

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:

KAYE SCHOLER LLP
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New York, New York 10022

ARTHUR STEINBERG, ESQ.
Of Counsel

GUY 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 the First Interim Application ("First Application") of Kaye Scholer LLP ("Kaye Scholer"), which was filed with the Court on February 12, 2001. Kaye Scholer was retained pursuant to an Order of this Court dated August 28, 2000, as special litigation counsel to the Trustee effective July 21, 2000, in the litigation against Arthur Andersen & Co. ("Andersen Litigation").

The First Application covers the period July 21, 2000 through December 31, 2000, and seeks professional fees in the amount of \$1,132,623.81 and reimbursement of expenses in the amount of

\$101,831.04¹². The First 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 Fee Auditor (“Auditor’s Report”) was filed with the Court on March 26, 2001. The First Application came on for a hearing before the Court on April 12, 2001, at which time the Court approved a provisional award of \$950,000 in fees and \$85,000 in expenses to Kaye Scholer. Objection to the First Application was filed by the United States Trustee (“UST”) on March 22, 2001, and a Supplemental Position was filed by the Committee of Unsecured Creditors (“Committee”) on April 6, 2001.

JURISDICTIONAL STATEMENT

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

FACTS, ARGUMENTS & CONCLUSIONS

As is customary, the Auditor’s Report identified entries in Kaye Scholer’s time records filed in

¹Kaye Scholer was previously appointed pursuant to an Order of the Court dated February 26, 1998, to represent the Early Investors Committee in this case. That representation was also the subject of several prior fee applications to this Court.

²Kaye Scholer adjusted its fee and expense request as reflected in its Response to Fee Auditors Report regarding First Interim Application on April 9, 2001 (“Kaye Scholer Response”).

support of the First Application as falling into sixteen categories which “Appear to Violate Court Guidelines.” In addition, the Auditor’s Report isolates approximately thirty-seven more specific and limited categories or tasks which the Auditor calls to the Court’s attention for further review and analysis. Kaye Scholer filed its Response to the Auditor’s Report on April 9, 2001 and noted certain adjustments to its fees and expenses as set out in Footnote 2.

The Committee, while supporting the Trustee in pursuit of his allegedly meritorious claims against Arthur Andersen utilizing the services of Kaye Scholer expresses shock at the magnitude of the First Application. The Committee, however, notes that the First Application presents a dilemma in that strong opposition to it will encourage Arthur Andersen to “accelerate a ‘paper war’ merely to generate more fees for the Bennett Bankruptcy Estate” (*See* Statement of Position of Committee dated April 12, 2001 at para. 17). The UST, in somewhat of a prophetic pronouncement comments that while it is unfortunate that Kaye Scholer after being substituted in the Andersen litigation for prior special counsel had to “re-invent the wheel and perform tasks that would have already been completed,” suggests that in any event the Trustee’s chances of being successful in the litigation are “uncertain and perhaps improbable” (*See* Objection of UST to First Application dated March 22, 2001 at para. 7.)³

Against this backdrop, the Court has reviewed the Response of Kaye Scholer to the Fee Auditors Report and accepts its assertion that the bulk of its efforts were necessitated by its substitution into the Andersen Litigation at a critical juncture facing a presiding judge whose patience with the

³On August 21, 2001 the Hon. John E. Sprizzo, of the United States District Court for the Southern District of New York dismissed the Trustee’s complaint in related litigation based on lack of standing, which dismissal, if sustained on appeal, will have apparently have the effect of terminating the Andersen litigation without any recovery by the Trustee.

Trustee's position was wearing thin and an adversary who had every reason to orchestrate a position of diversion and delay.

As so frequently happens in a case that continues on for years rather than months, hindsight tends to bathe earlier events in an unfavorable light to the point of portraying them as absolute folly. Nevertheless, when Congress amended the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"), specifically § 330, in 1994 it made it very clear in § 330(a)(3)(c) that in determining the amount of reasonable compensation a court shall consider "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of a case under this title;" eliminating any doubt that may have existed as to the role hindsight might play in evaluating fee applications.

Thus, while the services of Kay Scholer, as reflected in this Application, may never provide any tangible benefit to this estate, they may not be evaluated on that basis.

With regard to the time claimed for the category "General Fee/Employment Applications," the Court will allow the sum of \$1,000, thus, disallowing \$5,997.70. The adjustment to "General Fee/Employment Applications" is generally in keeping with the Court's rule regarding allowance of fees in connection with the compensation of professionals. The adjustments to "Kaye Scholer Retention" category results from the Court's review of Exhibit O-2 supplementing the Auditor's Report and its conclusion that the allowed fee is reasonable, again considering that the services generally benefit no one other than Kaye Scholer. After reviewing the remaining observations contained in the Fee Auditor's Report and Kay Scholer's response thereto, the Court makes no further adjustment to the First Application.

Turning to Kaye Scholer's request for expense reimbursement, the Fee Auditor has called the Court's attention to a number of categories. In its Response to the Fee Auditor's Report, Kaye Scholer has provided supporting documentation for all of the allegedly "Unreceipted Expenses."

Concerning "Meals," Kaye Scholer addresses the Fee Auditor's observations regarding "Lunches" by accepting a \$335.87 reduction. Additionally, the Fee Auditor isolates some \$4,762.02 in expenses which it identifies as "Travel Expenses with No Corresponding Fee Bills." Kaye Scholer agrees to reduce this expense by 50% or \$2,494.01 as well as adjusting categories identified as "First Class Airfare", "Mileage and Gas charged for the same trip: and "amenities." The remaining expense of significance is some \$6,374.05 incurred for "paralegal temps" Kaye Scholer asserts that these "temps" were hired to provide services in Syracuse and the Court will accept the explanation for their retention.

In summary, the Court makes the following reduction to fees and expenses sought in the First Application:

<u>Total Fee Requested</u>	\$1,132,623.81
underbilled as per Fee Auditor Report	<u>16,714.51</u>
	\$1,149,338.38
<u>Disallowances:</u>	
General Fee/Employment Applications	\$ 5,997.70
Travel Time (consensual)	\$ 4,815.91
Administrative/Clerical (consensual)	\$ 1,084.00
Provisional Award granted on 4/12/01	<u>\$ 950,000.00</u>

Total Net Fee Allowed	\$ 187,440.77
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<u>Total Requested Expenses</u>	\$ 101,831.04
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Disallowances:

Pre-Filing Reduction	\$ 1,147.84
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Technical Billing Discrepancies (consensual)	\$ 248.50
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Lunches (consensual)	\$ 335.87
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First Class Airfare (consensual)	\$ 211.00
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Mileage and Gas Charges for Same Trip (consensual)	\$ 29.00
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Amenities (consensual)	\$ 171.85
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Provisional Award Expenses granted 4/12/01	<u>\$ 85,000.00</u>
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<u>Total Net Expenses Allowed</u>	\$ 14,686.98
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Based on the foregoing, it is hereby

ORDERED that the fees and expenses requested by Kaye Scholer in its First Application shall be allowed and disallowed as detailed herein; and it is further

ORDERED that payment of the remaining balance of allowed fees and expenses totaling \$202,127.75 shall not be paid from encumbered assets of the consolidated estates.

Dated at Utica, New York

this 27th day of February 2003

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge