

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 Ninth Interim Fee Application (“Ninth Application”) of Simpson, Thacher & Bartlett (“STB”), attorneys for Richard C. Breeden as trustee in the consolidated case (“Trustee”). The Ninth Application seeks payment of professional fees in the amount of \$2,369,865.50 and reimbursement of expenses in the amount of \$241,993.80 incurred

during the period November 1, 1998 through February 28, 1999.<sup>1</sup> This Ninth 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 July 2, 1999. The Ninth Application came on for a hearing before the Court on August 26, 1999, at which time the Court approved a provisional award of \$1,500,000 in fees and \$150,000 in expenses to STB.<sup>2</sup> Opposition to the Ninth 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

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<sup>1</sup> STB adjusted its fee request as reflected on Exhibit A attached to its Response to Objections to Fee Auditor’s Review and Analysis of to the STB’s Ninth Interim Fee Application filed July 15, 1999 (STB’s “Response”). As adjusted, STB seeks payment of professional fees in the amount of \$2,369,689.50. No adjustment was made with regard to the expense request.

<sup>2</sup> The Court entered orders granting the above provisional award on September 13, 1999 and again on December 20, 1999. Subsequently, on December 29, 1999, the Court vacated the order granting the provisional award dated December 20, 1999.

Familiarity with the prior decisions of this Court which dealt with the first eight fee applications of STB is presumed and they will be referenced herein to the extent necessary.<sup>3</sup>

The Auditor's Report generally identifies entries in STB's time records offered in support of the Ninth Application as falling into seventeen general categories which "Appear to Violate Court Guidelines." In addition, the Auditor's Report isolates approximately 107 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 STB's Response. In that Response, STB indicates that it voluntarily reduced the Ninth Application by the net sum of \$176.00, which was the result of inadvertent double billing entries. STB has made no adjustment to its expense request.

STB again challenges the Auditor's Report insofar as it identifies "Allegedly Vaguely Described Tasks", "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 Eighth Fee Applications. Those criticisms need not be reiterated a ninth time in this decision.

With regard to the 107 more specific categories identified by the Fee Auditor which "The

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<sup>3</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, 1998, June 1, 1999, April 11, 2000 and July \_\_, 2000. STB moved to reconsider the Order of August 13, 1997 and on February 9, 1998, the Court entered a Memorandum-Decision, Finding of Fact, Conclusion of Law and Order reconsidering that Order. Familiarity with that Memorandum-Decision is also presumed.

Court May Wish to Examine for Relevance Necessity and Reasonableness,” STB focuses its Response to the Fee Auditor’s “Firm Staffing” to include “Long Billing Days,” “Intra-Office Conferences,” and “Fee Applications.” With regard to the “Long Billing Days” referred to in the Auditor’s Report, STB claims that efforts in the following tasks during the instant compensation period required STB attorneys and paralegals to work more than twelve hours in a single day: 1) Preparation of the Plan of Reorganization and Disclosure Statement; 2) Observation of Patrick Bennett criminal trial; 3) Finalization of the Generali settlement agreement; 3) Allocation of Generali settlement proceeds; 5) Analysis of time incurred on Generali matters in response to request by Committee; 6) Drafting Trustee Report due December 31, 1998; and 7) Objections to Aloha Banks’ Documents. *See* STB’s Response. ¶ C.1 at 11-14.

The Auditor’s Report identifies a total of 1,261.5 hours being consumed on these “Long Billing Days” for which a fee of \$164,209.50 is requested. (*See* Fee Auditor Report, Ex. K). In this current Ninth Application, as indicated, STB attributes the Long Billing Days to the above mentioned projects. The Court understands that such projects can be overwhelming and time consuming. However, of the 1,261.50 hours billed during these so called “Long Billing Days,” approximately 250.20 of those hours for fees totaling \$27,203 were billed to tasks other than those described above. As STB offers no additional explanation for that time, the Court will reduce those fees by twenty-five percent for a total of \$6,800.75.<sup>4</sup> In doing so the Court has been careful not to exclude those same hours under other categories of services identified in the

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<sup>4</sup> According to the Auditor’s Report, the majority of these so-called Long Billing Days were approximately 12 hours long. Aside from those projects discussed by STB in its response which were time sensitive, the Court finds no reason why STB needed to work longer than 8 hours per day on any other project relating to this case. As a result, the court will reduce 25% of STB’s fees in this category allowing charges to the estate for an 8 hour day.

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 eight 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>5</sup>

As reflected on Fee Auditor's Exhibit C - disallow \$14,042.50.

#### Intra Office Conferences<sup>6</sup>

As reflected on Fee Auditor's Exhibit M-1 - disallow \$14,979.

#### Administrative and Miscellaneous Clerical Tasks

As reflected on Fee Auditor's Exhibits D-1, D-4, D-5, and V-6, specifically, Exhibits D-1, Filing/Organizing/Retrieving; D-4 Miscellaneous Clerical Tasks; D-5 Administrative Tasks and V-6, Transfer of Files to Saperston and Day, a combined disallowance, \$82,962.50. 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 reiterates its prior observation that many of these tasks are purely clerical requiring absolutely no formal training

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<sup>5</sup> Much of the time disallowed on Exhibit C involved the multiple attendance of STB partners and associates at depositions, court hearings and meetings with the Trustee and the U.S. Trustee.

<sup>6</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.

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>7</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 Ninth Application seeks total fees of \$56,021.00 in connection with preparation and defense of STB’s fee applications. The Court will disallow \$52,000.

#### Assist in Preparation of Documents and Assist in Service of Documents

The Fee Auditor identifies 540.80 hours which amount to \$53,429.50 which STB attributes to “Assist in Preparation of Documents” and 317.30 hours or \$31,273 which STB attributes to “Assist in Service of Documents.” *See* Fee Auditor’s Exhibit E-1 and E-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

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<sup>7</sup> For example, voluminous entries described simply as “Reviewed and Organized Important Documents” and “Update Important Papers.”

service.” *See* Court Guidelines ¶ 9(a).

After reviewing Exhibits E-1 and E-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 E-1 and E-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 judgement, 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 \$19,540 and those fees associated with assisting in service of documents will be reduced by \$21,286.50. However, the Court makes these adjustments pending a further explanation by STB concerning these hours.

#### Shamrock Holdings Group, Inc.

The Fee Auditor has isolated 38.4 hours for fees totaling \$16,696 as devoted to General Shamrock Bankruptcy matters. (*See* Fee Auditor’s Exhibit V-5). 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 it did in its Response to Fee Auditor’s Review and Analysis of the Eight Interim Fee Application, STB responds to these criticisms by reminding the Court that the Trustee of these consolidated estates owns 100% of the stock of Shamrock. As such, STB argues, its services

clearly benefit these bankruptcy estates.<sup>8</sup> 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 \$16,696. This amount represents all fees associated with work performed with regard to the Shamrock estate.

#### Attendance at Patrick Bennett Criminal Trial

The Fee Auditor identifies 320.35 hours for fees totaling \$42,621 devoted to the attendance of the Patrick Bennett criminal trial. (the “Trial”) (See Exhibit BB-3) The Trustee objects to all services rendered in connection with the Trial. See Objection of the UST to Ninth Interim Fee Application of STB filed July 19, 1999 at ¶ 6. However, the Committee objects to various follow up entries at the trial. See Objections of the Committee to the Ninth Interim Fee Application filed by STB filed July 19, 1999 at ¶ 19-20.

STB responds to the objections of the UST and the Committee by stressing the ramifications that the Trial could have had on the avoidance actions filed in the instant case and potential recoveries for the creditors. Further, STB gives various explanations why during seven days of the Trial an attorney was in attendance. See Response of STB to Objections of UST and Committee to Firms Ninth Interim Fee Application filed August 5, 1999 at 16-18.

Upon review of the relevant time entries, the objections of the UST and the Committee, and the Response of STB thereto, the Court finds that the attendance of the attorneys on the

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<sup>8</sup> On June 17, 1998, the firm of Phillips, Lytle, Hitchcock, Blaine & Huber, LLP was appointed by Order of this Court to represent Shamrock.

described seven days served no benefit to the creditors of the consolidated estates. As a result, the Court will reduce those fees associated with attendance by attorneys at the Trial by \$13,306.

### Depositions

According to the Auditor's Report, the instant application includes 313.50 hours and \$92,299.50 in fees devoted to depositions. *See* Auditor's Report at 27. As was the case with the Eighth Application, the Court will make no disallowance in the Ninth 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 three exhibits: Exhibit Z-1, STB Conflicts Check; Exhibit Z-2, STB Supplemental Disclosures of Potential Conflicts; and Exhibit Z-3, Motion to Hold the Trustee in Contempt. These three exhibits reflect a total of 136.10 hours and \$28,867.50. As it has in the past, the Court, rather than analyzing each of these alleged conflicts, will, with the exception of Exhibit Z-3, 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-3, however, the Court finds little justification for charging the creditors of the estates with \$19,010.50 of legal fees incurred primarily to defend the Trustee against a motion to hold him in contempt for failing to abide by this Court's order requiring him to resign from Deloitte & Touche *nunc pro tunc*. As this conflict was due to the 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 the Court will disallow fees associated with the Motion for Contempt in their entirety.

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 Ninth 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 July 19, 1999 at ¶ 11). STB responds by asserting that the Fee Auditor has mischaracterized many of the hours attributable to paralegal/paraprofessionals. The Court reserves unto 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 instant Ninth Application again seeks reimbursement for expenses identified as “Word Processing,” “Proofreading,” “Desktop Publishing,” “Overtime Transportation,” “Overtime Meals,” “Restaurant/STB Cafeteria,” and “Office Supplies.” These expenses total \$33,796.40 and shall be disallowed consistent with prior decisions.

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

<u>Total Requested Fees</u> (as adjusted)	\$ 2,369,689.50
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#### Disallowances:

Long Billing Days	6,800.75
Multiple Professionals at Events	14,042.50
Intra Office Conferences	14,979.00
Administrative and Clerical Tasks	82,962.50
Fee Application	52,000.00
Assist in Preparation of Documents	19,540.00
Service of Documents	21,286.50
Shamrock Bankruptcy	16,696.00
Conflicts of Interest	19,010.50
Attendance at Patrick Bennett Criminal Trial	13,306.00
Provisional Fee Award granted on September 13, 1999	\$ 1,500,000.00

<u>Net Total Fee Allowed</u>	\$ 609,065.75
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<u>Total Requested Expenses</u>	\$ 241,993.80
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#### Disallowances:

Office Overhead	33,796.40
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Provisional Expense Award pursuant to Order dated September 13, 1999	150,000.00
<u>Net Total Expenses Allowed</u>	\$ 58,197.40

Based on the foregoing, it is

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

ORDERED that payment of the remaining balance of allowed fees and expenses, and any amount still due and owing on any prior award, shall not be made from encumbered assets of the consolidated Estates.

Dated at Utica, New York

this 18th day of October 2000

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge