

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 Tenth Interim Fee Application (“Tenth Application”) of Simpson, Thacher & Bartlett (“STB”), attorneys for Richard C. Breeden as trustee in the consolidated case (“Trustee”). The Tenth Application seeks payment of professional fees in the amount of \$1,792,803 and reimbursement of expenses in the amount of \$203,330 incurred during

the period March 1, 1999 through June 30, 1999.¹ This Tenth 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 November 1, 1999. The Tenth Application came on for a hearing before the Court on December 16, 1999, at which time the Court approved a provisional award of \$1,250,000 in fees and \$150,000 in expenses to STB. Opposition to the Tenth 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

Familiarity with the prior decisions of this Court which dealt with the first nine fee

¹ STB adjusted its fee and expense request as reflected on Exhibit A attached to its Response to Objections to Fee Auditor’s Review and Analysis of to the STB’s Tenth Interim Fee Application filed November 16, 1999 (STB’s “Response”). As adjusted, STB seeks payment of professional fees in the amount of \$1,790,717.50. No adjustment was made with regard to the expense request.

applications of STB is presumed and they will be referenced herein to the extent necessary.²

The Auditor's Report generally identifies entries in STB's time records offered in support of the Tenth Application as falling into 17 general categories which "Appear to Violate Court Guidelines." In addition, the Auditor's Report isolates approximately 108 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 their Response. In that Response, STB indicates that it voluntarily reduced the Tenth Application in the following manner: 1) \$1,141.00 for discrepancy in fees billed; 2) \$102.50 for alleged double billing; 3) \$342.00 for travel time; and 4) \$500.00 for a mistakenly billed entry. 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 Ninth Fee Applications. Those criticisms need not be reiterated a Tenth time in this decision. (*See* Response at ¶ B at 4-10)

With regard to the 108 more specific categories identified by the Fee Auditor which "The

² 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, July 12, 2000 and October 18, 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 Joint Appendix; and 2) Observation of Patrick Bennett criminal retrial. *See* Response at ¶ C.1 at 11-12.

The Auditor’s Report identifies a total of 799.30 hours being consumed on these “Long Billing Days” for which a fee of \$111,357.50 is requested. (*See* Auditor’s report, Ex. M). In this current Tenth Application, as indicated, STB attributes the long billing days to the above mentioned projects. The Court understands that such projects can be time consuming. However, of the 799.30 hours billed during these so called “Long Billing Days,” approximately 238.2 of those hours for fees totaling \$55,658.50 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 \$13,914.63.³ In doing so the Court has been careful not to exclude those same hours under other categories of services identified in the 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.”

³ 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 knows of 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.

Having written nine 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 Events⁴

As reflected on Auditor's Report Exhibit D - disallow \$8,628.00.

Intra Office Conferences⁵

As reflected on Auditor's Report Exhibit O-1 - disallow \$17,129.25.

Administrative and Miscellaneous Clerical Tasks

As reflected on Auditor's Report Exhibits E-1, E-4, E-5, and X-5, specifically, Exhibits E-1, Filing/Organizing/Retrieving; E-4 Miscellaneous Clerical Tasks; E-5 Administrative Tasks a combined disallowance, \$52,416.88. While STB continues to assert that performance of these tasks, "requires the exercise of the paralegals professional judgement," the Court continues to believe that many of these tasks are purely clerical requiring absolutely no formal training 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.⁶ In addition, the Court cannot justify charging the creditors for "Transfer of Files to

⁴ Much of the time disallowed on Exhibit D involved the multiple attendance of STB partners and associates at depositions, court hearings and meetings with the Trustee and the UST.

⁵ Time disallowed on Exhibit O-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.

⁶For example, voluminous entries utilizing terms such as "Filing," "Retrieve," "Update," "Loading," "Organize," "Review," and "Compile" do not suggest the need for an almost exclusive use of paralegal personnel.

Saperston & Day.”

Fee Applications

The Tenth Application seeks total fees of \$68,929.50 in connection with preparation, research and defense of STB’s fee applications. The Court will disallow \$65,000.

Assist in Preparation of Documents and Assist in Service of Documents

The Fee Auditor identifies 635.85 hours which amount to \$63,613.00 which STB attributes to “Assist in Preparation of Documents” and 220.20 hours or \$21,922.00 which STB attributes to “Assist in Service of Documents.” *See* Auditor’s Report Exhibit F-1 and F-2. The Court’s Amended Order 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 service.” *See* Court Amended Order ¶ 9(a).

After reviewing Exhibits F-1 and F-2 of the Auditor’s Report, the Court is once again unclear how STB personnel “assisted” in the preparation or the service of documents. Those narrative descriptions contained in Exhibits F-1 and F-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 appeared to require no professional or para professional judgment, 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 \$25,088 and those fees associated with assisting in service of documents will be reduced by \$9,726. However, the Court

makes these adjustments pending a further explanation by STB concerning these hours.⁷

Shamrock Holdings Group, Inc.

The Fee Auditor has isolated 4.0 hours for fees totaling \$2,199.50 as devoted to General Shamrock Bankruptcy matters. (See Fee Auditor's Exhibit X-4). 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.⁸ For the reasons previously stated in its prior fee decisions, the Court will disallow these hours in their entirety.

Attendance at Patrick Bennett Criminal Trial and Trial Memoranda

The Fee Auditor identifies 136.20 hours for fees totaling \$14,113.50 devoted to the attendance of the Patrick Bennett criminal trial. (the "Trial") (See Exhibit DD-3) The UST objects to all services rendered in connection with the Trial. See Objection of the UST to Tenth Interim Fee Application of STB filed November 19, 1999 at ¶ 20. STB responds to the objections of the UST and the Committee by reasserting the identical response asserted in its Ninth Response. See Response of STB to Objections of UST and Committee to Firms Tenth Interim Fee Application filed December 9, 1999 at ¶ 18.

Upon review of the relevant time entries, the objections of the UST and the Committee,

⁷ On September 28, 2000, STB filed a Supplemental Response to Specified Fee and Expense Disallowances in the Sixth, Seventh and Eighth Interim Fee Applications. In that Supplemental Response, though not specifically addressed to the instant Application, STB instructs the Court with regard to the permissible use of paralegals to prepare and serve various documents. STB's critique, however, appears to miss the point of the Court's disallowance. It is not so much the nature of the service performed by the paralegal that is objectionable, rather it is the vagueness of the entry in the contemporaneous time records and the incessant use of the generic term "assist."

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

and the Response of STB thereto, the Court finds that the attendance of Mr. Gamble, an attorney, in addition to Mr. Greco, a paralegal, on March 2, 1999, served no benefit to the creditors of the consolidated estates. As a result, the Court will reduce those fees associated with attendance by Mr. Gamble in addition to Mr. Greco at the Trial by \$703.50.

In the Auditor's Report, some 179 hours (\$20,841) is identified as having been expended in connection with a "Patrick Bennett Trial Memoranda." Absent a further explanation of the rationale for and necessity of these services being performed by STB, the Court will disallow same.

Depositions

According to the Auditor's Report, the instant application includes 587.03 hours and \$129,643.33 in fees devoted to depositions. *See* Auditor's Report at 28. As was the case with the Ninth Application, the Court will make no disallowance in the Tenth Application, but again emphasizes that any fee awarded in this regard is subject to being adjusted in the future if determined to be warranted.

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 November 22, 1999 at ¶ 16). 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 further adjustment at this time.

General Avoidance Actions

Exhibit U-1 to the Auditor's Report isolates 111.20 hours (\$46,200) devoted to "General Avoidance Actions."⁹ Both the UST and the Committee assert that STB provides no plausible explanation as to why it continues its involvement in matters transferred to S&D as special counsel in the Spring and Summer of 1998. STB disputes the UST's assertion that the "majority" of these actions were transferred due to STB's conflict of interest, contending that only 1% of the actions transferred involved conflicts. (*See* Response of STB to objections of UST and Creditors Committee, page 11). STB also argues that as the Trustee's primary counsel, it is required to play a "continuing role in coordination for the Trustee." *Id.* at page 12.

After reviewing the assertions of the parties as well as the noted Exhibits, the Court does not reach the conclusion that STB is exercising an impermissible degree of control over the avoidance litigation. It is undeniable that STB continues to devote significant time to the oversight and co-ordination of the avoidance actions, but the Court does not believe that such time increments are beyond the scope and necessity of STB's role as general counsel to the Trustee. Thus, the Court makes no adjustment in this category.¹⁰

⁹The Court has also reviewed Exhibit A attached to the objections of the Committee filed 11/19/99 which purports to isolate hours expended by STB personnel regarding avoidance actions turned over to S&D.

¹⁰In declining to make any adjustment in this category on the instant Tenth Application, the Court does not mean to convey the impression that it has rejected the assertions of the UST and the Committee that there can be no reasonable justification for the commencement and continuation of the thousands of adversary proceedings which have or will cost the unsecured creditors unwarranted millions of dollars in professional fees and expenses.

Expenses

The instant Tenth 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 \$32,197.32 and shall be disallowed consistent with prior decisions.

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

<u>Total Requested Fees</u> (as adjusted)	\$ 1,790,717.50
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Disallowances:

Long Billing Days	13,914.63
Multiple Professionals at Events	8,628.00
Intra Office Conferences	17,129.25
Administrative and Clerical Tasks	52,416.88
Fee Application	65,000.00
Assist in Preparation of Documents	25,088.00
Service of Documents	9,726.00
Shamrock Holdings Corp.	2,199.50
Attendance at Patrick Bennett Criminal Trial and Trial Memoranda	703.50 20,841.00
Provisional Fee Award granted on December 16, 1999	\$ 1,250,000.00

<u>Net Total Fee Allowed</u>	\$ 325,070.74
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<u>Total Requested Expenses</u>	\$ 203,330.00
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Disallowances:

Office Overhead	32,197.32
Provisional Expense Award pursuant to Order dated September 13, 1999	150,000.00

<u>Net Total Expenses Allowed</u>	\$ 21,132.68
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Based on the foregoing, it is

ORDERED that the fees and expenses requested by STB in its Tenth 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 \$346,203.44 shall not be made from encumbered assets of the consolidated Estates.

Dated at Utica, New York

this 28th day of December 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge