UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
	Chapter 11
Debtor	Substantively Consolidated

APPEARANCES:

WASSERMAN, JURISTA & STOLZ, P.C. Attorneys for Official Committee of Unsecured Creditors 225 Millburn Avenue Millburn, New Jersey 07041	DANIEL STOLZ, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Second Interim Fee Application of Wasserman, Jurista & Stolz, P.C. ("WJS"), attorneys for the Official Committee of Unsecured Creditors ("Committee"). The application seeks payment of professional fees in the amount of $339,997.25 and reimbursement of expenses in the amount of $34,396.18 incurred during the period from July 15, 1996 to January 31, 1997. This fee application was submitted to Stuart, Maue, Mitchell & 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. The report of the Fee Auditor ("Report") was filed with the Court on April 24, 1997, and a hearing on the fee application was held on June 12, 1997, at which time the Court awarded WJS a provisional award of $200,000 in fees and $25,000 in expenses. The matter was submitted for decision on that date.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and 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 ARGUMENTS

This Court previously entered a Memorandum-Decision, Findings of Fact, Conclusions of Law and Order in which it awarded fees and disbursements to WJS in connection with its First Interim Fee Application. *See In re The Bennett Funding Group, Inc*., No. 96-61376, slip op. (Bankr. N.D.N.Y. Feb. 6, 1997) ("WJS Fee Decision I"). Familiarity with that Decision is presumed and it will be referenced herein to the extent necessary.

The Order appointing the Fee Auditor and the subsequently issued Amended Order were made applicable to all professionals in these jointly administered cases employed or to be employed pursuant to sections 327 or 1103 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). The aforementioned Orders provided the authority and the guidelines for professionals regarding the process to be employed in submitting fee applications to the Fee Auditor and to the Court. In accordance with its responsibilities, the Fee Auditor performed a review of WJS's Second Interim Fee Application and submitted a Report in order to assist the Court in its analysis of the Fee Application. The Fee Auditor identified various time and expense entries that appeared to violate Court guidelines or that were brought to the Court's attention for further review.

WJS provided specific responses to the Report of the Fee Auditor in a reply filed on May 5, 1997 ("Reply"). The Reply addresses various issues and fee entries brought to the Court's attention by the Fee Auditor, and also provides a general comment that the portion of the Fee Auditor's Report entitled "Areas the Court May Wish to Examine for Relevance, Necessity, and Reasonableness" is awkward, often inapplicable in these cases and "defies response," in addition to providing an inaccurate overview of the services provided by the professionals in these cases. WJS' responses to the other individual categories shall be addressed in the Discussion section of this Decision.[1]

The only objection to the Second Interim Fee Application of WJS was filed by the United States Trustee ("UST") on April 29, 1997. The UST stated that for the most part the services rendered by WJS and the fees related thereto are reasonable. The UST does adopt some of the findings of the Fee Auditor, however, and specifically objects to the "double billing" of intra-office conferences, and questions whether services and fees related to the "Trustee Harrison Fee Application" pertain to the Second Interim Fee Application.

WJS filed a response to the UST's objection on May 2, 1997, in which it argues that it has been careful to avoid the use of multiple attorneys for similar functions, but that in order to coordinate the services of various attorneys, meetings were often required daily to assure that all issues were being addressed. WJS also notes that for the most part, only one attorney billed for intra-office conferences, and thus the blanket percentage reduction in this category suggested by the UST is not appropriate. As to fees billed for objections to Matthew Harrison's fee

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[1] In response to the Reply of WJS, the Fee Auditor prepared a revised exhibit addressing alleged double billings "in order to clear up some of the apparent confusion over the double billing exhibit . . . ." *See* Letter from Fee Auditor to WJS, dated May 5, 1997.

application, WJS asserts that such fees are appropriately billed to these cases, and notes that it was the primary objector to the large fee application of Mr. Harrison, which was thereafter reduced.

DISCUSSION

The Court shall not reiterate the commentary set forth in the WJS Fee Decision I regarding the potential for double disallowance of certain fees and expenses.

Code § 330 requires that authorized professionals demonstrate that their services were actual, necessary and reasonable, and it is the Court's duty to independently examine the reasonableness of the fees requested.[2] *See In re Keene Corp.,* 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997); *In re Spanjer Bros., Inc*., 191 B.R. 738, 747 (Bankr. N.D.Ill. 1996); *In re Ferkauf, Inc.*, 42 B.R. 852, 853 (Bankr. S.D.N.Y. 1984), *aff'd*, 56 B.R. 774 (S.D.N.Y. 1985). The applicant bears the burden of proving that the services rendered were actual and necessary and that the compensation sought is reasonable. *See Brake v. Tavormina (In re Beverly Mfg. Corp.)*, 841 F.2d 365, 370 (11th Cir. 1988); *In re Navis Realty*, 126 B.R. 137, 145 (Bankr. E.D.N.Y. 1991).

Reasonable fees are in part determined by calculating the "lodestar" figure, which is derived by multiplying the number of hours reasonably expended by a reasonable hourly rate.

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[2] Interim fee applications submitted pursuant to Code § 331 are judged under the same standards as final applications under Code § 330. *See In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474, 482 (Bankr D.Utah 1991); *In re RBS Indus., Inc*., 104 B.R. 579, 581 (Bankr. D.Conn. 1989).

See Blanchard v. Bergeron, 489 U.S. 87, 94, 109 S.Ct. 939, 944-45, 103 L.Ed.2d 67 (1989); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997); *Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1159 (2d Cir. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 17 (Bankr. S.D.N.Y. 1991). The lodestar amount should be comparable with rates prevailing in the district in which the court sits for similar services by professionals of reasonably comparable skill, experience and reputation. *See Blum v. Stenson*, 465 U.S. 886, 896 n.11, 104 S.Ct. 1541, 1547 n.11, 79 L.Ed.2d 891 (1984); *Olsten Corp.*, 109 F.3d at 115; *Polk v. New York State Dep't of Correctional Servs.*, 722 F.2d 23, 25 (2d Cir. 1983). An exception to the standard of compensating out-of-town professionals at rates prevailing in the district may be found when such professionals are necessarily employed. *See In re Victory Markets, Inc.*, No. 95-63366, slip op. at 6 (Bankr. N.D.N.Y. Nov. 7, 1996); *In re ICS Cybernetics, Inc.*, 97 B.R. 736, 740 (Bankr. N.D.N.Y. 1989) (recognizing exception but finding no substantial disparity between rates charged in Buffalo, New York as compared to Syracuse, New York); *In re S.T.N. Enters., Inc.*, 70 B.R. 823, 843 (Bankr. D.Vt. 1987) (indicating that in complex cases of national scope, rates of nationally prominent, out-of-state firms may apply). The billing rates of WJS have not been challenged during this fee period and the Court shall not make any adjustments to the hourly rates at this time. WJS must still demonstrate that the compensation requested is reasonable and that its services were actual, necessary and reasonable.

Determination of the lodestar figure does not end the inquiry of whether fees are reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983). A fee application is to be examined by the court with a consideration of the value of the work performed to the client's case. *See DiFilippo v. Morizio*, 759 F.2d 231, 235

(2d Cir. 1985). If the expenditure of time is deemed to be unreasonable, such hours should be eliminated from the lodestar calculation. *See Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939-40. In calculating a fee computation, the court may make an across-the-board reduction in the amount of hours billed based upon a finding of excessive or unreasonable hours. *See In re "Agent Orange" Prod. Liab. Litigation*, 818 F.2d 226, 237-38 (2d Cir. 1987); *New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983); *see also U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd*., 55 F.3d 1276, 1288 (7th Cir. 1995); *Ohio-Sealy Mattress Manuf. Co. v. Sealy, Inc.*, 776 F.2d 646, 658 (7th Cir. 1985). Furthermore, the lodestar figure may be reduced for over staffing and duplicative or inefficient work. *See Agent Orange*, 818 F.2d at 237; *Siegal v. Merrick*, 619 F.2d 160, 164 n.9 (2d Cir. 1980). Across-the-board percentage reductions are appropriate to use in cases where fee applications are voluminous and numerous. *See Agent Orange*, 818 F.2d at 238. In such cases, "no item-by-item accounting of the hours disallowed is necessary or desirable." *See id.* (citing *Ohio-Sealy*, 776 F.2d at 658).

With the foregoing principles in mind, the Court shall address the services provided and the fees requested in the Second Interim Fee Application of WJS.

Discrepancy Between Amounts Billed and Amounts Computed

Addressing the Fee Auditor's findings, WJS acknowledged that the discrepancy between fees and expenses billed by WJS and the fees and expenses computed by the Fee Auditor is the result of an error on the part of WJS in computing hourly rates relating to travel time. WJS therefore agrees to accept reduction of its fee request by the amount of $927.50.

