

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 Third Interim Fee Application ("Third Application") of Saperston & Day, P.C. ("S&D"), Special Counsel to Richard C. Breeden as trustee in the consolidated case ("Trustee"). The Third Application seeks payment of professional fees in the amount of \$665,937.75 and reimbursement of expenses in the amount of \$56,385.44 incurred during the period September 1998 through December 1998. This Third 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 Application subject to review by the Fee Auditor ("Amended Order"). The report of the Fee Auditor ("Auditor's Report") was filed with the Court on March 10, 1999. The Third Application came on for a hearing before the Court on April 15, 1999, at which time the Court approved a provisional award of \$500,000 in fees and \$45,000 in expenses to S&D. Opposition to the Third 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

As is customary, the Auditor's Report identifies entries in S&D's time records filed in support of the Third Application as falling into twelve categories which "Appear to Violate Court Guidelines." In addition, the Auditor's Report isolates twenty-four more specific and limited categories or tasks which it calls to the Court's attention for further review and analysis.

S&D filed its Response to Fee Auditor's Report Re: Third Interim Application of Saperston & Day, P.C. for Allowance of Fees and Expenses (September 1998 to December 1998) with the Court on April 6, 1999 ("S&D's Response"). In S&D's Response, S&D agreed to

reduce its fees for its Third Application in the following amounts: \$281.50 for technical billing discrepancies; and \$1,097 for travel time. Thus, S&D has agreed to an aggregate voluntary reduction of its fees totaling \$1,378.50

As to the balance of the Auditor's Report, S&D takes issue with the Fee Auditor's observations, specifically regarding Potentially Duplicative Entries, Vaguely Described Entries, Spread Billing, Unit Billing, Multiple Professionals, Legal Research, Administrative/Clerical Tasks, Personnel who Billed Twenty or Fewer Hours, Long Billing Days, 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 disputed by S&D, the Court initially notes four categories in the Auditor's Report that do require adjustment. These categories are: Saperston & Day Retention, Saperston & Day Conflicts Checks and Resolution, Saperston & Day Fee Application and Response to Fee Auditor; total fees sought for these services were \$16,285.50. These services benefit only S&D, not creditors, and as in the case of S&D's First and Second 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 twenty-eight time entries noted by the Fee Auditor as vague. See UST Objection to Third Interim Fee Application of Saperston & Day, P.C. filed with the Court on March 29, 1999 at ¶ 3. In its Response S&D singles out one of the twenty-eight entries regarding a memorandum drafted by a paralegal. S&D argues that if it had submitted a separate entry for the telephone conversation, the Fee Auditor would have complained of "spread billing." See Response at 2. The 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* Amended Order at ¶ 9(a). The Court has reviewed the twenty-eight entries contained in Exhibit B which the Fee Auditor has labeled as vague. Upon its review, the Court has identified various entries which contain such vague wording that it is impossible for the Court to ascertain what, if any, benefit these tasks provided to the estate. Accordingly, those vaguely described tasks will be reduced by \$193.50.

The UST also references what the Auditor’s Report identifies as 455.90 hours or \$72,166 devoted to “legal research.” The UST expresses skepticism at the need for legal research of this magnitude, particularly given the fact that S&D did not draft the bulk of the complaints which resulted in the significant portion of the ongoing litigation during the four month period covered by the Third Application. In its Response, S&D sheds very little light on the UST’s legal research objection. The Court notes, in reviewing Exhibit H to the Auditor’s Report, that a significant amount of the legal research was related to procedural as opposed to substantive matters, suggesting that S&D may have been somewhat unfamiliar with practice in this Court. Such research should not be fully compensable because it forces creditors to finance a “learning curve” that Special Counsel in a case of this magnitude should have already mastered. Accordingly, the Court will disallow \$8,419 for services devoted, generally, to legal research of a procedural nature. The Court will make no further adjustments at this time in response to the objections of the UST, but notes that several of the UST’s objections must necessarily await the final outcome of the thousands of adversary proceedings being handled by S&D.

In its objections to the Third Application, the Committee again expresses its concerns that S&D's legal fees were the result of adversary proceedings commenced at the "eleventh hour" without proper analysis and duplicative efforts on the part of both STB and S&D. Though the Court shares in the concerns of the Committee, it makes no finding in that regard at this juncture.

As the Court observed in its Memorandum-Decision, Findings of Fact, Conclusions of Law and Order dated May 24, 2000 addressing S&D's Second Interim Fee Application, it is difficult to assess what benefit the work completed by S&D will have on the Estate until final resolution of the thousands of pending adversary proceedings it is pursuing. For the same reasons stated therein, the Court will continue to hold back 10% of the balance of fees requested and approved in this Third Application. As those adversary proceedings commenced by S&D progress, the Court will evaluate their benefit to the Estate in relation to the fees S&D currently seeks and will charge to the Estate in the future. To that end, the Court requires that S&D include with its future interim fee applications, to the extent applicable, an analysis of the adversary proceedings resolved during the pursuant interim application period, so that the Court has some basis to assess the actual benefit to the Estate of the services rendered in connection with those adversary proceedings.¹

Finally, with regard to S&D's request for expense reimbursement in the Third Application, the Auditor's Report has identified \$1,461.50 of "unreceipted expenses." S&D's Response provides at Exhibit A copies of receipts for those expenses totaling \$1,433. To that

¹ To the extent that S&D has filed a number of interim Fee Applications since the submission of the instant Fee Application, the Court requires that S&D file such an analysis for each such Fee Application currently pending before this Court within 60 days of the date of this order.

extent, those receipts appear to satisfy the Fee Auditor's criticism. However, Exhibit A does not include a receipt for a taxi ride costing \$28.50. That expense shall be disallowed consistent with the Amended Order. S&D has also indicated that they will voluntarily reduce their expense request by the following amounts: \$413.68 for "Special Clerical Services," and \$59.04 for "Vaguely Described Expenses." 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 Third Application:

<u>Total Requested Fees</u>	\$665,937.75
<u>Reductions:</u>	
Legal Research	8,419.00
Technical Billing Discrepancies (Voluntary)	281.50
Vaguely Described Tasks	193.50
Travel Time (Voluntary)	1,097.00
Saperston & Day retention, conflicts, fee applications and auditor response	14,785.50
Provisional Fee Award granted on April 15, 1999	500,000.00
10% Holdback (based on fees actually approved)	64,116.12
<u>Net Total Fees Allowed</u>	\$ 77,045.13
 <u>Total Requested Expenses</u>	 \$ 56,385.44
<u>Reductions:</u>	
Unreceipted Expenses	28.50
Special Clerical Services	413.68
Office Supplies	35.26
Vaguely Described Expenses	59.04
Provisional Expense Award granted on April 15, 1999	45,000.00
<u>Net Total Expenses Allowed</u>	10,848.96

Based on the foregoing, it is

ORDERED that the fees and expenses requested by S&D in its Third 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 11th day of October 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge