

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MODERN PLASTICS CORPORATION,

Debtor.

Case No. DK 09-00651  
Hon. Scott W. Dales  
Chapter 7

NEW PRODUCTS CORPORATION and  
UNITED STATES OF AMERICA,

Plaintiffs,

Adversary Pro. No. 13-80252

v.

THOMAS R. TIBBLE, individually and in his  
capacity as Chapter 7 Trustee, and FEDERAL  
INSURANCE COMPANY,

Defendants.

ORDER FINDING CONTEMPT

PRESENT: HONORABLE SCOTT W. DALES  
Chief United States Bankruptcy Judge

In a Memorandum of Decision and Order entered July 24, 2015 (the “MDO,” DN 138), the court directed Mark S. Demorest, Esq., and his client, New Products Corporation, to pay \$166,187.50 to Dickinson Wright, PLLC, essentially as a discovery sanction under Fed. R. Civ. P. 45 for misuse of the subpoena power.<sup>1</sup> After Mr. Demorest and New Products failed to pay, Dickinson Wright sought to enforce the sanction through civil contempt proceedings, which it initiated by filing The Subpoena Recipients’ Motion for Contempt Against New Products

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<sup>1</sup> The court ordered Mr. Demorest and New Products, jointly and severally, to pay Dickinson Wright \$104,770.00 to hold in trust for Bank of America and \$61,417.50 to hold in trust for the Harbor Shore Entities.

Corporation and Mark Demorest. The alleged contemnors responded to the Contempt Motion by filing a brief and two declarations under penalty of perjury, arguing that they could not pay the award in full, without “substantial hardship,” though they proposed a two-year payment plan.<sup>2</sup> The court held a hearing in Kalamazoo, Michigan, on October 14, 2015 to consider the Contempt Motion and the Initial Response. During the hearing, the parties agreed that the MDO did not qualify as a “money judgment,” making enforcement of the court’s order by civil contempt proceedings, rather than garnishment or execution, appropriate as a procedural matter. Following the hearing, the court entered its Interim Order Regarding Contempt Motion (the “Interim Order,” DN 186).

As set forth in the Interim Order, the court found that the Initial Response failed to establish an inability to pay the full amount of the discovery sanction with requisite specificity. *See Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996) (to establish defense to contempt finding, alleged contemnor must show inability to comply “categorically and in detail”). Nevertheless, the court postponed its decision on the alleged contempt, and gave Mr. Demorest and his client an opportunity to file a supplemental response. In the Interim Order, however, the court warned Mr. Demorest and New Products as follows: “[i]f, after reviewing the supplemental filings, the court finds them unsatisfactory to establish a defense to the Contempt Motion, the court will likely issue a further order making contempt findings and imposing a coercive or compensatory sanction.” *See* Interim Order at p. 2.

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<sup>2</sup> The court will refer to subpoena recipients’ motion (DN 168) as the “Contempt Motion,” and will refer to the initial response (DN 177) by Mr. Demorest and his client, New Products Corporation, as the “Initial Response.”

Mr. Demorest and New Products filed a supplemental response on October 28, 2015 (the “Supplemental Response,” DN 197), together with their Motion to Stay Collection Pending Appeal and Investment Order (the “Stay Motion,” DN 198). The Supplemental Response offers no financial information from either of the alleged contemnors, but instead proposes to deposit \$166,187.50 into the court’s registry, essentially as a supersedeas bond, to obtain a stay of collection pending appeal. They argue that “[p]ayment of \$166,187.50 to the Clerk of the Court will render the Contempt Motion moot.” *See Stay Motion at ¶ 11.*

After reviewing the Supplemental Response, the court finds that it fails to establish a colorable defense to the Contempt Motion. Indeed, the Supplemental Response establishes, rather than refutes, Mr. Demorest’s and New Products’s contempt.

In the Initial Response, Mr. Demorest and his client argued that, although they could not pay the full amount of the discovery sanction imposed in the MDO, they instead proposed a two-year payment plan, with payments of \$7,500.00 per month. They did not, however, tender any payment to Dickinson Wright, just a payment proposal. In the Supplemental Response, Mr. Demorest makes a similar proposal, only sweetening the offer by proposing to pay the Clerk, rather than Dickinson Wright, in full, following the hearing on their Stay Motion. The latest proposal, however, undermines the factual predicate of the Initial Response, which argues that New Products is unable to pay in full without “substantial hardship.” They attempt to explain away their initially-professed inability to pay by making the following statement in a brief, but not under penalty of perjury:

New Products submitted an Affidavit from Cheryl J. Miller describing the hardship it would cause to pay the full amount in a lump sum. That hardship still exists, but New Products has made arrangements for payment of those funds, rather than continue to litigate a side issue.

See Stay Motion at ¶ 7. The admission that New Products at last has “made arrangements for payment,” without any explanation why the company did not make payment arrangements shortly after the entry of the MDO on July 24, 2015, or following the court’s refusal to reconsider its award, or in response to the Contempt Motion initially, is no defense to a contempt finding.

Moreover, the Supplemental Response certainly does not comply with the Interim Order, which directed both Mr. Demorest and New Products to “file a supplemental affidavit or solemn declaration to establish a defense to the Contempt Motion.” Interim Order at p. 3, ¶ 1. Neither has done so.

Rather, the Supplemental Response establishes that New Products has the ability to pay, but will do so only on its own terms, and not to Dickinson Wright. As for Mr. Demorest, he offered no proof of his inability to pay. Through this gamesmanship, both have effectively obtained a stay of collection since late July, when the court first directed them to pay Dickinson Wright for misusing the subpoena power, and evidently would like to continue this ersatz stay through the conclusion of the Stay Motion.<sup>3</sup>

The court finds that Mr. Demorest and New Products are in contempt of the MDO, and the *proposed* payment does not moot the Contempt Motion. Consequently, the court will require Mr. Demorest and New Products to remit \$166,187.50, in full, directly to Dickinson Wright, within seven days of the entry of this order. Should the contemnors fail to pay this full amount to Dickinson Wright within seven days of this Order, the court will levy a \$200.00 sanction for each day that the original award remains unpaid. In addition, given New Products’s ability to pay the

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<sup>3</sup> The court entered its MDO on July 24, 2015 and New Products filed its Stay Motion on October 28, 2015, a full three months later. A hearing on this motion has yet to be held or even scheduled.

award documented in the Supplemental Response, and the failure of Mr. Demorest to document his inability to pay in accordance with the Interim Order, it is appropriate to compensate the subpoena recipients for the expense of bringing the Contempt Motion. The moving party shall file an affidavit with supporting documents showing the reasonable expenses incurred in bringing and arguing the Contempt Motion, which the court will consider at the hearing scheduled for November 16, 2015, along with the imposition of additional measures to address the contempt if it continues.

Finally, had the contemnors proposed the payment into the court's registry earlier, the court might have regarded the effort as inconsistent with a contempt finding. Three months after the entry of the MDO, however, and three weeks after the contemnors cried poverty in sworn statements, the proposal reflected in the Stay Motion fortifies the court's resolve to enforce its orders and the professional obligations of counsel. The Supplemental Response, in addition to its failure as a defense to the Contempt Motion, casts doubt on the truth of the statements that Ms. Miller made under penalty of perjury to support the Initial Response. Perhaps the lawyerly phrase "substantial hardship" woven into the declaration will permit her to dodge the "penalty of perjury" mentioned therein, but readers of her declaration and the Supplemental Response may now view her statements, and the statements of those who may have assisted her in preparing the declaration, with understandable skepticism.

NOW, THEREFORE, IT IS HEREBY ORDERED AND DECREED as follows:

1. Mark S. Demorest and New Products Corporation are in contempt of the Memorandum of Decision and Order entered July 24, 2015;

2. Within seven days after entry of this Order, Dickinson Wright shall file an affidavit and supporting documents itemizing the reasonable fees incurred in connection with filing the Contempt Motion;

3. Should Mr. Demorest and New Products fail to pay \$166,187.50 to Dickinson Wright within seven days of the entry of this Order, they shall pay \$200.00 to Dickinson Wright for each day the amount remains unpaid in addition to the principal amount of the award; and

4. The court will hold a hearing, by telephone, to consider the fees to be awarded, any additional remedies to address the contempt, and the Stay Motion, on November 16, 2015, at 10:00 AM (parties shall dial (888) 273-3658 and reference Access Code 5199125 to participate in the hearing).


IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Melissa L. Demorest, Esq., Mark S. Demorest, Esq., John Chester Fish, Esq., Cody H. Knight, Esq., Elizabeth M. Von Eitzen, Esq., Daniel F. Gosch, Esq., Scott Knapp, Esq., Mathew Cheney, Esq., and the United States Trustee.

END OF ORDER

**IT IS SO ORDERED.**

Dated November 2, 2015



  
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Scott W. Dales  
United States Bankruptcy Judge