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 has before it the Second and Third Applications of Richard C. Breeden as trustee ("Trustee") for Orders allowing interim compensation and reimbursement of expenses. The Second Applications were filed in both the Bennett and Aloha cases[1] on April 15, 1997. An

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[1] The Bennett case includes the following debtors: The Bennett Funding Group, Inc., Bennett Receivables Corporation, Bennett Receivables Corporation II, and Bennett Management and Development Corporation ("Bennett Debtors"); the Aloha case includes debtors Aloha Capital Corp., American Marine International, Ltd., Resort Funding, Inc., and The Processing Center, Inc. ("Aloha Debtors"). The Bennett and Aloha Debtors' cases were substantively

objection was filed by the United States Trustee ("UST") on April 25, 1997, and a response to the Second Applications was filed by the Official Committee of Unsecured Creditors ("Committee") on May 5, 1997. The Trustee filed a response on May 7, 1997. The Third Applications, also submitted in both the Bennett and Aloha cases, were filed on July 15, 1997. An objection was filed by the UST on August 1, 1997, and the Trustee filed a response on August 12, 1997.

The Second Applications appeared on the Court's motion calendar in Utica, New York on May 8, 1997, and were submitted for decision on that date. The Third Applications appeared on the Court's motion calendar in Syracuse, New York on August 12, 1997, and were submitted for decision on that date. This Decision addresses the Second and Third Applications in both cases.[2]

JURISDICTIONAL STATEMENT

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

FACTS

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consolidated on July 22, 1997.

[2] Hereinafter, the Court shall refer to the Trustee's second applications in both the Bennett and Aloha cases collectively as the "Second Application," and the third applications in both the Bennett and Aloha cases collectively as the "Third Application."

On March 29, 1996, each of the Bennett Debtors filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). On April 18, 1996, following the entry of an Order dated April 12, 1996, the Trustee was appointed by the United States Trustee ("UST") to serve in these cases pursuant to Code § 1104. The Trustee's appointment was approved by an Order of this Court dated April 18, 1996. Joint administration of the Bennett Debtors' cases was approved in an Order dated May 5, 1996.

On April 19, 1996, American Marine International, Ltd. ("AMI") and the Resort Service Company, Inc. ("RSC") filed voluntary petitions for relief pursuant to chapter 11 of the Code. On April 25, 1996, an involuntary petition pursuant to chapter 11 of the Code was filed against Aloha Capital Corporation ("ACC") by The Bennett Funding Group, Inc, The Processing Center, Inc. ("TPC") and Resort Funding, Inc., and thereafter a voluntary petition under chapter 11 was filed by TPC on April 26, 1996. An Order for Relief in the ACC case was signed by this Court on May 10, 1996.

By Order dated May 13, 1996, this Court approved the appointment of the Trustee as Trustee for Debtors AMI, RSC and TPC. On that same date, the Court entered an ex-parte Order compelling the UST to appoint an operating trustee in the ACC case pursuant to 11 U.S.C. § 1104. On May 15, 1996, the UST appointed the Trustee to serve in the ACC case. The Trustee's appointment was approved by the Court on that date.

By an Order dated June 12, 1996, this Court ordered joint administration of the Aloha Debtors' cases pursuant to Rule 1015 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). The Bennett and Aloha Debtors' cases were then substantively consolidated on July 22, 1997.

In a previous decision addressing the Trustee's First Applications for compensation and reimbursement of expenses, filed in both the Bennett and Aloha cases, the Court held that the Trustee was entitled to receive as interim payment the sum of $50,000 per month and reimbursement of expenses in an amount not to exceed $3,500 per month. *See In re The Bennett Funding Group, Inc*., 96-61376, slip op. at 12-13 (Bankr. N.D.N.Y. Jan. 9, 1997).[3] Pursuant to that decision, the Trustee must file and notice, within fifteen days of the end of each three-month period commencing January 2, 1997, an application for the approval of the actual compensation and expense reimbursement received by the Trustee during the prior three-month period. *See id.* at 13. The Trustee's Second and Third Applications were submitted in accordance with that decision.

ARGUMENTS

The UST raises a number of objections to the Second Application. One objection, which was also raised regarding the Trustee's First Application, is that the Second Application fails to comply with the United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 ("UST Guidelines"). Specifically, the UST asserts that the Trustee's Second Application fails to supply project billing itemization.

The UST also notes that while the Second Application indicates that 1,083.95 hours were worked by the Trustee during this time period, 401.50 of these hours are not supported by

[3] The $50,000 per month provisional payment, along with the $3,500 per month expense allowance, are the total interim amounts to be received monthly by the Trustee for his work in both the Bennett and Aloha Debtors' cases.

contemporaneous time sheets. In addition, the UST questions whether the Trustee could have worked 1,083.95 hours during this time period, noting that this would average out to be a work day of 12.04 hours seven days per week. The UST indicates that several of the daily time entries do not add up to the hours denoted in the Second Application, and that it does not appear that the Trustee has taken reductions in hours for time spent traveling.

Regarding expenses, the UST objects to payment of any amount above the $3,500 amount set in the decision addressing the Trustee's First Application. Furthermore, the UST asserts that a number of the expenses incurred are either improper, inappropriate or excessive, including billing the estates for access to an Internet services provider and charges relating to the Trustee's apartment in Syracuse.

The UST also filed an objection to the Third Application in which no specific objection to the payment of fees was made, although certain observations were noted regarding the Third Application. For example, the UST asserts that there are many block entries and other inaccuracies which cast doubt upon the accuracy of the time sheets presented. In the objections to both the Second and Third Applications, the UST asserts that the Trustee appears to be spending less time in Syracuse and more time in Connecticut, to which the UST objects that the estates should not have to bear additional travel and lodging expenses.

As to expenses, the UST continues to object to what is asserted to be improper, inappropriate or excessive charges, including high, short-term airfare charges, expensive cab rides and the high cost of a furniture lease for the Trustee's apartment in Syracuse. Other observations made by the UST shall be addressed in the Discussion section of this Decision.

The Committee filed a response only to the Second Application of the Trustee, however

it does not specifically challenge or question any of the Trustee's time entries or expenses. Instead, the Committee notes that it reserves its right to question the information contained in the Second Application at a later time, since the Committee does not believe that the Trustee is seeking a monthly "draw" in an amount greater than that approved by the Court. At the hearing on the Third Application, the Committee reiterated its position that it was not objecting at this time to payment of the monthly allowance to the Trustee.

The Trustee submitted responses to the objections of the UST to the Second Application. The Trustee argues that the application complies in substance with the UST Guidelines, and specifically that the time records contain task codes which categorize the services performed. The Trustee asserts that the detailed descriptions along with itemization by task code and by entity are sufficient to allow for evaluation of the services performed by the Trustee.

Regarding the UST's assertion that the Second Application does not contain time records for 401.5 hours of time spent by the Trustee on these cases, the Trustee states that the time records are indeed contained in the Application in Exhibit B, and that only 682.45 hours were spent during the current application period, which covered the period from January 1, 1997 through March 31, 1997. Time records for the additional 401.5 hours are for the period from October 21, 1996 through December 31, 1996, which the Court's earlier decision required the Trustee to submit. The Trustee also asserts that he does not believe that he is spending any less time in Syracuse than in prior periods, despite the UST allegations.

As to travel time, the Trustee argues that such time entries in the application represent travel while working on estate matters. The Trustee further asserts that he is not billing the estates at an hourly rate for his services, but that his time records serve only to provide a

description of services performed for the benefit of the estates. Addressing the UST's objection to expenses which exceed $3,500 per month, the Trustee asserts that the Court's decision which established the monthly allocation for expenses applies only to the advance payment of expenses, and that it does not prohibit the reimbursement of additional expenses subject to application to and approval by the Court. Additional responses by the Trustee shall be detailed in the Discussion section of this Decision.

The Trustee also submitted a response to the UST's objection to the Third Application. The response reiterates many of the same explanations detailed in the Trustee's response to the UST's objection to the Second Application, and therefore the Court shall address the explanations herein.

DISCUSSION

One of the primary arguments made by the UST is that the Trustee's applications do not conform with the UST Guidelines.[4] Rather than addressing the merits of that objection when it was raised by the UST in relation to the Trustee's First Application, the Court required that all future provisional fee applications submitted by the Trustee comply with those guidelines, as well as the applicable Local Rules of this Court. *See In re The Bennett Funding Group, Inc.*, 96-61376, slip op. at 9-10 (Bankr. N.D.N.Y. Jan. 9, 1997). The UST's specific objection to the Second Application is that it lacks project billing itemization. Upon review of the application,

[4] This argument was asserted in the UST's objection to the Second Application, but was not made in the UST's objection to the Third Application.

the Court finds that the Trustee's time records contain detailed descriptions of services performed each day. Each entry also contains the amount of time spent on the particular project or service, as well as an identifying code number to indicate for which estate the services were performed. Furthermore, each entry contains a task code which categorizes the service into a particular project. These task codes are the same codes that are utilized by other professionals in these cases whose fee applications are subject to review by a fee auditor appointed by the Court. While the Trustee's fee applications are not subject to review by the fee auditor, use of the same project codes promotes uniformity of review, and in addition, allows for the eventual compilation of aggregate time spent on each project. Therefore, the Court finds that the Trustee's fee applications comply in substance with the UST Guidelines regarding project billing itemization.

The UST also objected to what appears to be the lack of supporting time records for approximately 401 hours of a total of 1,083.95 hours the Trustee asserts he worked for the estates. As noted by the Court at the hearing on the Second Application, the fee application itself is somewhat confusing. During the period from January 1, 1997, through March 31, 1997, the Trustee devoted 682.45 hours to work for the estates. This total is found at the end of Exhibit B attached to the Second Application. In addition, however, the Trustee has included time records for the period from October 21, 1996 through December 31, 1996, in accordance with the Court's decision relating to the Trustee's First Application. These hours appear at the beginning of Exhibit B, and they are not separately totaled or set off in any identifying manner. Hours for this period are not counted towards the total found at the end of Exhibit B, however. Although it appears that the application asserts hours in excess of the totals provided, it is clear that the additional hours are supported by the proper documentation.

As to the UST's assertion that the Trustee is spending much less time in Syracuse, the Trustee responds that on average he does not believe that he has spent less time there, although he has had to travel more often outside of Syracuse on estate business. The underlying objection of the UST is that if the Trustee is spending less time in Syracuse, the estates may not be getting the benefit of the cost of the Trustee's apartment located there. The Court previously instructed the Trustee to find suitable permanent housing in the Syracuse area in an effort to reduce costs associated with the Trustee's presence there on a sustained basis. If in fact the cost of the Trustee's housing is now greater to the estates than the cost of hotel rooms based on a reduction of time spent in Syracuse, it may be prudent to return to the former system utilized by the Trustee. The Court notes that the Trustee's lease should be coming up for renewal some time in January or February of 1998. In the interim, the Court requests that the Trustee perform a brief analysis of whether the continued use of full-time housing in Syracuse is necessary. This analysis may be submitted to the Court in the form of a filed affidavit indicating the Trustee's need, or lack of need, for full-time housing.

While the UST observes that the Trustee is not reducing billings for his travel time by one-half, as required of other professionals in these cases, the Trustee provisional payment is not based exclusively on hours billed each month. He must submit detailed time records which justify the monthly provisional awards, however, and the Court believes it is appropriate for the Trustee to reduce his time "billed" for tasks that the Court has previously indicated are non-compensable or compensable at lower rates, such as clerical or administrative tasks or travel time. By reducing the hours "billed" pursuant to the Court's guidelines, the total hours worked by the Trustee will be in accordance with generally compensable hours of other professionals in these

cases. This in turn will facilitate review of the Trustee's overall expenditure of time and his performance at the time of the final fee application. *Cf. Continental Illinois Nat'l Bank & Trust Co. v. Charles N. Wooten, Ltd. (In re Evangeline Ref. Co.)*, 890 F.2d 1312, 1321-22 (5th Cir. 1989) (stating that interim fee awards are interlocutory and are subject to reexamination and adjustment); *Garb v. Marshall (In re Narragansett Clothing Co.)*, 210 B.R. 493, 499 (B.A.P 1st Cir. 1997) (same).

The UST has observed that there are daily entries in the application which do not add up to the hours specifically noted therein. The Court is of the opinion that the time records submitted by the Trustee should be supported by explanations of the services performed during the listed hours. While the Trustee has referred the Court to its decision in *In re Rosen*[5] for the proposition that a trustee's time records do not need to meet the same degree of particularity or specificity as those of other professionals, that decision awarded only 19% of the maximum allowable compensation under Code § 326(a) because the fee application contained only general descriptions of services performed and did not provide specific time or detail regarding those services. Upon review of the Trustee's fee applications, the Court finds that for the most part the time records are supported by specific and detailed descriptions of the services performed. Although there are instances where the time ascribed to individual services does not add up to the total billed for the day, or where services are "lumped" within a single time entry, the Court is generally satisfied with the form of the Trustee's applications. Importantly, every effort should be made by the Trustee to ensure that his fee applications minimize differences between total itemized hours and total hours billed. *Cf. In re Office Prods. of America, Inc.*, 136 B.R. 964, 976

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[5] 95 B.R. 11, 12 (Bankr. N.D.N.Y. 1988).

(Bankr. W.D. Tex. 1992) (stating that where time records are inadequate, reduction of compensation is appropriate); *In re Stoecker*, 118 B.R. 596, 601-02 (Bankr. N.D. Ill. 1990) (stating that trustee bears burden of proof on all issues concerning his fees, and that factor of time and labor involved is significant consideration in determining trustee's fee) (citing to *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *see also Gill v. Wittenburg (In re Financial Corp. of America)*, 114 B.R. 221, 223-23 (B.A.P. 9th Cir. 1990) (stating that reasonable trustee fees are determined in accordance with guidelines of 11 U.S.C. § 330(a) and factors considered thereunder), *aff'd*, 946 F.2d 689 (9th Cir. 1991).

Despite the Trustee's contention that the Court's decision on the First Application merely established a $3,500 cap on *advance* payment of expenses, the Court's intention was to limit all expenses to $3,500 per month. Based on the Trustee's response to the objection by the UST, however, it is clear that there are occasions when the Trustee must exceed the monthly cap due to, *inter alia*, additional airline travel in furtherance of his duties to the estates. For such additional expenses, it is not inappropriate to seek the Court's approval by way of the corresponding fee application. However, in instances where significant additional expenses are going to be incurred, prior approval by the Court shall be required. The Trustee has exceeded the aggregate monthly expense cap in the Second Application by $2,362.58 and in the Third Application by $87.85. The Court shall approve payment for such additional expenses, however in the future the Court notes that exceeding the aggregate monthly cap by more than 20% is significant.[6]

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[6] The Court approves the supporting documentation provided by the Trustee for expenses in the amount of $7,580.31 for the period from 10/19/96 through 12/31/96. Payment for these expenses has already been received by the Trustee.

Regarding expenses incurred for Internet access, the Trustee has explained that the $19.95 monthly charge pays for access for all of the Debtor companies, thus reducing mail/overnight delivery expenses. While this expense should normally be borne by the Debtors, the Trustee claims that use of his credit card allows for automatic credit card debit. In light of the relatively insignificant charge, the Court approves the continued use of the Trustee's credit card for payment of this expense.

The Trustee has provided bills for cellular telephone usage for each month. Although the UST has requested that further detail be provided to determine whether the charges are legitimately billed to the estates, the Court believes that further detail would unnecessarily require additional accounting procedures. The Trustee is a fiduciary and is expected to bill only those charges which relate to his work on behalf of the estates. *See Evangeline Refining*, 890 F.2d at 1323 (indicating that trustees, as officers of the court, are held to high fiduciary standards of conduct, and that claims for fees and costs must be fairly and honestly made and should not be excessive). No further information shall be required at this time.

The UST's observations regarding the Trustee's Third Application substantially mirror those regarding the Second Application, which have been addressed above. Most significant is the UST's concern regarding the accuracy of the Trustee's time records. As discussed earlier, the Trustee shall be required to keep more specific account of individual services performed each day and the hours applicable thereto.

Based on the foregoing, it is

ORDERED that fees and expenses requested in the Trustee's Second and Third Applications are hereby approved; and it is further

ORDERED that the Trustee shall file with the Court by December 5, 1997, an affidavit regarding his need or lack of need for continued permanent housing in Syracuse.

Dated at Utica, New York

this 7th day of November 1997

STEPHEN D. GERLING
Chief U. S. Bankruptcy Judge