

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 Sixth Interim Fee Application (“Sixth Application”) of Simpson, Thacher & Bartlett (“STB”), attorneys for Richard C. Breeden as trustee in the consolidated case (“Trustee”). The Sixth Application seeks payment of professional fees in the amount of \$3,288,267.50 and reimbursement of expenses in the amount of \$555,405.29 incurred

during the period November 1, 1997 through February 28, 1998.¹ This Sixth 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 15, 1998. The Sixth Application came on for a hearing before the Court on July 30, 1998, at which time the Court approved a provisional award of \$1,750,000 in fees and \$250,000 in expenses to STB. Opposition to the Sixth Application was interposed by the United States Trustee (“UST”) and the Official Committee of Unsecured Creditors (“Committee”).²

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

¹STB adjusted its fee and expense request as reflected on Exhibit A attached to its Response to Fee Auditors Review and Analysis of Sixth Interim Fee Application filed July 27, 1998 (STB’s “Response”). The net adjusted fee is \$3,280,561.50 and the adjusted expense total is \$555,025.71.

² STB repeatedly refers to the Auditor’s Report as “Objecting” to portions of its Sixth Application, suggesting that the Court has abdicated some portion of its responsibility of fee application review in favor of an entity not even authorized by statute to play a role in a Chapter 11 case. The Court again emphasizes that the Fee Auditor’s role is simply one of review, compilation and categorization. The functions of analysis, allowance and disallowance have at all times throughout this case been performed by the Court.

Familiarity with the prior decisions of this Court which dealt with the first five fee applications of STB is presumed and they will be referenced herein to the extent necessary.³

The Auditor's Report generally identifies entries in STB's time records offered in support of the Sixth Application as falling into twenty general categories which "Appear to Violate Court Guidelines." In addition, the Auditor's Report isolates approximately one hundred fourteen 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 its Response. In that Response STB indicates that it has voluntarily reduced the Sixth Application by the net sum of \$7,705.50 which was the result of hourly computational errors and adjustments for travel time. STB has also conceded that its expenses should be reduced by \$379.58.

STB again challenges the Auditor's Report insofar as it identifies "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 Fifth Fee Applications. Those criticisms need not be reiterated a sixth time in this decision.

With regard to the one hundred twenty more specific categories identified by the Fee Auditor which "The Court May Wish to Examine for Relevance Necessity and Reasonableness,"

³ 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 and November 16, 1998. 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.

STB limits its Response to the Fee Auditor's highlighting of members of the firm who billed more than 12 hours in any one day during the current reporting period, intra-office conferences and time devoted to fee applications. With regard to the "long billing days" referred to in the Auditor's Report, STB offers no specific explanation other than to suggest that it is evidence that its attorneys and paralegals "are working very hard to achieve the best results possible for the Trustee and the estate." (*See* STB's Response, paragraph C.1 pgs. 15-16).

The Fee Auditor's Report identifies a total of 975.20 hours being consumed on these "long billing days" for which a fee of \$147,038.50 is requested. (*See* Fee Auditor Report, Ex.K). While in the past, STB has offered some unique event necessitating these "long billings days," none appears to be advanced in the current Sixth Application. In fact, the matters to which these extended days are devoted, as identified in the Fee Auditor's Report, do not appear to be particularly time sensitive or unusually critical to the case overall. Thus, the Court will reduce that fee request by \$50,000, being careful not to also reduce other categories of services identified in the Fee Auditor's Report which were performed on the so-called "long billing days." As it has done in the past, the Court makes this adjustment pending a further explanation by STB concerning these extended hours.

The Court once again considers STB's time devoted to "Vaguely Described Tasks," "Multiple Professionals at Events," "Intra Office Conferences," and "Administrative" or "Miscellaneous Clerical Tasks". Having written five prior decisions dealing with each of the foregoing categories, the Court will not reiterate the basis for its adjustments except as set forth below.

Vaguely Described Tasks

Upon review of Exhibit B attached to STB's Response, the Court will make no adjustment to the fees requested in this category.

Multiple Professionals at Events⁴

As reflected on Fee Auditor's Exhibit C - disallow \$24,773.50

Intra Office Conferences⁵

As reflected on Fee Auditor's Exhibit M-1 - disallow \$16,039.

Administrative and Clerical Tasks

As reflected on Fee Auditor's Exhibits D-1, D-2, D-6, D-7 and E-2, specifically Exhibits D-1, Filing/Organizing/Retrieving; D-2, Distribution of Documents/Materials; D-6 Miscellaneous Clerical Tasks; D-7, Administrative Tasks, and E-2, Assist in Service of Documents, a combined disallowance, \$139,897. This disallowance represents one-third of the total fees reflected on Fee Auditor's Exhibits D-1, 2, 6, 7 and E-2. While the Court appreciates STB's contention that many of these tasks "entail the very essence of the para professional work that Simpson Thacher paralegals perform," the Court believes 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 thousands upon thousands of dollars because STB may choose

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

⁵ Time disallowed on Exhibit M-1 resulted from intra-office conferences generally between 3 or more timekeepers, which in the Court's experience and familiarity with this case was an unnecessary overutilization of personnel.

to bill private clients in a similar fashion for these tasks.

Fee Application

The Sixth Application seeks total fees of \$104,432 in connection with preparation and defense of STB's fee applications. The Court disallows \$101,299.04.

Firm Staffing and Hourly Rates

Both the UST and the Committee have objected to STB's alleged overutilization of personnel and the application of ever escalating hourly rates of various groups of STB attorneys. The Committee references Footnote 6 of the Auditor's Report which indicates that "Through the Sixth Interim period, a total of 200 Simpson, Thacher personnel have billed to the matter: 11 partners, 78 associates, 91 paralegals and 20 other timekeepers." The Committee goes on to suggest that despite objections by it and the UST to the previous five fee applications, as well as the Court's prior fee decisions, STB has taken no measures to "efficiently manage the use of its personnel in this case." *See* Objection of the Committee dated July 23, 1998, at paragraphs 4 and 5.) The UST notes that "All (STB) partners are now billing at a rate in excess of \$500 per hour," and that 11 partners and associates who regularly perform services in the instant case have had rate increases anywhere from 2 to 4 times throughout the first six fee applications. *See* UST Objection dated July 27, 1998, at paragraph 23.)

While it is true that this Court has previously commented on both STB's alleged overutilization of personnel and arguably excessive hourly rates, the Court does not reach the conclusion as of the time period reflected in the Sixth Application, that STB stepped beyond the

bounds of reasonableness in either general category except as otherwise noted in this Decision. Thus, the Court notes these objections of the UST and the Committee, but makes no general adjustment during the instant time period.

Lady Kathleen

The Court will once again disallow a fee of \$3,469.50 which is attributable to services rendered in connection with the yacht referred to as the Lady Kathleen which the Court has previously concluded was not an asset of the consolidated estate. (Fee Auditor's Exhibit Q-13).

Change of Venue of Michael A. Bennett Case

During the period covered by this Sixth Application, STB has again billed the consolidated estates a total of 82.90 hours or \$28,712.50 for work in connection with the above referenced motion. (*See* Fee Auditor Exhibit BB-2). To date, STB has sought to charge the estates with a total of \$49,543 in fees in connection with this motion which has provided no perceptible benefit to creditors.⁶

In fact, this discreet matter has resulted in significant additional fees charged by Coll, Davidson, Carter, Smith, & Barkett, P.A. ("Coll Davidson") appointed by the Court, at the Trustee's request to handle a similar venue motion in the bankruptcy court in Florida.

Both the UST and the Committee question the extent to which STB appears to have involved itself in this motion despite the fact that the Court denied the motion it filed in the Northern District of New York and the motion was refiled in the Southern District of Florida by

⁶The total figure includes charges reflected in both the Fifth and Sixth Applications.

Coll Davidson. STB offers little in the way of explanation except to assert that it provided facts and affidavits in assisting Coll Davidson in Florida.

The Court simply reiterates its position as set forth in its Decision regarding this matter on STB's Fifth Application and will again disallow 30% of the fees incurred or \$9,571.

Database Matters

STB has sufficiently explained its need to expend time in connection with maintaining a database, presumably the "Concordance" database during the current application period and the Court will make no adjustment thereto.

Shamrock Holdings Group, Inc.

The Fee Auditor has identified 24.10 hours which STB devoted to the "Shamrock Bankruptcy Filing," representing a fee request of \$8,415. (*See* Fee Auditor's Exhibit T-2). In addition, Exhibit 0-3 reflects 57.90 hours devoted to professional services rendered on behalf of "Harold's Club," a Shamrock Asset. This work reflects a fee request of \$28,563. 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.

STB responds to these criticisms by reminding the Court that the Trustee of these consolidated estates own 100% of the stock of Shamrock and, therefore, is the beneficial owner of Harold's Club. As such, STB argues that its services clearly benefit these bankruptcy estates.⁷

⁷ On June 17, 1998, the firm of Phillips, Lytle, Hitchcock, Blaine & Huber, LLP was appointed by Order of this Court to represent Shamrock.

In light of STB's assertions and current posture of the Shamrock bankruptcy, the Court will not make any adjustment at this time. The Court, however, reserves the right to reconsider the fees devoted to Shamrock and Harold's Club at a later time.

