

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:

BINGHAM DANA

Attorneys for Michel/Shaked Group

150 Federal St.

Boston, MA 02110-1726

GUY B. MOSS, ESQ.

Of Counsel

WASSERMAN, JURISTA & STOLTZ

Attorneys for Official Unsecured Creditors Committee

225 Millburn Ave.

Millburn, NJ 07041

HARRY GUTFLEISH, ESQ.

Of Counsel

HISCOCK & BARCLAY.

Attorneys for Debtors

221 South Warren Street

P.O. Box 4878

Syracuse, New York 13221-4878

ROBERT LIDDELL, 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 all of the pending interim fee applications<sup>1</sup> of the

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<sup>1</sup> The Court has included in this Decision the Supplement to Fourth and Final Fee Application for informational purposes only. The Court made a final ruling on that Supplement by virtue of the Order dated March 12, 2003, notwithstanding inclusion in the title of the Order of the term "Partial Award."

Michel/Shaked Group (“MSG”) more particularly described as follows:

Second Interim Fee Application (“Second Application”) filed 3/16/2001 covering the period 2/1/00 through 12/31/00  
 Fees Requested: \$1,955,988  
 Expense Reimbursement: \$34,608.11  
 Hearing on Application held: 5/10/01  
 Provisional Fees and Expenses Awarded: \$1,000,000 fees and \$30,000 expenses pursuant to Order dated 5/11/01  
 Second Provisional Award: \$ 500,000 fees pursuant to Order dated 12/27/01

Third Interim Fee Application (“Third Application”) filed 3/13/ 2002 covering the period 1/1/01 through 12/31/01  
 Fees Requested: \$539,031  
 Expense Reimbursement: \$2,649.04  
 Hearing on Application held: 4/25/02  
 Provisional Fees and Expenses Awarded: \$475,000 fees and \$1,000 expenses pursuant to Order dated 5/3/02

Fourth and Final Fee Application (“Fourth Application”) filed 9/16/2002 covering the period 1/1/02 through 7/31/02  
 Fees Requested: \$64,080\* (included \$20,000 in estimated fee to complete project; thereafter MSG indicated that it had actually expended approximately \$25,000 in fees to complete but that it would limit its Fourth Application to the amount originally requested.  
 )  
 Expense Reimbursement: \$1,666.44  
 Hearing on Application held: 1/30/2003  
 Final Fees and Expenses Awarded: \$10,000 fees and \$1,666.64 expenses pursuant to Order dated 2/10/03

\*Supplement to Fourth and Final Fee Application Solely to Receive Reimbursement of its Outside Counsel Fees filed 2/11/03 covering the period 5/3/01 through 1/30/03  
 Fees Requested and Expenses Requested: \$57,553.99  
 Hearing on Supplement held: 2/27/03  
 Final Award of Outside Counsel Fees and Expenses: \$10,000 pursuant to Order dated 3/12/03

The Second and Third Applications were submitted to Stuart, Maue, Mitchell & James, Ltd (“Fee Auditor”) in accordance with the Court’s Order dated December 2, 1996. The Report of the Fee Auditor with regard to the Second Application was filed with the Court on April 26, 2001, and

a similar report with regard to the Third Application was filed with the Court on April 15, 2002. MSG filed Responses to the Fee Auditor's Report on May 9, 2001 and April 18, 2002, respectively. Additionally, objections to the Second Application were filed by the U.S. Trustee ("UST") on May 4, 2001, and by the Official Committee of Unsecured Creditors ("Committee") on May 8, 2001. MSG replied to the UST's objection in its May 9th Response. Likewise, the UST objected to the Third Application on April 18, 2002 and to the Fourth Application at the hearing held January 30, 2003.

### **JURISDICTIONAL STATEMENT**

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

### **FACTS and DISCUSSION**

MSG was initially appointed by Order of this Court dated August 11, 1999 ("August Order") as an expert witness to:

1. Review and analyze the existing financial data concerning the Debtors, including the work product of financial consultants previously engaged on behalf of the bankruptcy estate.
2. Based on the review of the above mentioned financial data, to render an opinion concerning what economic loss and/or damage resulted to the Debtors during the time frame when the Debtors were represented by certain third party professionals who are defendants in several adversary proceedings commenced by the Trustee.
3. To provide advice and consultation with respect to the foregoing

to the Trustee and his counsel, including expert opinions and testimony, if necessary.

Thereafter, on May 9, 2000, the Court executed a second Order (“May Order”) authorizing the Trustee “to extend the retention of the Michel/Shaked Group, including Dr. Allen Michel, Dr. Israel Shaked and Dr. Dennis Logue effective as of the date of the Application as expert consultants for trial in connection with *Breeden v. Sphere Drake Insurance plc, et al.* Adv. Proc. 97-70049A” (“Sphere Drake litigation”). The May Order authorized MSG to perform essentially the same services set out in the August Order, but in relation to the Sphere Drake litigation.

Both the Committee and the UST, in their Objections to MSG’s Second and Third Fee Applications, somewhat prophetically express concern as to the benefit the Debtors’ estate will derive from MSG’s services, as well as the significant fees billed in connection therewith. Following the hearing on the Second Application, the Court requested input from the Trustee’s counsel and special counsel involved with the so-called “law firm litigation” as to the directions given to MSG in light of what was then perceived as the possible dismissal of some, if not all, of that litigation.<sup>2</sup> Exclusive of the Sphere Drake litigation for which MSG was subsequently retained, it appears that through the end of the year 2000 and into the first quarter of 2001, MSG was justifiably devoting significant time and effort to the preparation of an expert report at the direction of special counsel. Thus, the objections of the Committee and the UST to the extent that they were relying on hindsight based upon information available to them at the time of the hearing on the Second Application cannot be given great weight by the Court in light of the mandate contained in

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<sup>2</sup> Following the hearing of May 10, 2001, on MSG’s Second Application, the Court received correspondence from Saperston & Day P.C. (May 29, 2001), Kaye Scholer, LLP (May 31, 2001) and Simpson Thacher & Bartlett (June 1, 2001). At the heart of the Court’s inquiry was the then pending motion for summary judgment by the professional defendants in the various lawsuits for which MSG had been retained as an expert.

§ 330(a)(3)(C) of the Bankruptcy Code (11 U.S.C. §§ 101-1330)(“Code”).

**The Second Application**

In its Response to Fee Auditor’s Report filed May 9, 2001, MSG agreed to voluntarily reduce its fee request by \$3,560 to the sum of \$1,952,428, and its expense reimbursement by \$671.26, to the sum of \$33,936.85. Upon a final review of the Response, the objections of the UST, the objections of the Committee, correspondence from special counsel and the Fee Auditor’s Report, the Court will make only one further adjustment to the Second Application. The Court will reduce the fees sought by MSG in connection with the preparation of, presumably, its First Application by \$16,370.50, allowing \$10,000. As this Court has noted on numerous occasions in connection with the multitude of fee applications filed in this Chapter 11 case, time devoted to the preparation and defense of fee applications essentially benefits the professional and only the professional. Thus, the Court will not allow such services to be fully compensated at the expense of the unsecured creditors.

The Court makes its final award as follows:

Total Fee Requested	\$ 1,955,988.00
Voluntary Reductions	3,560.00
Disallowance in connection with preparation of fee application	16,370.50
Provisional Awards granted on 5/11/01 and 12/27/01	1,500,000.00
<b>Allowed Final Net Fee remaining unpaid</b>	<b>\$ 436,057.00</b>
Total Expense Reimbursement	\$ 34,608.11
Voluntary Reduction	671.26
Disallowance	0.00

Provisional Award on 5/11/01	30,000.00
<b>Allowed Final Net Expense Reimbursement remaining unpaid</b>	<b>\$ 3,936.85</b>

