

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:

SAPERSTON & DAY, P.C.
Special Counsel to the § 1104 Trustee
360 South Warren Street
Syracuse, New York 13202

KENNETH M. ALWEIS, ESQ.
Of Counsel

WASSERMAN, JURISTA & STOLZ
Attorneys for Official Committee of Unsecured Creditors
225 Millburn Ave.
Millburn, New Jersey 07041

HARRY GUTFLEISH, ESQ.
Of Counsel

GUY A. VAN BAALEN, ESQ.
Assistant U.S. Trustee
10 Broad Street
Utica, New York 13501

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

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

The Court considers herein the Fourth Interim Fee Application (“Fourth Application”) of Saperston & Day, P.C. (“S&D”), Special Counsel to Richard C. Breeden as trustee in the consolidated case (“Trustee”). The Fourth Application seeks payment of professional fees in the amount of \$670,138.06 and reimbursement of expenses in the amount of \$44,787.39 incurred

during the period January 1999 through April 1999.¹ This Fourth 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 28.² The Fourth Application came on for a hearing before the Court on August 12, 1999, at which time the Court approved a provisional award of \$450,000 in fees and \$37,500 in expenses to S&D. Opposition to the Fourth 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).

FACT, ARGUMENTS AND CONCLUSIONS

The Auditor’s Report identifies entries in S&D’s time records filed in support of the

¹ On June 23, 1999, S&D filed an “Amended” Fourth Application. The amounts sought as fees and expenses, however, did not change in the Amended Fourth Application.

² The Auditor’s Report indicates a discrepancy between the amount of fees requested by S&D (\$670,138.06) and the actual computation of fees utilizing S&D’s contemporaneous time records (\$681,957.75). S&D in its Response to Fee Auditor’s Report Re: Fourth Interim Application (“S&D’s Response”) filed August 9, 1999, does not address the discrepancy. The Court will consider the total of fees as set out in the Fourth Application.

Fourth Application as falling into thirteen categories which “Appear to Violate Court Guidelines.” In addition, the Auditor’s Report isolates thirty more specific and limited categories or tasks which it calls to the Court’s attention for further review and analysis.

In S&D’s Response, S&D agreed to reduce its fees for its Fourth Application in the following amount: \$520 for travel time.

As to the balance of the Auditor’s Report, S&D takes issue with the Fee Auditor’s observations, specifically regarding Technical Billing Discrepancies, Inadequate Task Descriptions, Potentially Duplicative Entries, Vaguely Described Tasks, Spread Billing, Unit Billing, Multiple Professionals, Legal Research, Administrative/Clerical Tasks, Personnel Who Billed Twenty or Fewer Hours, Long Billing Days, Hourly Rates, Intra-Office Conferences, Conferences with Simpson Thacher & Bartlett (“STB”) Personnel, Dismissal/Discontinuance of Actions, and Other Activities. After reviewing each of the categories in the Auditor’s Report, the Court initially notes three categories in the Auditor’s Report that do require adjustment. These categories are: Saperston & Day Retention, Saperston & Day Fee Application and Response to Fee Auditor’s Report and Objections. Total fees sought for these services were \$14,574. These services benefit only S&D, not creditors, and as in the case of S&D First, Second and Third Interim Applications, the Court will limit those fees. The Court will approve total fees in these four categories in the amount of \$1,500.

In addition to those reductions reflected above, the UST objects, *inter alia*, to 96 hours or \$11,712 for S&D’s monitoring the criminal trial of Patrick Bennett. The UST questions the

necessity of both S&D and STB performing this seemingly identical function.³ The Court can find no necessity and will disallow the entire requested fee, absent a further explanation from S&D. The UST again objects to some 26.23 hours of S&D time devoted to conferences with STB personnel. In a footnote, the UST points out that through its first four Fee Applications, S&D has sought compensation for 278.13 hours of inter-office conferences with STB, suggesting that such services negate the benefit of using local special counsel. S&D responds simply by pointing to STB's overall responsibility for the case and the "de minimus" nature of the subject hours to the overall Fourth Application. In this regard, the Court notes that allegations have been made that S&D exercises very little independent authority in carrying out its role of special counsel and that STB exercises complete oversight and control. A review of the entries isolated in Exhibit Q to the Auditor's Report, however, does not support such an allegation and, therefore, with regard to the hours relevant to the Fourth Application, the Court will make no adjustment.

Two other areas identified in both the Auditor's Report and the Objection of the UST are potentially duplicative entries (860.20 hours/\$110,037.50) and avoidance actions (2,675.10 hours/\$332,024). With regard to the former, S&D asserts that due to the nature of the thousands of adversary proceedings that it is prosecuting, a great deal of repetitive work is necessary which is not duplicative. (S&D Response page 3) The Court has reviewed Exhibit D to the Auditor's Report and does not reach the conclusion that services isolated therein are unnecessarily duplicative. With regard to the latter services involving the avoidance actions, the Court notes

³ It is noted that in the Tenth Interim Fee Application filed by STB, which covered the period March 1, 1999 through June 30, 1999, the consolidated estates are billed for the daily attendance of an STB paralegal at this trial. STB asserts in the Tenth Interim Fee Application that it provided S&D with a copy of the paralegal's notes on a daily basis.

the UST's further analysis that through the first four fee applications S&D has expended a total of 18,150.50 hours or \$2,453,388.75 for these services, yet the bankruptcy estates "have not realized any discernable benefit at this time." (*See* UST's Objection to Amended Fourth Interim Application dated August 3, 1999 at ¶¶ 6 & 7). In addition, the Committee in its Statement dated July 22, 1999, expresses its confusion with regard to the so-called "current investor" settlements for which S&D has, apparently, taken credit. The Committee suggests that it was STB, not S&D, who developed and handled those settlements.

The issue of benefit to the estate continues to be the single most significant inquiry into the fee applications being filed by S&D (*See* 11 U.S.C. § 330(a)(3)). In a recent submission to the Court, S&D reflects the settlement of fifty (50) adversary proceedings apparently during the period covered by its First through Seventh Interim Fee Applications, which settlements have generated approximately \$218,500 to the bankruptcy estates. (*See* correspondence from S&D dated October 26, 2000). On November 27, 2000, S&D filed a similar attachment reflecting recoveries isolated by fee application period. Through the first four fee application periods, ten adversary proceedings were settled which resulted in total recoveries of \$23,830. Fees sought in connection with those ten settlements totaled \$8,967. It is apparent that the benefit to the bankruptcy estates will never be fully assessed until all of the adversary proceedings are resolved, however, given the present data available, the Court believes that it is justified in continuing to hold back 10% of the fees requested in the Fourth Application.

The UST again references what the Auditor's Report identifies as 326.03 hours or \$53,935.33 devoted to "legal research." (UST Objection at page 6) The UST expresses skepticism at the need for legal research of this magnitude, particularly given the fact that STB

did much of the “preliminary work” which resulted in a significant portion of the ongoing litigation during the four month period covered by the Fourth Application. In its Response, S&D indicates that much of its research was devoted to analyzing case law cited in various motions filed by opposing parties. A detailed review of Exhibit J to the Auditor’s Report indicates that while S&D continued to expend significant time devoted to legal research, the bulk of the research was directed at substantive rather than procedural issues. Accordingly, the Court will make no adjustment for time devoted to legal research in the Fourth Application.

As to the remaining objections of the UST and the Committee, the Court chooses to make no further adjustments at this time, though it is apparent that certain concerns, e.g. the cost/benefit of the thousands of adversary proceedings has yet to be determined.

Finally, with regard to S&D’s request for expense reimbursement in the Fourth Application, the Auditor’s Report has identified \$2,555.33 of “unreceipted expenses.” S&D’s Response provides at Exhibit A copies of receipts for those expenses which presumably satisfy the Fee Auditor’s criticism. One item of expense that is of concern to the Court is \$6,245.50 for computer assisted legal research (“CALR”). The Fee Auditor has highlighted this expense because it asserts that there is insufficient detail in the Fourth Application “to determine the substantive nature of the research or the reasonableness of the use of CALR and the time expended on the research” (*see* Auditor’s Report at page 31). In its Response to Auditor’s Report, S&D simply asserts “Computer assisted legal research is billed at actual cost” (*Id.* at page 8). Such an explanation is deemed to be unacceptable in light of this ever-escalating expense. Thus, the Court will deny reimbursement of this CALR expense pending a more detailed explanation. Other than these reductions, the Court finds no reason to further reduce

S&D's requested expense reimbursement.

In summary, the Court makes the following reduction to fees and expenses sought in the Fourth Application:

<u>Total Requested Fees</u>	<u>\$670,138.06</u>
<u>Reductions:</u>	
Monitoring the Patrick Bennett Criminal Trial	11,712.00
S&D retention, conflicts, fee applications and auditor response	13,074.00
Provisional Fee Award granted on 8/12/99	450,000.00
10% holdback (based on fees actually approved)	64,483.00
Travel Time (voluntary)	520.00
<u>Net Total Fees Allowed</u>	<u>\$130,349.06</u>
<u>Total Requested Expenses</u>	<u>\$ 44,787.39</u>
<u>Reductions:</u>	
Computer Assisted Legal Research	6,245.50
Provisional Expense Award granted 8/12/99	37,500.00
<u>Net Total Expenses Allowed</u>	<u>\$ 1,041.89</u>

Based on the foregoing, it is

ORDERED that the fees and expenses requested by S&D in its Fourth Application shall be allowed as detailed above; and it is further

ORDERED that payment of the remaining balance of allowed fees and expenses, as well as 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 6th day of December 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge