

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:

WASSERMAN, JURISTA & STOLZ

Attorneys for Official Committee of Unsecured

Creditors

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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 the Eighth Interim Fee Application (“Eighth Application”) of Zolfo Cooper LLC (“ZC”), financial adviser to the Official Committee of Unsecured Creditors (“Committee”). The Fee Application, which was filed on August 12, 1999, seeks payment of \$395,224 in professional fees and \$9,757.44 in reimbursement of expenses and covers the period September 1, 1998 through May 31, 1999. The Fee Application was submitted to Stuart, Maue, Mitchell & James, Ltd. (“Fee Auditor”) in accordance with the Court’s Amended Order dated December 2, 1996. The report of the Fee Auditor (“Report”) was filed with the Court on September 22, 1999, and a hearing on the Fee Application was held on October 14, 1999, at

which time the Court awarded ZC a provisional award of \$300,000 in fees and \$8,500 in expense reimbursement. Objection to the Eighth Application was interposed by the United States Trustee (“UST”).

JURISDICTIONAL STATEMENT

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

FACTS AND DISCUSSION

ZC has filed seven prior fee applications with this Court and has, to date, been awarded \$997,536.50 in fees and \$31,272.12 in expense reimbursement.

While the Report raises certain issues, it is the objection of the UST that focuses the Court’s attention on the services performed by ZC during the current application period. The UST asserts that ZC consumed some 192.50 hours or \$66,659.50 in fees for services related to the Equivest Initial Public Offering;¹ 36.90 hours or \$12,426 conducting market analysis on time share public offerings; and 69.20 hours or \$7,442.50 monitoring stock prices related to Equivest. The UST acknowledges that some portion of those services rendered by ZC in the instant application are within the scope of its retention by the Committee. However, the UST asserts that

¹ Equivest is a non-debtor entity in which the consolidated estates own a majority of the shares of stock, which shares are the subject of a pending liquidation by the Trustee. The Trustee presently functions as the chief executive officer of Equivest.

the services rendered by ZC “went beyond the mere analysis of the IPO on behalf of the [C]ommittee, [and] actually involved substantive financial analysis, consultation and other services which were directly beneficial to Equivest.” *See* United States Trustee Objection to the Eighth Interim Fee Application of Zolfo Cooper filed October 14, 1999 at 9. The UST suggests that the Court should defer approval of this compensation “until such time as an IPO of Equivest is consummated or abandoned.” *Id* at 10.²

ZC responds to the UST and asserts that all services included in the instant application were performed at the request of the Committee or its counsel “on behalf of the Committee.” *See* Response of Zolfo Cooper, LLC to United States Trustee’s Objection and to Fee Auditor Report Concerning Eighth Interim Fee Application (“Eighth Response”) at 7. In further support of that position, the Certification of Stolz asserts that the Estate’s share ownership of Equivest is “potentially the most valuable asset in this case.” Further, Stolz states that due to the concerns expressed by the UST pertaining to the Chapter 11 Trustee serving as both Trustee of the Debtor’s Estate and an officer of Equivest, the Committee determined it was “prudent to request that its financial advisors perform a more significant examination and monitoring of the proposed Equivest public offering and certain substantial acquisitions by Equivest during the last year and a half.” *See* Certification of Daniel M. Stolz In Reply to Objection of [the] United States Trustee to [the] Eighth Interim Fee Application of Zolfo Cooper, LLC filed October 12, 1999 at ¶ 7-9.

Though Code § 330(a)(3)(c) teaches that the Court must evaluate professional services’

²Though apparently not known to the parties, including ZC at the time covered by this Eighth Application, the public offering of Equivest stock never occurred and was ultimately abandoned by the Trustee on May 1, 2000, when he sought the appointment of Warburg Dillon & Read LLC to market the Equivest stock.

benefit to the bankruptcy estate “at the time at which the service was rendered,” the Court can only speculate as to the date at which it became apparent to all concerned (ZC included) that the public offering of Equivest stock was doomed, since surely the continuation of services by any professional after that date relating to such a public offering should be denied compensation. It would appear, however, from the docket of these consolidated cases that by May of 1999 the IPO was becoming a rapidly declining option.

Another task to which ZC devoted a significant amount of time during the current compensation period was an analysis of the Consolidated Debtors’ Plan and Disclosure Statement (\$59,965 as per Exhibit R to the Report). Much like the IPO, the Plan and Disclosure Statement stagnated during 1999 for a variety of reasons and at present both documents will require significant revision.

While these services isolated by the Report and emphasized by the UST are very real concerns, there is nothing before the Court to suggest that at the time ZC performed the services it had reason to believe that they would be of little or no benefit to the consolidated estates or that they were being performed beyond the scope of ZC’s retention. Nor is it a solution to withhold payment, particularly in the case of the IPO, because it is now clear that there will be no IPO of Equivest stock. Thus, the Court will not at this juncture disallow any portion of the hours devoted to advice regarding the IPO of Equivest stock or the consolidated Debtors’ proposed Plan and Disclosure Statement. That is not to say, however, that the necessity for such services will not be revisited at a future date.

Turning to other concerns, the Court focuses on that portion of the Report that identifies 515.6 hours or \$174,457 for “Conferences with Committee Counsel,” and “Conferences with

other Nonfirm Personnel.” *See* Report Exhibits E-1 and E-2. The UST highlights those fees associated with multiple professional attendance at meetings and conferences for which the estate is billed \$73,970. Recognizing that there is significant overlap in these categories within the Report, the Court notes that in the past it has permitted the attendance of at least two ZC professionals at meetings and conferences following an acceptable explanation. *See* Memorandum-Decision and Order of the Court dated August 20, 1998 (ZC’s Fourth Interim Application). A review of the applicable Exhibits reveals that no more than two ZC professionals attended those meetings.

Turning, finally, to services rendered by ZC which benefit only ZC. The Report identifies 3 categories which relate to these self-serving activities; Zolfo Cooper Supplemental Disclosure (Exhibit Q-1); General Fee Application (Exhibit Q-3); and, Zolfo Cooper Retention (Exhibit Q-4). These three exhibits total \$14,633 and will be reduced, in keeping with the Court’s prior policy regarding similar services, to \$2,000.

In considering the reimbursement of expenses, the Report identified a total of \$160 in unreceipted travel and meal expenses. In the Eighth Response, ZC notes that the Fee Auditor overlooked copies of three parking receipts which amount to \$160 and were included in Exhibit C to the Eighth Application. ZC’s explanation appears to satisfy this criticism. In addition to those unreceipted expenses, the Report notes a total of \$629.55 that it categorizes as “Vague Expenses.” In its Eighth Response, ZC asserts that the “poor copy quality of receipts relating to the \$629.55 of other expenses is directly attributable to the poor quality of the original receipt...in ZC’s possession.” *See* Eighth Response at 8. ZC follows this explanation by providing a detailed breakdown of the charges related to the \$629.55 total. In light of these explanations, the Court

will allow all requested expenses.

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

<u>Total Requested Fees:</u>	\$395,224.00
<u>Disallowances:</u>	
Fee Application	12,633.00
Provisional Award granted on 10/14/99	300,000.00
<u>Net Total Allowed</u>	82,591.00
<u>Total Requested Expenses</u>	\$ 9,757.44
Provisional Expense Award granted on 10/14/99	8,500.00
<u>Net Total Expenses Allowed</u>	1,257.44

ORDERED that the fees and expenses requested by ZC 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 \$83,848.44 shall not be made from encumbered assets of the consolidated estates.

Dated at Utica, New York

this 16th day of October 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge