

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MICHIGAN BIODIESEL, LLC,

Debtor.

Case No. DK 10-05786
Hon. Scott W. Dales
Chapter 7

THOMAS R. TIBBLE,

Plaintiff,

Adversary Pro. No. 12-80339

v.

MICHIGAN PROTEIN, INC.,

Defendant.

ORDER REGARDING MOTION FOR ATTORNEYS' FEES

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

The court held a hearing in Kalamazoo, Michigan on January 8, 2014 to consider the extent to which defendant Michigan Protein, Inc. ("Michigan Protein") is entitled to an award of attorney's fees and costs pursuant to the Order Regarding Motion to Strike on August 26, 2013 (the "August 26 Order," DN 50). As the court directed in the August 26 Order, Michigan Protein filed a separate motion (the "Motion," DN 56) itemizing the attorneys' fees and expenses it incurred as a result of the untimely disclosures made by plaintiff Thomas R. Tibble (the "Trustee") after the deadlines prescribed in the court's Pretrial Order dated January 11, 2013 (DN 11) and the parties' stipulation to extend the discovery deadline (DN 25).

By way of background, after the discovery deadline passed and in response to Michigan Protein's timely summary judgment motion (DN 31), the Trustee belatedly identified Dirk Longstreth, a key witness on the pivotal issue of pricing, and certain U.S. Department of Agriculture ("USDA") market reports, upon which he intended to build his case at trial. Naturally, after going to the expense of drafting and documenting its voluminous summary judgment motion ignorant of the Trustee's reliance on Mr. Longstreth and the USDA indices, Michigan Protein vehemently challenged the Trustee's additional witness and documents by (1) opposing the Trustee's request to enlarge the discovery deadline; and (2) moving to strike the undisclosed witness.

The court was inclined to permit the parties to augment the record to give the Trustee the benefit of Mr. Longstreth's testimony, but did so only on the condition that the Trustee make Michigan Protein whole for what it spent in response to the Trustee's disregard of the court's deadlines. At the time of that decision, however, it was not clear whether the additional discovery would impel Michigan Protein to revise its summary judgment papers, and, therefore, to what extent the Trustee's untimeliness would result in a waste of opposing counsel's time (and therefore Michigan Protein's money). The court, therefore, postponed its decision on the amount of compensation pending additional developments, and required Michigan Protein to file the Motion documenting its compensable fees and expenses.

At the hearing on January 8, 2014, after considering the itemization of Michigan Protein's counsel's fees, the court announced its intention to withhold any award related to the summary judgment motion, concluding that Michigan Protein did not amend or revise its summary judgment motion in any way. This fact persuaded the court that Michigan Protein was not meaningfully harmed in connection with the summary judgment motion, or at least the

defendant could address the harm by filing a reply brief — as it did and as it probably would have done even if the Trustee had followed the court’s scheduling orders. Nevertheless, as set forth in the August 26 Order, Michigan Protein clearly incurred fees in opposing the Trustee’s motion to extend the deadline and in moving to strike the Trustee’s improperly disclosed witnesses. Therefore, the court will award those fees.

The parties appear to agree through their papers and in their oral arguments that the court should apply the so-called “lodestar” analysis, multiplying the number of hours reasonably spent in connection with a particular activity by the reasonable rate or rates. *See In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991) (describing lodestar analysis); *In re Williams*, 357 B.R. 434, 439 (6th Cir. BAP 2007) (applicant has burden of proving reasonableness of fees). The court has done so, keeping in mind its aim to make Michigan Protein whole despite the Trustee’s untimely disclosures.

Having carefully reviewed the itemization of time entries submitted in support of Michigan Protein’s Motion, as well as the Trustee’s response to the Motion, the court takes no issue with respect to the number of hours Michigan Protein’s counsel spent in moving to strike the undisclosed witnesses, and in opposing the Trustee’s motion to extend the discovery deadlines. Rather, the fee controversy at this point mainly involves the rate at which Michigan Protein’s attorneys charge for their time. To summarize the Trustee’s opposition, he contends that Michigan Protein’s attorneys charge unreasonable rates in excess of rates charged in the Western District of Michigan. For the reasons below, the court rejects the Trustee’s position.

First, the rate that Barnes & Thornburg LLP is charging Michigan Protein is supported by affidavits from Michigan Protein’s counsel describing the firm’s national practice, conducted, in part, from offices in Grand Rapids and eleven other cities. For example, the affidavits of John T.

Gregg, Esq. and Scott R. Murphy, Esq., both partners at the firm, refer to *curriculum vitae* describing the impressive scholarship and sophisticated practices of each, and aver that the rates charged are “commensurate with the normal hourly rates charged for attorneys of like experience and background.” *See, e.g.*, Affidavit of John T. Gregg, Esq., at ¶ 7 (DN 56-2). The principal billing attorneys are partners in the firm’s Grand Rapids office, and evidently command such rates from bankruptcy and non-bankruptcy clients alike.¹

In opposition, the Trustee’s counsel offers no affidavit to counter the affidavits of Messrs. Gregg and Murphy.² Instead, he argues that the lawyers in his firm, who were admitted to the bar around the same time as Michigan Protein’s counsel, charge a lower hourly rate:

Based on Mr. Gregg's and Mr. Murphy's years of experience, the trustee submits that a reasonable rate for Defendant's counsel would be between \$325 and \$375 per hour for this type of work in West Michigan. Litigation counsel with similar experience within Trustee's counsel's firm, charge rates ranging from \$300 per hour for an attorney admitted to practice in 2004 to \$395 per hour for an attorney admitted to practice in 1997. Attorneys Murphy and Gregg were first admitted to practice in 2001 and 2002, respectively. As a result, based on their years of experience, \$400 and \$450 per hour do not appear reasonable under the Lodestar test.

See Trustee’s Response to Motion for Entry of Order Awarding Fees and Expenses (DN 59) at p.

2. From this passage, it appears that the Trustee is asking the court to reduce Michigan Protein’s well-documented fee request based solely on counsel’s argument (without supporting affidavit) that attorneys in his firm admitted earlier in time in fact charge less.

Even accepting the reasonable suggestion that the date of bar admission is a relevant yardstick, the Trustee’s counsel simply refers to “[l]itigation counsel with similar experience,”

¹ As a policy matter, albeit in a slightly different setting of estate professionals, Congress encourages the courts to evaluate reasonableness of fees based on, among other things, “the customary compensation charged by comparably skilled practitioners in cases other than under this title.” 11 U.S.C. § 330(a)(3)(F).

² Under applicable rules, the court may consider this Motion “on affidavits.” *See* Fed. R. Civ. P. 43 and Fed. R. Bankr. R. 9017; *see also* Fed. R. Bankr. P. 9006(d) (opposing affidavits must ordinarily be served one day before hearing).

without identifying the supposed benchmarks or at least describing their experience so the court may determine whether, in fact, the experience is similar. And, even if the rates that Barnes & Thornburgh charges exceed the rates that the Trustee's counsel's firm charges, it does not follow that the former's rates are unreasonable, just that they are different. The court concludes only that two firms with offices in Grand Rapids charge different rates.

This is not a case in which an out-of-state defendant from a high-cost area retains "high-priced New York counsel" or an expensive "Philadelphia lawyer," but instead is a case in which a business from Cedar Springs, Michigan hired partners from the Grand Rapids office of a regional firm. The court will not second-guess the Defendant's choice of counsel, certainly not at the behest of another attorney whose own discovery violations made it necessary to shift the burden of the fees as a condition of excusing the violation, simply because defense counsel charges a higher rate than plaintiff's counsel. In view of the affidavits from Michigan Protein's counsel, and given the absence of any opposing affidavit regarding the reasonableness of counsels' hourly rates, the court will permit Michigan Protein to recover attorneys' fees based on the hours spent and rates described and supported in the affidavits of Messrs. Gregg and Murphy. Moreover, if the court reduced the rate that the Trustee has to pay, Michigan Protein could well have to make up the difference, thereby undermining the court's effort to mitigate the prejudice resulting from the Trustee's failure to abide by the court's scheduling orders and the rules of discovery in the first place.

Michigan Protein has requested fees in the amount of \$17,243.50. From this figure, the court will deduct the time relating to work performed between June 10-12, 2013 in connection with the motion for summary judgment because, as it turns out, Michigan Protein did not spend any time in connection with its motion due to the Trustee's untimely disclosures.

This leaves \$12,196.00 in reasonable and reimbursable attorneys' fees allocable to the Trustee's discovery extension motion and Michigan Protein's motion to strike, including time spent in drafting pleadings, and in oral argument. The court accepts the affidavits of Michigan Protein's counsel and concludes that the rates, though higher than Trustee's counsel's rates, are not unreasonable. Similarly, although Michigan Protein took an aggressive stand in response to the Trustee's untimely disclosures, the defendant was entitled to insist on compliance with the court's Pretrial Order and, under the circumstances of this case, to receive compensation for its stance.

Finally, the Trustee has offered, and the court sees, no reason to disturb the relatively modest request for expenses in the amount of \$123.55, which are also supported by affidavit.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Trustee shall remit to Michigan Protein the sum of \$12,319.55, representing attorneys' fees in the amount of \$12,196.00 and expenses in the amount of \$123.55, within 14 days after entry of this Order.

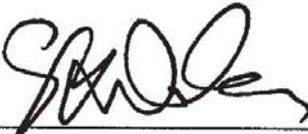
IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order upon John T. Gregg, Esq., and John T. Piggins, Esq., pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4.

END OF ORDER

IT IS SO ORDERED.

Dated January 14, 2014





Scott W. Dales
United States Bankruptcy Judge