Duplicate Billing Entries

Regarding alleged double billings, WJS addressed the findings of the Fee Auditor individually. WJS agreed that the entries for Harry Gutfleish on 10/10/96 and 10/29/96 were inadvertent double billings, and therefore the amount of $72 shall be disallowed. As to fee entries on 12/11/96, 12/12/96, 1/22/97and 1/23/97, WJS argues that such entries are not double billed, but rather that one of the billings is for travel time to and from Court and the other is for the actual Court appearance. Review of the revised exhibit, *see* footnote 1, *supra*, appears to indicate that these dates do indeed contain inadvertent duplicate time entries. Specifically, on 12/11/96, Harry Gutfleish billed three hours for travel time to/from Newark to Syracuse for the 12/12/96 calendar. On 12/12/96, Mr. Gutfleish billed six hours for the Court appearance, two hours for travel to and from the Court from Syracuse, and an additional six hours for "travel time-Syracuse/NWK (round trip)." The Court presumes that Mr. Gutfleish did not make two trips to and from Syracuse to Newark within those two days, and therefore the additional three hours billed on 12/11/96 for travel shall be disallowed. Similarly, an additional three hours billed for travel time from Syracuse to Newark on 1/23/97 shall be disallowed because six hours was billed on 1/22/97 for travel to/from Newark to Syracuse. These two additional disallowances total $600.[3]

WJS also submits that there are no double billings contained in the time entries of Stephen Kitzinger. The Fee Auditor noted in its Report, however, that the duplicate billing entries could

[3] The Court makes this finding without prejudice to the right of WJS to show at a later time why the additional three hours of travel time on two separate occasions is not double billed.

be identified by reference to the First Interim Fee Application of WJS. On the revised exhibit, the Fee Auditor listed the alleged duplicate fee entries by reference to both the First and Second Interim Fee Applications. Apparently, billings for Mr. Kitzinger on July 15, 1996 for the exact same tasks and amount of time were included in the First and Second applications. Therefore, these duplicate fees, amounting to $350, shall be disallowed.

WJS also acknowledged that a $32 reduction is proper for one entry of Scott Rever. As to alleged duplicate time entries by Daniel Stolz, WJS agrees that an entry on 7/24/96 for $54 is improper, but that the remainder of the entries which reflect "multiple conferences or telephone calls, which may have occurred on the same day, but involved several conversations or meetings with the same person or persons." The Court shall make no further deductions in this category.

Vaguely Described Tasks

Fee requests should be supported with specific, detailed and itemized documentation. *See* C&L Fee Decision I, slip op. at 16; *In re Poseidon Pools of America, Inc.*, 180 B.R. 718, 729 (Bankr. E.D.N.Y. 1995). Without detailed itemization, it is difficult to determine whether the time expended was reasonable, whether the services were needed and whether the fees charged were reasonable. *See Hensley*, 461 U.S. at 441, 103 S.Ct. at 1943 (Burger, C.J., concurring).

WJS responded to the Fee Auditor's classification of certain entries as "Vaguely Described Conferences," although the Reply actually responds to the category of "Other Vaguely Described Tasks" found in Exhibit D. As to Exhibit D, WJS asserts that the two questioned entries related to research for avoiding preferences and for litigation regarding the West Virginia Racetrack. No deduction shall be made for these entries, as they have been adequately explained.

As to the issue of vague telephone conferences as listed in Exhibit C of the Report, WJS did not specifically respond to the Fee Auditor's findings. Because the entries in Exhibit C are vague and provide no detail at all, fees of $250 shall be disallowed to reflect this shortcoming.

Multiple Attendance at Events

It is clear that over staffing and duplication of work are not to be compensated from the debtor's estate. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983) (stating that excessive, redundant or otherwise unnecessary hours should not be considered); *General Electric Co. v. Compagnie Euralair, S.A.*, 1997 WL 397627, *4, (S.D.N.Y. July 3, 1997) (noting that when more lawyers than are necessary are assigned to a case, level of duplication of effort increases; also finding staffing level excessive); *Agent Orange*, 818 B.R. at 238 ("Over staffing and other extravagances are not recoverable"); *Seigal v. Merrick*, 619 F.2d at 164 n.9 ("Ample authority supports reduction in the lodestar figure for over staffing as well as for other forms of duplicative work"); *see also In re Rancourt*, 207 B.R. 338, 363 (Bankr. D.N.H. 1997) (finding that time record indicated excessive staffing and inordinate amount of conferences).

WJS argues that it has gone to great lengths in this case to avoid multiple attendances or participation where unnecessary. In support of time entries labeled by the Fee Auditor as "Multiple Attendances at Events," WJS explains that both Mr. Stolz and Mr. Gutfleish are required to attend all meetings or conference calls with the Committee, and in addition that there are certain aspects of the case more familiar to one or the other attorneys working on the case, therefore, requiring the participation of more than one attorney at various times.

Upon review of Exhibit E of the Report, the Court has located billing entries and attendant fees amounting to $2,049 which shall be disallowed as representing services for which one attorney was more than sufficient.

Administrative/Clerical Tasks

In the Decision relating to WJS' First Interim Fee Application, the Court provided a lengthy discussion regarding the compensability of administrative or clerical tasks. Familiarity with that discussion is assumed, and therefore it shall not be repeated here. While such tasks may be compensable, it is the applicant's burden to demonstrate to the Court the reasonableness and necessity of a professional or paraprofessional performing such tasks. *See* WJS Fee Decision I, slip op. at 18-19; *Poseidon Pools*, 180 B.R. at 746.

In response to the Fee Auditor's categorization of 43 time entries totaling $2,310 as clerical or administrative, WJS asserts that none are actually administrative or clerical in nature. For a majority of the entries, the Court agrees that the services performed involved professional skills or attention. However, the Court also located time entries for services such as photocopying which are deemed secretarial in nature, regardless of who performed them, as well as administrative services for which compensation at the full hourly rate of the billing party is unwarranted. Based on the Court's review of Exhibit F, the amount of $600 shall be disallowed.

Intra-office Conferences

While the Court recognizes the need for intra-office conferences in a case of this magnitude, time spent in such conferences must be justified. *See Office Prods. of America*, 136

B.R. at 977. Furthermore, the Court has previously indicated its belief that generally no more than one professional may bill for intra-office conferences or meetings unless there is sufficient explanation to justify additional billings. *See* WJS Fee Decision I, slip op. at 15; *see also Poseidon*, 180 B.R. at 731; *In re Adventist Living Ctrs.*, 137 B.R. 701, 716 (Bankr. N.D.Ill. 1991); *In re Environmental Waste Control*, 122 B. R. 341, 347 (Bankr. N.D.Ind. 1990).

In the WJS Fee Decision I, the Court observed that WJS generally does not bill for more than one attorney attending an intra-office conference. This practice continued during the fee period covered by the Second Interim Fee Application. However, the Court did locate a number of entries where multiple professionals did bill for such services. The total fees categorized by the Court as multiple billing for intra-office conferences amount to $3,388, and therefore this amount shall be disallowed.

Conferences with Non-firm Personnel

Exhibit L of the Report is entitled "Conferences with Non-Firm Personnel," and review of this exhibit reveals more than 1,500 time entries during this interim fee period with attendant fees of $127,980.75. A large majority of these conferences are with investors or the representatives of investors, and the conversations are generally brief and concern the status of the case. Upon review of the time entries, the Court deems that a 15% reduction in the requested fees is warranted. This reduction reflects the fact that not all conversations last the entire length of the associated billing entries, which are noted in six minute intervals. This fact, when multiplied by hundreds of billing entries at significant hourly rates, results in a notable, but unintentional, increase in fees charged to the estates. The total amount disallowed in this

category is $19,197.11. Regarding the calls from investors, the Court inquires whether there may possibly be a more cost-efficient method of addressing the concerns of investors and their representatives without consuming the individual time of the attorneys for the Committee.[4]

Fee Application

As provided by Code § 330(a), "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). This Court has previously indicated its belief that reasonable compensation is appropriate for time expended in preparing a fee application, *see* WJS Fee Decision I, slip op. at 20-21, as opposed to those courts which have indicated that fee application preparation is of no benefit to the estate and therefore is not compensable. *See, e.g., In re Wilson Foods Corp.*, 36 B.R. 317, 323 (Bankr. W.D.Okla. 1984); *In re Liberal Market, Inc.*, 24 B.R. 653, 661 (Bankr. S.D.Ohio 1982). Other courts have also indicated that reasonable compensation for this task is appropriate. *See In re NuCorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985); *Braswell Motor Freight Lines, Inc. v. Crutcher, Burke & Newsom (In re Braswell Motor Freight Lines, Inc.)*, 630 F.2d 348, 351 (5th Cir. 1980); *Office Prods. of America*, 136 B.R. at 977; *CF&I Fabricators*, 131 B.R. at 483. The Court must examine the amount and value of time spent preparing the application, however, and limits may be placed on compensation for this task. *See* WJS Fee Decision I, slip op. at 20-21; *see also Office Prods. of America*, 136 B.R. at 977; *In re*

[4] The Court realizes that it would not be possible, or appropriate, to completely eliminate the calls from concerned investors. Instead, the Court inquires whether there is a form of communication that would be available to the investors to receive updates regarding case status, thus eliminating some of the many calls that the attorneys for the Committee must address during the day.

Pettibone Corp., 74 B.R. 293, 304 (Bankr. N.D.Ill. 1987)

The Court finds the hours and fees related to WJS' fee application to be reasonable, and therefore no adjustment shall be made for this task. In comparison to the billings of other professionals in this case for fee applications, the Court notes that other professionals spent significant time and related fees for the preparation and defense of their own fee applications. Review of the categories relating to fee applications in the Report analyzing WJS' Second Interim Fee Application reveals many entries for objections to fee applications of *other* professionals in this case, which can be viewed as a benefit to the estates, as opposed to fees for preparation and defense of a professional's own fee application, which is of little benefit to the estates.

Exhibit W-5 addresses time entries which the Fee Auditor categorized as "Compliance With Fee Auditor Order Requirements." Since the Court has imposed the fee auditor process on the parties, reasonable fees relating to compliance with the Fee Auditor's requirements shall be compensable. The time entries and related fees in this category are reasonable, and therefore no deduction shall be made.[5]

Expenses

When applying for reimbursement of expenses, the applicant must demonstrate that such

[5] The Court notes that although WJS criticizes the portion of the Fee Auditor's Report entitled "Areas the Court May Wish to Examine for Relevance, Necessity, and Reasonableness" as defying response and being often inapplicable and awkward, WJS utilizes these very same categories to object to the fee applications of other professionals subject to the Fee Auditor process. Furthermore, the Court does not find these categories to be inapplicable or beyond response.

expenditures were reasonable and necessary. *See Poseidon Pools*, 180 B.R. at 781; *In re Convent Guardian Corp.*, 103 B.R. 937, 939 (Bankr. N.D.Ill. 1989); *In re Cuisine Magazine*, 61 B.R. at 218; *In re Island Helicopter Corp*., 53 B.R. 71, 73 (Bankr. E.D.N.Y. 1985). The Court will not assume that any expense is necessary. *See Spanjer*, 191 B.R. at 749. An expense is deemed to be necessary if it was reasonably needed to accomplish the representation of a client. *See id*.; *In re Wildman*, 72 B.R. at 731.

The Court has previously noted that reasonable computer assisted legal research shall be reimbursable at actual cost, however such research must be listed with sufficient detail. In response to the Fee Auditor's Report, WJS submitted detailed descriptions of the legal issues researched using electronic databases in its Reply. The Court finds the descriptions adequate, and therefore no adjustments shall be made.

Exhibit EE of the Report addresses unreceipted expenses. In the Reply to the Report, WJS also provided receipts for expenses that were previously lacking the requisite documentation. Of the expenses listed in Exhibit EE, charges totaling $392.42 remain unreceipted and therefore shall be disallowed.[6]

A deduction of $55.80 shall also be made for what the Court deems is local mileage. *See* Exhibit EE of the Report. Finally, the Court notes that the use of overnight delivery services should be reserved for items necessarily delivered by the next day.

In summary, the Court makes the following reductions to the fees and expenses sought

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[6] The Court notes that one entry for taxi<u>s</u> on July 16, 1996, is not receipted. The Court will presume for this entry that more than one taxi was taken or more than one trip was made relating to this expense, meaning that each was likely less than the $25 receipt reporting requirement for travel expenses, and that no receipts were required.

in WJS' Second Interim Fee Application:

Total of requested fees:	$339,997.25
Disallowances	
Discrepancy- Amounts billed and amounts computed	-927.50
Duplicate Billing Entries	-1,108.00
Vaguely Described Tasks	-250.00
Multiple Attendance at Events	-2,049.00
Administrative/Clerical Tasks	-600.00
Intra-office Conferences	-3,388.00
Conferences with Non-firm Personnel	-19,197.11
Provisional fee award granted on 6/12/97	-200,000.00
Net Total Fees Allowed	$112,477.64
Total Requested Expenses	$34,396.18
Disallowances	
Unreceipted	-392.42
Local Mileage	-55.80
Provisional expense award granted on 6/12/97	-$25,000.00
Net Total Expenses Allowed	$8,947.96

Based on the foregoing, it is

ORDERED that the fees and expenses requested by WJS in its Second Interim Fee 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 these estates.

Dated at Utica, New York

this 20th day of August 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge