

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:

WASSERMAN, JURISTA & STOLZ

Attorneys for Official Committee of Unsecured

Creditors

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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 the Seventh Interim Fee Application ("Fee Application") of Zolfo Cooper LLC ("ZC"), financial adviser to the Official Committee of Unsecured Creditors ("Committee"). The Fee Application, which was filed on December 1, 1998, seeks payment of \$492,128.50 in professional fees and \$15,809.02 in reimbursement of expenses and covers the period March 1, 1998, through August 31, 1998. The Fee Application was submitted to Stuart, Maue, Mitchell & James, Ltd. ("Fee Auditor") in accordance with the Court's Amended Order dated December 2, 1996. The report of the Fee Auditor ("Report") was filed with the Court on January 11, 1999, and a hearing on the Fee Application was held on January 28, 1999, at which

time the Court awarded ZC a provisional award of \$250,000 in fees and \$10,000 in expense reimbursement. Following the January 29<sup>th</sup> hearing, the Court requested the submission of a supplemental affidavit regarding a specific issue raised by an objection to the Fee Application filed by the United States Trustee (“UST”). On March 10, 1999, additional “Certifications” were filed with the Court by Daniel Stolz, Esq. (“Stolz”), one of the attorneys for the Committee, Paul S. Dzera, Esq. (“Dzera”), a member of ZC and Roger A. O’Dell (“O’Dell”), a managing director of Chase Manhattan Bank and member of the Committee, in apparent response to the Court’s request.

### **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 DISCUSSION**

ZC has filed six prior fee applications with this Court and has, to date, been awarded \$512,593 in fees and \$15,906.70 in expense reimbursement.

While the Report raises certain issues, it is the objection of the UST that focuses the Court’s attention on the services performed by ZC during the current application period. The UST asserts that ZC consumed some 382.70 hours or \$111,754.50 in fees for services related to

“Equivest’s acquisition of Eastern Resorts.”<sup>1</sup> The UST asserts that while ZC may have properly advised the Committee regarding the Equivest acquisition of Eastern Resorts, given the stock interest held by the Consolidated Estates in Equivest, the services outlined in the Fee Application “went beyond a mere evaluation of the merits of the acquisition, but were, instead, akin to due diligence by Equivest in the acquisition of Eastern Resorts. Thus, the cost of these services should be borne by Equivest/RFI rather than the Consolidated Estate.”<sup>2</sup> *See* UST Objection to Seventh Interim Fee Application of [ZC] at paragraph 10.

Initially, ZC responds to the UST and asserts that it did not perform “due diligence” on behalf of Equivest, but rather its services were rendered to the Committee wherein it analyzed the “accretive value to the Estate as a result of the acquisition under alternative scenarios.” *See* Response of [ZC] to United States Trustee Objection, etc. at paragraph 7. In further support of that position, the Certifications of Stolz, Dzera and O’Dell, all note that in April of 1998, the Committee filed an application with this Court seeking to clarify scope of the retention of ZC in order to permit it to assist the Committee and the Trustee to “conduct appropriate due diligence with respect to any business combinations, mergers, acquisition or public offerings proposed by the Trustee.” That Application was approved by Court Order dated May 7, 1998. (*See* Certification of Stolz in Support of the [ZC] Seventh Interim Fee Application at paragraph 9.) Notwithstanding the intent and scope of the May 7, 1998 Order, at paragraph 11 of the Stolz

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<sup>1</sup> Equivest is a non-debtor entity in which the consolidated estates own a majority of the shares of stock, which shares are the subject of a pending secondary public offering. The Trustee presently functions as the chief executive officer of Equivest. Eastern Resorts apparently is a timeshare company acquired by Equivest in the Fall of 1998.

<sup>2</sup> RFI is wholly owned by Equivest and is itself prominent in the timeshare industry.

Certification, he acknowledged that ZC's assistance to the Trustee permitted the avoidance of "the Estate being burdened with additional professional fees for the Trustee to retain his own specialized financial advisors to evaluate the ER transaction....." At best, this statement suggests the Trustee in his role as CEO of Equivest benefitted indirectly from ZC's analysis of the Eastern Resorts acquisition, and, at worst as the UST contends, ZC provided a direct benefit to Equivest for which Equivest and not the Consolidated Estates should be financially liable.

O'Dell contends that ZC should not be penalized for having incidentally provided the Trustee as Equivest's CEO with a windfall noting that in any event ZC fee (apparently for Eastern Resorts acquisition only) was "less than 0.4% of the total transaction." (*See* Certification of O'Dell sworn to on March 2, 1999 at paragraph 11).

To further induce the Court to reject the assertions of the UST, Dzera observes in his Certification sworn to on March 2, 1999, that ZC's due diligence (for whomever it was performed) was largely responsible for a \$12 million decrease in the initial price sought by Eastern Resorts for its assets. (Certification at paragraph 10).

Having considered the foregoing, the Court remains troubled, generally, by the Trustee's ongoing role as Equivest's CEO utilizing professional services provided and paid for by the Consolidated Estates and predicated on oft cited premise that the Trustee's attention to the affairs of Equivest will ultimately result in a premium price being realized upon the completion of the secondary public offering of Equivest stock.

Notwithstanding that concern, the Court finds it inappropriate to penalize ZC by disallowing compensation for services which the Court believes were rendered in good faith and in reasonable reliance upon the orders of this Court, specifically the Order dated May 7, 1998.

Thus, the Court will not disallow any portion of the hours devoted to advice regarding the Equivest acquisition of Eastern Resorts.

Turning to other concerns, the Court focuses on that portion of the Report that identifies 677.8 hours or \$226,615 for “Conference with Committee Counsel,” and “with other Nonfirm Personnel.” *See* Report Exhibits G-1 and G-2. The UST highlights the so-called “Multiple Professionals” aspect of the Report for which the estate is billed \$111,249. Recognizing that there is significant overlap in these categories within the Report, the Court notes that in the past it has permitted the attendance of at least two ZC professionals at meetings and conferences following an acceptable explanation. *See* Memorandum-Decision and Order of the Court dated August 20, 1998 (ZC’s Fourth Interim Application).

In the instant Fee Application, however, the frequency of these specific services has increased significantly. At page 14 of the Fee Application, ZC points out that the Trustee “is no longer using Coopers Lybrand or other financial advisors for the Estate.” Keeping the forgoing statement in mind, a review of the ZC time records as categorized by the Report could lead to the conclusion that ZC now serves two masters, the Committee and the Trustee.<sup>3</sup> In addition to ZC’s involvement in the operations and acquisitions of Equivest, it has actively participated in discussions regarding significant litigation instituted by the Trustee, as well as the settlement of other litigation. It appears that these services, in fact, exceed the overview and advice functions to be performed on behalf of the Committee. The Court suggests that while much of what ZC accomplished during the period covered by this Fee Application falls within the spirit, if not the letter of, May 7, 1998 Order, ZC should be vigilant not to exceed the bounds of that Order in the

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<sup>3</sup> Dual representation arguably was authorized by the Court in the May 7, 1998 Order.

future.

Turning, finally, to services rendered by ZC which benefit only ZC. The Report identifies 3 categories which relate to these self serving activities; Zolfo Cooper's Fee Application (Exhibit P-1); Fee Objections (Exhibit P-2) and Expansion/Clarification of ZC's Role (Exhibit P-3). These three exhibits total \$8,185.00 and will be reduced, in keeping with the Court's prior policy regarding similar services, to \$1,000.

In considering the reimbursement of expenses, the Report identified a total of \$1,658.55 that "Appear to Violate Court Guidelines." ZC has provided explanation for each of the questionable expense categories with the exception of \$443.60 vaguely identified only as "Transportation." Thus, the Court will disallow only that amount subject to further documentation from ZC.

In summary, the Court approves ZC's Fee Application in the sum of \$484,943.50 in fees and \$15,365.42 in expenses, crediting the Trustee in these consolidated cases with the provisional award of \$250,000 in fees and \$10,000 in expenses, ZC shall recover an additional \$234,943.50 in fees and \$5,365.42 in expenses.

IT IS SO ORDERED.

Dated at Utica, New York

this 3rd day of January 2000

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge