UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

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

APPEARANCES:

SIMPSON THACHER & BARTLETT Attorneys for § 1104 Trustee Richard Breeden 725 Lexington Avenue New York, New York 10017	WILLIAM T. RUSSELL, JR., ESQ. Of Counsel
WASSERMAN, JURISTA & STOLZ Attorneys for Unsecured Creditors Committee 225 Millburn Avenue Millburn, New Jersey 07041	DANIEL M. STOLZ, 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 has before it the Final Fee Application ("Final Application") of Richard C. Breeden as Chapter 11 Trustee ("Trustee") of the above referenced Consolidated Debtors' estate, filed with this Court on September 26, 2002. The Final Application, while asserting that pursuant to the formula set out in § 326(a) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code") the Trustee would be entitled to a maximum compensation of $22 million based upon an anticipated distribution of $740

million to creditors, seeks compensation in the compromised amount of $14 million.[1] Pursuant to the Order Confirming the Consolidated Debtors' Chapter 11 Plan, dated June17,2002, a hearing on the Trustee's Final Application was scheduled for January 30, 2003. On the date of the hearing the Court was presented with an Agreement entered into between the Trustee and the Office of the United States Trustee ("UST")("UST Agreement"),dated January 30, 2003, by which the Trustee agreed to further reduce his compensation from $14 million to $13.850 million, the reasons for which are outlined in the UST Agreement. That Agreement likewise acknowledges that it is in no way binding upon the Court.[2]

The Final Application adequately details the qualifications, role and accomplishments of the Trustee in this case, once styled as the "largest Ponzi scheme in U.S. history," as it made its way through this Court and others over the last 7 years. In support of the Final Application, the Trustee offers the Affidavit of Kevin M. Clermont, the Flanagan Professor of Law at Cornell University, Ithaca, New York. Professor Clermont's Affidavit and attached documentation purports to offer a detailed expert opinion on the appropriateness of the Trustee's request for compensation as set out in the Final Application.

It is to be noted that commencing on or about January 1, 1997, the Trustee has been compensated at the rate of $50,000 per month plus monthly expenses not to exceed $3,500, subject only to the

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[1]The Trustee notes that after negotiation with the Committee of Unsecured Creditors ("Committee") he agreed to seek compensation in the reduced amount of $14 million plus a 3% share of certain specified future recoveries. The Trustee acknowledges that his agreement with the Committee is in no way binding upon this Court. *See* Committee Agreement dated September 9, 2002, attached to the Final Application.

[2]The UST Agreement indicates that it has been agreed to by the Committee; however, the Committee is not a signatory to the Agreement.

requirement that he file a post -payment application for approval of the interim compensation every 90 days commencing with January 2, 1997.[3] As of the date of the Final Application, the Trustee acknowledges that he has been paid the sum of $6,700,000 through August 1, 2002, pursuant to the aforementioned Order.[4] Obviously, that sum is to be credited against any final award made herein.

At the hearing on the Final Application held on January 30, 2003, the Court heard from Simpson Thacher & Bartlett, William T. Russell, Jr., of counsel, attorneys for the Trustee, Wasserman, Jurista & Stolz, Daniel M. Stolz, of counsel, attorneys for the Committee and Guy Van Baalen, Assistant U.S. Trustee. All argued in favor of the Final Application as modified by the respective Agreements. No one appeared in opposition to the Final Application.

DISCUSSION

Code § 326(a) prescribes a formula by which a bankruptcy court may calculate compensation to a trustee serving in a case filed pursuant to chapter 11. Code § 326(a) requires only that the compensation awarded be "reasonable" and authorizes a court to apply specific percentages to "all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims" in order to arrive at the appropriate amount of compensation. In order to determine reasonableness, however, the Court must examine the factors set out in Code §

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[3]*See* the Memorandum-Decision, Findings of Fact, Conclusions of Law and Order of this Court dated January 9, 1997. *See In re The Bennett Funding Group, Inc.*, 213 B.R. 227 (Bankr. N.D.N.Y. 1997).

[4]*See* the Agreement between the Trustee and the Committee dated September 9, 2002.

330. *See In re Marvel Entertainment Group, Inc.*, 234 B.R. 21, 38-39 (D. Del. 1999).[5] While the statute does not so provide, case law is clear that the percentages set out in Code § 326(a) are maximums, not automatic entitlements, and should not be viewed as such. *See In re Narragansett Clothing Co.*, 210 B.R. 493, 497 (1st Cir. BAP, 1997); *In re Marvel*, 234 B.R. at 38-39; *In re Blue Grotto, Inc.*, 243 B.R. 602, 605 (Bankr. D.R.I. 2000); *In re Biskup* 236 B.R. 332, 336 (Bankr. W.D. Pa. 1999); *In re Stoecker*, 118 B.R. 596, 601 (Bankr. N.D. Ill. 1990). The Trustee asserts that he has devoted some 15,750 "billable hours" to this case over the past seven years which would suggest a billing rate of approximately $880 per hour. The Trustee opines that his long and distinguished legal career during which he "served in a series of high level government posts under Presidents Reagan, Bush and Clinton, including four years as Chairman of the SEC,"qualify him to command compensation at an hourly rate "vastly higher than the slightly more than $400 per hour that he has to date received." In further support of the hourly rate, the Trustee points to the fact that he was recently awarded $800 per hour by the U.S. District Court for the Southern District of New York for his work in the "World Com, Inc bankruptcy."[6]

The Trustee, the Committee and the UST all recognized that prolonged litigation over the appropriate amount of compensation pursuant to Code §§ 326(a) and 330 would generate more expense to the bankruptcy estates and further delay a final distribution to creditors. The parties acknowledge, however, that any agreement they have reached is not binding on this Court as it is well

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[5]While the Court does not necessarily agree with the conclusions reached in *Marvel*, one could argue that it contains many factual similarities to the matter sub judice.

[6]See Trustee's Final Application dated September 24, 2002 at pages 28-29.

settled that a bankruptcy court has an independent obligation to review all applications for compensation filed pursuant to Code § 330. *See In re Lan Associates XI, L.P.*, 192 F.3d 109, 122-123 (3rd Cir. 1999); *In re The Bennett Funding Group, Inc.*, 213 B.R. 234, 244 (Bankr. N.D.N.Y. 1997). Thus, while the Agreements reached by the parties should be given considerable weight by this Court, it is not bound by them.

As the Court has noted on a number of occasions, this case was atypical of most chapter 11 cases in the sense that while the Debtors carried on normal business operations for a number of years, there came a point in time pre-petition that legitimate business operations appear to have ceased and some or all of the Consolidated Debtors embarked upon a course of conduct that was thereafter to become known, accurately or inaccurately, as the " largest Ponzi scheme in U.S. history." While there were many parties who initially called for the re-organization of the Bennett companies as going concerns, it readily became apparent that veins of fraud appeared to course through almost every extremity of the Consolidated Debtors' operations such that a return to normalcy would have been impractical, if not impossible. The very fact that a trustee is appointed in a chapter 11 case is generally some evidence that a debtor's operations have been plagued, either pre or post petition, by some degree of fraud, dishonesty, incompetence, and/or gross mismanagement. *See* Code § 1104(a).

In the initial stages of these cases, a critical asset that had to be preserved was the stream of lease payments being generated by literally thousands of equipment leases executed by one or more of the Consolidated Debtors.[7] As in the case of any chapter 11 debtor, the onset of the bankruptcy filing

[7]The Trustee's Final Application notes that on the date of filing, the Consolidated Debtors were overseeing a portfolio of approximately 66,000 individual lease contracts with a face value of roughly

almost always causes accounts receivable to dwindle due to the account debtors' assumption that aggressive collection activities will fall victim to the initial chaos surrounding the bankruptcy. In the instant case, the Trustee asserts that the potential receivable problem was exacerbated by the fraudulent actions of certain of the Consolidated Debtors' principals in the days immediately before and after the filing. The Trustee, utilizing one of the Debtor entities, The Processing Center, and certain of its key employees, was able to stabilize the lease collection activity, prevent the continued chaos that had initially occurred post petition and, ultimately, collect some $297 million in lease proceeds.[8] The Trustee aggressively pursued other aspects of the Consolidated Debtors pre-petition activities, conducting numerous asset sales including the stock sale of Equivest Finance Inc., a time share company owned almost entirely by the Consolidated Debtors, for approximately $81 million. The Trustee, utilizing the services of numerous law firms throughout the country, as well as his general counsel Simpson Thacher & Bartlett, commenced thousands of adversary proceedings and contested matters against the Consolidated Debtors' principals and former employees, secured lenders, insurance companies, accounting firms, brokers, law firms, trade vendors and individual investors. Notable among the Trustee's successes in this area was the settlement of the bankruptcy estates' claims against the Italian insurer, Generali Assicurazioni which netted approximately $102 million, as well as his settlement with the majority of the 245 secured bank lenders, netting approximately $122 million for unsecured creditors.[9] It is also in this area that the Trustee drew the harshest criticism and strongest opposition

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$295 million. Trustee's Final Application dated September 24, 2002 at page 9.

[8]See Trustee's Final Application dated September 24, 2002 at page 16.

[9]See Trustee's Final Application dated September 24, 2002 at pages 19-21.

from the Committee and the UST, some of which may have proven to be well founded had the parties not reached an accord in the form of the Agreements which the Court is being asked to approve.[10]

Throughout the chapter 11 case much has been written both in and out of Court about the fees paid to the professionals appointed pursuant to the applicable sections of the Code. Perhaps no single professional has drawn more attention than the Trustee himself. Certainly a request to be compensated for services rendered at the rate of $800 per hour plus, having already been paid approximately $7 million, will draw attention in most venues, notwithstanding the mind boggling salaries paid to today's professional athletes and the CEOs of major corporations.[11] In some circles the Trustee has been compared to an overpaid consultant, while others have suggested that at times he has acted in utter disregard of his role as a fiduciary and officer of this Court. In this Court's opinion, what is undeniable, without condoning a sense that the end justifies the means, is that the Trustee has crafted a result over these past seven years that few if any could ever have anticipated in March of 1996. While it may be debated that other individuals could have accomplished a similar result, perhaps at a lesser expense to the creditors of the estate, this Court, having presided over this the "largest Ponzi scheme in U.S. history" for some 2,500 days, need not engage in a debate of classic hindsight. The Court does not believe that an enhanced rate of $880 per hour, given the magnitude, uncertainty and length of this case coupled with the very significant rate of return to creditors, is unreasonable. *See In re Apex Oil Co.*,

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[10] While the Court obviously has not been a party to the discussions which resulted in both the Committee and UST Agreements, the Court believes that the consensual reduction in compensation adequately resolves the objections of the Committee and the UST.

[11] In fact, Professor Clermont, in his Affidavit submitted in support of the Trustee's compensation, suggests that the Trustee should be viewed as the chief executive officer/chief financial officer of the bankruptcy estate and compensated accordingly. Clermont Affidavit at page 6.

960 F.2d 728, 732 (8th Cir. 1992); *In re El Paso Refinery, L.P.*, 257 B.R. 809, 835 (Bankr. W.D. Tex. 2000). Thus, the Court will approve the compensation of $13,850,000 set forth in the Agreement between the Trustee and the UST dated January 30, 2003, to be paid in accordance with it's terms and conditions.

IT IS SO ORDERED

Dated at Utica, New York

this 20th day of February 2003

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge