

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MODERN PLASTICS CORPORATION,

Debtor.

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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.

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ORDER IMPOSING CONTEMPT AWARD

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

On November 2, 2015, the court entered its Order Finding Contempt (the “Contempt Order,” ECF No. 201), after concluding that New Products Corporation (“New Products”) and its attorney, Mark S. Demorest, Esq., flouted the court’s earlier Memorandum of Decision and Order that required them to pay \$166,187.50 to Dickinson Wright, PLLC (“Dickinson Wright”) as a discovery sanction under Fed. R. Civ. P. 45. *See* Memorandum of Decision and Order entered July 24, 2015 (the “Discovery Order,” ECF No. 138). The court intended this award to

compensate Dickinson Wright and its clients<sup>1</sup> for their substantial costs, as non-parties, in responding to subpoenas that Mr. Demorest issued as New Products's counsel.

The Contempt Order, entered after an initial hearing on October 14, 2015 in Kalamazoo, required Dickinson Wright to file an affidavit and supporting documents "itemizing the reasonable fees incurred in connection with filing the Contempt Motion." *See* Contempt Order at p. 5. The firm timely complied and the court conducted a telephone hearing on November 16, 2015 to consider the amount of the fees to award the Bank and the Harbor Shores Entities to compensate them for prosecuting The Subpoena Recipients' Motion for Contempt Against New Products Corporation and Mark Demorest (the "Contempt Motion," ECF No. 168).

During the telephone hearing, the parties agreed that the court could consider the unredacted invoices of Dickinson Wright, *in camera*, in deciding the amount of reasonable fees to award for bringing the Contempt Motion, and neither side requested a formal evidentiary hearing.<sup>2</sup> The court has completed its *in camera* review, and will award \$4,725.00 to Dickinson Wright's clients for what the court regards as the reasonable costs of filing and arguing the Contempt Motion.

First, neither New Products nor Mr. Demorest challenged the fact that Dickinson Wright has charged, or will charge, the Bank \$16,153.50 to negotiate and eventually force New Products and Mr. Demorest to comply with their obligations under the Discovery Order from August 28 to November 2, 2015. Similarly, there is no controversy that the firm charged, or will charge, the Harbor Shores Entities \$14,856.00 for similar services, during the same period. The charges are

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<sup>1</sup> Dickinson Wright represents Bank of America ("the Bank"), 3 OCIR 337, LLC and Evergreen Development Company, LLC (collectively the "Harbor Shores Entities" in connection with New Products's subpoenas.

<sup>2</sup> On the record, the parties also agreed that the court would destroy the unredacted invoices after completing its review.

amply supported in the Declaration of Daniel F. Gosch dated November 6, 2015 (ECF No. 204), and attached invoices. All told, Dickinson Wright spent over 45 hours on the project in the service of the Bank, and over 47 hours for the Harbor Shores Entities, for more than 92 hours. Similarly, there is no substantial controversy about the fact that Dickinson Wright charged the Bank rates ranging from \$175.00 to \$458.00 per hour, depending on the professional, for a blended hourly rate of \$358.00. For the Harbor Shores Entities, the rates per hour ranged from \$195.00 to \$450.00, resulting in a blended rate of \$315.00 per hour. Mr. Gosch reported that these rates represent client-specific discounts below the firm's usual rates.

During the telephone conference, while refusing to concede contempt and taking issue with the court's dim assessment of his client's earlier declaration, Mr. Demorest did offer his opinion that a reasonable award for prosecuting a simple contempt motion would range from \$3,000.00 to \$5,000.00. Mr. Gosch, for his part, defended the time spent,<sup>3</sup> but explained that he anticipated criticism about the amount of the charges and especially the intra-firm conferences. Dickinson Wright, therefore, further reduced its request to a flat \$25,000.00, despite the fact that his clients have been or will be billed for the higher amounts.

The question, however, is not simply how much Dickinson Wright charged its clients to enforce their rights under the Discovery Order. Rather, when it entered the Contempt Order, the court announced its intention to award only "the reasonable fees incurred in connection with filing the Contempt Motion." Much of the time reflected in the Dickinson Wright invoices involves correspondence with Mr. Demorest, and substantial intra-office correspondence and

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<sup>3</sup> For example, in response to Mr. Demorest's criticism that it was not necessary to send two "partners" to the initial hearing on the Contempt Motion, Mr. Gosch explained that he attended with Mr. Knapp because he expected to testify. But, given the court's established procedures under Rule 9014(e) governing the taking of evidence during regular motion days, which are posted on the court's website, the initial hearing on the Contempt Motion was not set as an evidentiary hearing. Indeed, the Scheduling Order (ECF No. 169) advised counsel that the court would "hear arguments" at the initial hearing. It was not reasonable to expect to give testimony at the initial hearing.

conferences among Dickinson Wright personnel, as well as a fair amount of legal research. Moreover, many of the staffing decisions reflect a disproportionate reliance on members, naturally demanding higher rates, than associates or other lower-cost legal professionals.

Certainly, the clients of Dickinson Wright expect, and are willing to pay for, top-flight representation, and by all accounts they get what they bargain for. The court, however, regards the issues involved in drafting and arguing the Contempt Motion as not meriting the robust approach and charges that Dickinson Wright's clients may be willing to pay for, at least not when the court will be relaxing the American Rule to some extent by shifting the expense to others -- even a contemptuous litigant and its counsel as in this case.

Based on its experience in this and other matters, and acknowledging the limited amount of travel required to argue the Contempt Motion in Kalamazoo, the court has decided to allow recovery of fifteen hours of attorney time in preparing, filing, and arguing the Contempt Motion. This takes into account the time necessarily incurred in traveling to and from Kalamazoo for the initial hearing, waiting for the court to call the case, participating in the conference *in camera*, and arguing the Contempt Motion on the record. It also includes the amount of time the court regards as reasonable for drafting a straightforward contempt motion. The issues in the Contempt Motion, indeed in any contempt motion, are fairly straightforward: whether the alleged contemnors refused to obey the clear command of the court. Admittedly, counsel spent time carefully reviewing the insufficient declarations that New Products and its counsel offered in defense, and responding to the court's letter about Mr. Demorest's proposal for installment payments. Considering all this, the court nevertheless finds that it would be unreasonable to permit recovery of over ninety-two hours in connection with the Contempt Motion, and perfectly

reasonable to require New Products and its counsel to bear the costs of fifteen hours of professional attention on account of their contempt.

The lodestar analysis, applicable under authorities such as *In re Boddy*, 950 F.2d 354 (6th Cir. 1991), requires the court to consider the reasonable rate. Given the number and variety of professionals assisting the Bank and the Harbor Shores Entities in connection with the Contempt Motion, the court has determined to apply the blended hourly rate that Dickinson Wright offers the Harbor Shores Entities -- \$315.00 per hour. *Cf. In re Ulrich*, 517 B.R. 77, 86 (Bankr. E.D. Mich. 2014) (using blended hourly rate in conducting lodestar analysis under *Boddy*). The rate strikes the court as reasonable given (i) the considerable expertise of Dickinson Wright's associates and other counsel involved in this matter; and (ii) the court's familiarity with the range of rates within the district.

To summarize, therefore, the court will require New Products and its counsel to pay Dickinson Wright the sum of \$4,725.00, representing fifteen hours at a blended rate of \$315.00 per hour. As with the Discovery Order, the liability of the contemnors shall be joint and several.

NOW, THEREFORE, IT IS HEREBY ORDERED that New Products and Mark S. Demorest, Esq., are jointly and severally liable to the Bank and the Harbor Shores Entities in the amount of \$4,725.00, and shall pay that sum to Dickinson Wright, who shall hold the payment in trust, and distribute it to its clients as the clients and the firm may agree.

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,

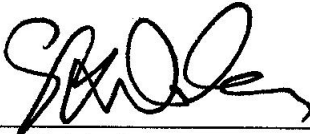
Esq., John Chester Fish, Esq., Cody H. Knight, Esq., Elizabeth M. Von Eitzen, Esq., Daniel F. Gosch, Esq., Scott Knapp, Esq., Mathew Cheney, Esq., and the United States Trustee.

END OF ORDER

**IT IS SO ORDERED.**

Dated November 18, 2015



  
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Scott W. Dales  
United States Bankruptcy Judge