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

Defendant Aerospace Machining International, Inc. moves to stay execution and enforcement of judgment, without bond, pending appeal.

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 later 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. An *Opinion and Order* dated April 17, 2014 granted plaintiffs' motion for entry of judgment, requiring plaintiffs to submit a judgment under MCR 2.602(A)(3).

Defendants subsequently moved for reconsideration while plaintiffs moved for entry of the order of judgment. An *Opinion and Order* dated May 21, 2014 denied defendants' motion and granted plaintiffs' motion. A *Judgment Against All Defendants* was signed May 21, 2014.

Defendant AMI now moves to stay execution and enforcement of judgment, without bond, pending appeal.

II. ANALYSIS

Defendant AMI seeks a stay of proceedings to protect its current operations and allow time to receive additional work that will stabilize its financial condition. Defendant AMI asserts it has been unable to obtain a bond but that the injunctive relief previously granted serves the same purposes. Defendant AMI does not oppose the exercise of any remedies against defendants DCI and ACE in satisfaction of the *Judgment.* However, unless plaintiffs are precluded from enforcing the *Judgment* against it, defendant AMI contends it will be forced out of business and its appeal will be moot. Hence, defendant AMI argues justice requires a stay of proceedings against it without a bond.

In response, plaintiffs aver they need the protection of a bond if a stay of proceedings is granted given defendant AMI's continued failure to repay any of their debt while paying other unsecured creditors. Plaintiffs maintain defendant AMI's ongoing egregious conduct precludes a finding that the interests of justice would favor allowing it to proceed without a bond. Plaintiffs deny the collateral and injunctive relief provisions are sufficient to protect them. Thus, plaintiffs argue defendant AMI should be required to post a bond in at least the full amount of the *Judgment.*

Defendant AMI's reply has been considered.

MCR 7.209 provides in pertinent part:

> (A)(1) Except for an automatic stay pursuant to MCR 2.614(D), an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. * * *
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> (B)(1) Unless determined by law, the dollar amount of a stay or appeal bond in a civil action must be set by the trial court in an amount adequate to protect the opposite party.
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> * * *
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> (E)(1) Except as otherwise provided by law or rule, the trial court may order a stay of proceedings, with or without a bond as justice requires.
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> * * *
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> (G) Except as otherwise specifically provided in this rule, MCR 3.604 applies.

Plaintiffs correctly note the tangled web under which defendants have operated in seeking to avoid repaying the loans. Despite entry of the *Judgment,* defendant AMI seeks further delay in satisfying the debt owed.

Defendants previously asserted that receipt of the Phase II work, now being performed, would allow for repayment of plaintiffs' loans. However, there has been no repayment of the loans to plaintiffs. Consequently, defendant AMI's present assertion that the awarding of the next contract for production of multiple units will stabilize its financial position and allow for

payment of the *Judgment* rings hollow.

Given the minimal value of the collateral in relation to the debt owed, seizure and sale of the collateral is not likely to result in any significant recovery to plaintiffs. Defendants DCI and ACE have no other evident assets of significant value to satisfy the *Judgment.* The present injunctive relief measures have also failed to result in any payments.[1] While plaintiffs' collection efforts against defendant AMI may put it out of business, plaintiffs know they are proceeding at their own risk in this regard.

Moreover, while defendant AMI has proffered some evidence of the bond underwriting requirements, the record is devoid of any evidence suggesting it has actually tried applying for and been denied a bond. It is also important to note the underwriting requirements reference the acceptability of a letter of credit as collateral. If the next phase of the contract work will be so lucrative, it is unclear why defendant AMI can not obtain a letter of credit based thereon, procure other security in lieu of a bond,[2] or obtain new capital from additional investors.

III. CONCLUSION

For the reasons set forth above, defendant Aerospace Machining International, Inc.'s motion to stay execution and enforcement of judgment, without bond, pending appeal is DENIED.

This *Opinion and Order* again resolves the last pending claim in this matter and re-closes the case. MCR 2.602(A)(3).

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[1]Defendant AMI is apparently paying non-business expenses. The Comcast bill, attached as Exhibit A to defendant AMI's reply brief, is for service at "12258 153RD CT N JUPITER FL 33478-6658". Google Maps (accessed June 26, 2014) depicts this structure as a residence. MRE 201(b)(2) and (c); see also *Aniel v City of Pontiac,* unpublished opinion per curiam of the Court of Appeals, issue July 26, 2011 (Docket No. 297901), and *People v Akram,* unpublished opinion per curiam of the Court of Appeals, issued August 31, 2010 (Docket No. 283161) (both cases relying on Google Maps as evidence). Consequently, defendant AMI has apparently violated the current injunctive relief measures, diminishing their purported protective value.

[2]See, e.g., MCL 600.2631 (allowing cash, checks and other securities in lieu of a bond).

IT IS SO ORDERED.

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

Dated: July 7, 2014

JCF/sr

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