STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

FRANK L. WARCHOL, as Grantor Trustee of
The Frank L. Warchol Living Trust;
VIRGINIA J. WARCHOL, as Grantor Trustee of
The Virginia J. Warchol Living Trust; and
RICHCRAFT INDUSTRIES, INC.,
a Michigan corporation;

Plaintiffs,

vs. Case No. 2012-0964-CK

DYNAMIC CONTROL INTERNATIONAL,
INC., a Michigan corporation;
APPLIED COMPUTER ENGINEERING, INC.,
a Michigan corporation; and
AEROSPACE MACHINING INTERNATIONAL,
INC., d/b/a Griffon Defense Systems, a Delaware
corporation;

Defendants.

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OPINION AND ORDER

Plaintiffs Frank L. Warchol, Virginia J. Warchol and Richcraft Industries, Inc. move for entry of judgment.

I. BACKGROUND

Plaintiffs Frank L. Warchol, Virginia J. Warchol and Richcraft Industries, Inc. filed this action on March 1, 2012. Plaintiffs assert Harry Nichols, Angelo Harry Nichols and Arthur Nichols own/operate defendants Dynamic Control International, Inc. ("DCI") and Applied Computer Engineering, Inc. ("ACE"). Defendant DCI engaged in substantially the same business as defendant ACE and was formed through the transfer of the assets and business of defendant

ACE.

Plaintiff Richcraft avers it entered into a Security Agreement with defendant ACE on May 16, 2002 that covered all of defendant ACE's assets. Plaintiff Richcraft loaned $240,000 to defendant ACE from May 16, 2002 through October 30, 2002. The principal balance remains unpaid and interest of $197,743.90 has accrued through March 31, 2011.

On January 29, 2003, the Warchol trusts entered into a Security Agreement with defendant ACE that also covered all of defendant ACE's assets. The Warchol trusts similarly entered into a Security Agreement covering all of defendant DCI's assets on December 31, 2008. The Warchol trusts loaned defendant ACE and its successor, defendant DCI, $2,105,000 from January 29, 2003 through December 11, 2008. The principal balance remains unpaid and interest of $1,016,248.68 has accrued through March 31, 2011.

Plaintiffs contend defendant DCI requested they subordinate their secured loans on March 25, 2011 so defendant DCI could borrow from a new lender. At the time, defendant DCI claimed to be within days of being locked out of its leased facility, have previously laid off all of its employees and have met with a bankruptcy attorney. However, despite requests, defendant DCI refused to substantiate any of these representations. Consequently, plaintiffs sent written demands on June 8, 2011 for repayment of the loans. Defendant DCI subsequently received approximately $700,000 from the Australian Department of Defence but failed to make any loan payments. Defendant DCI is still owed an additional $500,000 under its contract with the Australian Department of Defence, an amount it plans to use for purposes other than to repay the loans.

Plaintiffs note negotiations resulted in a Forbearance Agreement dated December 7, 2011. In exchange for plaintiff's willingness to temporarily forebear payment, defendants DCI

and ACE acknowledged their loan obligations, the validity of the various Secured Promissory Notes and Security Agreements, their lack of defenses to their obligations, the existence of their defaults, they would limit the use of any funds and they would not impair the collateral. Defendants DCI and ACE subsequently violated the Forbearance Agreement.

Plaintiffs argue defendant DCI entered into a Subcontract Agreement with defendant Aerospace Machining International, Inc. ("AMI") for defendant AMI to perform the remainder of the Phase I work for the Australian Department of Defence. Defendant DCI also agreed to a special bank account for Australian Department of Defence payments to avoid plaintiffs' ability to attach or seize any funds. Defendant DCI has sublet its building to defendant AMI, allowed defendant AMI to use its equipment and supplies, and turned over intellectual property to permit defendant AMI to finish the Phase I work for the Australian Department of Defence. Arthur Nichols, defendant DCI's vice president, is defendant AMI's authorized officer/agent and financial manager.

Accordingly, plaintiffs' amended complaint alleges: I. Declaratory judgment against defendants DCI and ACE; II. Claim and delivery against defendants DCI and ACE; III. Judicial foreclosure of personal property against defendants DCI and ACE; IV. Breach of the Secured Promissory Notes against defendants DCI and ACE; V. Violation of the Uniform Fraudulent Transfer Act, MCL 566.31 *et seq.*, against defendant DCI; VI. Violation of the Uniform Fraudulent Transfer Act, MCL 566.31 *et seq.*, against defendant AMI; VII. Civil conspiracy against defendants DCI and AMI; VIII. Successor liability against defendant AMI; IX. Piercing of the corporate veil against defendant AMI and X. Injunctive relief against defendants DCI and AMI.

On March 2, 2012, plaintiffs moved for a temporary restraining order and preliminary

injunction. A temporary restraining order ("TRO") was signed March 2, 2012, requiring defendants DCI and ACE to maintain and preserve the collateral. An *Order of Preliminary Injunction* was signed April 6, 2012, additionally enjoining defendants DCI and ACE from spending, transferring and disposing of any payment funds from the Australian Department of Defence without a court order. The restrictions were extended to defendant AMI on May 3, 2012. However, the TRO against defendant AMI was dissolved May 14, 2012 in favor of requiring defendant AMI to disclose any contracts with the Australian Department of Defence (including invoices, payments and records of disbursement), to not utilize collateral equipment in a manner that would substantially impair its value and to not use Australian Department of Defence funds to pay—other than the salaries of—John LaFuira, Angelo Nichols or Arthur Nichols.

On April 10, 2012, defendants DCI and ACE moved to dissolve the TRO. Plaintiffs opposed the motion. An evidentiary hearing was held April 23, 2012 and an *Order* was signed that directed the parties to file supplemental briefs. An *Opinion and Order* dated August 12, 2012 declined to dissolve the *Order of Preliminary* Injunction signed April 6, 2012. Defendants DCI and ACE's motion for reconsideration was denied September 20, 2012.

The parties subsequently filed various motions seeking sundry relief. An *Opinion and Order* dated February 25, 2013 granted plaintiffs' motion for summary disposition on Counts I-IV against defendants DCI and ACE, and denied defendants DCI and ACE's motion to file a first amended answer, special and affirmative defenses, and a counterclaim. Defendants DCI and ACE's motion for reconsideration was denied in an *Opinion and Order* dated May 20. 2013.

On September 9, 2013, plaintiffs moved for summary disposition on remaining Counts V-X. An *Opinion and Order* dated December 20, 2013 granted plaintiffs summary disposition on

Counts V, VI, VII, VIII and X but dismissed Count IX. In conjunction therewith and following objections, an *Order Enjoining Defendants from Transferring Assets* was signed February 28, 2014.

Meanwhile, plaintiffs moved for entry of judgment and attorney fees on February 24, 2014. A hearing was held March 3, 2014. A *Stipulated Order Extending Deadline for Submission of Briefs and Proposed Forms of Judgment* was signed March 14, 2014, giving the parties until March 19, 2014 to submit their papers.

II. ANALYSIS

A. Damages

Plaintiffs' complaint alleged various claims based on the loans, as evidenced by the Secured Promissory Notes, and fraudulent transfers. Contrary to defendants' assertion, the assets fraudulently transferred would include not only Australian Department of Defence payments but also the original Phase I work that defendant DCI handed to defendant AMI.[1] The value of the Phase I work is the amount spent thereon, which is best evidenced by the subject loans that financed the Phase I work.[2] Hence, plaintiffs' damages have the same measure—the amount of the loans as set forth in the Secured Promissory Notes—regardless of the claim asserted.

In their answers to plaintiffs' Second Amended Verified Complaint, defendants admitted execution of all of the Secured Promissory Notes. The *Opinion and Order* dated February 25,

[1]Recall *Opinion and Order* dated December 20, 2013, p 6:

> Defendants DCI and AMI entered into a Subcontract Agreement effective March 1, 2012 in which defendant AMI took over performance of the Phase I work using defendant DCI's intellectual property and equipment. * * *
>
> The Subcontract Agreement resulted in a transfer of substantially—if not all—of defendant DCI's assets to defendant AMI. * * *
>
> As a result of the transfer and Subcontract Agreement, defendant AMI admits it sought to not only obtain the remaining payments for completing the Phase I work but also hoped to win the lucrative (over $6 million) Phase II work.

[2]See *id.* at 11 n 3 ("It is important to recall plaintiffs' loans essentially paid for the original design work handed to

2013 held the Secured Promissory Notes were valid and enforceable, and that defendants DCI and ACE were liable for their breach. See also the *Opinion and Order* dated May 20, 2013 (denying defendants DCI and ACE's motion for reconsideration) and the *Opinion and Order* dated December 20, 2013 (also holding defendant AMI liable for defendant DCI's debts).

The Secured Promissory Notes provide for interest "equal to the Bank One prime rate plus 1.5 % per annum with monthly compounding". Defendants do not dispute plaintiffs' calculation of the loan balances and accrued interest through February 28, 2014.

Thus, plaintiff Richcraft is entitled to judgment against defendants in the amount of $503,343.05 with interest through February 28, 2014 and interest accruing thereafter, including judgment interest under MCL 600.6013(7), at the rate of 4.75% until satisfied. The Warchol trusts are entitled to judgment against defendants in the amount of $3,569,946.44 with interest through February 28, 2014 and interest accruing thereafter, including judgment interest under MCL 600.6013(7), at the rate of 4.75% until satisfied.

B. Costs & Fees

MCL 600.2401 limits the taxation of costs to those identified in that chapter and otherwise provided in the act.

MCL 600.2405 provides in pertinent part:

> The following items may be taxed and awarded as costs unless otherwise directed:
>
> (1) Any of the fees of officers, witnesses, or other persons mentioned in this chapter or in chapter 25, unless a contrary intention is stated.
>
> (2) Matters specially made taxable elsewhere in the statutes or rules.
>
> * * *
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> (6) Any attorney fees authorized by statute or by court rule.

The $150 filing fee is recoverable under MCL 600.2529(1)(a).

Plaintiffs may recover $20 for proceedings before trial. MCL 600.2441(2)(a).

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defendant AMI.")

Plaintiffs also recover $200 for motions. MCL 600.2441(1)(a).

Plaintiff may recover $23 for service of a subpoena upon Melvin S. Goldstein. MCL 600.2559(1)(g) or (m).

While several depositions have been taken, plaintiffs have not shown the depositions were filed in the clerk's office. Contrast MCL 600.2549. Hence, the deposition costs are not recoverable.

There is no apparent statutory basis for awarding reimbursement of plaintiffs' e-Filing fees, conference call costs, copy costs, outside printing costs, courier service fees, private investigator charges and federal express fees. Consequently, none of these items are recoverable.

Plaintiffs may recover $15 for the witness fee of Jason Carter. MCL 600.2552(1).

Therefore, plaintiffs are awarded total costs of $408.

2. Attorney fees

As a preliminary matter, plaintiffs are entitled to an award of attorney fees as prevailing parties. MCR 2.625(A)(1).

In *Smith v Khouri,* 481 Mich 519, 528-530; 751 NW2d 472 (2008), our Supreme Court stated:

> As all agree, the burden of proving the reasonableness of the requested fees rests with the party requesting them. *Petterman v Haverhill Farms, Inc,* 125 Mich App 30, 33; 335 NW2d 710 (1983). [Footnote omitted.] In Michigan, the trial courts have been required to consider the totality of special circumstances applicable to the case at hand. *Smolen v Dahlmann Apartments, Ltd,* 186 Mich App 292, 297; 463 NW2d 261 (1990); *Hartman v Associated Truck Lines,* 178 Mich App 426, 431; 444 NW2d 159 (1989). *Wood* listed the following six factors were to be considered in determining a reasonable attorney fee:
>
> > (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood,* 413 Mich at 588 (citation omitted)]. [Footnote omitted.]
>
> The trial courts have also relied on the eight factors listed in Rule 1.5(a) of the Michigan Rules of Professional conduct, see, e.g., *Dep't of Transportation v*

Randolph, 461 Mich 757; 610 NW2d 893 (2000), and *In Re Condemnation of Private Prop for Hwy Purposes (Dep't of Transportation v D&T Constr Co)*, 209 Mich App 336, 341-342; 530 NW2d 183 (1995), which overlap the *Wood* factors and include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [MRPC 1.5(a).]

In determining "the fee customarily charged in the locality for similar legal services," the trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan. See, e.g., *Zdrojewski[v Murphy*, 254 Mich App 50, 73; 657 NW2d 721 (2002); *Temple v Kelel Distributing Co Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990). The above factors have not been exclusive, and the trial courts could consider any additional relevant factors. *Wood*, 413 Mich at 588.

The *Smith* Court then concluded:

> We conclude that our current multi-factor approach needs some fine tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5(a) and factor 2 under *Wood).* The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [Footnote omitted.]

See also *Schellenberg v Rochester Elks Lodge No 2225*, 228 Mich App 20, 44; 577 NW2d 163

(1998) ("[t]here has never been a requirement that a prevailing party must receive the total amount of attorney fees requested or incurred").

Moreover, MCR 2.626 provides "[a]n award of attorney fees may include an award for the time and labor of any legal assistant who... meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan."

In the instant matter, no admissible evidence was presented to support the claimed attorney fees of Harrington Dragich PLLC. The record is also devoid of any evidence that the paralegals, Christi Redmond and Michelle Pleban, satisfy MCR 2.626. Thus, the claimed fees of Harrington Dragich and the paralegals are denied.

Brent William Warner testified he is employed by Brooks Wilkins Sharkey & Turco PLLC ("BWST"), plaintiffs' present counsel. Warner stated several attorneys from BWST worked on this matter including himself (admitted in 2004 and a non-equity partner in BWST), Daniel N. Sharkey (admitted in 1995, ranked as one of the top twenty-five lawyers in Michigan and an equity partner in BWST), Brad A. Danek (an associate in BWST), James M. McAskin (an associate in BWST) and Matthew Dawson (an associate in BWST). Warner stated all of the lawyers billed at an hourly rate.

Significantly, Warner explained Sharkey's role was primarily one of oversight; Sharkey would review pleadings before they were filed. However, given Warner's experience, it is unclear why routine supervision of his work was required or what expertise Sharkey was able to provide.

While the issues in this matter were relatively straightforward, defendants' actions in attempting to evade liability for the loans required some significant effort to unravel. Indeed, extensive discovery was required and resulted in the production of numerous documents to prove

the truth of what occurred.

Given the value of the loans and accrued interest, a substantial amount of money was in controversy. As plaintiffs essentially prevailed on the entirety of their claims, BWST obtained an excellent result.

In light of the effort expended and time sensitivity of some issues,[3] plaintiffs' counsels' representation in this matter predictably precluded their ability to work on other matters. In fact, plaintiffs' original counsel essentially withdrew because of the time constraints.

The withdrawal of plaintiffs' original counsel resulted in BWST having to re-perform certain tasks and excessive time was spent on other tasks; an appropriate reduction in the billable hours has been made. As the extensive discovery sought by Harrington Dragich generally only required short responses and/or objections, only a small reduction in the billable hours relating to enforcement has been made.

The State Bar of Michigan 2010 Economics of Law Practice survey provides the hourly billing rate is $203 for associates, $283 for non-equity partners and $282 for equity partners. The mean hourly billing rate is from $154-189 for attorneys with 0-5 years of practice, $205 for attorneys with 6-10 years of practice and $255 for attorneys with 16-25 years of practice. The mean hourly billing rate is $198 for creditor collection actions, $207 for general practice and $262 for other civil law. The mean hourly billing rate for Macomb County practice is $235.

Therefore, plaintiffs may recover the following attorney fees:

Sharkey	44.1 hours at $250 per hour	$11,025
Warner	327.2 hours at $225 per hour	$73,620
Danek	93 hours at $200 per hour	$18,600
McAskin	4.1 hours at $200 per hour	$ 820
Dawson	3.3 hours at $200 per hour	$ 660

[3]Time sensitive issues included, but were not limited to, trying to preserve assets (equipment and payments) in light of defendant DIC and ACE's dire financial circumstances and defendants' endeavors to avoid repayment.

Therefore, the total recoverable attorney fees are $104,725.

3. Foreclosure

Plaintiffs may foreclose on their security interests in the Collateral (as defined and itemized in the Security Agreements between defendant DCI and the Warchol trusts, defendant ACE and plaintiff Richcraft, and defendant ACE and the Warchol trusts, which definition is incorporated into the judgment subject to the limitations in the *Opinion and Order* dated February 25, 2013 regarding intellectual property), may seize and sell the Collateral as provided by law and shall apply those sale proceeds towards the judgment amount and accrued interest.

4. Other

The entry of judgment in plaintiffs' favor shall not be construed as a waiver of any priority or secured party position that they may have under the Security Agreements and/or Secured Promissory Notes.

The reporting requirements of the *Order* dated May 14, 2012 and *Order Enjoining Defendants from Transferring Assets* signed February 28, 2014 shall remain in effect until the judgment is satisfied.

III. CONCLUSION

For the reasons set forth above, plaintiffs Frank L. Warchol, Virginia J. Warchol and Richcraft Industries, Inc.'s motion for entry of judgment is GRANTED.

Accordingly, plaintiffs shall prepare a judgment consistent with this decision MCR 2.602(B)(3).

This *Opinion and Order* neither resolves the last pending claim in this matter nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: April 17, 2014

JCF/sr

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