### **The Third Application**

While purporting to cover the period 1/1/01 through 12/31/01, the bulk of the services rendered by MSG actually only covered the months of January, February and March 2001 and pertained only to work in connection with an expert report prepared for the Trustee's use in his then pending litigation versus Arthur Andersen. Trustee's special counsel in that litigation, Kaye Scholer, LLP, had advised the Court in correspondence, that it directed MSG to finalize its expert report in early March 2001, notwithstanding "a hiatus in the AA litigation agreed to among counsel (because of issues raised in the so-called "attorneys litigation")." See correspondence from Kaye Scholer, LLP to the Court dated May 31, 2001. That decision was made because Kaye Scholer, LLP was advised by MSG that "it was almost finished with project." *Id.* Thus, MSG proceeded with the completion of the expert report through the end of March 2001. MSG's billings for professional services during the month of March included in the Third Application totaled approximately \$148,300. In hindsight, as is now known, the Trustee's special counsel was to have little or no use for the expert report prepared by MSG because on August 20, 2001, the Hon. John E. Sprizzo of the United States District Court for the Southern District of New York dismissed the so-called "law firm litigation," as well as the Arthur Andersen litigation concluding, *inter alia*, that the Trustee had no standing to commence such litigation. Judge Sprizzo's ruling was affirmed on appeal by the United States Court of Appeals for the Second Circuit on July 15, 2003. As has been previously indicated, Congress in amending Code § 330, generally precluded bankruptcy courts from applying hindsight when considering a professional's fee application at a point in time far removed from the actual

performance of the services. See *In re Angelika Films 57th, Inc.*, 227 B.R. 29, 42 (Bankr. S.D.N.Y. 1998), *aff'd* 246 B.R.176, (S.D.N.Y. 2000); *In re Unitcast, Inc.*, 214 B.R. 992, 1009 (Bankr. N.D. Ohio 1997); *In re Rancourt*, 207 B.R.338, 341 (Bankr. D.N.H. 1997). Only in the limited circumstances outlined in Code § 328(a) may the bankruptcy court apply hindsight, and then only when the basis for applying that hindsight could not have been anticipated at the time of the professional's appointment. Here it can hardly be said that from MSG's perspective dismissal of the Trustee's litigation versus the law firms and Arthur Andersen could not have been anticipated as that prospect is always present in all litigation.<sup>3</sup>

The Court has reviewed the Third Application in light of the Fee Auditor's Report, the objection of the UST and MSG's Response to the Fee Auditor's Report and, again, will adjust only the fees incurred by MSG in connection with the preparation and defense of its Second and Third Applications. The Auditors Report reflects a total of 50.6 hours or \$19,725 in fees devoted to these tasks and the Court will allow \$7,500, thus disallowing \$12,225.

The Court make its final award as follows:

Total Fee Requested	\$539,031.00
Voluntary Reductions	0.00
Disallowance in connection with preparation of fee application	12,225.00
Provisional Award granted on 5/3/02	475,000.00
<b>Allowed Final Net Fee remaining unpaid</b>	<b>\$ 64,031.00</b>

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<sup>3</sup> In reaching this conclusion the Court makes no finding regarding the role played by Trustee's special counsel in continuing to utilize MSG's services to prepare a report or reports that may ultimately prove to be of absolutely no value to the consolidated estates in connection with the so-called "law firm" and Arthur Andersen litigation.

Total Expense Reimbursement	\$ 2,649.04
Voluntary Reduction	746.99
Disallowance	0.00
Provisional Award on 5/3/02	1,000.00
<b>Allowed Final Net Reimbursement remaining unpaid</b>	<b>\$ 902.05</b>

As indicated above, the Court made its final award on MSG's Fourth and Final Application by Order dated February 10, 2003, and on MSG's Supplement to Fourth and Final Application by Order dated March 12, 2003, and makes no further award on either Application herein.

Based on the foregoing, the Net Fees and Expenses as allowed in connection with MSG's Second and Third Applications shall be paid from the unencumbered assets of the Consolidated Estates.

IT IS SO ORDERED.

Dated at Utica, New York

this 25th day of February 2004

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge