. Thus, the Court will make no adjustment on the current application, but cautions against the indiscriminate use of personnel over extended hours in the absence of an extraordinary or compelling event.

Intra-Office Conferences

The Report identifies some 91.42 hours and \$22,579.50 consumed in this category. This is a significant reduction in the time devoted to such conferences when compared to C&L’s first two interim fee applications. Whether this reduction is coincidental or the result of C&L heeding the Court’s earlier observations is unknown. In any event, the Court will not make any adjustment.

Relief From Stay Proceedings

The Fee Auditor Report calls the Court’s attention to what appears to be a significant amount of time during the current application period devoted to “relief from stay proceedings”

which include “preparation for and attendance at stay trials,” “preparation of C&L affidavit in support” and “preparation of valuation model for stay trials.” This general category consumed some 2,265 hours for which a total fee of \$624,666.50 is requested.

While the Court again can appreciate the efforts of C&L in preparing for the relief from stay proceedings, or the “bank trials” as these proceedings are more commonly referred to, the Court simply cannot justify a price tag of \$625,000. Having presided over these trials and having heard the expert testimony proffered by C&L representatives Robert Darefsky, Manny Alas, Stephen Gerard and Jerome Arcy, and having reviewed the documentary evidence received through their testimony in support of the Trustee’s defense, the Court will not at this juncture approve this portion of the fee request in full.

As this Court has noted in the Memo Decisions and Orders relating to C&L’s two prior interim fee applications, the Court is empowered to exercise a certain amount of discretion when considering interim fee applications. The Court has noted and reiterated once again that it may make an across the board reduction in the amount of hours billed based upon a finding of excessive or unreasonable hours. *See* this Court’s Memo Decision and Order dated August 13, 1997 at 8.

The Fee Auditor’s Report at Exhibits EE 1-4 summarizes the hourly increments that C&L asserts its employees devoted to the bank trials. Those exhibits indicate that approximately 10 to 13 C&L employees were assigned to this task, including the four aforementioned representatives, whose time was billed at \$375 to \$450 per hour. Aside from actual testimony, much of the four representatives’ time was devoted primarily to reviewing and revising the work of other C&L employees. Accordingly, the Court will reduce C&L’s time devoted to bank trials

by 25% or \$156,166 and allow \$468,500 in this category.

Fee Application Expenses

C&L contends that no adjustment in this category is appropriate because it voluntarily reduced its Third Application by \$122,662. However, both the UST and the Creditors Committee assert that in arriving at the voluntary reduction to meet a self-imposed 5% “cap”, C&L did not include \$111,616.50 for work devoted to responding to objections to their fee applications. Both the UST and the Creditors Committee contend that if the fees for that work are properly included in the generic category of “Fee Applications” even with the voluntary reduction, “fees associated with the Fee Application process are still grossly excessive.” *See* Objection of the Official Committee of Unsecured Creditors To The Third Interim Fee Application of Coopers & Lybrand, dated August 5, 1997 at ¶ 21.

The Court must agree with both the Committee and the UST, even \$209,792 charged back to general unsecured creditors for services that benefit only the professionals fall well outside the mandates of 11 U.S.C. § 330(a)(6). Additionally, the Court, while applauding C&L’s voluntary reduction, has never condoned any artificial “cap” on professional fees at 5% of the total fee application. *See* the Memo-Decision and Order on C&L’s Second Interim Fee Application at page 24. Quite to the contrary, this Court, since issuing that Memo-Decision and Order, in a Memorandum-Decision and Order dated February 9, 1998 addressing a motion for reconsideration filed by the Trustee’s counsel, Simpson, Thacher & Bartlett (“STB”) regarding its second interim fee application, concluded that it would thereafter “cap” professional fees at 3% of the total amount requested for the preparation and defense of the application. In this case

that amount would be \$11,562 [$\$332,454 - \$1,637.59^7$) x 3% + \$1,637.50].⁸

Expenses

Turning to C&L's request for expense reimbursement, the Fee Auditor's Report once again identified a total of \$4,312.48 in unreceipted expenses. In its Reply to the Report, C&L produces receipts for \$1,887.25, acknowledging that it did not keep receipts for \$103.23 related to taxi cab rides and is still in the process of producing receipts for the remaining \$2,322.

Finally, the Fee Auditor calls to the Court's attention expenses incurred by C&L for rental vehicles in the total sum of \$8,070.67 during this five month period. The Fee Auditor opines that it appears that C&L parked rental vehicles at the Syracuse, New York airport for future use rather than turning them in to the rental agency. The vehicles would then be picked up the following week by C&L employees making the trip between Syracuse and Utica, New York.

In its defense, C&L asserts that due to winter weather and its impact on driving conditions, it entered into two rental agreements for two four wheel drive vehicles, covering the entire period from December 1996 through March 1997, so that it would not miss Court mandated deadlines or hearings due to adverse weather conditions. The Court will make no adjustment to this expense.

⁷ The Court deems it appropriate to award C&L the full amount of \$1,637.50, as reflected on Exhibit Z-10, for services necessary to comply with the Fee Auditor's format requirements.

⁸ The Court recognizes that unlike STB, C&L must and has retained outside counsel to support and defend its fee applications before this Court. Those fees do not appear to be reflected in its Third Application. Having reviewed Exhibits Z-1 through Z-12 of the Report, and without knowing the extent of outside counsel's involvement, the Court is receptive to giving consideration to a supplementary request from C&L for reimbursement of reasonable attorneys' fees as an expense in connection with this application before this Court.

In summary, the Court makes the following reductions to the fees and expenses sought in C&L's Third Interim Fee Application:

Total Requested Fees	\$1,727,084.75 ⁹
<u>Disallowances</u>	
Administrative/Clerical Tasks	- 5,673.00
Administrative Work for Trustee	- 2,232.50
Relief from Stay Proceedings (Bank Trials)	- 156,166.00
Fee Applications	- 198,230.00
Provisional Fee Award granted August 12, 1997	- 400,000.00
<u>Net Total Fees Allowed</u>	\$ 964,783.25
<u>Total Requested Expenses</u>	\$ 106,619.00
Unreceipted	2,425.23
Provisional Expense Award August 12, 1997	50,000.00
<u>Net Total Expenses Allowed</u>	\$ 54,193.77

Dated at Utica, New York

this 13th day of April 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

⁹C&L's Reply to the Fee Auditor's Report acknowledges further reduction to its fee request of \$1,504.50 for double billing and \$393.75 for local travel.