UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-2256

April 26, 2018

In re: MODERN PLASTICS CORPORATION,

Debtor.

NEW PRODUCTS CORPORATION and MARK DEMOREST

Appellants,

v.

DICKINSON WRIGHT, PLLC; BANK OF AMERICA, N.A.; EVERGREEN DEVELOPMENT, LLC; and 3 OCIR 337, LLC,

Appellees.

On Appeal from the United States District Court for the Western District

Before: GUY, SUTTON, and COOK, Circuit Judges.

RALPH B. GUY, JR., Circuit Judge. In the course of litigating the adversary proceeding brought

by New Products Corporation (NPC) against the Chapter 7 Trustee and his surety, NPC's Attorney Mark Demorest served five non-parties with subpoenas *duces tecum* pursuant to Federal Rule of Civil Procedure 45 (Fed. R. Bankr. P. 9016). The ensuing discovery dispute—which included several motions, hearings and orders—resulted in a substantial award of attorney fees and costs to the non-parties, and a subsequent finding of civil contempt for failure to pay that award as ordered. NPC and Demorest appealed, and the district court affirmed in all respects. *See New Prods. Corp. v. Dickinson Wright, PLLC (In re Modern Plastics Corp.), 577* B.R. 690 (W.D. Mich. 2017). After consideration of the arguments presented here, we also affirm.[1]

I.

NPC's adversary proceeding alleged that the trustee breached his fiduciary duties with respect to one of the Debtor's assets—property on which sat a former manufacturing facility located in Benton Harbor, Michigan (Property). In the context of that suit, NPC's counsel Mark Demorest served a succession of subpoenas on the following non-parties: Steven Siravo and Bank of America (collectively BOA) (the Debtor's prepetition lender and NPC's predecessor in interest); Dickinson Wright, PLLC,

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[1] The bankruptcy court's record on appeal appears in the two cases that were consolidated for decision by the district court (Case Nos. 15-cv-1026 (RE 14) and 15-cv-1200 (RE 6)). All of the filings related to this appeal were made in the bankruptcy adversary proceeding (Bankr. Case No. 13-802512-swd).

and two of its attorneys (DW) (BOA's attorneys); and separately Evergreen Development Company, LLC, and 3 OCIR 337, LLC (collectively Harbor Shores Entities) (both of which had been prospective purchasers of the Property and were also clients of DW). The back-and-forth communications between Demorest and Christina McDonald, an attorney with Dickinson Wright who represented the subpoena recipients (Respondents), were central to the bankruptcy court's determination that the reasonable expenses incurred in complying with the subpoenas should fall on NPC and Demorest under Rule 45(d).

Briefly, the first three subpoenas were served by mail on BOA and DW on August 28, 2014, and each sought the production of documents—including all communications, computer records and emails—in 36 broad categories reaching back to January 1, 2005. The subpoenas requested a privilege log for any documents withheld on that basis, and commanded production of the documents on or before September 15, 2014. Upon receipt of the subpoenas on September 4, McDonald emailed Demorest requesting an extension of time to respond, explaining that "it will take quite some time and work to determine what might exist in response to the numerous requests." Through several email exchanges on September 5, Demorest suggested that they talk after McDonald reviewed the subpoenas and discuss an extension the following week; while McDonald said there was no need to talk, she wanted to know if he would agree to an extension, and proposed September 26 as a new date for any responses, objections, or motions for protective order. Demorest responded to the last suggestion on September 11, indicating that he could agree to an extension of the time to object until

September 23, but that he still expected the production of documents on October 10.

On September 15, McDonald sent timely Responses and Objections to the subpoenas on behalf of BOA and DW. In the accompanying cover letter, McDonald advised, among other things, that there were "very real concerns about the exceedingly broad scope of the requests, the undue burden they place on Respondents, the obvious request for what you must reasonably know to be privileged communications, and the ultimate purpose of your requests." However, McDonald expressed willingness to proceed in good faith "based on the critical assumption that [they would] be able to agree on a stipulated order which addressed the concerns set forth more fully in the Respondents' Objections." That letter also indicated that a stipulated order would need to "address such matters as, without limitation, the proper scope and limits of any production, the ground rules and methods of collection for Electronically Stored Information ('ESI'), protections for privileged and confidential information, *and* the reimbursement of costs." (Emphasis added.) Consistent with those sentiments, the formal Responses and Objections began with objection to the requests as burdensome and a demand to be compensated under Rule 45 "for all costs incurred in copying and producing the requested documents, including but not limited to reasonable attorneys' fees." On September 19, without responding to the objections, Demorest served 3 OCIR 337, LLC, with a similar subpoena

requesting documents in 58 broad categories dating back to January 1, 2005.[2]

Demorest then responded in an email on September 23, inviting a call, demanding production of the documents, and asking to see a draft of a proposed protective order. McDonald's return email (sent that same day) declined the call, confirmed that efforts were underway to respond to the subpoenas, and advised that a draft protective order would be forthcoming. In fact, on October 2, McDonald sent a proposed stipulated protective order with an email that enumerated the specific steps that had been taken to identify and collect potentially responsive material. McDonald stated that they had already identified six boxes of documents and 8,000 emails (not including BOA's emails) and advised that it would take longer to review the email correspondence as much of it would be privileged. Notably, McDonald also invited Demorest to narrow his requests, asking: "If you have further limiting search terms that we might be able to agree upon, or would like to limit the identified Custodians to limit the scope of the potentially responsive Dickinson Wright PLLC material, and thereby potentially speed up the process, please advise and we will consider same. Otherwise, we will proceed as per above."

Demorest did not respond, comment on the proposed order, or suggest any limit to the search then

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[2] Responses and Objections were sent on behalf of 3 OCIR 337, LLC, on October 10—the first objection being a demand for all costs and expenses incurred, including but not limited to reasonable attorney fees as a non-party under Rule 45.

or at a later time. Instead, on October 13, Demorest served the Evergreen Development Company, LLC, with the last subpoena requesting documents in 57 broad categories going back in some cases as far as January 1, 2005.[3] Despite the lack of response to the October 2 letter, McDonald sent Demorest an email update regarding all of the subpoenas on October 27. In that update, McDonald advised that BOA's third-party vendor had completed an initial search of the electronic records, and indicated that "nearly 13,000 potentially responsive documents" had been identified that DW would need to review. Significantly, McDonald's email added: "I welcome the opportunity to limit the scope of electronic documents by appropriate search terms or otherwise. As it stands, BOA's review is likely to be quite expensive, and, as you are aware, [NPC] has agreed to reimburse BOA for all costs incurred in connection with this compliance." This update did not prompt any response from Demorest until an email on December 29 asking to set up a phone call.[4]

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[3] Evergreen's written Responses and Objections dated October 31 also began with a demand to be compensated for all costs and expenses, including reasonable attorney fees under Rule 45.

[4] In their Reply Brief, NPC and Demorest argue for reversal based on Respondents' acknowledgement that all communications regarding the subpoenas were deliberately conducted in writing. However, close review of the chart setting forth the chronology shows that this revelation is immaterial. First, the unanswered calls and declined invitations to call were followed by same-day written communication on both September 5 and September 23. Second, nothing in

McDonald responded by email on January 5, 2015, explaining that the production of documents had proceeded, that BOA's third-party vendor had completed its search of the electronic records, and that reviews of documents for confidentiality and privilege were completed. McDonald reiterated that no documents would be produced without a protective order, and advised that the Respondents expected reimbursement of more than $150,000 in costs that had been incurred in responding to the subpoenas. Demorest objected by phone the next day and in a letter that followed on February 2, insisting that the amount was unreasonable, requesting that supporting documentation be provided, and taking the position that the Respondents were not entitled to any reimbursement for expenses incurred prior to the entry of a court order. Not surprisingly, the dispute ended up before the bankruptcy judge.

The Recipients' Motion for Protective Order and NPC's Motion to Compel were fully briefed and heard together on April 16, 2015. After agreements were reached regarding issues of confidentiality and privilege that are not at issue here, the bankruptcy judge granted the motion for protective order as modified, ordered production of the documents with the issue of costs to be determined later, and denied the motion to compel as moot. The cost-shifting issue was subsequently litigated, including a full evidentiary hearing at which the bankruptcy judge heard testimony from Demorest, a partner from

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the Reply undermines the bankruptcy court's finding that there was no communication from Demorest between October 2 and December 29 (other than serving Evergreen with the last subpoena).

Dickinson Wright, and a representative of the third-party vendor that performed the electronic records searches for BOA.

The bankruptcy court issued its decision on July 23, 2015, setting forth its findings and concluding that NPC and Demorest should bear the burden of the reasonable attorney fees and costs incurred by BOA and the Harbor Shores Entities (Discovery Order). Although that order relied on Rules 26(c) and 37(a)(5) as well as Rule 45, the bankruptcy court clarified on reconsideration that it had shifted expenses to NPC and Demorest "under Rule 45 as a means of enforcing counsel's duty to mitigate the burden of discovery on non-parties" and adhering to the conclusion that the award of "significant and reasonable expenses" incurred as a result of their compliance was consistent with Rule 45(d)(2)(B). *New Prods. Corp. v. Tibble (In re Modern Plastics Corp.),* 536 B.R. 783, 788, 791 (Bankr. W.D. Mich. 2015).

In determining the amount of the award, the bankruptcy judge independently assessed the reasonableness of the charges and substantially reduced the amount of the attorney fees and costs that would be reimbursed to BOA and the Harbor Shores Entities (from $79,095.98 to $47,488.80 and from $115,857.35 to $61,417.50, respectively). In addition, the bankruptcy court found that the $57,281.20 BOA had paid to its third-party vendor to comply with the subpoena was supported by credible evidence and was reasonable. In all, the bankruptcy court awarded $104,770.00 to BOA and $61,417.50 to the Harbor Shores Entities, specifically directing that those amounts be paid to Dickinson Wright, PLLC, in trust for distribution to its clients. NPC's motions for

reconsideration and a stay were denied on August 26, 2015. *See New Prods.,* 536 B.R. at 791.

When payment was not immediately forthcoming (Demorest proposed a two-year payment plan), a motion for contempt was filed, a hearing and supplemental response followed, and an order finding contempt was entered on November 2, 2015 (Order Finding Contempt). Payment was promptly made as directed, and, after further proceedings, the bankruptcy court ordered payment of an additional $4,725.00 in attorney fees and costs incurred by Respondents in connection with the contempt proceedings (Order Imposing Contempt Award). NPC and Demorest appealed, the district court affirmed, and this appeal followed.

II.

In this appeal, the bankruptcy court's orders are reviewed directly rather than the intermediate decision of the district court. *Lowenbraun v. Canary (In re Lowenbraun),* 453 F.3d 314, 319 (6th Cir. 2006). We review the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. *Id.* The decision to impose discovery sanctions is reviewed for abuse of discretion. *Corzin v. Fordu (In re Fordu),* 201 F.3d 693, 711 (6th Cir. 1999); *Harmon v. CSXTransp., Inc.,* 110 F.3d 364, 366 (6th Cir. 1997).

A. **Rule 45(d)**

Under Rule 45(d) (formerly 45(c)), there are "two related avenues by which a person subject to a subpoena may be protected from the costs of compliance: sanctions under Rule 45(d)(1) and cost-

shifting under Rule 45(d)(2)(B)(ii)." *Legal Voice v. Stormans Inc.,* 738 F.3d 1178, 1184 (9th Cir. 2013). Appellants argue that the award of attorney fees and costs was an abuse of discretion under either provision.

1. Sanctions

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply. (10 of 15) **8** Fed. R. Civ. P. 45(d)(1). Also, on a timely motion, the court "must quash or modify a subpoena that . . . subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). Undue burden is to be assessed in a case-specific manner considering "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed." *Am. Elec. Power Co., Inc. v. United States,* 191 F.R.D. 132, 136 (S.D. Ohio 1999) (quoting *Concord Boat Corp. v. Brunswick Corp.,* 169 F.R.D. 44, 53 (S.D.N.Y. 1979)). Courts must "balance the need for discovery against the burden imposed on the person ordered to produce documents," and the status of that person as a non-party is a factor. *Id*.

Appellants argue that sanctions may not be imposed under Rule 45(d)(1) absent a finding of bad faith, relying on *Legal Voice,* 738 F.3d at 1185, and *N.*

Am. Rescue Products, Inc. v. Bound Tree Med LLC, No. 08-cv-101, 2009 WL 4110889, at *13 (S.D. Ohio Nov. 19, 2009) ("An element of bad faith is *usually* required." (emphasis added)). But neither case supports a bad-faith requirement. In fact, the passage quoted from *Legal Voice* explained that "failure narrowly to tailor a subpoena may be a ground for sanctions," although the court "need not impose sanctions every time it finds a subpoena overbroad." 738 F.3d at 1185 (citing *Mount Hope Church v. Bash Back!,* 705 F.3d 418, 426 (9th Cir. 2012)). The court in *Legal Voice* affirmed both because plaintiff had not clearly acted in bad faith and because the subpoena was not "so facially overbroad that the district court's denial of sanctions was an abuse of discretion." *Id.; see also Mount Hope Church,* 705 F.3d at 429 (holding that bad faith is sufficient but not necessary to impose sanctions if Rule 45(d)(1) is otherwise violated).[5]

Here, the bankruptcy court specifically found, after undertaking a case-specific inquiry, that the subpoenas issued to the non-parties were unduly burdensome for reasons that included the undisputedly broad scope of the requests in terms of the number of categories, the breadth of each category, and the temporal reach of the requests. Also, as an experienced commercial litigator, Demorest would have known that complying with such subpoenas would involve considerable time and resources, implicate significant concerns about

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[5] The advisory committee's notes for the 1991 amendment to Rule 45 indicate that this section is intended to give specific application to Fed. R. Civ. P. 26(g), which does not limit sanctions to instances of bad faith or improper purpose.

customer privacy for BOA, and require review for privileged communications and attorney work product regarding matters for which DW had been retained. The breadth of the requests was confirmed by credible testimony from BOA's third-party vendor about the work it performed (including searches of all electronically stored information that mentioned, referred to, or related to the Debtor or the Property since January 1, 2005). The bankruptcy court found that much of the expense could have been avoided either initially, or by engaging with Respondents' counsel to address the concerns, tailor the document requests, or comment on the proposed protective order. We agree with the district court that the record supports the bankruptcy court's finding that the subpoenas imposed an undue burden or expense on the non-party Respondents, which Demorest failed to take reasonable steps to avoid. *New Prods.,* 577 B.R. at 705. The bankruptcy court did not abuse its discretion in finding that sanctions were warranted under Rule 45(d)(1).

2. Cost-Shifting

Alternatively, Rule 45(d)(2)(B) provides that any person subject to such a subpoena may serve objections "before the earlier of the time specified for compliance or 14 days after the subpoena is served" and that:

> If an objection is made, the following rules apply:
>
> (i) At any time, on notice to the commanded person, the serving party may move the court for the district

> where compliance is required for an order compelling production or inspection.
>
> (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

Fed. R. Civ. P. 45(d)(2)(B) (formerly 45(c)(2)(B)). Thus, if an objection is made and the court orders the non-party to comply, the court must protect a non-party from significant expenses resulting from compliance. *See United States v. McGraw-Hill Cos.,* 302 F.R.D. 532, 534 (C.D. Cal. 2014).[6]

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[6] The court in *McGraw-Hill* explained that before the 1991 amendment to Rule 45, courts applied a number of equitable factors to determine whether to exercise discretion to shift the cost of production to the requesting party. 302 F.R.D. at 534-36. Some district courts have continued to consider three equitable factors in making that determination: (1) "whether the putative non-party actually has an interest in the outcome of the case"; (2) "whether it can more readily bear its costs than the requesting party"; and (3) "whether the litigation is of public importance." *In re Exxon Valdez,* 142 F.R.D. 380, 383 (D.D.C. 1992) (citing cases). The bankruptcy court did not rely on those factors here, however, agreeing instead with two of our sister circuits that doing so would be inconsistent with the language of the current rule. *See Legal Voice,* 738 F.3d at 1184; *Linder v. Calero-Portocarrero,* 251 F.3d 178, 182

NPC and Demorest argued that any claim for reimbursement under this (or any) provision was forfeited because the Respondents "voluntarily produced the documents when [they] should have simply refused production and waited for [the serving party] to file a motion to compel." *Angell v. Kelly,* 234 F.R.D. 135, 138 (M.D.N.C. 2006). The court in *Angell* concluded that, because the subpoenaed party produced the documents without waiting for a court order, it could not "seek reimbursement post-production based on Rule 45." *Id.* at 139. This case differs from *Angell,* however, because although the expenses were *incurred* after objection but before an order was entered, the documents actually were not *produced* until after a protective order was entered requiring it. Technically, at least, Respondents both objected and did not voluntarily produce the documents without a court order.

In another case that relied on *Angell,* the district court found that the subpoena recipient could not seek reimbursement under Rule 45(d)(2)(B)(ii) because the non-party "voluntarily complied with the subpoena *without conditioning its compliance on reimbursement*." *N. Am. Rescue Prods.,* 2009 WL 4110889, at *14 (emphasis added). In contrast, the Respondents indicated their intention to seek

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(D.C.Cir.2001);*seealsoMcGraw-Hill,*302F.R.D.at535. The parties have not urged this court to weigh in on the issue, although appellants assert that the Respondents had an unspecified interest in the outcome of the adversary proceeding. However, in the absence of further explanation, we have no reason to doubt the bankruptcy judge's assessment that they did not.

reimbursement in several ways (objections, email communication, and a proposed protective order). The bankruptcy court did not err in this case in concluding that neither *Angell* nor *North American Rescue* would preclude reimbursement in this case. *See also McCabe v. Ernst & Young, LLP,* 221 F.R.D. 423, 426-27 (D.N.J. 2004) (finding non-parties forfeited the right to reimbursement of significant counsel fees where they did not object to the subpoenas, did not condition compliance on reimbursement, and voluntarily produced the subpoenaed documents before expressing any concern about the costs of compliance).

Appellants also contend that recovery under Rule 45(d)(2)(B)(ii) is not available because one or more of the Respondents' objections was untimely. It is clear that BOA and DW served their objections timely, although Evergreen's objections may have been one day late and Respondents concede that 3 OCIR 337's objections were several days late. However, this issue is deemed forfeited because it was not raised before the bankruptcy court. *See Johnston v. Hazlett (In re Johnston),* 209 F.3d 611, 612 n.1 (6th Cir. 2000). Moreover, as the district court recognized, if the issue had been raised, the bankruptcy court would have been able to decide whether to consider the untimely objection. *See Am. Elec. Power,* 191 F.R.D. at 136-37 (considering untimely objections under Rule 45(d)(2)(B)(ii)).

Finally, the bankruptcy court examined the attorney fees and costs sought by the Respondents and disallowed those that Respondents had not shown were reasonable or resulted from their compliance with the subpoenas. NPC and Demorest did not deny

that the remaining costs were "significant." The bankruptcy court found that Respondents had not forfeited the ability to pursue cost-shifting because the record showed that they specifically objected to the burden and expense of complying with the subpoenas, communicated concerns about the amount of work and expense that would be required to comply, invited efforts to narrow the search terms and/or custodians subject to the requests, and, ultimately, did not produce the documents until required to do so. Although Rule 45(d) offers more than one mechanism for addressing the difficulties posed by potentially expensive non-party subpoenas *duces tecum*, nothing requires that the costs of such efforts be established before expenses can be incurred. *See* Rule 45 advisory committee's note to 1991 amendment (noting that a court "is not required to fix the costs in advance of production").

B. Civil Contempt

NPC and Demorest argue that the order to pay Respondents' attorney fees and costs should have been enforced by writ of execution under Fed. R. Civ. P. 69 ("A money judgment is enforced by a writ of execution, unless the court directs otherwise.") (Fed. R. Bankr. P. 7069). On the contrary, as the district court explained, civil contempt was an appropriate means of enforcing the order to pay discovery sanctions. *New Prods.,* 577 B.R. at 710-11 (citing *Cleveland Hair Clinic, Inc. v. Puig,* 106 F.3d 165, 166 (7th Cir. 1997) ("Use of the contempt power is an appropriate way to enforce a sanction for misconduct, which is not an ordinary money judgment.")). Nor is there any basis for the claim that the bankruptcy court erred by failing to afford NPC and Demorest

with an opportunity to "purge" the contempt. In fact, the bankruptcy court entered an interim order allowing further supplementation in response to the contempt motion. Rather than purging the contempt, the response was to propose payment to the court rather than to DW as ordered. The bankruptcy court found the offer did not moot the contempt, and entered a contempt order that provided an opportunity to purge the contempt by making the required payment within seven days.

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The district court's order affirming the bankruptcy court's decisions arising out of this discovery dispute are AFFIRMED.

Case No. 17-2256

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

In re: MODERN PLASTICS CORPORATION

Debtor

NEW PRODUCTS CORPORATION; MARK S. DEMOREST

Appellants

v.

DICKINSON WRIGHT PLLC; BANK OF AMERICA N.A.; EVERGREEN DEVELOPMENT, LLC; 3 OCIR 337, LLC

Appellees

BEFORE: GUY, Circuit Judge; SUTTON, Circuit Judge; COOK, Circuit Judge;

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk
/s/ Deborah S. Hunt

Issued: May 17, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: MODERN PLASTICS CORPORATION, Debtor. _____/	Case Nos: 1:15-CV-1026, 1:15-CV-1200, 1:15-CV-1249
NEW PRODUCTS CORPORATION et al., Appellants, v. DICKINSON WRIGHT PLLC et al. Appellees. _____/	HON. JANET T. NEFF

OPINION

This is a consolidated appeal from several orders of the Bankruptcy Court of the Western District of Michigan. Modern Plastics Corporation filed for bankruptcy under Chapter 7 of the Bankruptcy Code. In connection with the bankruptcy proceedings, one of Modern Plastics' creditors, New Products Corporation, filed an adversary proceeding against the former bankruptcy trustee, Thomas Tibble. As part of the discovery process in the adversary

proceeding, New Products' counsel, Mark Demorest, served subpoenas *duces tecum* on seven non-parties: Steven M. Siravo; Bank ofAmerica, NA ("BOA"); Theodore B. Sylwestrzak; John G. Cameron, Jr.; Dickinson Wright PLLC; Evergreen Development Company, LLC; and 3 OCIR 337, LLC. Appellants are New Products and Demorest. Appellees are the seven non-party recipients of the subpoenas ("Recipients").

In this appeal, Appellants challenge the bankruptcy court's order requiring New Products and Demorest to pay $166,187.50 of Recipients attorney's fees and expenses for responding to the subpoenas. Appellants also challenge the bankruptcy court's orders finding them in contempt for failing to pay the aforementioned amount, and ordering them to pay $4,275 of Recipients' attorney's fees and costs for bringing a motion for contempt. Having considered the parties' briefs and the record, the Court finds that oral argument is unnecessary. For the reasons stated herein, the Court affirms the bankruptcy court's orders.

I. Background

A. Adversary Proceeding

Modern Plastics ceased operations in 2008 and filed its petition for relief under Chapter 7 of the Bankruptcy Code in January 2009. Tibble was appointed to be the trustee for the bankruptcy estate. The assets in the estate included 12 acres of real estate in Benton Harbor, Michigan, on which sat Modern Plastics' offices, warehouse, and a manufacturing facility (the "Property"). At the time, the Property was encumbered by mortgages held by

Bank of America ("BOA") and tax liens. Tibble attempted to sell the Property several times in 2009, with BOA's consent, but he was not successful. 3 OCIR 337 and Evergreen were potential purchasers of the Property. BOA, 3 OCIR 337, and Evergreen were represented by the law firm Dickinson Wright.

The condition of the buildings on the Property deteriorated substantially over the next few years as a result of looting, vandalism, and lack of maintenance. In March 2013, New Products purchased BOA's mortgages on the Property. Several months later, New Products brought an adversary action against Tibbie, claiming that he breached his fiduciary duties by failing to maintain and protect the Property. Demorest represented New Products in the adversary proceeding.

B. Subpoenas

To obtain information relevant to New Products' claims against Tibble, Demorest issued subpoenas *duces tecum* to Dickinson Wright, Dickinson Wright attorneys Sylwestrzak and Cameron, BOA, and BOA Vice President Steven Siravo.[1] The subpoenas sought 36 categories of documents spanning a nine-year time period dating back to January 1, 2005. Demorest served the subpoenas on August 28, 2014, and requested compliance within a little over two weeks, due to deadlines in the adversary proceeding. The scheduling order in the adversary proceeding required the parties to file any motions for summary judgment by September 29, 2014. Demorest

[1] Siravo was the loan officer in charge of the Modern Plastics account.

apparently wanted to review any documents produced in response to the subpoenas before the deadline for filing a motion for summary judgment.

On September 4, Recipients' counsel, Christina K. McDonald, e-mailed Demorest and requested an extension of time for compliance with the subpoenas until October 31, 2014. She told Demorest that it would take "quite some time and work to determine what might exist" in response to the subpoenas. (PageID.673.)[2]

Demorest replied the next day, suggesting that they talk after McDonald "had a chance to review the Subpoena." (PageID.672.) McDonald responded that the subpoenas were self-explanatory, and she wanted to know if Demorest would grant an extension. (PageID.671.) Demorest told her that they could discuss an extension, but he did not understand why an additional six weeks would be necessary. (PageID.670.) McDonald explained that an extension was necessary because of the scope of the subpoena request, the amount of preliminary work required, and the unavailability of personnel. *(Id.)* McDonald suggested a procedure whereby Recipients would file a written response to the subpoena, including any objections and/or a motion for a protective order, by September 26. (Id.) In addition, Recipients would propose a date for inspection and copying of non-privileged documents, which McDonald anticipated would be October 31. McDonald offered to inform

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[2] All citations to "PageID. " refer to the record filed in Case No. 1:15-cv-1200, unless otherwise noted.

Demorest before September 26 if she believed that the documents would not be ready by October 31. (Id.) Demorest replied about a week later, on September 11. He told McDonald that he would agree to extend the time for a written response to the subpoenas to September 23, but that he needed the documents responsive to the subpoena no later than October 10. (PageID.676.)

McDonald wrote Demorest on September 15 and expressed concern that an October 10 deadline would be a "very short time frame" for responding to the subpoenas, given the "enormous breadth and scope of the requests and the amount of work that will be required to assess, gather and produce potentially responsive materials[.]" (PageID.770.) She also expressed "very real concerns about the exceedingly broad scope of the requests, the undue burden they place on Respondents, the obvious request for what [Demorest] must reasonably know to be privileged communications, and the ultimate purpose for [his] requests." (PageID.771.) McDonald indicated that the recipients ofthe subpoenas would be willing to proceed based on the assumption that both sides would be able to agree on a protection order that would, among other things, provide for the reimbursement of costs. (Id.) McDonald also provided the recipients' formal, written objections to the subpoenas. Among other things, Recipients objected to production of documents without compensation for the costs and expenses of copying and producing the requested documents, including reasonable attorney's fees. *(See* Response of Steven Siravo and BOA to Subpoena, PageID.489.)

Demorest did not respond immediately. Four days later, however, he issued a subpoena to 3 OCIR 337, another client of Dickinson Wright. This subpoena requested 58 categories of documents dating back to January 1, 2005, including 36 of the same categories in the other subpoenas. The subpoena to 3 OCIR 337 specified October 10 as the deadline for compliance.[3]

On September 23, Demorest contacted McDonald and complained that BOA and Dickinson Wright had possessed their subpoenas for nearly three weeks, which was "more than adequate time to gather the requested information." (PageID.317.) He offered to "discuss the most efficient way to get the requested documents[.]" *(Id.)* McDonald responded that three weeks had not been enough time, but that she would provide responsive documents as soon as she was reasonably able to do so. She also promised to provide a draft of a stipulated protective order. *(Id.)*

On October 2, McDonald provided Demorest with the promised draft of the protective order, which provided that New Products "agrees to compensate Respondents for all actual costs and expenses incurred in copying and producing the requested documents, but those costs shall not include attorney's fees or lay labor costs unless those expenses are approved by the Court pursuant to a request or

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[3] 3 OCIR 337 served its objections to this subpoena on October 10, 2014. Like the other Recipients, 3 OCIR 337 objected that the subpoena did not provide for compensation of the costs and expenses incurred in copying and producing the requested documents. (PageID.543.)

motion separate from this Stipulated Order." (PageID.1135.)

In an email to Demorest, McDonald explained the steps that had been taken thus far to respond to the subpoenas, including: identifying the relevant custodians at BOA and issuing them litigation holds, receiving BOA's paper files related to Modern Plastics, running a search of the relevant custodians' email messages using the term "Modern Plastics," creating a list of attorneys and staff at Dickinson Wright working on matters related to Modern Plastics, issuing a litigation hold to these individuals and contacting them to determine their involvement in the matters related to Modern Plastics, identifying the individuals at Dickinson Wright most likely to have responsive materials, and searching the email files of these individuals using the term "Modern Plastics." (PageID.688-689.) The searches had turned up six boxes of documents and nearly 8,000 email files, not including BOA's email correspondence. McDonald explained that it would not be possible to review all of this material by October 10, but she offered to produce documents on a "rolling basis." (PageID.689.) She anticipated that review of the hard-copy documents would be complete by October 15, but that the email correspondence would take longer to review because much of it would be privileged or not subject to production. She suggested that Demorest could speed up the process by proposing additional search terms or limiting the list of custodians. Otherwise, she would proceed as proposed. (Id.)

Demorest did not respond to McDonald's email. On October 13, he issued a subpoena to Evergreen Development Company, another potential purchaser

of the Property and a client of Dickinson Wright. This subpoena requested 57 categories of documents dating back to January 1, 2005.[4]

Near the end of October, having received no response from Demorest to her concerns about the scope of the subpoenas and the difficulty in complying with them, to her proposed protective order, or to her suggestions for modifying the subpoenas, McDonald notified Demorest that BOA's vendor had completed an initial search of BOA's emails and identified nearly 13,000 potentially- responsive documents containing the search term "Modern Plastics." (PageID.688.) McDonald again invited Demorest to limit the scope of his requests and warned that "BOA's review is likely to be quite expensive." *(Id.)* She also notified him of her understanding that New Products had agreed to reimburse BOA for its costs of compliance.

Another two months passed without word from Demorest. In late December, he attempted to contact McDonald to arrange a conference call. She responded by email on January 5, 2015, explaining that she had not received any response to her suggestion to limit the scope of responsive documents, so BOA and Dickinson Wright went ahead with their review. (PageID.832.) McDonald expected that documents responsive to each of the subpoenas would be ready for production by mid to late January, subject to the

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[4] Evergreen served its objections to this subpoena on October 31, 2014. Like BOA, it objected to the fact that the subpoenas did not provide for compensation of expenses incurred for compliance.

terms of a protective order. She told Demorest that BOA had incurred in excess of $100,000 in fees and expenses, and that Dickinson Wright had incurred in excess of $50,000 in fees and expenses. 3 OCIR 337's and Evergreen's expenses were "nominal in comparison." (PageID.833.) She explained that none of the Recipients would turn over their documents without payment.

Apparently, Demorest called McDonald the next day and objected to the costs. A month later, on February 2, Demorest sent McDonald a letter contending that: Recipients' request for reimbursement of $150,000 in costs was "completely unreasonable"; Recipients were not entitled to reimbursement under Rule 45 of the Federal Rules of Civil Procedure because the court had not ordered them to comply with the subpoena; and Recipients had waived the right to seek costs by raising only "general" objections to the subpoenas. (PageID.694-695.)

C. Costs of Compliance with the Subpoenas

Recipients subsequently filed a motion for a protective order that sought reimbursement of approximately $180,000 in fees and expenses incurred by Recipients for responding to the subpoenas. New Products opposed this motion and filed a motion to compel Recipients to turn over the relevant documents and to hold Recipients in contempt for failing to comply with the subpoenas. The bankruptcy court held a hearing on the parties' motions on April 16, 2015. At the hearing, Demorest acknowledged that his client would have to pay some of the costs for complying with the subpoenas,

particularly copying costs, but not attorney's fees or labor costs. (4/16/2015 Hr'g Tr. 58- 59, PageID.942-943.) After the hearing, the court granted the motion for a protective order and denied the motion to compel as moot. The bankruptcy court determined that New Products would bear some of the burden of the costs of compliance, but reserved the question as to the amount and nature of the costs that would be shifted to New Products or its counsel.

Recipients turned over documents responsive to the subpoenas to Demorest and New Products on May 6, 2015. On June 24, the bankruptcy court held an evidentiary hearing on the issue that it had reserved. After the hearing, the court held that New Products and Demorest would be jointly and severally liable to BOA in the amount of $104,770.00, and jointly and severally liable to 3 OCIR 337 and Evergreen in the amount of $61,417.50. (7/23/2015 Mem. of Decision & Order, PageID.106.) These amounts included the fees paid by BOA to its third-party search vendor, Huron Consulting Group, and a portion of the legal fees charged by Dickinson Wright to BOA, 3 OCIR 337, and Evergreen in connection with responding to the subpoenas. The court directed Appellants to pay these sums to Dickinson Wright, who would distribute the money to its clients. *(Id.)*

D. Reconsideration & Motion to Stay

Appellants moved for reconsideration of the order requiring them to pay the subpoena expenses and filed a motion to stay enforcement of the order until 14 days after a decision on the motion for reconsideration. The court denied the motion for reconsideration and the motion to stay at the same

time. (8/26/2015 Mem. of Decision & Order, PageID.177.)

E. Contempt Proceedings

Dickinson Wright subsequently asked New Products and Demorest for payment in accordance with the court's order. Appellants refused to pay in full, but proposed a payment plan. Recipients filed a motion to hold Appellants in contempt. In response, Appellants filed affidavits claiming that Demorest did not have the full amount and that New Products could not pay in full without suffering "substantial hardship." The court held a hearing on the contempt motion and concluded that Appellants' responses were inadequate as a defense to contempt because they were "non-specific and conclusory[.]" (10/14/2015 Interim Order Regarding Contempt Mot., PageID.338, 339.) However, the court permitted Appellants to file a supplemental response before the court ruled on the contempt motion.

In their supplemental response, Appellants' provided no further details regarding their inability to pay or the hardship that New Products would face if required to make payment in full. Instead, they asserted that New Products had made arrangements to pay the full amount due. (PageID.342.) Appellants proposed to make full payment to the Clerk of the Court "as an appeal bond," and filed a motion to stay collection pending appeal. *(Id.)* They contended that payment to the Clerk of the Court would render the motion for contempt moot. (PageID.343.)

The bankruptcy court held that the supplemental response "establishes, rather than refutes, Mr.

Demorest's and New Products'[] contempt." (11/2/2015 Order Finding Contempt, PageID.22.) The court found them in contempt of the July 23, 2015 order and directed them to pay the full amount due to Dickinson Wright within seven days. The court also awarded Recipients their reasonable attorney's fees for bringing the motion for contempt. (PageID.24.) Before the court ruled on Appellants' motion for a stay pending appeal, Appellants' paid the full amount due under the bankruptcy court's July 23, 2015 order to Dickinson Wright. The court subsequently held a hearing on the motion for a stay and denied it because Appellants had already paid what was due. (11/16/2015 Order Denying Stay Pending Appeal, PageID.394.)

Dickinson Wright submitted an affidavit and other documents seeking approximately $25,000 in fees for bringing the motion for contempt on behalf of its clients. After considering these documents and the parties' arguments at a hearing, the bankruptcy court ordered New Products and Demorest to pay Dickinson Wright $4,275.00 for bringing the contempt motion. (11/18/2015 Order Imposing Contempt Award, PageID.397, 401.) This amount was in line with Demorest's estimate that $3,000 to $5,000 would be a reasonable amount of fees for prosecuting a contempt motion.

New Products and Demorest now appeal the foregoing orders.

III. Jurisdiction

This Court has jurisdiction over these appeals under 28 U.S.C. § 1334 and the Court's order referring

all cases under Title 11 to the bankruptcy court. W.D. Mich. L Civ R 83.2. As explained in more detail below, Appellants have appealed from orders in an adversary proceeding, which is a "core proceeding" under 28 U.S.C. § 158(a)(1). This Court has jurisdiction to hear appeals from "final judgments, orders, and decrees" of bankruptcy judges in proceedings referred to them. 28 U.S.C. § 158(a)(1). The adversary proceeding concluded with a judgment entered on January 21, 2016. In addition, a bankruptcy court order imposing sanctions is a final order. *In re Royal Manor Management, Inc.,* 525 B.R. 338, 345 (B.A.P. 6th Cir. 2015); *In re Hake,* No. 06-8007, 2006 WL 2621116, at *1 (B.A.P. 6th Cir. Sept. 14, 2006).

IV. Standard of Review

The bankruptcy court's conclusions of law are reviewed *de novo. Rowell v. Chase Manhattan Auto. Fin. Corp. (In re Rowell),* 359 F. Supp. 2d 645, 647 (W.D. Mich. 2004). "Under a *de novo* standard of review, the reviewing court decides an issue independently of, and without deference to, the trial court's determination." *Menninger v. Accredited Home Lenders (In re Morgeson),* 371 B.R. 798, 800 (B.A.P. 6th Cir. 2007).

The Court applies the clearly erroneous standard when reviewing the bankruptcy court's findings of fact. *Stamper v. United States (In re Gardner),* 360 F.3d 551, 557 (6th Cir. 2004). "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Riverview Trenton R.R. Co. v. DSC, Ltd. (In re DSC, Ltd.),* 486 F.3d 940,

944 (6th Cir. 2007) (quoting *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 573 (1985)).

The Court reviews the bankruptcy court's imposition of discovery sanctions for abuse of discretion. *Harmon v. CSX Transp., Inc.,* 110 F.3d 364, 366 (6th Cir. 1997). Under this standard, the bankruptcy court's decision is to be afforded "great deference"; it "will be disturbed only if the . . . court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Blue Cross & Blue Shield Mut. Of Ohio v. Blue Cross & Blue Shield Ass'n,* 110 F.3d 318, 322 (6th Cir. 1997).

Appellants contend that this Court should review all of the bankruptcy court's determinations *de novo,* arguing that the bankruptcy court did not have statutory authority to enter the orders requiring Appellants to pay the expenses for the subpoenas and finding them in contempt, because those orders did not arise in a core proceeding. Appellants assert that the bankruptcy court should have submitted proposed findings of fact and conclusions of law that are subject to *de novo* review by this Court.

"When a district court refers a case to a bankruptcy judge, that judge's statutory authority depends on whether Congress has classified the matter as a '[c]ore proceeding]' or a '[n]on-core proceedin[g],'" *Wellness Int'l Network, Ltd. v. Sharif,* 135 S. Ct. 1932, 1940 (2015) (quoting 18 U.S.C. §§ 157(b)(2), (4)).

Congress gave bankruptcy courts the power to "hear and determine" core proceedings and to

> "enter appropriate orders and judgments," subject to appellate review by the district court. § 157(b)(1); *see* § 158. But it gave bankruptcy courts more limited authority in non-core proceedings: They may "hear and determine" such proceedings, and "enter appropriate orders and judgments," only "with the consent of all the parties to the proceeding." § 157(c)(2). Absent consent, bankruptcy courts in non-core proceedings may only "submit proposed findings of fact and conclusions of law," which the district courts review *de novo*. § 157(c)(1).

Id. A proceeding is core if it invokes a substantive right provided by Title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. *Sanders Confectionery Prods., Inc. v. Heller Financial, Inc.,* 973 F.2d 474, 483 (6th Cir. 1992).

The adversary proceeding filed by New Products against the Chapter 7 bankruptcy trustee was a core proceeding. Indeed, in its complaint against the trustee, New Products asserted as much. (Case No. 1:15-cv-1026, PageID.225.) Likewise, the bankruptcy court determined that New Products' adversary action was a core proceeding because it is a matter "concerning the administration of the estate[.]" 28 U.S.C. § 157(b)(2)(A). Moreover, a claim that the bankruptcy trustee breached his duties to the creditors can only arise in a case under Title 11. Thus, the bankruptcy court had jurisdiction to "enter appropriate orders and judgments" in the adversary proceeding. 28 U.S.C. § 157(b)(1).

The dispute between Appellants and Recipients regarding payment for the cost of compliance with the subpoenas arose in the context of the adversary proceeding. New Products issued the subpoenas for the purpose of obtaining evidence for the adversary proceeding, and attempted to enforce the subpoenas in that proceeding. Bankruptcy courts routinely issue orders regarding subpoenas in adversary proceedings. *See, e.g., In re SII Liquidation Co.,* No. 10-60702, 2015 WL 1365591 (Bankr. N.D. Ohio Mar. 20, 2015) (issuing an order on a motion to quash a subpoena in an adversary proceeding). Thus, the dispute between Appellants and Recipients regarding the subpoenas was part of a core proceeding.

Appellants also challenge the bankruptcy court's order finding them contempt for failing to abide by an order in the adversary proceeding. "Civil contempt proceedings arising out of core matters are themselves core matters." *In re Burkman Supply, Inc.,* 217 B.R. 223 (W.D. Mich. 1998) (quoting *In re Skinner,* 917 F.2d 444, 448 (10th Cir. 1990)).

In short, the bankruptcy court's orders regarding the subpoenas and the contempt sanctions arose in a core proceeding; thus, the bankruptcy court had authority to "hear and determine" the dispute between Appellants and Recipients and to "enter appropriate orders and judgments" therein. Consequently, the bankruptcy court's findings are subject to the standard of review applicable to federal appellate proceedings, i.e., *de novo* review for conclusions of law and clear-error review for findings of fact. *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.),* 526 F.3d 942, 946 (6th Cir. 2008).

V. Analysis

A. The Bankruptcy Court Properly Shifted the Subpoena Expenses to Appellants

The bankruptcy court held that Appellants did not comply with their duty under Rule 45 of the Federal Rules of Civil Procedure to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. 45(d)(1). Rule 45 requires a court to "enforce this duty and impose an appropriate sanction-which may include lost earnings and reasonable attorney's fees-on a party or attorney who fails to comply." *Id.*

The bankruptcy court also relied on Rule 45(d)(2) to determine how much of the cost of compliance with the subpoenas to shift to Appellants. This rule provides additional protection for non-party recipients of a subpoena. It permits a person commanded to produce documents to serve written objections on the person issuing the subpoena "before the earlier of the time specified for compliance or 14 days after the subpoena is served." Fed. R. Civ. P. 45(d)(2)(B)(i). Some courts have held that after an objection has been made, the recipient is not obligated to comply with the subpoena until ordered to do so. *See Pennwalt Corp. v. Durand-Wayland, Inc.,* 708 F.2d 492, 493 (9th Cir. 1983). The party serving the subpoena may seek an order to compel production, and any order compelling a non-party to produce documents after an objection has been made must protect that party from "significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii). Rule 45(d)(2), which was formerly Rule 45(c)(2), was added to protect non-parties from "significant expense

resulting from involuntary assistance to the Court." Fed. R. Civ. P. 45 (Advisory Committee Notes, 1991 Amendment, Subdivision (c)).

Rule 45 reflects a concern to protect recipients of subpoenas from undue burden or expense, particularly recipients who are not parties to the underlying litigation. "Courts addressing the issue of how the costs of subpoena compliance should be allocated have consistently emphasized that non-parties who have no interest in the litigation should not be required to subsidize the costs of the litigation." *Broussard v. Lemons,* 186 F.R.D. 396, 398 (W.D. La. 1999) (collecting cases). "Rule 45's mandatory cost-shifting provisions promote the most efficient use of resources in the discovery process. When nonparties are forced to pay the costs of discovery, the requesting party has no incentive to deter it from engaging in fishing expeditions for marginally relevant material. Requesters forced to internalize the cost of discovery will be more inclined to make narrowly-tailored requests reflecting a reasonable balance between the likely relevance of the evidence that will be discovered and the costs of compliance." *Linder v. Calero-Portocarrero,* 183 F.R.D. 314, 322-23 (D.D.C. 1998).

Applying Rule 45(d)(1), the bankruptcy court concluded that the subpoenas imposed an undue burden or expense on Recipients. In particular, the court noted the broad scope of the document requests, including the many different categories of documents requested (36 to 58) and the expansive definition of "document" to include both tangible documents and electronically stored information ("ESI") "mentioning, referring to, or related to Modern Plastics or the Modern Plastics Property." *(See, e.g.,* Subpoena to

Siravo and BOA, PageID.417.) In addition, the subpoenas requested documents from a nine-year period of time, dating back to September 2005. The court questioned the relevance of any documents from before 2009, when Tibble became the bankruptcy trustee. *See Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49-51 (S.D.N.Y. 1996) ("[T]o the extent a subpoena sweepingly pursues material with little apparent or likely relevance to the subject matter it runs the greater risk of being found overbroad and unreasonable."). The court also noted the short deadline for compliance with the subpoenas and the targets of the subpoenas, including "a global banking giant and a national law firm." (7/23/2015 Mem. Of Decision & Order, PageID.91.) A bank is "highly regulated and highly sensitive to customer privacy issues," such that "addressing these concerns would take considerable time (including attorney time) and other resources." *(Id.)* Similarly, serving a subpoena on a law firm in a matter in which the firm or its clients had been retained would "necessitate review [by attorneys] for privileged communications and work product." (Id.)

The court also concluded that Appellants failed to take reasonable steps to avoid imposing an undue burden or expense. Recipients repeatedly notified Demorest of their concerns with the subpoenas, their efforts at compliance, and their intent to seek reimbursement of fees and costs. Recipients also provided a proposed protective order. Demorest did not meaningfully respond to any of these concerns or proposals, except to extend the deadlines for compliance. As an experienced litigator, Demorest knew or should have known of the burden that his requests would impose on Recipients. He could have

avoided some or all of this burden by providing some input to McDonald on the ESI protocol or narrowing the subpoena requests. For instance, the bankruptcy court noted that Demorest could have requested Siravo's work file from BOA, instead of almost 10 years of documents from the entire organization. Additionally, Demorest could have requested documents directly from the clients of Dickinson Wright rather than serving subpoenas on lawyers and a law firm who were more likely to possess information that was protected by attorney-client privilege. Rather than discuss the objections with Recipients, Demorest tacitly encouraged them to continue working toward compliance with the subpoenas, knowing that they intended to seek compensation for that work. When Recipients finally completed the task that Appellants had assigned to them, Appellants refused to provide significant compensation for it.

As a sanction for failing to abide by the duty in Rule 45(d)(1), and in light ofthe requirement in Rule 45(d)(2) to protect Recipients from "significant expense," the bankruptcy court required New Products and Demorest to pay for the "lion's share" of the reasonable costs and expenses of compliance with the subpoenas. *(Id.,* PageID.100.)

1. Rule 52(a)

Appellants contend that the bankruptcy court failed to make specific findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure. This rule requires that a district court, "[i]n an action tried on the facts without a jury or with an advisory jury, . . . must find the facts

specially and state the conclusions of law separately." Fed. R. Civ. P. 52(a)(1). The bankruptcy court held that Rule 52(a)(3) applied, which states that "[t]he court is not required to state finds or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rule provide otherwise, *any other motion*." Fed. R. Civ. P. 52(a)(3) (emphasis added).

Appellants cite *G.G. March & Assocs., Inc. v. Peng,* 309 F. App'x 928 (6th Cir. 2009), which suggests that an order and judgment imposing sanctions requires a court to make specific findings of fact and conclusions of law under Rule 52(a)(1). *Id.* at 931. Nevertheless, even when Rule 52(a)(1) applies,

> [i]t is not necessary for the [Bankruptcy] Judge to prepare elaborate findings on every possible issue raised at trial. However, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which an ultimate conclusion can rationally be predicated. The findings should be explicit so as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the grounds on which the trial court reached its decision.

Orlett v. Cincinnati Microwave, Inc., 954 F.2d 414, 418 (6th Cir. 1992). In this case, the findings and conclusions of the bankruptcy court are sufficiently detailed to give this Court an understanding of the basis for the bankruptcy court's decision. Appellants contend that the bankruptcy court did not identify any particular requests in the subpoenas that imposed an undue burden. The court was not required

to do so, however. It found that the subpoenas imposed an undue burden or expense for reasons that were common to most, if not all, the subpoena requests. For instance, the expansive definition of "document" applied to all the requests in the subpoenas. In addition, all of the subpoena requests sought documents dating back to 2005.

Likewise, there is a sufficient explanation of the bankruptcy court's decision to find Appellants in contempt to give this Court a clear understanding of the basis for that decision. Thus, even assuming that Rule 52(a)(1) applies, the bankruptcy court's orders are sufficiently detailed to permit meaningful appellate review.

2. Rule 45(d)(1)

Appellants argue that the bankruptcy court lacked authority to award fees and expenses under Rule 45(d)(1) because Recipients failed to show bad faith or an abuse of the subpoena power. This argument is not supported by the text of the Rule, which requires the court to enforce a party's duty "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). The Rule does not require a finding of bad faith. The bankruptcy court found that the subpoenas imposed an undue burden or expense on Recipients and that Appellants failed to take reasonable steps to avoid this burden; these findings are sufficiently explained in the bankruptcy court's opinion and are supported by the record. Thus, the bankruptcy court did not abuse its discretion in awarding sanctions

absent an express finding of bad faith or abuse of the power to issue subpoenas.[5]

Appellants argue that they should not be required to compensate Recipients for expenses incurred to review documents for privilege, citing *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280 (S.D.N.Y. 2003). In *Zubulake,* the court stated that "the responding party should *always* bear the cost of reviewing and producing [inaccessible] electronic data once it has been converted to an accessible form," because "the producing party has the exclusive ability to control the cost of reviewing the documents" and "the producing party unilaterally decides on the review protocol." *Id.* at 290.

Zubulake is distinguishable because it applied Rule 26(c), and the "responding party" was a party to the litigation. Like Rule 45(d), Rule 26(c) permits a court to issue orders that protect a responding party from "undue burden or expense" in complying with discovery. Fed. R. Civ. P. 26(c)(1). Under Rule 26(c), however, both sides are required to provide discovery and both may have to incur some cost in reviewing and producing information to the other side. Different concerns arise when the responding party is not a party to the litigation, has no stake in the litigation, has little or no knowledge of the issues relevant for discovery, and does not stand to benefit from any

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[5] The bankruptcy court did not expressly state that Appellants abused the subpoena power, but the court's findings regarding the undue burden imposed by the subpoenas amounts to the same thing.

reciprocal review and production of relevant documents by the other side. Moreover, unlike Rule 26(c), Rule 45(d) specifically protects non-party recipients of subpoenas from "significant expense," a term that is broad enough to include expenses for privilege review. Thus, it does not follow that a non-party must always bear the cost of reviewing and producing information in response to a subpoena.

3. Rule 45(d)(2)(B)

After determining that Appellants' subpoenas had imposed an undue burden or expense on Recipients, and that Appellants failed to take reasonable steps to avoid imposing this burden or expense, the bankruptcy court discussed Rule 45(d)(2)(B) in order to determine how much of the cost of compliance with the subpoenas should be shifted to Appellants. The rule provides that, after an objection to a subpoena is made, and the court orders a non-party to produce documents, the order must protect the non-party from "significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii). Because the bankruptcy court ordered Recipients to produce documents after Recipients timely objected to the subpoenas, the bankruptcy court determined that it "'must order the party seeking discovery to bear at least enough of the cost of compliance to render the remainder 'non-significant.'" (7/23/2015 Mem. Decision & Order, PageID.100 (quoting *Linder v. Calero- Portocarrero,* 251 F.3d 178, 182 (D.C. Cir. 2001).) Appellants contend that Rule 45(d)(2)(B) does not apply, for two reasons.

(a) The objections by Evergreen and 3 OCIR 337 were not timely.

Appellants argue that Rule 45(d)(2)(B) does not apply to any expenses incurred by Evergreen and 3 OCIR 337 because their objections to the subpoenas were not timely.[6] However, Recipients note that Appellants did not raise this issue before the bankruptcy court. Recipients asserted, and the bankruptcy court agreed, that the objections were timely. Appellants never contended otherwise. "Issues not raised before the trial court are generally considered waived." *In re Johnston,* 209 F.3d 611, 612 n.1 (6th Cir. 2000) (citing *White v. Anchor Motor Freight, Inc.,* 899 F.2d 555, 559 (6th Cir. 1990)). "Appellate courts ordinarily do not consider issues raised for the first time on appeal." *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.),* 229 B.R. 388, 389 n.1 (B.A.P. 6th Cir. 1999).

The Court declines to consider any issue related to the timing of the objections. Contrary to Appellants' assertion that Rule 45(d)(2) does not apply when untimely objections are filed, courts can consider untimely objections in "unusual circumstances," such as when the subpoena is overbroad on its face and the target of the subpoena is a non-party. *See Am. Elec. Power Co., Inc. v. United States,* 191 F.R.D. 132, 136-37 (S.D. Ohio 1999); *see also* 9A Charles Alan Wright et al., Federal Practice & Procedure Civ. § 2463 (3d ed.) ("[T]he district court, in its discretion, may entertain untimely objections if circumstances warrant."). If the objections were not timely, then

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[6] Recipients concede that 3 OCIR 337's objections were late by one day, but contend that Evergreen's objections were timely. Appellants contend that Evergreen's objections were late by one day.

Appellants should have raised this issue before the bankruptcy court in the first instance.

(b) Recipients incurred expenses before the court ordered them to produce documents.

Next, Appellants argue that Rule 45(d)(2) does not apply to any expenses incurred by Recipients before the bankruptcy court ordered them to produce documents pursuant to the protective order. Appellants contend that after serving objections, Recipients were required to cease all efforts toward complying with the subpoena until ordered to comply by the court. Then, and only then, would Recipients be entitled to protection from significant expense. Appellants rely on cases outside this district. *See N. Am. Rescue Prods., Inc. v. Bound Tree Med., LLC,* No. 2:08-CV-101, 2009 WL 4110889 (S.D. Ohio Nov. 19, 2009); *Angell* v. *Kelly,* 234 F.R.D. 135 (M.D.N.C. 2006).

The bankruptcy court rejected Appellants' argument because it is not required by Rule 45. Moreover, it would "reward gamesmanship and punish cooperation." (7/23/2015 Mem. Decision & Order, PageID.101.) The court saw "no point in penalizing a cooperative [party] who gathers documents while reaching out to the requesting party in an effort to limit the expense and delay for all concerned." *(Id.,* PageID.94.) This Court agrees.

Recipients repeatedly notified Demorest of their concerns with the subpoenas and of their intent to seek reimbursement of the costs and expenses for compliance, but he turned a deaf ear. Rather than work with Recipients to reduce the burden and

expense of the subpoenas, or even inquire what those expenses might be, he encouraged them to continue working by extending the deadline for compliance. Only after Recipients had reviewed and prepared documents for production did he object to payment. Allowing Appellants to obtain the benefit of production without payment of Recipients' reasonable fees and expenses would reward inaction by Appellants and is inconsistent with Appellants' duty to take reasonable steps to avoid imposing an undue burden or expense on Recipients. Moreover, Appellants' position would encourage non-compliance with subpoenas and unnecessary court intervention rather than communication, cooperation and expedient discovery.

This case is distinguishable from *Angell,* in which the subpoena recipient voluntarily produced the documents without waiting for a court order to do so. The court held that, without a court order compelling compliance, Rule 45(d)(2)[7] did not apply. *Angell,* 234 F.R.D. at 139. In contrast, Recipients did not turn over their documents to Appellants until ordered to do so in connection with the protective order. Thus, when granting that order, the court was required to protect Recipients from "significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii).

The other case cited by Appellants, *North American Rescue Products,* is not persuasive. In that case, the recipient objected to the subpoena and the

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[7] The court examined Rule 45(c)(2), which is now Rule 45(d)(2).

court subsequently entered an order compelling production. The court held that the subpoena recipient could not seek reimbursement for any of its costs incurred prior to the court order because its compliance up to that point in time was voluntary and not conditioned on reimbursement. *N. Am. Rescue Prods.,* 2009 WL 4110889, at *14. The court cited no authority for this position, other than *Angell.* Notably, *Angell* did not hold that a party compelled to produce documents could not seek reimbursement for expenses incurred prior to the order compelling production.

Moreover, the result in *North American Rescue Products* is not supported by the text of Rule 45 itself. Rule 45(d)(2) contains a simple requirement: the court ordering compliance with the subpoena must protect the non-party subpoena recipient from "significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii). The rule does not distinguish compliance costs incurred prior to the court's order from costs incurred after the order. It might be argued that the term "compliance" in 45(d)(2)(B)(ii) specifically refers to compliance with the court's order, but this interpretation is inconsistent with the rest of Rule. When the term "compliance" is used in other parts of Rule 45(d)(2), it always means compliance *with the subpoena. See* Fed. R. Civ. P. 45(d)(2)(B) ("The objection must be served before the earlier of the time specified for compliance [with the subpoena] or 14 days after the subpoena is served."); Fed. R. Civ. P. (d)(2)(B)(i) ("At any time, on notice to the commanded person, the serving party may move the court for the district where compliance [with the subpoena] is required for an order compelling production or inspection."). Thus, the Court discerns

no error in the bankruptcy court's conclusion that it could require Appellants to pay Recipients' reasonable costs of compliance, including costs that were incurred before the bankruptcy court ordered Recipients to turn over the documents.

4. Reasonableness of Expenses

Rule 45(d)(1) permits a court to impose a sanction that includes "reasonable attorney's fees." Fed. R. Civ. P. 45(d)(1). Rule 45(d)(2) does not expressly limit the compensable expenses to those that are reasonable, but courts have read it to do so. *See In re Application of Michael Wilson & Partners, Ltd., for Judicial Assistance Pursuant to 28 U.S.C. 1782,* 520 F. App'x 736, 739 (10th Cir. 2013) ("Although Rule 45(c)(2)(B)(ii) protects a nonparty subpoena respondent from 'significant expense, expenses . . . must be reasonable.")(quoting *United States v. Columbia Broadcasting Sys., Inc.,* 666 F.2d 364, 371 n.9 (9th Cir. 1982)).

Appellants claim that the fees charged by Huron were patently unreasonable. BOA gathered 600 gigabytes of emails and attachments from nine custodians. Huron charged BOA $57,000 to review the 600 gigabytes at a per-unit rate of $95.00 per gigabyte. The bankruptcy court required Appellants to pay this fee. Appellants contend that this fee was unreasonable because only 2 gigabytes were relevant. After eliminating duplicate documents and searching the data for the term "Modern Plastics," Huron narrowed the data set to 2 gigabytes. Appellants claim that Huron should have charged only $190 (i.e., $95 per gigabyte times 2 gigabytes), because BOA could have narrowed the data set down to 2 gigabytes by

searching for the term "Modern Plastics" before passing the data to Huron. However, there is no evidence that BOA had the capability to do so.[8] Nor was there any guarantee that Appellants would accept a search protocol that elicited only the e-mails and attachments containing the term Modern Plastics. Indeed, the subpoena to BOA requested all documents *relating to* Modern Plastics and the Modern Plastics property, not just those which contained the term Modern Plastics. McDonald indicated that Recipients would search the ESI for responsive documents using the term "Modern Plastics," but Demorest never responded to this suggestion. In short, it was not error, let alone abuse of discretion, for the bankruptcy court to conclude that Appellants should be required to pay the fees charged by Huron.

Appellants also claim that the bankruptcy court failed to use a "lodestar" approach when considering the reasonableness of Recipients' legal fees. The court indicated in its order that "the fact that the Recipients paid the invoices [for attorney's fees] might permit the court to infer that the charges were reasonable . . . . The court, however, is unwilling to abdicate its independent role (under the lodestar analysis) in assessing the reasonableness of the charges." (7/23/2015 Mem. of Decision & Order, PageID.102.) After reviewing Recipients' billing records, and

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[8] Huron's employee overseeing review of BOA's data, Craig Smith, testified that he had no knowledge about BOA's capabilities in this regard. (6/24/2015 Hr'g Tr., PageID.1190, 1194.)

hearing testimony from attorney Gosch at Dickinson Wright, the court allowed Recipients to recover $108,906.30 in attorney's fees, a substantial reduction from the nearly $195,000.00 in fees sought by Recipients. *(See id.,* PageID.103.) The court arrived at its calculation, in part, by excluding billing entries that were too redacted to permit the court to evaluate the reasonableness of the charge. The court did not discuss the individual rates charged by Dickinson Wright's attorneys and staff.

Although a more detailed discussion of the billing rates and hourly charges might have provided more insight into the court's analysis, Appellants have not shown that the court abused its discretion in making its award. Appellants assert that a few of the attorneys charged $450 per hour for their services; however, Appellants do not explain why this fact alone renders the court's decision erroneous or an abuse of discretion, especially considering that Appellants paid far less than $450 per hour overall.

Finally, Appellants claim that the court should have differentiated the fees awarded under Rule 45(d)(1) from fees awarded under 45(d)(2), but this Court cannot discern any error in the court's failure to do so. The bankruptcy court relied on both rules and its award is justified under both.

B. The Bankruptcy Court Properly Found Appellants in Contempt

In its July 2015 order, the bankruptcy court held that New Products and Demorest would be "jointly and severally liable" to Recipients in a total amount of $166.187.50. *(Id.,* PageID.106.) The court ordered

New Products to pay "that sum" to Dickinson Wright, "who shall hold the payment in trust, and distribute it to its clients, as their interest may appear." (Id.) Rather than pay the full amount as ordered, Appellants attempted to negotiate a payment plan with Recipients. Recipients refused to accept this proposal and filed a motion to hold Appellants in contempt. Appellants initially responded that payment in full would impose a "substantial hardship" on New Products, but the court found that this statement was "non-specific and conclusory." (10/14/2015 Interim Order, PageID.339.) The court gave Appellants an opportunity to supplement their defense to the contempt motion. In response, Appellants proposed to pay the full amount to the clerk of the court. The court rejected this proposal and found Appellants in contempt.

Holding a party in contempt is a matter of discretion, but the movant must produce clear and convincing evidence that the party "violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Elec. Workers Pension Trust Fund of Local Union No. 58, IBEW v. Gary's Elec. Service Co.,* 340 F.3d 373, 379 (6th Cir. 2003). The evidence must be clear and unambiguous, and any ambiguities must be resolved in favor of the party charged with contempt. *M&C Corp. v. Erwin Behr GmbH & Co.,* 298 F. App'x 927, 935-36 (6th Cir. 2008). Once the movant establishes his prima facie case, the burden shifts to the contemnor who may defend by coming forward with evidence showing that he is presently unable to comply with the court's order. *United States v. Rylander,* 460 U.S. 752, 757 (1983).

In this case, there is no dispute that, on July 23, 2015, the bankruptcy court ordered Appellants to pay a specific sum to Dickinson Wright. Appellants attempted to stay the enforcement of this order, but their motion was denied on August 26. Over two months later, when the court found Appellants in contempt, they had not paid or offered adequate evidence that they were unable to comply with the order. Indeed, their offer of full payment indicated that they were fully able to comply. On these facts, the court acted within its discretion to find Appellants in contempt.

Appellants argue that the July 23 order did not provide a specific deadline for payment, and did not preclude Appellants from paying the judgment over time. To the contrary, the order required payment of a specific sum. It did not provide for payment in partial amounts over an extended period of time. The order did not state a specific deadline for payment, but it did not need to do so. "In contempt proceedings, 'the basic proposition [is] that all orders and judgments of courts must be complied with promptly.'" *Jim Walter Res., Inc. v. Int'l Union, UnitedMine Workers,* 609 F.2d 165, 168 (5th Cir. 1980) (quoting *Maness v. Meyers,* 419 U.S. 449, 458 (1975)); *accord NLRB v. Cincinnati Bronze, Inc.,* 829 F.2d 585, 590 (6th Cir. 1987). The record amply demonstrates that Appellants did not promptly comply with the order. Nothing prevented Appellants from attempting to work out an agreement with Recipients to pay over time, but by delaying full payment, Appellants took the risk that they would be found in contempt for failing to comply with the court's order.

Appellants contend that the bankruptcy court erred by refusing to stay the sanctions order pending appeal. A few days before the bankruptcy court granted Recipients' motion for contempt, Appellants filed a motion under Rule 62(d) of the Federal Rules of Civil Procedure to "stay collection" of the $166,187.50 pending appeal. (Mot. to Stay, PageID.347.) When the court issued its decision on the motion for contempt, it had not yet scheduled a hearing on the motion for a stay pending appeal. *(See* 11/2/2015 Order Finding Contempt, PageID.68.) Rather than wait for a hearing and a decision on the motion to stay, Appellants paid the full amount due to Dickinson Wright, thereby rendering a stay unnecessary. In other words, the court had no reason to issue a stay preventing Recipients from collecting an amount that Appellants had already paid. Thus, the bankruptcy court properly denied the motion to stay.

Appellants argue that their motion for a stay should have "purged" their contempt. However, Appellants' motion proposed making payment to the clerk ofthe court, which is not what the court's order required. Appellants also contend that the bankruptcy court erred by not giving them an opportunity to "purge" their contempt. However, Appellants had the opportunity to do so at any time before the Court entered its order finding them in contempt. Indeed, in its interim order on the contempt motion, the court indicated that it was inclined to grant the motion, but that it wanted to give Appellants another opportunity to establish that their failure to pay was not a contempt ofthe order. (PageID.339.) The court expressly informed Appellants that "nothing in this Order should be

construed to preclude New Products and Mr. Demorest from making the payments which, they have already indicated, they could make pending appeal." (PageID.340.) Had Appellants made such payments, it is possible that the court would not have found them in contempt.

Finally, Appellants argue that the bankruptcy court lacked power to enforce the discovery order through contempt sanctions. According to Appellants, "'[t]he presumption, in federal proceedings, is for monetary obligations to be enforced by entry of a monetary judgment (and, if necessary, execution thereon), and not by contempt.'" (Case No. 1:15-cv-1026, Appellants' Suppl. Br., ECF No. 42, PageID.1891 (quoting *Adelphia Commc'ns Corp. v. Rigas (In re Adelphia Commc'ns Corp.),* 323 B.R. 345, 394 (Bankr. S.D.N.Y. 2005).) Appellants assert that a writ of execution under Rule 69(a) would have been adequate to enforce the court's order. Rule 69(a) provides that "[a] money judgment is enforced by a writ of execution, unless the court directs otherwise." Fed. R. Civ. P. 69(a).

Appellants' arguments ignore the fact that the bankruptcy court's order requiring payment of Recipients' costs and expenses was not a judgment. Thus, it could not be enforced by a writ of execution. Indeed, Recipients were not parties to the adversary proceedings. Thus, it is not clear how the court could have entered a judgment in their favor. Consequently, the court's contempt power was an appropriate means of enforcing the order. *See ClevelandHair Clinic, Inc. v. Puig,* 106 F.3d 165, 166 (7th Cir. 1997) ("Use of the contempt power is an appropriate way to enforce a

sanction for misconduct, which is not an ordinary money judgment.").

For all the foregoing reasons, Appellants have not shown that any error exists in the bankruptcy court's orders.

C. Bias

Appellants claim that the bankruptcy court was biased, and they ask the court to reassign the case on remand under the Court's authority in 28 U.S.C. § 2106. "This Court possesses the power, under appropriate circumstances, to order the reassignment of a case on remand pursuant to 28 U.S.C. § 2106." *Rorrer v. City ofStow,* 743 F.3d 1025, 1049 (6th Cir. 2014). The Court is not remanding the matter; the Court is affirming the bankruptcy court's orders. Thus, the Court rejects Appellants' request for reassignment.

VI. Conclusion

For the reasons stated herein, the Court discerns no error in the bankruptcy court's orders requiring New Products and Demorest to pay a substantial portion of the costs of compliance with the subpoenas, finding Appellants in contempt for failing to pay as ordered by the court, denying the motions to stay, and imposing a contempt award on Appellants. Accordingly, the Court affirms the bankruptcy court's orders.

An order will enter consistent with this Opinion.

Dated: September 22, 2017 /s/ Janet T. Neff
JANET T. NEFF
United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: MODERN PLASTICS CORPORATION, Debtor. _____/	Case Nos: 1:15-CV-1026, 1:15-CV-1200, 1:15-CV-1249
NEW PRODUCTS CORPORATION et al., Appellants, v. DICKINSON WRIGHT PLLC et al. Appellees. _____/	HON. JANET T. NEFF

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that the orders of the bankruptcy court in *New Products Corporation v. Tibbie {In re Modern Plastics Corp.),* No. 13-80252 (Bankr. W.D. Mich.), dated July 23, 2015, August 26, 2015, October 14, 2015, November 2, 2015, November 16, 2015, and November 18, 2015 are **AFFIRMED.**

Dated: September 22, 2017 /s/ Janet T. Neff
JANET T. NEFF
United States
District Judge

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN

In re: MODERN PLASTICS CORPORATION,

Debtor.
_____/

NEW PRODUCTS CORPORATION and UNITED STATES OF AMERICA,

Plaintiffs,	Hon. Scott W. Dales Chapter 7 Adversary Pro.
v.	No. 13-80252

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

Defendants.
_____/

MEMORANDUM OF DECISION AND ORDER

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

I. INTRODUCTION

This Memorandum of Decision and Order addresses a costly discovery dispute between New Products Corp. (the "Plaintiff" or "New Products") and

seven non-parties[1] upon whom New Products served subpoenas duces tecum. The court lays the blame for this dispute squarely on the shoulders of Plaintiff's counsel who flouted the duty he owed to the Recipients to avoid saddling them with undue burden and expense, then stubbornly exacerbated the problem by multiplying proceedings.

The court held two hearings in Kalamazoo, Michigan, in connection with this collateral controversy. During the first hearing, held on April 16, 2015, the court considered the Motion for Protective Order (the "MPO," DN 86) and Plaintiff's Motion to Compel Non-Parties to Comply With Subpoenas (the "Motion to Compel," DN 93). After hearing the arguments of counsel, the court announced its intention to require the Recipients to produce documents, subject to the protections contemplated under the rules to mitigate the burden of compliance with the subpoenas. The court and the litigants agreed that granting the MPO, pursuant to which the non-parties would comply with the

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[1] In this opinion, the court will refer to all of the non-parties collectively as the "Recipients." They are: Steven M. Siravo, Bank of America, N.A., Theodore B. Sylwestrzak, Esq., John G. Cameron, Jr., Esq., Dickinson Wright PLLC, 3 OCIR 337, LLC, and Evergreen Development Company, LLC. The court will refer to Mr. Siravo and Bank of America collectively as "BOA," and to Messrs. Sylwestrzak and Cameron, and the Dickinson Wright law firm, collectively as "DW." Finally, the court will refer to 3 OCIR 337, LLC and Evergreen Development Company, LLC, collectively as the "Harbor Shores Entities."

Plaintiff's subpoenas, made the Motion to Compel moot.

During the second hearing, held on June 24, 2015, the court took evidence regarding the costs involved in complying with the subpoenas. The following constitutes the court's findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52, made applicable in this adversary proceeding by Fed. R. Bankr. P. 7052.[2] For the following reasons, the court will shift the majority of the costs of compliance and discovery-related motion practice to New Products and its counsel.

II. JURISDICTION

The court has jurisdiction to resolve the adversary proceeding, including this discovery dispute, for the reasons set forth in the Memorandum of Decision and Order dated December 18, 2014 (DN 69).

III. ANALYSIS

A. Factual History

On June 20, 2006, Bank of America's predecessor extended credit to Modern Plastics Corporation (the

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[2] In this opinion, and unless otherwise indicated, a reference to a "Rule" shall mean one of the Federal Rules of Civil Procedure, generally incorporated into bankruptcy proceedings by one of the Federal Rules of Bankruptcy Procedure. The main rule at issue in this controversy, Rule 45, applies in bankruptcy proceedings pursuant to Fed. R. Bankr. P. 9016.

"Debtor") and secured its loan with security interests and a mortgage on the Debtor's factory located at 489 North Shore Drive, Benton Harbor, Michigan (the "Property"). On January 26, 2009, the Debtor filed a voluntary petition for relief under chapter 7 which created an estate including, among other things, the Debtor's interest in the Property. Thomas R. Tibble was appointed as trustee (the "Trustee").

The Trustee episodically attempted to sell the Property, but was unable to close any such transaction. On March 4, 2013, Bank of America assigned its note, mortgage, and other loan documents, but not the Property itself, to New Products, the Debtor's neighbor. A little over six months after the assignment, New Products filed suit against the Trustee seeking to hold the estate and the Trustee accountable in damages for the diminution in the Property's value during the nearly five years it remained as property of the estate, on the theory that the Trustee breached his fiduciary duties to the bankruptcy estate, Bank of America, and to New Products.

On August 28, 2014, as part of the adversary proceeding against the Trustee, New Products issued subpoenas duces tecum pursuant to Rule 45 against BOA and DW. (Exhs. 1-3). Each subpoena contained roughly 36 separate categories of requests reaching back almost ten years to January 1, 2005.

In response to the subpoenas, on September 4, 2014, Christina K. McDonald, an attorney at Dickinson Wright, made a request to New Products's attorney, Mark Demorest, on behalf of BOA and DW, for an extension (from September 15, 2014 to October

31, 2015) to respond to the subpoenas, stating that "it will take quite some time and work to determine what might exist in response to the numerous requests." (Exh. 14). In reply, the next day, through a series of emails, Mr. Demorest suggested that they talk after Ms. McDonald has "had a chance to review the Subpoena." (Exh. 15, p.3). Ms. McDonald responded to Mr. Demorest by saying that the subpoenas were self-explanatory so there was no need to talk, she just wanted to know if Mr. Demorest would agree to an extension. (Exh. 15, p.2). Again, Mr. Demorest said they could discuss an extension when they communicated the next week. (Exh. 15, p.1). Ms. McDonald explained that BOA and DW needed an extension because of the scope of the request, the amount of preliminary work required, and the unavailability of personnel. Furthermore, Ms. McDonald made a suggestion as to an approach between Mr. Demorest and BOA and DW that included filing a response, objections, and a motion for protective order, as well as a proposed date for an initial production of October 10, 2014.

Ten days later, on September 15, 2014, after hearing nothing back from Mr. Demorest regarding the September 5, 2014 proposal on how to proceed, Ms. McDonald wrote Mr. Demorest a letter (Exh. 16), and also served him with an objection to the subpoenas (the "Objection," attached as Exh. 2 to the MPO (DN 86)). In the letter, Ms. McDonald balked at the enormous breadth and scope of the requests, the amount of work required to assess the demands, as well as the effort required to gather and produce potentially responsive materials. She also stated that BOA and DW had very real concerns about the undue burden of the requests and the fact that Mr. Demorest

had asked for items that he must know to be privileged communications. Nevertheless, BOA and DW indicated that they were willing to proceed on a good faith basis, based upon the assumption that they could come to some agreement with Mr. Demorest regarding the scope of the subpoenas, the ground rules for collecting electronically stored information, and the reimbursement of costs.

In the Objection, BOA and DW formally reiterated their opposition to the time period for compliance and the time frame of the subpoenas, as well as several other items. Further, the Objection states that BOA and DW must be compensated for all costs and expenses in complying with the subpoenas, that the demand for documents had placed an undue burden on them, and that the subpoena requests were overbroad, as well as vague and ambiguous. Regardless of this Objection, and comporting with the course of action they suggested in their letter to Mr. Demorest, BOA and DW kept working to gather responsive documents.

Instead of replying to Ms. McDonald's September 5 and 15, 2014 requests, Objection and proposal, on September 19, 2014, Mr. Demorest served another subpoena duces tecum pursuant to Rule 45 on 3 OCIR 337, LLC, also a client of Dickinson Wright and a one-time potential buyer of the Property that had an option to purchase which it never exercised. (Exh. 4). This subpoena contained 58 separate categories of mostly the same general requests reaching back almost ten years to January 1, 2005.

On September 23, 2014, Mr. Demorest replied to Ms. McDonald's September 15, 2014 letter stating

that he wanted to set up a time to discuss the proposal and also noted that BOA and DW had had three additional weeks to respond to the subpoenas and should be able to do so shortly. (Exh. 17, p.1). Ms. McDonald responded to Mr. Demorest's email by reiterating that despite BOA's and DW's Objection, they had been working diligently to collect the necessary materials to his "extremely broad document requests" but that three weeks had not been long enough. Id. Additionally, Ms. McDonald pointed out that they had yet to determine how many non-privileged documents existed and by what method they could be produced. Id.

Ms. McDonald sent Mr. Demorest a letter enclosing a proposed protective order (the "Proposed Protective Order," Exh. A), and inviting comments. Again, Ms. McDonald warned Mr. Demorest that they had spent "considerable time and effort" collecting documents. Id. at p.1. Specifically, Ms. McDonald outlined the steps they had taken to assemble the data and also quantified the gathered information as consisting of six boxes of hard documents and almost 8,000 emails that still required review. Id. She specifically advised Mr. Demorest that this number did not include the collection of BOA's email correspondence. Id. Because Ms. McDonald claimed it was impossible to review all of these documents by October 10, 2015, the date she previously suggested, she proposed a rolling document production and requested that Mr. Demorest provide them with suggestions for limiting search terms for electronic information retrieval and agree to a limitation of custodians. Id. at p.1-2. If Mr. Demorest was unable to fulfill this request, Ms. McDonald stated that they would "proceed as per above." Id. at p.2.

Again, instead of signing, negotiating, or in any way responding to the Objection, Proposed Protective Order, or this latest correspondence, on October 14, 2014, Mr. Demorest served Dickinson Wright with yet another subpoena duces tecum pursuant to Rule 45, this time against their client, Evergreen Development Company ("Evergreen"), another past potential purchaser of the Property. (Exh. 5). This subpoena contained the same 36 separate categories of general requests as served in the previous subpoenas, plus 21 more. It also reached back almost ten years to January 1, 2005. Apparently, there was no more communication between the Recipients and Mr. Demorest from the date of the Evergreen subpoena to December 29, 2014. On December 30, 2014, Mr. Demorest sent an email to Ms. McDonald attempting to set up a meeting to talk about the subpoena requests. (Exh. B). Due to the holidays, no one involved in the subpoena requests was available to meet with Mr. Demorest. Id. at p.1. The court notes that Mr. Demorest, as of late December, still had not signed, commented on, or even rejected to the Proposed Protective Order.

During the drought of communication between Mr. Demorest and the Recipients, BOA enlisted the assistance of Huron Consulting Services ("HCS"), a consulting firm that helps corporate entities sift through e-data, such as email and e-documents. On or about November 1, 2014, HCS retrieved 602.96 gigabytes of data using the parameters of the subpoenas from the nine custodians BOA identified. For this, they charged $95.00[3] per gigabyte. (Exh. 7).

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[3] This rate is discounted from the usual charge of $350.00-$450.00 per gigabyte, largely due to Bank of

Generally speaking, one gigabyte of data equals about 50,000 pages. After checking for duplicates, HCS was left with 276.87 gigabytes or roughly 2.8 million pages of documents. Next, using a variety of search terms and assistance from Dickinson Wright's lawyers to minimize the amount of potential documents that could be responsive to the BOA subpoenas, HCS generated about 15,500 potentially relevant data files. On December 5, 2014, HCS invoiced Bank of America $57,281.20 for these services. Id. The witness from HCS testified that Bank of America has paid this bill.

On January 5, 2015, Ms. McDonald sent an email to Mr. Demorest once again reiterating the undue burden of the subpoenas and Mr. Demorest's lack of a response to their October 2, 2014 letter, Objection, and Proposed Protective Order. (Exh. 20). Ms. McDonald further stated that the Respondents had thus far incurred about $150,000.00 in fees and expenses ($100,000.00 for BOA and $50,000.00 for DW and the Harbor Shores Entities) that they had every intention of seeking from Mr. Demorest and his client. Id. at p.2.

Apparently, Mr. Demorest contacted Ms. McDonald by telephone the next day and objected to the impending request for $150,000.00 in costs, insisting upon the production of documents by the Recipients even without a protective order. (Exh. D, p.1 and 2). About a month later, he followed up this

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America's generally high volume of requests and its long-standing relationship with HCS.

phone conversation with a letter reiterating his view that the costs were not reasonable. (Exh. D). In the letter, Mr. Demorest also stated that Dickinson Wright had failed to follow the requirements of Rule 45(d)(2)(B) by inadequately protecting its clients from undue expense in responding to the subpoenas, and by failing to invoke Rule 45(d)(2)(B) in the Objection served upon him on September 15, 2014. Id. at p.1-2. In addition, Mr. Demorest expressed his belief that, in the absence of a motion to quash the subpoenas and a corresponding court order, the Recipients should have stopped trying to respond to the subpoenas immediately upon serving him with the Objection. Id. at p.2. Nevertheless, and quite inconsistently, Mr. Demorest still demanded responsive documents without agreeing to or suggesting changes to the Proposed Protective Order. Id. In essence, he sought everything for nothing.

B. Procedural History

On March 10, 2015, the Recipients filed the MPO. Almost a month later, on April 8, 2015, New Products filed its Motion to Compel. After the litigants filed answers to the respective discovery motions, the court conducted a hearing in Kalamazoo, Michigan, on April 16, 2015. After hearing from counsel, the court recessed and held a conference in chambers in an effort to reach consensus. When the court reconvened, the litigants announced that they had reached agreement on the material terms of a protective order, reserving the issue of the extent to which the court should shift to New Products the costs of compliance and the costs of bringing the MPO.

At the April 16, 2015 hearing, the court treated the MPO and the Motion to Compel as two-sides of the same coin. See Transcript of Hearing held April 16, 2015 (hereinafter "April Tr.") at 4:18-20. In fact, the Recipients' counsel was indifferent as to whether the court granted the MPO or the Motion to Compel, so long as the court protected his clients. Id. at 27:24-28:5.

At the conclusion of the hearing, the court and the litigants discussed the best way to memorialize the outcome of the hearing.

> THE COURT: All right. So, earlier in the presentation, you indicated that you don't really care whether you're compelled to produce the documents, or whether your protective order is granted. So how do you want to resolve the two motions that we have? The motion to compel and protective order. I indicated, and as you guys have said, too, you've got the protective order. I indicated I'm going to require the production, subject to the protective order along the lines you've described, with the little two-step procedure for the privilege log. In other words, you'll have a choice to decide whether you're willing to pay for what they estimate in good faith the costs will be. So does that mean your motion to compel is granted, or your motion to compel is denied, or the motion for protective order is granted, or what do you want to do?
>
> MR. KNAPP: I think it's mooted, Your Honor.

> THE COURT: Okay. So the entry of the protective order will moot the motion to compel. Is that okay with you?
>
> MR. DEMOREST: I think that's okay, Your Honor.

April Tr. at 65:19-66:14. The court summarized the outcome of the hearing, saying that "the long and short of it is the protective order is going to require [the Recipients] to produce the documents" and "New Products is going to have to pay [the Recipients] something to mitigate the expense." Id. at 68:1-11. The court reserved the question of the amount and nature of fee shifting. Id.; see also Stipulation Regarding Production of Information in Response to Subpoenas (DN 105) at ¶ 2; Order Approving Stipulation Regarding Production of Information in Response to Subpoenas (DN 108, and with DN 105, collectively the "Protective Order"). From the Protective Order, it is clear that the court was awarding relief under Rule 26(c) and Rule 45, even though it technically denied the Motion to Compel. See Protective Order at p.2 ("It is the intent of the Court that this Order incorporates all of the terms and conditions of the Stipulation and that the Stipulation, accompanied by this Order, serve as a protective order for purposes of Federal Rules of Bankruptcy Procedure 9016 and Fed. R. Civ. P. 45, Fed. R. Civ. Proc. 26(c)").

On June 24, 2015, after granting a one month adjournment to accommodate counsel for New Products, and after the litigants failed to reach agreement on the fee shifting issues reserved in the Protective Order, the court held an evidentiary

hearing in Kalamazoo to consider the amount and nature of the costs to be shifted from the Recipients to New Products or its counsel.

During the evidentiary hearing, the court heard testimony from Craig Smith, of Huron Legal (a division of HCS in Charlotte, North Carolina), Daniel F. Gosch, Esq. (a partner at Dickinson Wright PLLC), and Mr. Demorest. In addition, mostly on stipulation, the court admitted twenty documents offered in support of the Recipients' case and five documents offered by New Products.

C. Legal Analysis

1. In General.

The two rules at issue in this discovery dispute -- Rule 26(c) and Rule 45(d)[4] -- overlap to some extent, though there are important differences.[5] Both aim to

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[4] The court's analysis rests on the Federal Rules of Civil Procedure, and not on contract rights arising under the Loan Purchase and Assumption Agreement between Bank of America and New Products, which contract rights (and defenses) are expressly preserved.

[5] As Judge Duggan from the Eastern District of Michigan recently noted, ". . .[e]xpense shifting under Rule 37(a)(5) is mandatory, United States v. Dynamic Visions Inc., __ F.Supp.3d __, 2015 WL 294378 (D.D.C. Jan. 23, 2015), while expense-shifting under Rule 45(d)(1) is discretionary. Legal Voice v. Stormans, Inc., 738 F.3d 1178, 1185 (9th Cir. 2013)." See Muslim Community Ass'n of Ann Arbor v.

mitigate the burdens of discovery by shifting costs upon a proper showing, but Rule 45 includes additional protections designed to address the risks of putting the court's subpoena power in the hands of an attorney, and allowing that attorney to wield that power against non- parties.

There is authority for the proposition that when a court considers the burdens associated with the service of a subpoena, it should generally apply Rule 45, which specifically addresses abuse of the subpoena power, rather than the more general rubric of Rules 26 and 37. Muslim Community Ass'n, supra at fn.4 (directing Magistrate Judge to consider discovery dispute through the lens of Rule 45 despite the parties' reliance on Rules 26 and 37); but see In re Morrealle Hotels, LLC, 517 B.R. 184 (Bankr. C.D. Calif. 2014) (considering subpoena-related discovery dispute under both sets of rules). For the sake of completeness, however, and the manner in which the litigants framed the dispute, the court will address the controversy under Rule 26(c) and Rule 37(a)(5), as well as Rule 45.

Central to any inquiry under either set of rules is the goal of avoiding "undue burdens" associated with discovery, with a particular solicitude for strangers to the litigation such as the Recipients in this matter. In deciding whether a subpoena imposes an "undue burden" upon a non-party, the courts undertake "a case specific inquiry," considering "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period

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Pittsfield Charter Twp., Slip Op. No. 12–CV–10803, 2015 WL 404145 (E.D. Mich. Jan. 29, 2015).

covered by it, the particularity with which the documents are described and the burden imposed." American Elec. Power Co. v. United States, 191 F.R.D. 132, 136 (S.D. Ohio 1999) (citations omitted). The court must consider, and weigh, the need of New Products for the discovery it seeks, against the burdens imposed on the Recipients. In this analysis, "the status of a person as a non- party is a factor that weighs against disclosure." Id.[6]

The court regards the subpoenas as unduly burdensome for several reasons. New Products framed the first of thirty-six enumerated categories of "documents" it sought from Bank of America[7] in

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[6] During this proceeding, the court learned that New Products and several of the Recipients have been involved in state court litigation regarding the development of real estate in which New Products claims an interest. The court suspects that the animus from that litigation which has lasted several years according to Mr. Demorest's testimony, and the suspicions of New Products that the Recipients have colluded with Mr. Tibble to harm its interests in that other litigation, inspired him to issue the subpoenas. The court's concerns about the motivation of New Product in issuing the court's process, however, is not crucial to the court's conclusion that the burdens of the subpoenas are undue. The court, in other words, agrees that in considering whether a burden is undue, it should put greater emphasis on the Recipients' burden than on the issuer's motive. Morreale Hotels, 517 B.R. at 193.

[7] New Products defined Bank of America to include its predecessor, LaSalle Bank.

extremely broad terms: "Any and all documents mentioning, referring to, or related to Modern Plastics or the Modern Plastics Property, from January 1, 2005 to date." (Exh. 3). To maximize the reach of the subpoena, New Products's boilerplate language defined the term "document" to have the "broadest possible meaning," including an extensive array of tangible documents and electronically stored information. (Exhs. 1-5). Mr. Demorest, the attorney who signed the subpoena, testified that he has worked approximately thirty years as a litigator, and that he has read articles on "e-discovery," which is to say discovery of electronically stored information. Moreover, with his experience as a commercial litigator over three decades, including experience in litigation with major banking organizations, he must have known that the target of his subpoena is highly regulated and highly sensitive to customer privacy issues. This would mean, naturally, that addressing these concerns would take considerable time (including attorney time) and other resources.

Similarly, as an experienced litigator, who had to have known that serving a subpoena on a national law firm, such as Dickinson Wright, seeking documents including communications relating to matters in which the firm or its clients had been retained, would (as a matter of professional responsibility on the target's part) necessitate review for privileged communications and work product. Angell v. Kelly, 245 F.R.D. 135, 140 n.1 (M.D.N.C. 2006). Even if he failed to perceive this risk, he was reminded of it in Ms. McDonald's September 15, 2014 letter. (Exh. 16).

Nevertheless, heedless of these obvious burdens, Mr. Demorest issued subpoenas, as an officer of the court, that required a global banking giant and a national law firm -- neither a party to the litigation -- to produce documents involving their clients in thirty-six categories, covering nearly a decade, within a fortnight -- spanning the Labor Day holiday.

Mr. Smith, a representative of HCS, the company Bank of America retained to assist in complying with the production of electronically stored information ("ESI") credibly testified about the processing of ESI, the expense, and therefore the burdens. From this testimony, the court understands that it is not uncommon for big financial (and other) institutions to store large amounts of information in electronic format -- e-mails, spreadsheets, databases, and other documents. Typically, an institution such as Bank of America, when served with a subpoena seeking ESI, makes an initial effort to gather electronic data, measured in gigabytes, of potentially responsive information. To make this first cut, bank employees use date and other parameters (including the likely "custodians" of the information) to create a databank of information from throughout the organization to be further winnowed before production. Cf. Coleman v. American Red Cross, 23 F.3d 1091, 1098 (6th Cir.1994) (defendant would have been required "to search every file that exists" at its headquarters to locate requested documents). Mr. Smith testified that Bank of America identified approximately 603 "gigs" of data in need of additional refinement.

According to its usual process, Bank of America retained HCS to continue searching through the databank to separate responsive from unresponsive

(and sensitive or privileged) documents. Mr. Smith testified that it charged the Bank $95.00 per gigabyte -- a discounted high volume rate -- resulting in a flat fee of $57,281.20. (Exh. 7). This figure covers the efforts of HCS's personnel (including contract attorneys) and admittedly non-proprietary search software and expertise in the field, but does not include the time expended by BOA's counsel in connection with the production. There was no evidence that BOA or its lawyers exaggerated the expense: the fact is that discovery of ESI is expensive, especially given the breadth of the subpoena served by New Products on BOA in this case.

The court notes that the subject of this litigation -- Mr. Tibble as Trustee -- had no duty to New Products or involvement in the affairs of the Debtor until his appointment in 2009 as a chapter 7 bankruptcy trustee, calling into question the relevance of documents predating his appointment by four years. The half-hearted explanation about the value of the Property being relevant on the question of damages may explain the last category of documents in the subpoena directed to BOA, but the request seems almost an afterthought following the breathtaking, categorical enumeration that precedes it: "36. Any and all documents regarding the value of the Modern Plastics property from January 1, 2005 to date." (Exh. 1 and 3).

New Products's main argument against finding an undue burden relies on the fact that the Recipients timely objected to the subpoenas under Rule 45(d)(2)(A), thereby relieving themselves of the obligation to respond absent an order from this court under Rule 45(d)(2)(B). Citing Angell v. Kelly, supra,

and Tutor-Saliba Corp. v. United States, 32 Fed. Cl. 609 (Fed. Cl. 1995), New Products contends that the Recipients created their own burden by continuing to gather documents in response to the subpoenas after they served their objections under Rule 45(d), and that the court should refuse to award costs after the Recipients had substantially complied with the subpoenas despite having objected. The court is not persuaded for several reasons.

As the drafters of Rule 45 noted, the rule does not preclude a non-party from seeking costs after substantially complying with a subpoena. "In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party." Fed. R. Civ. P. 45 (1991 Committee Notes) (citing United States v. Columbia Broadcasting Systems, Inc., 666 F.2d 364 (9th Cir. 1982)). The non-parties in Columbia Broadcasting, like the Recipients in this case, consistently reiterated their intention to seek reimbursement for compliance costs throughout the production, and the requesting party, like New Products in this case, turned a deaf ear throughout the production. The court agrees with the Ninth Circuit (and the drafters of Rule 45 who expressly cited Columbia Broadcasting):

> Accordingly, we have little sympathy on the facts of this case for the networks' lament that deferral of a Rule 45(b)(2) determination [of compliance costs] until after compliance with a subpoena may result in grave injustice by visiting liability for costs on parties, who cannot then escape the consequences.

Columbia Broadcasting, 666 F.2d at 368. Like the Ninth Circuit, the court sees no point in penalizing a cooperative witness who gathers documents while reaching out to the requesting party in an effort to limit the expense and delay for all concerned. Id. at 369 (citing Fed. R. Civ. P. 1). The cases upon which New Products relies for a contrary conclusion are distinguishable from the present dispute because the Recipients steadfastly reminded New Products of the expense of their production, sufficiently bringing themselves within the scope of Columbia Broadcasting. (Exh. 14, Sept. 4, 2014 email from Christina McDonald, Esq. to Mark Demorest, Esq., requesting extension of deadline to response because it will take "quite some time and work to determine what might exist in response to the numerous requests"); (Exh. 15, p.1, to similar effect); (Exh. 16, letter dated Sept. 15, 2014 from Christina McDonald, Esq., to Mark Demorest, Esq., describing "very real concerns about the exceedingly broad scope of the requests the undue burden they place . . . the obvious request for what you must reasonably know to be privileged communications, and the ultimate purpose of your requests"); (Exh. 17, p.1, email from Christina McDonald, Esq., to Mark Demorest, Esq., advising that Recipients have been gathering documents despite their objection under Rule 45(d)(2)); (Exh. A, email dated Oct. 2, 2014 from Christina McDonald, Esq., to Mark Demorest, Esq., referring to "considerable time and effort" collecting documents, and proposing draft protective order).

In response to the Recipients' concerns about the obvious breadth and burdens of the initial subpoenas, Mr. Demorest responded essentially with: (i) three non-committal emails declining to relax deadlines

while seeming to express a willingness to "talk next week" or some other time,[8] and (ii) new subpoenas directed at two more clients of Dickinson Wright with even broader document production requests and unreasonable response deadlines. He provided no comments on the Proposed Protective Order, and as far as the record is concerned, never acknowledged it until much later. According to the credible testimony of Mr. Gosch, from late October to late December, despite the Recipients' repeated complaint about the burdens of the subpoenas (especially with respect to ESI and privileged communications), communications from Mr. Demorest "went completely dark," meaning that the lawyers from Dickinson Wright heard nothing from him until late December, 2014.

Mr. Demorest's pretended reliance on some (but not all) of the terms of the Proposed Protective Order is similarly unpersuasive. During the June 24, 2015 evidentiary hearing, he attempted to persuade the court that he assumed the unsigned draft (including the portion that stated each side would bear their own attorney fees absent a court order) would govern the production, yet elsewhere in his testimony he took pains to point out that there was no agreement reached regarding the document protection (presumably in an effort to bring this case within the terms of Angell v Kelly, supra, and similar authorities). Mr. Demorest's explanation is implausible and not credible. The form of the document itself -- crafted as a protective order -- certainly suggested judicial involvement, in addition to a formal signature indicating Mr. Demorest's assent. Moreover, the cover email clearly invited

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[8] See Exh. 15, pp.1 and 3; Exh. 17, p.1.

comments, if not assent, as Mr. Gosch noted in his testimony. From an attorney who has practiced for over 30 years, who is familiar with discovery of ESI in commercial litigation, and who certainly should have anticipated extensive attorney time in response to subpoenas directed at a law firm, the pretended explanation rings hollow, and the court does not credit it. Moreover, the Proposed Protective Order -- even if Mr. Demorest had extended the Recipients the common courtesy of negotiating, rejecting, or agreeing to it -- did not waive the Recipients' request for attorney fees incurred in the production, but simply reserved the question pending later motions (which the Recipients and New Products eventually filed). Again, an attorney with the experience of Mr. Demorest would have known this. To react with surprise and shock in January, 2015 as Mr. Demorest did when Dickinson Wright lawyers provided firm numbers to quantify the earlier email warnings and predictions about the expense and burdens associated with the subpoenas is perplexing.

In his testimony on June 24, 2015, and in correspondence with Recipients' counsel,[9] Mr. Demorest tried to put the onus on Dickinson Wright to limit the burdens associated with the subpoenas that he issued as an officer of this court. In this way, he betrayed his misapprehension of his responsibility as an officer of the court in connection with the subpoenas, and flouted his clear duty to "take reasonable steps to avoid imposing undue burden or

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[9] See Exh. D, pp.1-2 (Letter dated Feb. 2, 2015 from Mark S. Demorest, Esq., to Christina K. McDonald, Esq., criticizing Recipients for failing to mitigate the burden of the subpoenas).

expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). Mr. Demorest and his client, rather than Dickinson Wright and theirs, had a duty to mitigate the burdens of the subpoenas, and must now bear the costs of their reckless disregard of this duty.

Given the breadth of documents covered by the subpoenas in terms of time periods and content, the nature of the primary targets of the subpoenas (a global financial institution and a 400-attorney national law firm), the non-party status of the Recipients without any interest in the outcome of the claims against Mr. Tibble, and the compressed (two-week) response-time unreasonably requested under each subpoena, the court easily concludes that the subpoenas imposed an undue burden on the Recipients. Indeed, for that reason it announced its intention to grant the MPO as a condition for compelling production. This conclusion has implications regarding the court's analysis concerning cost-shifting for motion practice under Rules 26(c) and 37, as well as compliance costs under Rule 45. See Fed. R. Civ. P. 26(c)(1) and 45(d)(1).

2. Rule 26(c)/Rule 37(a)(5).

The Recipients' MPO relies, in part, on Rule 26(c) which, upon a showing of good cause, authorizes the court to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Fed. R. Civ. P. 26(c)(1). Significantly, Rule 26(c)(3) incorporates Rule 37(a)(5), which provides the following direction to the court:

> If the motion is granted -- or if the disclosure or requested discovery is provided after the

> motion was filed -- the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5). Because the court granted the MPO after concluding that the subpoenas imposed several undue burdens, under Rule 37(a)(5) the court "must" -- subject to two caveats not applicable here -- "require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Id. As for the caveats just mentioned, the record is replete with evidence of the good faith efforts of Dickinson Wright personnel to resolve the dispute before seeking judicial assistance. Moreover, the court perceived not even a whiff of justification for the conduct of New Products or its counsel, in terms of avoiding undue burden resulting from the subpoenas, let alone a "substantial" justification, during the two hearings the court held in connection with the discovery dispute.

To illustrate, the court cites the undisputed evidence that the Recipients' counsel reasonably

requested an extension of the 14 day response deadline prescribed in the subpoenas to produce the documents spanning nearly a decade, a request that ought to have been granted at once. Mr. Demorest's response smacked of indifference to the predicament his subpoenas imposed on the Recipients and their counsel, or worse. After Dickinson Wright promptly and thoughtfully drafted and shared with New Products the Proposed Protective Order and invited comments from Mr. Demorest in an effort to mitigate the expense of ESI (for example by limiting the time period, search terms, and the number of ESI custodians), Mr. Demorest offered nothing meaningful in response, not even a formal rejection of the proposal. Worse, Dickinson Wright personnel consistently advised Mr. Demorest of the steps they were taking to comply with the subpoenas notwithstanding their formal objection, all the while warning that the costs of compliance would be significant. (Exh. A, p.17 and 20). Mr. Demorest said nothing.

Even when, in frustration, the Recipients filed their MPO, New Products and its counsel declined to respond in a manner consistent with their duty under Rule 45(d)(1) to avoid imposing a burden in discovery. Instead, New Products opposed the MPO by filing a Motion to Compel the Recipients to comply with the overbroad and burdensome subpoenas without protection.

For similar reasons, the court finds no evidence of any circumstances making it unjust to require New Products and its counsel to bear the reasonable costs and attorney fees that the Recipients incurred in bringing the MPO.

3. Rule 45(d).

In addition to cost shifting under Rule 37(a), the federal rules also require the court to shift the lion's share of the costs of compliance with the subpoenas to New Products, given the court's conclusion that they imposed an undue burden on the Recipients when, after objection, the court entered an order compelling production, as the court did on April 16, 2015. See Fed. R. Civ. P. 45(d)(2)(B)(ii). The applicable rule provides, in relevant part, as follows:

> If an objection is made, the following rules apply:
>
> (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
>
> (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

Fed. R. Civ. P. 45(d)(2)(B). While the Sixth Circuit has not yet given substantial guidance regarding Rule 45(d)(2), at least two other Courts of Appeals on both sides of the country have reached straightforward conclusions: "[O]nly two considerations are relevant" to the cost-shifting inquiry: "(1) whether the subpoena imposes expenses on the non-party, and (2) whether those expenses are 'significant.'" Legal Voice v. Stormans, Inc., 738 F.3d 1178, 1184 (9th Cir. 2013) (adopting the rule set out by Linder v. Calero–

Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001)). A court "must order the party seeking discovery to bear at least enough of the cost of compliance to render the remainder 'non-significant.'" Id. (citing Linder).

The court has already found that the subpoenas imposed an undue burden, and that New Products and its counsel took no meaningful steps to mitigate the burden. In addition, the court ordered the Recipients to produce the documents, albeit subject to protective provisions negotiated during the hearing on the MPO and Motion to Compel -- not before. Under the circumstances, and even though most of the expenses were incurred before entry of the Protective Order, the court will shift the costs of compliance from the Recipients to New Products and its counsel as the well-reasoned opinions in Legal Voice and Linder suggest. To accept New Products's argument based on Rule 45(d)(2) -- i.e., that the Recipients must now absorb all compliance costs incurred after they served their Objections and that New Products is entitled to the documents at no charge -- would reward gamesmanship and punish cooperation. The court cannot countenance such a windfall on this record, and will not construe Rule 45 in this way. See Fed. R. Civ. P. 1.

4. Amount and Allocation of the Award.

In their closing brief, the Recipients ask the court to require New Products to reimburse Bank of America in the amount of $136,377.18, and DW and the Harbor Shores Entities in the amount of $96,078.81 for "all costs and expenses incurred in responding to New Products's Subpoenas." See The Subpoena Recipients' Post-Hearing Closing

Statement in Support of Their Motion for Fees and Costs (DN 132, at p.15). The court has carefully scrutinized the evidence, and more specifically the invoices included as Exhibits 6-8, and has determined to award Bank of America $104,770.00, and the other Recipients, $61,417.50.

Mr. Gosch testified that he supervised the work his firm performed in connection with the subpoenas, and that the charges reflected on Exhibits 6 and 8 were actually incurred and generally paid. In addition, Bank of America paid the HCS invoice. (Exh. 7). The court does not doubt that Dickinson Wright performed the work billed on the invoices admitted during the hearing, and the fact that the Recipients paid the invoices might permit the court to infer that the charges were reasonable (on the theory that sophisticated commercial actors would not pay unreasonable charges). The court, however, is unwilling to abdicate its independent role (under the lodestar analysis) in assessing the reasonableness of the charges. As Mr. Demorest suggested during the cross-examination of Mr. Gosch, the finds that the substantial redactions within Exhibits 6 and 8 preclude it from performing this important function. See Transcript of Hearing held June 24, 2015 (hereinafter "June Tr.") at 110:23-111:3.

Rule 37(a)(5) specifically directs the court to award only "reasonable" fees, and while Rule 45(d)(2)(B)(ii) requires the court to shift compliance costs without qualifying that term, the court assumes that it need only shift the reasonable costs of compliance. Indeed, the court perceives no basis in rule or logic to shift unreasonable costs. The heavily redacted entries interfere with the court's ability to evaluate the

reasonableness of the charges even if, as Mr. Gosch credibly maintained, the charges relate in some way to compliance with the subpoenas. See June Tr. at 111:1-8.

For example, the first entry for September 8, 2014, included on Invoice No. 960045, reads as follows: "Telephone calls and emails re:_____, 1.20 hours" valued at $555.60. (Exh. 6). Although the court does not doubt the fact the charge was incurred, it has no basis to evaluate the nature of the charge. This quoted entry is not an isolated example. Indeed, as part of its review, the court has identified on Appendix A and B the entries which suffer from the same shortcoming and which the court will disallow as a result. Dickinson Wright did not offer to make an unredacted version available for in camera review.

Therefore, in making its award of attorney fees, the court has reviewed the Dickinson Wright invoices included within Exhibits 6 and 8, calculated the amounts charged to each set of clients (i.e., $79,095.98 for Bank of America and $115,857.35 for the Harbor Shores Entities), and made the deductions for each set, as identified on Appendix A and B. In general, the court is not satisfied with the explanation for the disbursements and the reasonableness of the most-heavily redacted entries, and will therefore exclude these charges from its award.

With respect to Bank of America, the court finds that the HCS invoice (Exh. 7) in the amount of $57,281.20, which reflects a substantial volume discount and is supported by the credible testimony of Mr. Smith, is reasonable and completely compensable. It will allow Bank of America to collect

that amount in full. As for the other charges, the following table summarizes the court's award in total:

Client/Amount Billed/Vendor	Dates	Total Hours Reduced	Total Amount Reduced	Total Amount Allowed
BOA $79,095.98 (Dickinson Wright)	09/08/15-04/20/15	102.80	$31,607.18	$47,488.80
BOA $57,281.20 (HCS)		NA		$57,281.20
BOA (Grand Total)			$31,607.18	$104,770.00
Harbor Shores Entities $115,857.35 (Dickinson Wright)	09/05/14-04/27/15	133.10	$54,439.85	$61,417.50
Harbor Shores (Grand Total)				$61,417.50

Finally, because the court has concluded that Mr. Demorest ignored his duty to minimize the burdens associated with the subpoenas, and because the court also concludes that the Plaintiff's opposition to the MPO was not substantially justified, the court must allocate its award as between Mr. Demorest[10] and the

[10] The court has determined to impose the sanction upon Mr. Demorest personally, rather than his law firm. Unlike Fed. R. Bankr. P. 9011, which

Plaintiff. See Fed. R. Civ. P. 37(a)(5) ("the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees"); Fed. R. Civ. P. 45(d)(1) (court must impose appropriate sanction "on a party or attorney who fails to comply" with duty to mitigate burden on non-parties).

The evidence admitted at the evidentiary hearing leads the court to want to place the blame squarely on Mr. Demorest. He was the attorney who issued the subpoenas and who dealt with Dickinson Wright lawyers after service. From his testimony, and that of Mr. Gosch, he appears to have been the architect of New Products's strategy in connection with discovery from the Recipients and the resulting litigation. Given the substantial amount of the award, the peculiar role that Mr. Demorest played in the unhappy dealings with the Recipients, and the absence of evidence implicating New Products or its principal in the litigation decisions, the court hesitates to impose the resulting burden on Mr. Demorest's client. Nevertheless, the Supreme Court's opinion in Pioneer Investment Services Co. v. Brunswick Assocs., L.P., 507 U.S. 380 (1993), teaches that a client may have to suffer the consequences of the acts or omissions of its counsel under long-standing agency principles:

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contemplates imposition of sanctions upon the party, the attorney, the law firm or all three, Rules 37(a)(5) and 45(d) mention only the attorney or the party, omitting any reference to a law firm.

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

Id. at 396-97 (internal quotations and citations omitted). Under this approach, the court must charge New Products with notice of the facts and circumstances that can be charged to Mr. Demorest.

Imposing the burden of the court's award on the Plaintiff itself has two additional benefits. First, the point of Rules 37(a)(5) and 45(d)(2) is to compensate the Recipients. To give them access to two funds, rather than one, is consistent with this aim. Second, Mr. Demorest and his client are in a better position to reach some accommodation among themselves about the allocation of the burden, as they are more keenly aware of the circumstances of their relationship. If a dispute arises between them about the allocation, they can resolve it in a court of general jurisdiction, not this court of limited jurisdiction. Accordingly, the court will make New Products and Mr. Demorest jointly and severally liable for the award. See, e.g., Morrealle Hotels, 517 B.R. at 205 (imposing joint and several liability for discovery sanction on counsel and client).

The awards in favor of the Recipients shall be remitted to Dickinson Wright, PLLC as their

attorney, who shall allocate funds among its clients according to their respective shares of the invoices.

IV. CONCLUSION AND ORDER

The burden that the subpoenas imposed and the Plaintiff's duty to avoid it were eminently foreseeable, and the court must now shift the costs as described in this opinion.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Plaintiff and Mark Demorest are jointly and severally liable to Bank of America in the amount of $104,770.00, and shall pay that sum to Dickinson Wright, PLLC who shall hold the payment in trust, and distribute it to Bank of America;

2. Plaintiff and Mark Demorest are jointly and severally liable to the Harbor Shores Entities in the amount of their respective shares of $61,417.50, and shall pay that sum to Dickinson Wright, PLLC, who shall hold the payment in trust, and distribute it to its clients, as their interest may appear.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and 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 July 23, 2015

/s/ Scott W. Dales
Scott W. Dales
United States
Bankruptcy Judge

Appendix A

Dickinson Wright Charges to Bank of America

(Excluded From Award)

Source: Exhibit 6

Invoice Number or Statement Date and Total Billed	**Date**	**Hours Reduced**	**Amount Reduced**
960045/$5,632.85	09/08/14	1.20	$ 555.60
	09/10/14	1.90	$ 879.70
	09/18/14	.30	$ 138.90
	10/10/14	.60	$ 277.80
	10/30/14	.50	$ 132.50
	Disbursements		$ 16.75
	Sub Total	4.50	$2,001.25
966207/$16,727.00	11/03/14	.20	$ 47.00
	11/04/14	.60	$ 277.80
	11/05/14	.40	$ 106.00
	11/10/14	.50	$ 231.50
	11/17/14	.50	$ 231.50
	11/18/14	.20	$ 53.00
	11/19/14	.70	$ 154.50
	11/21/14	.20	$ 47.00
	11/23/14	.20	$ 53.00
	11/24/14	.10	$ 23.50
	11/24/14	.20	$ 47.00
	11/24/14	1.20	$ 210.00
	11/25/14	1.20	$ 282.00
	11/25/14	2.70	$ 715.50
	11/26/14	.40	$ 94.00
	11/26/14	.50	$ 132.50
	11/30/14	1.30	$ 601.90
	11/30/14	5.50	$1,292.50

	Disbursements		$ 19.30
	Sub Total	16.60	$4,619.50
977631/$21,475.98	12/01/14	.30	$ 70.50
	12/02/14	.80	$ 188.00
	12/02/14	.50	$ 120.00
	12/04/14	.10	$ 23.50
	12/04/14	.50	$ 120.00
	12/05/14	.30	$ 137.40
	12/10/14	.30	$ 70.50
	12/11/14	.30	$ 72.00
977631 (cont.)	12/18/14	.20	$ 48.00
	12/19/14	.40	$ 138.00
	12/19/14	.20	$ 47.00
	12/19/14	.10	$ 24.00
	12/22/14	.20	$ 47.00
	12/30/14	.10	$ 24.00
	12/30/14	.40	$ 183.20
	12/31/14	.70	$ 320.60
	12/31/14	.20	$ 69.00
	Disbursements		$ 720.98
	Sub Total	5.60	$2,423.68
980560/$12,022.35	Disbursements		$ 25.35
	01/03/15	.20	$ 48.00
	01/05/15	.50	$ 229.00
	01/05/15	.20	$ 92.60
	01/05/15	.20	$ 69.00
	01/05/15	.50	$ 117.50
	01/05/15	1.10	$ 264.00
	01/05/15	3.50	$ 612.50
	01/06/15	3.80	$ 1,311.00
	01/06/15	1.10	$ 258.50
	01/07/15	2.90	$ 1,000.50
	01/07/15	.20	$ 47.00
	01/07/15	1.00	$ 235.00
	01/07/15	1.70	$ 408.00
	01/08/15	.40	$ 138.00
	01/08/15	2.40	$ 564.00
	01/08/15	.10	$ 24.00

	01/09/15	.50	$ 117.50
	01/09/15	.20	$ 48.00
	01/11/15	.40	$ 94.00
	01/11/15	.10	$ 24.00
	01/12/15	1.10	$ 258.50
	01/12/15	.40	$ 94.00
	01/12/15	.30	$ 70.50
	01/12/15	1.10	$ 264.00
	01/12/15	.40	$ 70.00
	01/13/15	.40	$ 183.20
	01/14/15	.40	$ 94.00
	01/14/15	.30	$ 72.00
	01/16/15	.60	$ 207.00
	01/16/15	.30	$ 52.50
980560 (cont.)	01/20/15	.80	$ 276.00
	01/20/15	.40	$ 96.00
	01/20/15	1.00	$ 175.00
	01/21/15	1.20	$ 414.00
	01/21/15	.50	$ 117.50
	01/21/15	.10	$ 23.50
	01/21/15	.10	$ 23.50
	01/21/15	.50	$ 120.00
	01/26/15	.20	$ 91.60
	01/26/15	.60	$ 207.00
	01/26/15	.40	$ 94.00
	01/26/15	.50	$ 120.00
	01/27/15	.90	$ 216.00
	Sub Total	33.50	$9,067.25
984150/$10,654.50	02/01/15	.20	$ 69.00
	02/02/15	.20	$ 91.60
	02/02/15	.30	$ 138.90
	02/02/15	.40	$ 138.00
	02/02/15	.10	$ 23.50
	02/03/15	.60	$ 274.80
	02/03/15	1.40	$ 336.00
	02/04/15	.40	$ 183.20
	02/04/15	1.60	$ 552.00
	02/05/15	.20	$ 91.60
	02/05/15	3.20	$ 1,104.00

	02/05/15	.50	$ 117.50
	02/05/15	.80	$ 192.00
	02/09/15	.10	$ 45.80
	02/09/15	.30	$ 138.90
	02/09/15	1.50	$ 262.50
	02/09/15	.20	$ 35.00
	02/10/15	.20	$ 69.00
	02/10/15	.50	$ 87.50
	02/16/15	3.00	$ 720.00
	02/16/15	1.50	$ 262.50
	02/17/15	3.50	$ 840.00
	02/18/15	.70	$ 320.60
	02/19/15	.80 (out of 2.8)	$ 366.40 (out of $1282.40)
984150 (cont.)	02/19/15	1.10	$ 509.30
	02/20/15	.90	$ 216.00
	02/21/15	4.50	$ 1080.00
	Disbursements		$ 6.00
	Sub Total	28.70	$8271.60
990435/$5,065.30	03/03/15	1.50	$ 360.00
	03/04/15	1.10	$ 264.00
	03/05/15	2.50	$ 1145.00
	03/06/15	1.30	$ 601.90
990435 (cont.)	03/08/15	.30	$ 138.90
	03/09/15	1.20	$ 288.00
	03/16/15	.60	$ 144.00
	Disbursements		$ 5.10
	Sub Total	8.50	$2,946.90
Proforma Statement as of 04/23/15/ $75,18.00	04/08/15	1.40	$ 641.20
	04/21/15	.20	$ 48.00
	04/14/15	.10	$ 45.80
	04/17/15	1.40	$ 641.20
	04/22/15	.10	$ 45.80
	04/22/15	.20	$ 48.00
	04/20/15	.50	$ 120.00

	04/18/15	.30	$ 137.40
	04/20/15	1.20	$ 549.60
	Sub Total	5.40	$ 2,277.00
Exhibit 6/$79,095.98	Total	102.80	$31,607.18

Appendix B

Dickinson Wright Charges to Harbor Shores Community Redevelopment Inc.

(Excluded From Award)

Source: Exhibit 8

Invoice Number or Statement Date and Total Billed	**Date**	**Hours Reduced**	**Amount Reduced**
955445/$22,139.10	09/05/14	.50	$ 75.00
	09/08/14	4.20	$ 882.00
	09/09/14	.20	$ 83.00
	09/09/14	1.70	$ 552.50
	09/10/14	1.60	$ 336.00
	09/10/14	6.90	$ 1,276.50
	09/11/14	3.20	$ 672.00
	09/15/14	.30	$ 124.50
	09/17/14	.10	$ 32.50
	09/17/14	3.90	$ 721.50
	09/22/14	5.30	$ 980.50
	09/23/14	.20	$ 30.00
	09/28/14	.50	$ 162.50
	09/28/14	.20	$ 42.00
	Disbursements		$ 31.60
	Sub Total	28.80	$6,002.10
962254/$28,669.60	10/01/14	2.10	$ 388.50
	10/02/14	4.30	$ 795.50
	10/06/14	.50	$ 107.50
	10/07/14	.10	$ 45.00
	10/07/14	6.20	$ 1,147.00
	10/15/14		$ 105.00
	10/21/14	.50	$ 105.00
	10/21/14	2.70	$ 499.50
	10/22/14	.10	$ 41.50

	10/31/14	2.00	$ 370.00
	Disbursements		$ 134.60
	Sub Total	18.50	$3,739.10
970312/$2,596.50	11/05/14	.10	$ 32.50
	11/21/14	.30	$ 135.00
	Disbursements		$ 5.50
	Sub Total	.40	$173.00
976528/$3,132.42	12/01/14	.20	$ 37.00
	12/16/14	.30	$ 124.50
	12/22/14	.50	$ 207.50
	Disbursements		$ 543.92
	Sub Total	1.00	$912.92
983419/$10,460.81	01/02/15	1.20	$ 252.00
	01/05/15	.20	$ 39.00
	01/07/15	.10	$ 21.00
	01/07/15	3.50	$ 787.50
	01/08/15	6.40	$ 1,440.00
	01/09/15	.50	$ 105.00
	01/11/15	4.50	$ 1,012.50
	01/12/15	4.00	$ 900.00
	01/13/15	.40	$ 166.00
	01/13/15	.80	$ 360.00
	01/13/15	1.70	$ 357.00
	01/14/15	5.50	$ 1,237.50
	01/15/15	.30	$ 63.00
	01/15/15	4.00	$ 900.00
	01/19/15	3.00	$ 675.00
	01/20/15	.30	$ 97.50
	01/20/15	.80	$ 168.00
	01/20/15	.40	$ 78.00
	01/26/15	.20	$ 83.00
	Disbursements		$ 88.31
	Sub Total	37.80	$8,830.31
986778/$8,797.56	02/03/15	.60	$ 249.00
	02/03/15	1.30	$ 273.00
	02/04/15	.40	$ 166.00
	02/09/15	.10	$ 41.50
	02/09/15	1.40	$ 455.00
	02/09/15	.20	$ 39.00

	02/12/15	2.30	$ 483.00
	02/13/15	.90	$ 189.00
	02/15/15	2.00	$ 420.00
	02/16/15	2.90	$ 609.00
	02/17/15	1.30	$ 253.50
	02/18/15	.20	$ 42.00
	02/19/15	2.80	$ 1,162.00
	02/19/15	1.00	$ 325.00
986778 (cont.)	02/20/15	1.00	$ 210.00
	02/21/15	4.50	$ 945.00
	Disbursements		$ 43.06
	Sub Total	22.90	$5,905.06
993952/$7,568.32	03/03/15	1.50	$ 315.00
	03/04/15	1.10	$ 213.00
993952 (cont.)	03/06/15	1.50	$ 337.50
	03/08/15	.40	$ 84.00
	03/09/15	1.30	$ 273.00
	03/10/15	.50	$ 105.00
	03/16/15	.60	$ 126.00
	03/17/15	.20	$ 65.00
	Disbursements		$ 2,068.32
	Sub Total	7.10	$3,586.82
Proforma Statement as of 04/23/15/ $32,493.04	04/08/15	.20	$ 83.00
	04/09/15	.30	$ 58.50
	04/09/15	3.30	$ 1,369.50
	04/09/15	1.10	$ 357.50
	04/09/15	.60	$ 126.00
	04/10/15	2.40	$ 996.00
	04/10/15	1.40	$ 455.00
	04/10/15	.60	$ 270.00
	04/13/15	1.00	$ 415.00
	04/13/15	.10	$ 21.00
	04/14/15	.10	$ 41.50
	04/15/15	.70	$ 290.50
	04/18/15	2.50	$ 525.00

	04/20/15	.60	$ 126.00
	04/21/15	.60	$ 126.00
	04/22/15	.10	$ 41.50
	04/27/15	1.00	$ 210.00
	Disbursements [11]		$19,778.54
	Sub Total	16.60	$25,290.54
Exhibit 8/ $115,857.35	Total	133.10	$54,439.85

[11] Based upon the total amount of fees and costs requested on behalf of Harbor Shores in The Subpoena Recipients' Post-Hearing Closing Statement in support of their Motion for Fees and Costs (DN 132), this amount was not included in the request, however it is reflected in Exhibit 8.

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN

In re: MODERN PLASTICS CORPORATION,

Debtor.
_____/

NEW PRODUCTS CORPORATION and UNITED STATES OF AMERICA,

Plaintiffs,

v.

Hon. Scott W. Dales
Chapter 7 Adversary Pro.
No. 13-80252

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

Defendants.
_____/

MEMORANDUM OF DECISION AND ORDER

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

I. INTRODUCTION

On July 24, 2015, the court entered two decisions in this adversary proceeding, in each instance ruling against New Products Corporation (the "Plaintiff" or "New Products"). On August 6, 2015, New Products timely moved for reconsideration of the decisions by filing separate motions. The first motion seeks

reconsideration of the court's decision[1] substantially granting the summary judgment motion filed by Thomas R. Tibble and Federal Insurance Company regarding the scope of the assignment from Bank of America (the "First Motion," DN 150). The second motion addresses the court's imposition of a subpoena-related discovery award[2] against New Products and its counsel (the "Second Motion," DN 151).[3] Shortly after filing the Reconsideration Motions, New Products filed a motion seeking to stay the Discovery Order (the "Stay Motion," DN 154).

The Stay Motion and the Reconsideration Motions are fully briefed, and the court has determined to resolve them without oral argument.

II. ANALYSIS

1. Reconsideration Standards

The same standards govern both Reconsideration Motions. Generally speaking, reconsideration is available only in limited circumstances involving: (1) a clear error of law; (2) newly-discovered evidence; (3) intervening changes in controlling law; and (4) manifest injustice. See GenCorp. Inc. v. American Int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999); In re No-Am Corp., 223 B.R. 512, 513 (Bankr. W.D. Mich. 1998).

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[1] See Memorandum of Decision and Order dated July 23, 2015 (the "Summary Judgment Order," DN 139).

[2] See Memorandum of Decision and Order dated July 23, 2015 (the "Discovery Order," DN138).

[3] The court will refer to the First Motion and Second Motion collectively as the "Reconsideration Motions."

Motions for reconsideration are "not an opportunity to re-argue a case" and should not be used by the parties to "raise arguments which could, and should, have been made before judgment issued." Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998).

2. The First Motion

In its First Motion, New Products amplifies and supplements its earlier opposition to the Defendants' summary judgment motion, citing additional authority but nothing that involves a change in controlling law. The First Motion makes no suggestion about any newly-discovered evidence or, for that matter, manifest injustice. Rather, it simply cites additional authorities that were available before the court entered its Summary Judgment Order. Even if the newly-cited authorities qualified as a "change" or as "controlling" so as to warrant a second bite at the apple (which they do not), they are not particularly persuasive.

For the most part, the newly-cited authorities regarding the interpretation of assignments follow the same path the court took by scrutinizing the assignment language using principles of contract interpretation. Not surprisingly, the courts identified in the First Motion reached a different conclusion because the assignment language in each case was broader than in the present. The Stewardship Credit case, for example, relied on assignment language that conveyed not just the loan documents, but "causes of action" related thereto. See Stewardship Credit Arbitrage Fund LLC v. Charles Zucker Culture Pearl Corp., 929 N.Y.S.2d 203 (N.Y. Sup. Ct. 2011). Cases involving claims related to appraisal reports similarly

make a much stronger case for including claims against third parties, particularly where such reports are specifically mentioned in the assignment documents. For similar reasons, where an assignment specifically identifies claims against third parties involving specific transactions it is easy to regard such claims as within the scope of the parties' agreement.[4]

New Products's untimely citation to Sweet v Clay, 88 Mich. 1, 12, 49 N.W. 899 (Mich. 1891), is also unpersuasive. That decision stands for the proposition that a fraud claim, which might not be assignable in gross, may be assigned as part of the assignment of a judgment. Given the contractual nature of any assignment, however, it is not fair to read that decision as broadly as New Products does.

Sweet merely recognized a bedrock principle of fraudulent conveyance law, albeit without citing the statute in effect at the time: "every conveyance, charge, instrument, or proceeding declared by law to be void as against creditors or purchasers, shall be equally void as against the heirs, successors, personal representatives or assigns of such creditors or purchasers." 2 How. Ann. St. § 6205 (1883) (emphasis added). Against this background, and given the facts before the court, it is not surprising the Sweet court

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[4] See, e.g., FDIC v. Burke, Slip Op. No. 12-7398, 2015 WL 404513 (D. N.J., Jan. 29, 2015) (appraisal reports mentioned and included in assigned loan documents); see also Cannon Twp. v. Rockford Public Schools, Slip Op. Nos. 320683 & 320940, 2015 WL 4249786 (Mich. Ct. App. July 14, 2015) (claims against third party specifically mentioned).

permitted the assignee to sue insiders who tried to profit from transactions intended to hinder, delay, or defraud the assignor.[5] This is a simple application of black letter law, then as now.[6]

The court, however, does not read Sweet as undercutting the contractual nature of an assignment or the role that contract interpretation principles must play in resolving disputes about the scope of an assignment, as several of the cases cited by New Products confirm. Although remedies combatting fraudulent conveyances might automatically follow an assignment as a matter of law, the court adheres to the contractual approach of Macomb Interceptor Drainage Dist. v. Kilpatrick, 896 F. Supp.2d 650 (E.D. Mich. 2012), which states that "the ability of an

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[5] Indeed, the Michigan Supreme Court in Jones v. Hicks, 100 N.W.2d 243, 246 (Mich. 1960), distinguished Sweet on the ground that the complainant in Sweet was trying to reach tangible property fraudulently transferred, rather than assert a claim for damages against a third party. Similarly, the unpublished opinion in Morris v. Schnoor, Slip Op. Docket Nos. 315006 et al., 2014 WL 2355705 (Mich. Ct. App. May 29, 2014), appeal denied, 859 N.W.2d 514 (Mich. 2015), similarly recognizes the link between Sweet and the fraudulent conveyance laws.

[6] Current law, though using different phrasing, continues this idea. See M.C.L. § 566.34 ("[a] transfer made ... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made. . . if the debtor made the transfer . . .[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.").

assignee to enforce contractually-created rights does not necessarily permit the assignee to also bring tort or statutory claims that are merely related somehow to the contractual relationship but that arose outside of the rights created by the contract." Id.

Nor, for that matter, does Pazdzierz v First Am. Title Ins. Co. (In re Pazdzierz), 718 F.3d 582, 587-88 (6th Cir. 2013), alter the court's analysis. That case did not involve the assignment of claims against a third party, such as Mr. Tibble, but only the assignor's claims against the original obligor under the note that was assigned. The Sixth Circuit simply held that the holder of the assigned claim may seek to prove that the claim should be excepted from discharge as a product of fraud under § 523(a)(2). A successful suit under § 523(a)(2) would only permit the assignee to enforce the obligor's original obligations to the assignor. Nothing in Pazdzierz involved conceptually distinct claims against a third party.

The First Motion pays only lip service to the standards governing reconsideration, and is an obvious and ultimately unsuccessful attempt to amplify its original papers with untimely argument. The Summary Judgment Order will stand.

3. The Second Motion

In its Second Motion, New Products complains that the court made incomplete and inaccurate findings leading up to the Discovery Order, and did not separate its legal conclusions from its factual findings.[7] For example, New Products complains that

[7] Although the court made factual findings in resolving the discovery motions, it is not required to

it cannot tell whether the court's award of $104,770.00 to Bank of America and $61,417.50 to the Harbor Shores entities is justified under Rule 26, 37, or 45. New Products also takes issue with many of the court's supposed findings, such as its motive in issuing the subpoenas and the reasonableness of the fees awarded.

In reaching its decision to shift the costs from the non-parties to New Products and its counsel, the court cited Muslim Community Ass'n of Ann Arbor v. Pittsfield Charter Twp., Slip Op. No. 12-CV-10803, 2015 WL 404145 n.4 (E.D. Mich. Jan. 29, 2015), for the proposition that a court should consider a subpoena-related discovery dispute through the lens of Rule 45 despite the parties' reliance on Rules 26 and 37, because Rule 45 is the more specific rule.[8] The court noted contrary authority, see In re Morreale Hotels, LLC, 517 B.R. 184 (Bankr. C.D. Calif. 2014), and stated that "[f]or the sake of completeness, however, and the manner in which the litigants framed the dispute, the court will address the controversy under Rule 26(c) and Rule 37(a)(5), as well as Rule 45." See Discovery Order at pp. 11-12.[9]

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separately state factual and legal conclusions in motion practice. See Fed.R.Civ.P.52(a)(3).

[8] In this opinion, a reference to a two-digit rule (e.g., "Rule 45") means one of the Federal Rules of Civil Procedure, as indicated, and a reference to a four-digit rule means one of the Federal Rules of Bankruptcy Procedure.

[9] The court proceeded in this fashion primarily to express its view, which it holds today, that New Products's opposition to the motion for protective

The court can appreciate the confusion that its approach might have engendered, and for clarity's sake now states that it shifted the expenses from Bank of America and the Harbor Shores entities to New Products and its counsel under Rule 45 as a means of enforcing counsel's duty to mitigate the burden of discovery on non-parties. Because Dickinson Wright and its clients are non-parties, every dollar they reasonably spent in responding to the subpoenas, whether in reviewing documents for privilege, paying an ESI vendor, drafting and reviewing correspondence, or preparing for and appearing in court in formal litigation, they incurred as non-parties protected from significant expense under Rule 45, and because Mr. Demorest ignored his duty under Rule 45(d)(1) to avoid exacerbating that expense.

The costs that the court shifted were admittedly significant, but under the circumstances, the court exercised its discretion to shift enough of the costs to New Products and its counsel so that the remaining cost to the non-parties would be, in the words of two Courts of Appeals, "non-significant." See Legal Voice v. Stormans, Inc., 738 F.3d 1178, 1184 (9th Cir. 2013) (citing Linder v. Calero–Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001)).

The court cannot say for certain how much of the non-parties' significant expense of compliance would have been avoided had Mr. Demorest fulfilled his duty to mitigate the burdens of the subpoenas.

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order was not substantially justified, should an appellate court favor the rationale of Morreale Hotels over Muslim Community Ass'n.

Consequently, it determined to impose the burden of that uncertainty upon the persons who created it—Mr. Demorest and his client—by shifting the significant compliance costs to them both.

For example, had Mr. Demorest meaningfully engaged with Dickinson Wright to develop an ESI protocol for the Bank of America subpoena, some or all of the Huron Consulting expense might have been avoided. Indeed, Mr. Demorest himself implies that a more targeted search might have cost as little as $190.00. See Second Motion at p. 17. Similarly, had he simply requested Mr. Siravo's work file (rather than ten years of documents in numerous categories from the entire Bank of America organization), it seems reasonably likely that any follow-up requests would have been more limited and, therefore, less burdensome to the bank. As for some of the other subpoenas, had Mr. Demorest refrained from serving them on lawyers and a law firm (and instead sought documents directly from the affected clients first), it is conceivable that much of the expense of privilege review might have been avoided while securing the information that his client could legitimately expect to obtain.

Because his own misbehavior made it impossible to establish what portion of the compliance costs might have been avoided had he taken meaningful steps to limit the burdens of the subpoenas, the court visited the consequences of this uncertainty upon him by making him jointly and severally liable for the entire amount. He may reduce his share of these costs, without imposing additional expense or delay on the Defendants and the non-parties, by allocating the compliance costs between him and his client as they see fit. Nevertheless, having refused to mitigate the

burdens that his actions imposed on non- parties, he can hardly complain that the court is exercising its discretion to enforce his duty under Rule 45(d)(1) by requiring him to share that burden with his client. The allocation risk is one that he, rather than the non-parties, must bear.

The balance of the Second Motion largely seeks to exploit immaterial defects in the court's decision,[10] or expresses disagreement with the court's factual

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[10] For example, the court's opinion includes the following, technically incorrect, observation: "Again, instead of signing, negotiating, or in any way responding to the Objection, Proposed Protective Order, or this latest correspondence, on October 14, 2014, Mr. Demorest served Dickinson Wright with yet another subpoena duces tecum pursuant to Rule 45, this time against their client, Evergreen Development Company ("Evergreen"), another past potential purchaser of the Property." See Discovery Order at p. 6 (emphasis added). This sentence is technically inaccurate, as New Products served Evergreen, not Dickinson Wright. Nevertheless, the circumstances surrounding service of the Evergreen were never material. See Fed. R. Bankr. 9005. Rather, the point of that observation was that New Products and its counsel steadfastly ignored the legitimate concerns that Dickinson Wright lawyers had expressed about the scope of the original subpoenas, issuing a similarly burdensome subpoena on another entity (Evergreen) that, after years of litigation, Mr. Demorest almost certainly knew to be a client of the Dickinson Wright firm.

findings, in some instances mischaracterizing the court's decision. For example, New Products suggests that the court relied on an erroneous conclusion about the company's motives in issuing the subpoenas, despite the court's statement that such motives were not "not crucial to the court's conclusion that the burdens of the subpoenas are undue" and that the court was placing "greater emphasis" on the Recipients' burden than on the issuer's motive. See Discovery Order at p. 12 n.6 (citing Morreale Hotels, 517 B.R. at 193).

Similarly, New Products chides the court for finding that Bank of America and the Harbor Shores entities paid the Dickinson Wright invoices,[11] and for supposedly drawing an inference from the fact of payment that the fees it shifted were reasonable. See Second Motion at p. 7 ("In finding that the charges were reasonable, the Court relies in part on the fact that all of the invoices have allegedly been paid."). This argument plainly mischaracterizes the court's decision. See Discovery Order at p. 24 (after considering whether the fact of payment would support an inference of reasonableness, the court stated that it was "unwilling to abdicate its independent role (under the lodestar analysis) in assessing the reasonableness of the charges," and

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[11] It is specious to argue, as New Products does, that the unrebutted testimony of Mr. Gosch, without more, is insufficient to establish payment of the invoices. Testimony and documents are both competent evidence of payment and the rules do not favor one form over another. The court credited Mr. Gosch's testimony.

therefore independently considered the reasonableness of the charges).

The court finds in the Second Motion no basis for disturbing the Discovery Order.

4. The Stay Motion

New Products and its counsel cite Rules 7062 and 8007 in support of an order staying the Discovery Order. More specifically, they ask the court to stay any effort to collect the discovery award for 14 days after entry of an order resolving the Second Motion. See Stay Motion at p. 2 (prayer for relief).

Rule 62 applies in adversary proceedings, according to Rule 7062.[12] New Products and its counsel have already enjoyed the benefit of the automatic stay that Rule 62(a) affords, and now they seek an additional stay under paragraph (b) of that rule. Rule 62(b) provides in relevant part as follows:

> (b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any of the following motions:
>
> ...
>
> (3) under Rule 59, for a new trial or to alter or amend a judgment . . .

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[12] For purposes of the Stay Motion, the court assumes that the Discovery Order is appealable, and therefore a "judgment" within the scope of Rule 62. See Fed. R. Bankr. P. 9001(7) (defining "judgment" as any "appealable order").

Fed. R. Civ. P. 62(b) (emphasis added). Putting aside the probably-fatal fact that New Products proposed no security, the italicized phrase demonstrates that relief under Rule 62(b) is available only "pending disposition" of the enumerated post-judgment motions, such as the Second Motion (ostensibly premised on Rule 59). By resolving the Second Motion and the Stay Motion promptly and simultaneously, the court will render the Stay Motion moot, at least to the extent premised on Rule 62(b).

To the extent that New Products and its counsel seek to stay enforcement of the Discovery Order for 14 days beyond disposition of the Second Motion, they must look to a rule other than Rule 62(b).

The only other rule cited in the Stay Motion to support a stay of the Discovery Order is Rule 8007.[13] That rule, however, requires the moving party to establish the well- settled (and recently cited) standards governing requests for stays pending appeal. See In re Michigan Produce Haulers, Inc., Slip Op. No. 14-03188, 2015 WL 1275387 (Bankr. W.D. Mich. Mar. 19, 2015) (citing Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150 (6th Cir.1991)); see also In re Grand Traverse Development Co. Ltd. P'ship., 151 B.R. 792 (W.D. Mich.1993).

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[13] New Products has not filed a notice of appeal, but this procedural fact does not foreclose relief under Rule 8007. See Fed. R. Bankr. P. 8007(a)(2). Strictly speaking, however, New Products has not asked for a stay pending appeal, but only during the court's consideration of the Second Motion, and for 14 days thereafter.

More specifically, under Rule 8007(a) or (e), New Products must establish (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay, (3) the prospect that others will be harmed if the court grants the stay, and (4) the public interest in granting the stay.

For the reasons given above with respect to the Second Motion, the court is not persuaded that New Products has a likelihood of success on appeal from the Discovery Order.

Moreover, although New Products and its counsel may be harmed if they pay the funds as directed in the Discovery Order (and if it turns out that the court erred in so ordering), the resulting harm hardly seems "irreparable." In the event of reversal, repayment from an international banking giant is eminently likely, and New Products has given the court no reason to doubt the collectability of Dickinson Wright or the Harbor Shores entities.

As for the prospect of harm to others, the targets of New Products's subpoenas have already been harmed in the court's view by having to shoulder the expense of New Products's discovery requests. Postponing the relief prescribed in the Discovery Order would only continue that harm.

Finally, the court perceives no meaningful public interest in granting a stay. On balance,[14] the

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[14] See In re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985) (standards for stay are not "prerequisites that must be met" but considerations to be "balanced").

traditional factors do not favor granting a stay under Rule 8007. For these reasons, the court will deny the Stay Motion.

III. CONCLUSION AND ORDER

The court previously considered and rejected New Products's strongest argument, namely that by filing their objections under Rule 45(d)(2)(B) the Recipients were absolved from complying with the subpoenas, and should have refrained from doing so. The court will not penalize the good faith cooperation of Dickinson Wright and its clients, and irrespective of the timing of the production, the court interprets Rule 45 as requiring it to shift the significant and reasonable expenses of a non-party's document production to the party requesting the information. New Products seems to argue, based on its reading of Rule 45(d)(2)(B), that it should have the documents produced in response to the subpoenas without paying the significant expenses in compiling them. Adopting this "have your cake and eat it, too" approach to Rule 45(d)(2)(B) would lead to a windfall for New Products at the expense of non-parties, promoting gamesmanship, incivility, delay and expense, contrary to the tenor of the federal rules and the better aspirations of practitioners in this District.

The court has considered the other arguments that New Products has advanced in support of the Reconsideration Motions and the Stay Motion and finds them without merit.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

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1. The First Motion (DN 150) is DENIED;

2. The Second Motion (DN 151) is DENIED; and

3. The Stay Motion (DN 154) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and 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 August 26, 2015

/s/ Scott W. Dales
Scott W. Dales
United States
Bankruptcy Judge