Depositions

As in the case of the Fifth Application, the instant application includes a significant amount of time devoted to numerous depositions, 1,118.85 hours and \$291,114 in fees. As was the case with the Fifth Application, the Court will make no disallowance in the Sixth Application, but again emphasizes that any fee awarded in this regard is subject to being adjusted in the future if determined to be warranted.

Carmi Bank Trial

According to Fee Auditor's Exhibit DD-2, 578.8 hours were consumed by STB in connection with the so-called "Carmi Bank Trial." Fees totaling \$155,758 were incurred by two partners and four associates and fourteen paralegals. The Court's familiarity with the "Carmi Bank Trial," which in fact was a one day evidentiary hearing, causes it to seriously question the necessity of such a significant amount of time and personnel being devoted to it. While the Court appreciates that there was substantial discovery and discussion leading up to the "trial," without a more in depth explanation than can be gleaned from entries in time records, the Court will disallow 30% of the fees requested or \$51,919.

Conflict of Interest

Both the UST and the Committee have again restated their objection to approval of fees that relate to STB's services rendered to two non-debtors, Equivest Finance Inc. ("Equivest") and Resort Funding, Inc. ("RFI"), as well as services provided to the Trustee which they assert were of a personal nature.

The Fee Auditor has identified these so-called conflict issues primarily on three exhibits. Exhibit Z-1, Allegation Re: Simpson Thacher Conflict of interest; Exhibit Z-2, Trustee Equivest Salary; Exhibit Z-3, Allegation Re: Trustee Conflict of Interest. These 3 exhibits reflect a total of 315 hours and \$107,061. As it has in the past, the Court, rather than analyzing each of these alleged conflicts, will, with the exception of Exhibit Z-3, simply award the requested fees without prejudice to the rights of either the UST or the Committee or any other party in interest seeking disgorgement of said fees and expenses at a later point in time based on an alleged conflict of interest.

As to Exhibit Z-3, however, the Court finds little justification for charging the creditors of the estates with approximately \$80,000 of legal fees incurred primarily to defend the Trustee's initially undisclosed personal purchases of Equivest stock at a time when he was promoting a debt for equity swap involving the stock which would have a potential positive effect on its value. Because the Court does not believe that all of the entries reflected in Exhibit Z-3 deal with the Trustee's personal purchase of Equivest stock and because some of those entries were already disallowed by the Court in connection with this Application under the heading Intra-Office Conferences, the Court will disallow \$50,000 of the amount reflected on that Exhibit.

With regard to the remaining objections asserted by the UST and the Committee, the Court has considered the same in light of STB's Response to the objections of the UST and the

Committee and as indicated above has determined to make no further adjustments to the Sixth Application based upon those objections in connection with this Application.

Expenses

The Fee Auditor has identified \$1,297.35 in unreceipted travel expenses. STB's Response provides at Exhibit F copies of receipts which appear to satisfy this criticism.

The instant Six Application again seeks reimbursement for expenses identified as "Word Processing," "Proofreading," "Desktop Publishing," "Overtime Transportation," "Overtime Meals," and "Restaurant/STB Cafeteria." These expenses total \$90,809.89 and shall be disallowed consistent with prior decisions. The Court also notes that STB's use of Express Mail/Messenger/Courier Service again exceeds \$20,500. The Court will, therefore, allow a total of \$15,000, denying reimbursement of \$7,015.20 as representing an indiscriminate use of these services.

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

<u>Total Requested Fees</u> (as adjusted)	\$3,280,561.50
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Disallowances:

Long Billing Days	50,000.00
Multiple Professionals at Events	24,773.50
Intra Office Conferences	16,039.00
Administrative and Clerical Tasks	139,897.00
Fee Application	101,299.04
Lady Kathleen	3,469.50
Change of Venue Motion	9,571.00
Carmi Trial	51,919.00

Conflicts of Interest	50,000.00
Provisional Fee Award granted on August 3, 1998	\$1,750,000.00
<u>Net Total Fee Allowed</u>	\$1,083,593.46
<u>Total Requested Expenses</u> (as adjusted)	\$ 555,025.71
Office Overhead	90,809.89
Express mail/Messenger/Courier Services	7,015.20
Provisional Expense Award granted on August 3, 1998	250,000.00
<u>Net Total Expenses Allowed</u>	\$ 207,200.62

Based on the foregoing, it is

ORDERED that the fees and expenses requested by STB in its Sixth Application shall be disallowed as detailed above; and it is further

ORDERED that payment of the remaining balance of allowed fees and expenses, and any 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 1st day of June 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge