SO ORDERED.

SIGNED this 13 day of May, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
BEMIS CONSTRUCTION, INC.	)	**Case No. 02-14893**
a Kansas corporation	)	**Chapter 11**
	)	
Debtor In Possession.	)	
	)	
WARREN POWER & MACHINERY, INC.,	)	
	)	
Plaintiff,	)	
v.	)	**Adversary No. 03-5132**
	)	
BEMIS CONSTRUCTION, INC.,	)	
MID-CONTINENT CASUALTY COMPANY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Warren Power (Warren) filed this adversary proceeding in April, 2003, to recover a judgment for

unpaid invoices against the debtor Bemis Construction (Bemis), to recover on certain statutory bonds issued by Mid Continent Casualty Company (Mid Continent), and to obtain a decree equitably subordinating the claims of all other creditors to its claim. Warren supplied Bemis with parts and tools that Bemis used in its road-construction equipment and machinery. After nearly two years of pretrial discovery and other litigation activity, Bemis and Mid Continent tendered offers of judgment to Warren under Fed. R. Bankr. P. 7068 and Fed. R. Civ. P. 68. Warren filed acceptances of both offers, but maintained its entitlement to substantial attorneys fees and costs, under Fed. R. Civ. P. 68 and Oklahoma statutory law. The Court entered judgment in accord with the accepted offers, but reserved the issue of Warren's entitlement to costs and fees.[1]

On February 10, 2005, the Court convened an evidentiary hearing on Warren's Combined Notice of Acceptance of Offers and Motion to Establish Procedures (Procedure Motion),[2] Warren's Motion to Recover Costs and Attorney Fees (Fees Motion),[3] and Warren's Motions to Amend Judgment (Motions to Amend).[4] Having heard the evidence presented on that date and reviewed the authorities submitted by counsel, the Court is prepared to rule.[5]

FACTUAL BACKGROUND

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[1] Dkt. 86 (Bemis) and Dkt. 88 (Mid Continent).

[2] Dkt. 85.

[3] Dkt. 90.

[4] Dkt. 97 (Bemis) and Dkt. 99 (Mid Continent).

[5] Except as otherwise noted, all docket entry references are to the above-captioned adversary proceeding.

A. The Underlying Legal Dispute.

Bemis filed for chapter 11 relief in this Court on September 27, 2002. Bemis was a road construction and grading contractor that worked extensively on public works projects in the state of Oklahoma. At the time of filing, Bemis's counsel informed the Court that a liquidation in chapter 11 was the only likely result, but that the orderly completion and billing of Bemis's outstanding projects in bankruptcy would benefit all of the parties in interest.

Mid Continent, as surety, issued the performance and payment bonds for most of Bemis's Oklahoma road projects. Early on, Mid Continent took the position that it was subrogated to Bemis's accounts arising out of the projects and that, by virtue of its subrogation, it claimed a superior interest in Bemis's accounts receiveable as well as an inchoate interest in the rest of Bemis's assets.[6] Thus, any claims disputes with Bemis subcontractors or suppliers on bonded jobs implicated the interests of Mid Continent. If those claims were deemed valid, Mid Continent might be liable under its bond. Were Mid Continent to pay those claims under the bond and assert further subrogation rights against Bemis, the bankruptcy estate would be affected.

Warren provided parts, tools and repairs for the heavy machinery used by Bemis in various road construction projects. At the petition date, Bemis owed Warren $124,835 on account of these transactions. Contemporaneously with the commencement of this adversary proceeding against Mid

[6] Bemis's commercial lenders have just settled another adversary proceeding with Mid Continent concerning the relative priority of the lenders' and Mid Continent's interest in Bemis's receivables and assets. *See Mid Continent Casualty Co. v. Bemis Construction, Inc., et al.,* Adv. No. 03-5049 (Bankr. D. Kan.), Dkt. 93.

Continent and Bemis, Warren filed a proof of claim in the bankruptcy case.[7] Bemis objected to Warren's claim.

Mid Continent disputes Warren's bond claim because it alleges that some or all of what Warren provided to Bemis was not job-specific (*i.e.*, that it was not "used or consumed" in the bonded jobs). Mid Continent discovered and analyzed hundreds of Warren invoices to determine if any of them could be tied to a specific job and, if so, whether or not they represented the furnishing of materials which were used or consumed in a bonded job.[8] As many of the parts provided by Warren were machinery parts that were likely installed on Bemis's equipment and not necessarily "consumed" in the course of any one particular job, Mid Continent denied most of the claim as being for "capital" rather than consumable expense. Warren disputed the applicability of the "used or consumed" standard, asserting instead that the Oklahoma statute assures repayment of "all indebtedness" owed by the bond obligor. Had this dispute not been settled, the legal question at trial would have centered on the meaning of the Oklahoma public works laws and the scope of Mid Continent's bond coverage.

B. Procedural History.

Warren muddied the waters by filing in the bankruptcy case a proof of claim for "unpaid rental expenses" and by asserting that its claim was "secured."[9] On the same day, April 15, 2003, Warren commenced this adversary proceeding, filing a complaint in which it prayed for a judgment against Bemis

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[7] Claim No. 68.

[8] *See* Ex. NN.

[9] Case No. 02-14893, Claim No. 68.

for the unpaid rentals.[10] Warren also sued Mid Continent to enforce its bond claim and sought a declaratory judgment that the bond was not property of Bemis's bankruptcy estate. Bemis objected to Warren's proof of claim on the basis that it had rented nothing from Warren[11] and filed an answer setting up the same as a defense.[12] Bemis also stated that it had only done business with "Warren Cat," not Warren Power.

On July 11, 2003, Warren filed an amended complaint and an amended proof of claim deleting the references to rentals and instead asserted that its claims were based on unpaid invoices for parts.[13] Warren still sought to collect its unpaid accounts in the adversary proceeding and reasserted the other claims set out above. This Court entered a scheduling minute order on September 18, 2003.[14] After a year of discovery efforts (punctuated, it appears, by numerous informal discovery disputes), Warren again sought leave to amend its complaint, this time to assert that all of the creditors' claims should be equitably subordinated to Warren's claim. This motion to amend was not filed until September 30, 2004 and the amended complaint was not filed until December 2, 2004 (Second Amended Complaint).[15] The defendants offered Warren judgment on the Second Amended Complaint on December 13 and 15,

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[10] Dkt. 1.

[11] Case No. 02-14893, Dkt. 280.

[12] Dkt. 11.

[13] Dkt. 16; Case No. 02-14893, Claim No. 70.

[14] Dkt. 21.

[15] *See* Dkt. 49 (motion to amend); Dkt. 66 (order granting leave November 23, 2004) and Dkt. 68 (second amended complaint).

2004.[16]

As is this Court's practice, it conducted an initial scheduling conference pursuant to Fed. R. Civ. P. 16(b) on the Amended Complaint on September 18, 2003. Warren's Oklahoma counsel, Messrs. Richard Ogden and Russell Wantland participated in the conference by phone.[17] Their local counsel, William Wells, appeared at this conference and at all hearings in the case. At that time, the Court entered an order outlining a discovery schedule that terminated discovery on January 15, 2004, and required the submission of a final pretrial order on February 15, 2004.[18] By mutual motion of the parties, the discovery deadline was extended to April 16, 2004, the pretrial order deadline was extended to May 14, 2004, and the final pretrial conference was reset to June 17, 2004.[19] On April 27, 2004 the parties entered into another agreed amended scheduling order that extended discovery to July 31, 2004 and extended the deadline for a final pretrial order and conference.[20] Notably, there are no deposition notices in the record and, indeed, no discovery notices of any kind were filed by any party until June 30, 2004 when Bemis filed a notice of service of written discovery upon Warren.[21] Warren apparently propounded some written

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[16] Dkt. 69 (Mid Continent offer) and Dkt. 72 (Bemis offer).

[17] Prior to the February 10, 2005 hearing, Warren's Oklahoma counsel did not personally appear in this Court.

[18] Dkt. 21. This Court typically allows for a 120-day discovery period followed by a 30-day time frame in which counsel must prepare and submit a pretrial order. This scheduling is more than ample for most adversary proceedings.

[19] Dkt. 30.

[20] Dkt. 37.

[21] Dkt. 40.

discovery because Bemis filed an objection to it on July 7, but there is no notice of the issuance of discovery requests by Warren in the record. Again at the instance of counsel, the Court extended the discovery deadline to September 30, 2004 and continued the final pretrial order to October 31, 2004.[22]

On September 30, 2004 Warren sought leave to file its Second Amended Complaint,[23] along with a request for extension of the discovery deadlines.[24] The amendment was allowed although the Second Amended Complaint was not formally filed until December 2, 2004.[25] The parties submitted and the Court entered an Agreed Scheduling Order on November 18, 2004 which extended discovery, dispositive motions, and the final pretrial order deadline to December 30, 2004.[26] In November of 2004, Warren issued a flurry of deposition notices and took George Bemis's deposition pursuant to notice on November 11.[27]

On December 13, 2004, Mid Continent filed a Notice of Offer of Judgment (MC Offer).[28] On December 15, 2004, Bemis filed its Notice of Offer of Judgment (Bemis Offer).[29] On December 20,

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[22] Dkt. 44.

[23] Dkt. 49.

[24] Dkt. 50.

[25] Dkt. 66 and 68.

[26] Dkt. 61.

[27] Dkt. 53, 54, 55, 56, 57, and 60.

[28] Dkt. 69.

[29] Dkt. 72.

Warren filed separate Notices of Acceptance of both offers.[30] Curiously, on the same day, Warren also filed a Motion for Summary Judgment.[31] When the Clerk did not immediately enter judgment in accordance with the accepted offers, Warren filed a "Motion to Establish a Post-Acceptance Procedure" in which it argued at length that despite having accepted the offers, it remained entitled to additional attorneys fees and costs.[32] The Clerk entered Judgments on January 3, 2005.[33] On January 3, 2005, Warren filed a Motion to Recover Costs and Attorney's Fees with numerous exhibits.[34] Then, on January 12, 2005, after the Judgments were entered, Warren filed its Motion to Amend the judgments to add to each a reference to costs.[35] Warren filed three pleadings seeking essentially the same relief, an award of attorneys fees and costs amounting to some $126,586.93 for which it curiously asserts Mid Continent and Bemis are jointly liable.

C. The Offers of Judgment

The MC Offer is clear. In it, MC offers Warren judgment "for the claims alleged in Plaintiffs' Petition [sic]" in the amount of $40,000.[36] Warren's acceptance of this offer states that Warren "accepts Defendant, Mid-Continent Casualty Company's, Offer of Judgment in the amount of $40,000.00 . . . ," but

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[30] Dkt. 79 (Mid Continent) and Dkt. 80 (Bemis).

[31] Dkt. 78.

[32] Dkt. 85 (Procedure Motion).

[33] Dkt. 86 and Dkt. 88.

[34] Dkt. 90 (Fees Motion).

[35] Dkt. 97 and Dkt. 99 (Motions to Amend).

[36] Dkt. 69.

also states that "by operation of Rule [footnote omitted], Warren is entitled to costs accrued including reasonable attorney's fees as of the date of the Offer of Judgment."[37]

The Bemis Offer is also straightforward. In it Bemis offers Warren a judgment on the following terms: (1) Bemis offers the allowance of an unsecured, non-priority claim in the amount of $124,835.53 with recovery to be limited to whatever Warren's pro-rata recovery might be, said claim amount to be reduced by whatever Warren recovers from Mid Continent; and (2) a declaration that the surety bonds are not the property of the estate.[38] As it did with Mid Continent, Warren's acceptance "accepts . . . in the amount of $124,835.53" and recites that, by Rule it remains entitled to attorneys fees and costs, an application for which will follow.[39]

The use of Rule 68 procedure is, in this Court's experience, rare, and especially so in this District's Bankruptcy Court. Warren's acceptances were filed shortly before the Christmas holiday and were not brought to this Court's attention until after December 25, 2005, when the Court was on vacation. After review of the acceptances, this Court instructed the Clerk to enter judgments that granted Warren judgment against Mid Continent "in the sum of $40,000" and against Bemis allowing Warren "a general, unsecured, non-priority claim in the amount of $124,835.53," limited as set forth in Bemis offer, and a declaration that the surety bonds are not property of Bemis' bankruptcy estate. Each judgment also recognized that Warren asserted a right to accrued costs and reasonable attorneys fees as of the date of the Offer of Judgment and

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[37] Dkt. 79.

[38] Dkt. 72.

[39] Dkt. 80.

that this issue remained for determination by the Court.[40]

D. Communications Concerning the Offers and Acceptance.

At the evidentiary hearing, many letters and e-mails between and among counsel for the parties were admitted into evidence. Richard Ogden testified about his understanding of the offers and his acceptance of them on behalf of his client, Warren. Susan Saidian testified about Bemis's offer. Larry Lerner testified about Mid Continent's offer.

With respect to the MC Offer, it appears that all communication between Lerner and Ogden had broken down by the middle of 2004. The documents admitted into evidence contain a number of Lerner's file notes indicating that Ogden was, at best, unreliable in returning Lerner's calls about settlement and scheduling, beginning in March of 2004 and extending throughout the case.[41] In one of Lerner's letters to Ogden, he notes that Ogden had failed to contact him to follow up on settlement discussions for over *seven months*.[42] Ogden essentially admitted this under cross examination. When the Court asked Ogden why he did not simply pick up the phone and confer with Lerner about the offer and acceptance, he stated that he "should have called [Lerner]" but that doing so had not occurred to him. The Court finds that Mid Continent unambiguously accepted MC's Offer of $40,000 and concludes that Warren's right to recover costs and fees is a legal issue that will be discussed below.

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[40] Dkt. 86 (Bemis) and Dkt. 88 (Mid Continent).

[41] *See* Ex. CC (File note, March 23, 2004, no callback from Ogden after initial settlement discussions; further notation of no callback April 14, 2004); Ex. OO (September 30, 2004 letter from Martin Bauer, Mid Continent's local counsel, to Russell Wantland, Ogden's partner, stating *inter alia* their agreement that Ogden will return "Larry Lerner's calls which have been made weekly to discuss the status of your review of the records . . . .").

[42] *See* Ex. UU.

There was more discussion among counsel in connection with the Bemis Offer. Notably, Bemis's counsel, Ms. Saidian, wrote Ogden a letter in November of *2003* (a full year prior to the Bemis Offer), offering to allow Warren's claim in the same amount ultimately allowed in the judgment.[43] On December 26, 2004, Saidian wrote Ogden and told him that "the only sums you can recover from the estate will be in accordance with the offer . . . your client will not be able to receive any amounts for sums due for anything other than unpaid invoices."[44] Saidian goes on to state that Warren's proof of claim (and Bemis's Offer) does not include any other fees or costs. More important is Saidian's trial testimony that she spoke with Wantland via phone and he confirmed Warren's view that the Bemis Offer did not include an award of any fees. When Ogden challenged Saidian's testimony on cross examination, she did not waiver. Moreover, when Saidian so testified on direct, Ogden lodged no objection to her testimony. Wantland was present in Court during this testimony at trial, but did not testify to rebut Saidian's testimony. From Saidian's credible testimony and Wantland's silence, this Court finds that Wantland indeed confirmed Saidian's understanding that the Bemis Offer excluded attorneys fees and costs and that Warren thereafter accepted it.

The Court notes that, after the trial and record closed, after Warren had submitted its closing brief on February 22, 2005 as authorized by the Court[45] and Bemis had submitted its closing brief on March 3,

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[43] *See* Ex. R. ("Please understand that given that we have agreed that you will have an unsecured claim in the bankruptcy less any amounts your receive from the bond company, the debtor is not particularly interested in participating in voluminous depositions, as it does create a cost for the estate.").

[44] *See* Ex. BBB.

[45] Dkt. 114.

2005,[46] Wantland filed a Supplemental Affidavit.[47] Because this affidavit was filed after the close of the evidence and without leave of the Court, this Court struck it sua sponte without reviewing the document at length.[48] From its cursory review and from statements made in Warren's closing memoranda, the Court concludes that the document, supposedly affirmed as true by Wantland, was submitted by way of a back-door impeachment of Saidian's trial testimony. Warren had the chance to present Wantland's rebuttal testimony at trial where he could have been cross-examined by Bemis's counsel, but Warren declined to do so. Failing to call Wantland as a witness and then subsequently submitting his affidavit testimony after the record was closed is poor practice if not sanctionable.[49]

As to the Bemis Offer, the Court finds that the parties' agreement expressly excluded the payment of attorneys fees to Warren in addition to the allowance of its claim in bankruptcy. As set forth below, this finding logically follows from the posture and conduct of the case. All of Warren's fees claimed in connection with this litigation arose post-petition. Warren's claim for unpaid invoices arose pre-petition. There is no evidence in the record that Warren incurred or makes a claim for attorneys fees incurred in

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[46] Dkt. 117.

[47] Dkt. 118.

[48] Dkt. 120.

[49] The Court notes that Warren also submitted an affidavit of Wantland with its closing brief (Dkt. 114, Ex. 9), which like the Supplemental Affidavit stricken by the Court, purports to impeach Saidian's testimony concerning her phone call with Wantland. The submission of this affidavit in support of its closing brief is not any more appropriate than the Supplemental Affidavit, having come after a closed record. The closing trial briefs authorized by the Court were for submission of legal authorities and argument; it is not an opportunity to submit additional evidence or conduct a trial by affidavit.

connection with this claim before the bankruptcy case was filed.[50] 11 U.S.C. § 502(b) makes plain that the amount of an allowed claim is determined as of the date of filing the bankruptcy petition.

E. Attorney Fees and Costs.

Warren seeks costs and fees ranging from $126,586.93[51] to $139,260.70,[52] plus pre- and post-judgment interest, for what amounts to a $40,000 recovery from Mid Continent and the allowance of a claim by Bemis which could conceivably have a cash value to Warren of less than $10,000. The Court has carefully examined Warren's monthly statements of time and expense submitted in support of its fee request.

At trial, Warren presented a series of exhibits in support of its fee request. The first exhibit contains monthly statements by Mullinix, Ogden, Hall, Andrews & Ludlam ("Mullinix Firm") and local counsel William Wells from November 11, 2002 until December 30, 2004.[53] There are a number of red-highlighted entries in this exhibit. Ogden testified that these highlighted entries are for work done by the Mullinix Firm in connection with either the main bankruptcy case or adversaries other then this one and, accordingly, Warren does not seek reimbursement of the highlighted fees from Bemis and MC. The second exhibit consists of the Mullinix Firm's billing from January 1, 2005 through February 9, 2005, the day prior to the

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[50] Indeed, Warren's proof of claim filed April 15, 2003 expressly excluded attorney fees and costs, as did its amended proof of claim filed June 23, 2003. *See* Claim No. 68 and No. 70.

[51] In its Motion for Fees filed January 3, 2005, Warren sought fees and costs totaling $126,586.93 based on over 740 hours of attorney time. *See* Dkt. 90, Ogden Affidavit. This same affidavit was received into evidence at trial as Ex. 4.

[52] As explained *infra* at page 13-14, this figure is derived from Warren's summary presented at trial as Ex. 3, and is purportedly more accurate than Ex. 4, Ogden's Affidavit. The number of attorney hours compiled in Ex. 3 is over 1,000.

[53] Ex. 1.

scheduled evidentiary hearing.[54] This statement totals $29,355.75 in attorney time, all of which was expended in preparing and defending the fee request. The third fee exhibit consists of a summary of fees incurred on various task categories by attorney from the beginning of the Mullinix Firm's engagement until the receipt of the MC Offer on December 13, 2004 and the Bemis Offer on December 20, 2004.[55] While Warren asserts that Bemis and MC are jointly and severally liable for Warren's fees in this case, Warren also appears to assert that each defendant is "jointly" liable for different amounts of fees.[56]

The record also contains an affidavit by Ogden[57] prepared in anticipation of trial which asserts that the fees earned in prosecuting the adversary proceeding up to the time of the entry of judgment is $96,818,59, with additional costs of $10,891.17.[58] The affidavit also describes post-judgment fees in the amount of $18,256.25 and costs of $620.92. The affidavit supports a total request for fees and expenses, before and after judgment, of $126,586.93. In his testimony, Ogden stated that the affidavit may be inaccurate in some respects and that the most accurate record of fees and expenses is found in the Exhibit 3 summary. The total fee exposure supported by Exhibit 3 (subject to Ogden's redactions at trial and the Court's comments below), is $103,205.71 in fees through the date of the offers, $16,012.50 in fees from

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[54] Ex. 2.

[55] Ex. 3.

[56] *See* Ex.3. As Ogden has testified, some $96,086.96 in fees were incurred by Warren before MC's Offer was made on December 13, 2004. But, on December 15, 2004, when Bemis's Offer was made, the "joint" fee burden had increased to $103,205.71. It is hard to understand how these parties are "jointly and severally" liable for the additional $7,000 claimed against Bemis.

[57] Ex. 4.

[58] Of the fees incurred up to entry of judgment, $91,973.75 were the Mullinix Firm's fees and $4,844.84 were local counsel's fees.

the date of acceptance to judgment (as corrected at trial), and $18,358.75 in fees post-judgment. Exhibit 3 contains no summary of pre-judgment costs and expenses. Post-judgment costs reflected in Exhibit 3 are $1,683.74, much higher than that contained in Ogden's affidavit. Exhibit 3 would appear to support a total request for fees and expenses, before and after judgment, of $139,260.70. It is not clear how one reconciles the discrepancies in figures between Exhibit 3 and 4.

Compounding the confusion in these numbers is the inconsistency of hourly rates requested by the Mullinix Firm. Ogden testified that his normal rate was $175, but that Warren is such a good client that he reduced his rates in this case to $145. Yet, on Exhibits 3 and 4, he reports his rate as $175, thereby increasing the bottom line on those exhibits. There is similar inconsistency in Wantland's rate which is billed to Warren at $90, but stated on Exhibit 3 as $150. John Barbush's rate is billed at $135 but reported in Exhibit 3 at $150. On the detailed monthly billing statements,[59] Ogden's hourly rate started at $135 in 2003 and went up to $145 a couple of months into the case. Wantland's hourly rate started at $90 in 2003, increased to $125, and was billed at $145 by December of 2004. Barbush's hourly rate was billed at $135 and $145 in the monthly statements.

Many of the entries on the statements are often "batched," making it difficult to determine how much time the attorney spent doing a particular task. For instance, on March 26 and March 27, 2003, Barbush's time reflects 10.1 hours of batched entries.[60] The Court cannot determine from batched entries what increments of time were spent on what tasks and, in the bankruptcy context, such time entries are usually

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[59] *See* Ex.1. These monthly statements appear to be the billings submitted to Warren and from which Warren paid the Mullinix Firm.

[60] Ex. 1, p. 4536.

dishonored.[61]

It appears that preparation of the original complaint and proof of claim, both of which were based on the erroneous premise that Warren was owed rental payments took, between Barbush and Ogden, nearly fifteen hours.[62] Preparation of the summons and cover sheet took over 1.5 hours in attorney time.[63] The original complaint was 6 pages long, including the prayer and signature block of counsel. And this is only the start.

In the July, 2003 billing, Barbush billed *six* hours to "research bankruptcy law" on the "debtor's objection," presumably to Warren's proof of claim.[64] This objection was 3 pages in length and asserted that debtor lacked sufficient documentation from Warren to prove that it had done business with "Warren Power" as opposed to "Warren Cat."[65] Barbush slapped on another 3.0 hours for preparation of the First Amended Complaint which is identical to the Complaint, save that the reference to rental agreements is replaced by a reference to invoiced parts.[66]

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[61] *See* Judge Nugent's Professional Fee and Expense Guidelines, effective January 31, 2002. The complete text of the Guidelines may be found on the Court's website www.ksb.uscourts.gov under the Judges' Corner link.

[62] Ex. 1, pp. 4536 and 4538.

[63] Ex. 1, p. 4538. There is an additional entry for drafting of the summons but the amount of time devoted to that task cannot be determined from the batched entry of 3/27/03. Ex. 1, p. 4536.

[64] Ex. 1, page 4543, 6/11/03 entry.

[65] In May, 2003, Ogden billed 2.6 hours reviewing "answer" to Warren's adversary complaint. *See* Ex. 1, p. 4541, 5/22/03 and 5/26/03 entries. Mid Continent's answer was approximately 4 pages in length and Bemis's answer was 2 ½ pages.

[66] Ex. 1, p. 4544, 6/12/03 entry. A like simple revision was made to Warren's proof of claim but between Ogden, Barbush, and Wantland, no less than four time entries involving 7.1 hours of time

Later, on August 28, 2003, Ogden billed 3.0 hours for working with John Barbush regarding the "pretrial/status conference and Rule 26(f) conference." Not to be outdone, Barbush also billed his time talking with Ogden and "work on" preparing for the discovery conference.[67] On September 2, Ogden and Barbush spent another five hours preparing for the Rule 26(f) conference.[68] Thereafter, Wantland, Ogden and Barbush devoted nearly 6 hours "preparing" for and participating by telephone in the Court's routine scheduling conference.[69]

In short, a review of the Mullinix Firm's monthly statements reveals that very little substantive legal work was done on the adversary in 2003. There was minimal activity regarding discovery and scheduling of depositions in late 2003, but it does not appear much, if any, of this materialized.[70] At trial, both Ogden and Lerner testified about a lengthy conference call held between them on March 23, 2004 where the parties reviewed each and every one of Warren's invoices. Mid Continent made a settlement offer to Warren

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amending and reviewing the proof of claim were billed. *See* Ex. 1, p. 4544, 6/12/03 and 6/19/03 entries. The Court notes that it is impossible to determine precisely how much time was devoted to revising the proof of claim due to the batched time entries and that all but 3 hours of this time was redacted by Ogden.

[67] Ex. 1, p. 4548.

[68] Ex. 1, p. 4550. Yet another 2.75 hours was spent by Ogden and Barbush preparing the Rule 26(f) report. *Id.*, 9/4/03 and 9/5/03 entries.

[69] Ex. 1, p. 4551, 9/15/03, 9/16/03, 9/17/03 and 9/18/03 entries. This Court schedules pretrial scheduling conferences in its cases about 10-15 minutes apart. The perfunctory scheduling conferences consist of a review of the parties' Rule 26(f) report and the setting of discovery and other scheduling deadlines.

[70] Ex. 1, pp. 4556, 4557, 4559.

based upon Mid Continent's analysis of the invoices.[71] At this point, it became clear that Mid Continent disputed liability for those invoices for parts that were not used or consumed in a bonded project. Warren had maintained that no such showing was required in order for it to recover against the bond. At this point, the Mullinix Firm began to research the bond coverage issue.[72] In his direct examination, Ogden stated that the high fees in this case were, in great part, due to the burden of having to analyze each invoice and tracing whether the part was used or consumed by Bemis in a bonded project. Yet, only a few hours of attorney time were devoted to that task which, according to Ogden, was performed by Debbie Smith, a former Bemis employee who now works for Warren.[73]

Ogden also attributed much time to the lack of cooperation among counsel. The Court notes, however, that no discovery motions other than those seeking deadline extensions were ever filed. According to the monthly billing statements, discovery in this adversary proceeding did not heat up until late summer of 2004.

The Court received proffered expert testimony from Thomas J. Lasater, a Kansas attorney and a well-respected member of the Bar of this Court. Lasater's proffered testimony was to the effect that the fees and time incurred by the Mullinix firm were reasonable and that the time spent litigating about the Offers

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[71] Even though the settlement offer was made on March 23, 2004, it does not appear that the Mullinix Firm communicated the offer to Warren until nearly a month later (Ex. 1, p. 4570, 4/19/04 entry) and drafted a formal responded to Mid Continent's offer in May, 2004, although it is not apparent that the response was ever sent. (Ex. 1, p. 4572, 5/6/04 entry).

[72] Ex. 1, pp. 4567, 4569-4571.

[73] *See* Ex. 1, p. 4572, 5/6/04 entry for attorney Wantland of 3.70 hours "conducted review of invoices with Deborah Smith and Paula Green Ant [sic] Warren Cat." Wantland logged an additional 4.40 hours reviewing invoices on 7/23/04 (Ex. 1, p. 4580) and 1 hour on 8/12/04 (Ex. 1, p. 4583).

themselves was reasonably necessary as well. No one cross-examined Lasater. Notwithstanding his excellent standing and reputation, the Court attributes little weight to his proffered testimony.

Mid Continent's counsel, Larry Lerner, testified that his firm's fees for defending this action were between $35,000 and $40,000. Susan Saidian testified that her firm's fees for defending on Bemis's behalf were $7,800.

CONCLUSIONS OF LAW

A. Rule 68 and Attorneys' Fees as to MC Offer

Did MC's Offer include attorneys fees and did Warren's acceptance, which included language reserving its right to recover fees and costs, operate as a valid acceptance under Rule 68? These are the core legal issues in this case.

We start with the actual language of Rule 68:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, *with costs then accrued*.[74]

If the plaintiff rejects the offer and proceeds to trial, the defendant will be entitled to recover from the plaintiff all costs incurred after the date of the offer if the plaintiff recovers less at trial than was offered. The obvious purpose of the Rule is to facilitate settlement by forcing plaintiffs to carefully consider the substance of offers before they accept or reject them and by penalizing plaintiffs whose view of the value of their cases is later not shared by the finder of fact at trial.

There is no Tenth Circuit authority squarely on point on the issue before the Court. The leading

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[74] Fed. R. Civ. P. 68 (Emphasis added).

Supreme Court case concerning Rule 68 is *Marek v. Chesny*,[75] but it, too, is factually distinguishable. *Marek* involved a civil rights case where the defendants' pretrial offer of judgment was *rejected* by the plaintiff and the plaintiff ultimately obtained a judgment amount less, following trial, than the defendants' pretrial offer. The Supreme Court stated the issue before it in *Marek* was "whether attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Federal rule of Civil Procedure 68 must be paid by the defendant under [the fee-shifting statute] 42 U.S.C. § 1988, when the plaintiff recovers a judgment less than the offer."[76] The Supreme Court answered the question "no." This Court also notes that the language in the pretrial offer of judgment made by defendants in *Marek* is markedly different from the terms of the offers made by Mid Continent and Bemis in this case.[77]

Both parties in the current controversy argue that *Marek* supports their position, citing to different portions of language in the opinion addressing the validity of the pretrial offer. Warren seizes upon dicta in *Marek* stating that a court is obligated by Rule 68 to include an amount for costs in the judgment if the offer of judgment does not explicitly include costs. The plaintiff in *Marek* argued unsuccessfully that it was incumbent upon defendants to bifurcate or itemize the respective amounts offered for the substantive claim and the costs. *Marek* holds that a defendant's offer need not itemize what is being tendered in the judgment:

> This construction of the Rule best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make

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[75] 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed. 2d 1 (1985).

[76] 473 U.S. at 3.

[77] *Id.* at 3-4. The defendants' offer in *Marek* was "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS."

> a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff.'[78]

The *Marek* Court also concluded that "where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68."[79] In the present matter, Warren has claimed attorneys fees under an Oklahoma fee-shifting statute that taxes attorney's fees as costs when a vendor recovers a judgment.[80] Thus, under the authority of *Marek*, the Court can conclude as a matter of law that MC's Offer was valid and that it subsumed attorney's fees when it tendered a judgment "for the claims alleged in Plaintiff's petition" and those claims included attorneys fees and costs.[81] A resolution of the validity of the offer does not, however, dispose of the question before the Court today.

Several Circuit Courts of Appeal have opined on the offer and acceptance process contemplated by Rule 68.[82] In *McCain v. Detroit II Auto Fin. Center,*[83] the Sixth Circuit found that the acceptance of

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[78] *Id.* at 6-7 (citation omitted).

[79] *Id.* at 9.

[80] OKLA. STAT. tit. 12, § 936 (2002).

[81] Against Mid Continent, Warren alleged that Mid Continent was liable "for the full amount of parts, tools and repair services utilized on the construction projects under which it issued payment bonds, *along with interest, costs and attorney fees*" and in its prayer for relief, Warren sought judgment against Mid Continent "in the amount of $124,835.53, *along with interest, costs and a reasonable attorney fee*." *See* Second Amended Complaint. Dkt. 68 (Emphasis added.).

[82] As noted previously, this Court's review of the Rule 68 cases decided by the Tenth Circuit Court of Appeals does not provide any guidance for the appropriate analysis of Rule 68 offers and acceptances implicated by the facts of this case. *See e.g., First Nat. Bank of Turley v. Fidelity & Deposit Ins. Co. of Maryland,* 196 F.3d 1186 (10th Cir. 1999) (determining whether judgment obtained after trial is greater than rejected Rule 68 offer requires court to compare offer with sum of jury award and pre-offer costs); *Dalal v. Alliant Techsystems, Inc.*, 182 F.3d 757 (10th Cir.1999) (review of fee award to plaintiff in age discrimination case as prevailing party after plaintiff rejected defendant's Rule 68 offer of judgment and recovered less than offer); *Sussman v. Patterson,* 108

an offer "as to all claims and causes of action" was sufficient to include attorneys fees where such fees were part of the statutory damages contemplated, but that the plaintiff would still be entitled to seek costs. The plaintiff's subsequent request for attorneys fees was denied on that basis. Applying basic principles of contract law, the Sixth Circuit concluded that the offer was unambiguous. Nor was there an issue as to the "validity" of the acceptance of the offer because the acceptance was unambiguous and did not voice a reservation or intention to seek additional fees.

In *Nordby v. Anchor Hocking Packaging Co.*,[84] the Seventh Circuit found an offer of judgment plus costs to be unambiguous and when the plaintiff accepted the offer, the Court concluded that since attorneys fees were part of the substantive relief sought by the plaintiff, acceptance of the offer prevented the plaintiff from returning for an attorney's fee award after judgment was entered. The court stated that

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F.3d 1206 (10th Cir. 1997) (review of attorney's fees award in connection with acceptance of offer of judgment; cutoff date for fees and costs under Rule 68 is date of offer); *Driver Music Co., Inc. v. Commercial Union Ins. Companies*, 94 F.3d 1428 (10th Cir. 1996) (determination of whether plaintiff was prevailing party at trial under Oklahoma statute); *Stubblefield v. Windsor Capital Group*,74 F.3d 990 (10th Cir. 1996) (appellate court lacked jurisdiction to review the grant of a Rule 60(b) motion vacating a judgment entered pursuant to Rule 68); *Arkla Energy Resources, a Div. of Arkla, Inc. v. Roye Realty and Developing, Inc.*, 9 F.3d 855 (10th Cir. 1993) (Costs and attorney fees were not required under Rule 68 where ambiguous offer, which did not clarify the value of the offer, was made); *Fry v. Board of County Com'rs of County of Baca, State of Colo.*, 7 F.3d 936 (10th Cir. 1993) (Rule 68 is limited to cases where the offeree, not the offeror, prevails at trial); *Knight v. Snap-On Tools Corp.*, 3 F.3d 1398 (10th Cir.1993) (attorney fees not defined as costs under fee shifting state statute involved; plaintiff could not recover post-offer costs where jury award was less than offer of judgment); *American Ins. Co. v. El Paso Pipe and Supply Co.*, 978 F.2d 1185 (10th Cir.1992) (analysis of whether plaintiff was prevailing party after Rule 68 offer was rejected and case went to trial); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 527 (10th Cir. 1992) (Rule 68 offer for sum certain not mentioning prejudgment interest was deemed to include prejudgment interest).

[83] 378 F.3d 561 (6th Cir. 2004).

[84] 199 F.3d 390 (7th Cir. 1999).

there is no ambiguity in an offer that encompasses relief on all counts. A subsequent application for fees was not necessarily evidence of something other than acceptance. Judge Posner stated that:

> Granted, the contract-law analogy is just that, an analogy, for the reason stated earlier: the consequences of rejecting a Rule 68 offer are more serious than those of rejecting an ordinary contract offer. But the appropriate adjustment is to insist that the Rule 68 offer be completely unambiguous, not that it use the *magic words* "attorneys' fees."[85]

In so holding, the Seventh Circuit joins the Sixth and Eleventh Circuits in eschewing the "magic words" approach to interpreting offers of judgment and their acceptances.[86]

The *Nordby* Court also expressly disagreed with the Eighth Circuit holding in *Stewart v. Professional Computer Centers, Inc*.[87] There, the plaintiff was offered judgment "on any or all counts." When plaintiff accepted the offer, she also stated that she would seek attorney's fees as part of her costs in accordance with Fed. R. Civ. P. 54. The district court thereafter granted plaintiff an award of fees. Applying principles of contract law, the Eighth Circuit determined that the plaintiff's acceptance, with its cavil concerning attorney's fees, did not evidence an objective manifestation of mutual assent. Because the acceptance was not valid, the Eighth Circuit concluded that the district court's award of fees should be reversed and remanded with instructions to grant relief from the judgment. The "contract principles" or

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[85] *Id* at 392 (Emphasis added).

[86] *See Arencibia v. Miami Shoes, Inc.*, 113 F.3d 1212 (11th Cir. 1997) (Plaintiff's suit under the Fair Labor Standards Act where attorney's fees were sought were included in offer of judgment that was silent as to attorney's fees and costs and district court could not reserve jurisdiction to award attorney's fees.).

[87] 148 F.3d 937 (8th Cir. 1998).

"magic words" approach is also favored by the Ninth Circuit.[88]

This Court is troubled by the "magic words" approach because it seems to offer plaintiffs an opportunity to manipulate, as Warren may have done, the Rule 68 process. Warren unambiguously accepted the MC Offer, but asserted "by operation of Rule," its entitlement to attorney's fees and stated it would apply for them. Thus, to the extent there is ambiguity in the offer and acceptance, it is Warren that introduced the ambiguity by accepting the offer, but also demanding attorney's fees. And, even if Warren's response to MC's Offer was ambiguous, the existence of the ambiguity does not void the agreement; instead, it allows the Court to consider parol evidence to determine the actual intentions of the parties.

Even applying a strict contract analysis to these facts and considering parol evidence, the Court would still be convinced that Warren intended to accept a $40,000 offer of judgment from Mid Continent. There is ample testimony in the record to support the finding that Mid Continent's previous offer in March, 2004, was less than $16,000. This offer was predicated on Mid Continent's understanding and interpretation of the Oklahoma public works statute that a person furnishing materials for a public works project only has a lienable claim as to those items "used or consumed" in the project itself. Mid Continent was only able to satisfy itself that parts invoiced for $16,000 of the $124,000 claimed by Warren could be attributed to specific jobs and were used or consumed in them. In addition, Mid Continent's spreadsheet which matches up each Warren invoice with a job or other disposition of the parts sold, reflects the existence of a $7,000 credit in favor of Bemis.[89] Finally, a good many of the parts sold by Warren were delivered

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[88] *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830 (9th Cir. 1997) (Offer of judgment for specific sum together with costs, but is silent as to attorney fees, is ambiguous and does not preclude plaintiff, after accepting offer, from seeking fees under federal Truth in Lending Act statute.).

[89] *See* Ex. NN.

not to job sites but rather to lockboxes strategically placed around Oklahoma where contractors could pick up their parts. Lerner testified that, in his analysis for Mid Continent, he gave Warren credit for lockbox parts as well as parts delivered to "shop" – parts purchased by Bemis to be held as reserve inventory against future breakdowns. The Court finds credible Lerner's testimony that the difference between the initial $16,000 and the later $40,000 offered was intended to pay accrued fees and costs.

Mid Continent issued its offer on December 13, 2004. There is no mention of Warren's receipt of the MC Offer in the Mullinix Firm's time records until December 15.[90] On that day, it appears that attorney "TMS" spent first 6.2 hours, then 8.4 hours researching the law concerning offers of judgment. Ogden spent 2.75 hours in the same effort. On December 16, Ogden's time record shows "Receipt of. . . offer to confess judgment" with a billing of 0.2 hours.[91] On December 17, various lawyers spent some 7.9 hours researching the law on offers of judgment and attorney's fees. On December 19, Wantland billed some 2.3 hours in the same endeavor. On December 21, Wantland drafted a letter to all counsel regarding the offers of judgment after which attorney "TMS" undertook a 8.2 hour effort to research and draft Warren's Motion to Establish Post-Acceptance Procedure.[92] December 22 featured over 13 hours of billing on the offer of judgment, followed by 10 more hours on December 23, 2.3 hours on Christmas Eve and another 2.0 hours on December 26.[93] Nowhere in this concerted effort to deal with Mid Continent's three-line offer of

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[90] Ex. 1, p. 4607.

[91] Ex. 1, p. 4608. All of these entries have been redacted from Warren's attorney's fees request.

[92] Ex. 1, p. 4609.

[93] Ex. 1, p. 4609-10.

judgment is there a phone call or letter to Mid Continent's counsel. Ogden admitted at trial that he "should have called [Lerner or Bauer]." This suggests to the Court that Warren was in no doubt as to what MC's Offer meant. If the offer had been ambiguous, Warren's counsel could easily have confirmed its meaning with Mid Continent's counsel and simply failed to do so. Instead, Warren chose to accept the MC Offer and then expend over fifty attorney hours on finding a way to recover its attorney's fees. Indeed, in Ogden's letter to counsel dated December 21 (before the Post-Acceptance Procedure Motion was filed), Ogden states unequivocally that Warren has accepted the offers of both Mid Continent and Bemis.[94]

The Court also notes that after receiving the December 13 MC Offer, Warren continued to prepare its summary judgment motion and filed the same on December 20, the same day its notice and acceptance of the MC Offer was filed.[95]

From all of this, the Court concludes that Warren had every intention of accepting the MC Offer as made, but also of attempting to enhance its recovery by seeking fees later. The fact that no Warren lawyer made any inquiry of Mid Continent counsel about the "meaning" of the MC Offer and that Warren's counsel immediately undertook the fifty hour effort described above belies Ogden's testimony that he did not know what Mid Continent was doing when they offered $40,000. If Warren did not wish to accept $40,000, a simple one line pleading rejecting the offer would have been sufficient. Warren's activities do not amount to a "counter-offer" and this Court finds Warren's acceptance to be unequivocal and binding.

B. Rule 68 and Attorneys' Fees as to Bemis Offer

The terms and language of the Bemis Offer differ from the MC Offer but the Court concludes that

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[94] Ex. AAA.

[95] Dkt. 78 and 79.

a similar result must obtain. The debtor offered Warren the allowance of an unsecured, non-priority claim in the full amount of Warren's proof of claim, $124,835.53, and Warren's pro-rata recovery thereon. Warren's proof of claim was exclusive of interest, attorney's fees and costs. This is the most that Warren could have recovered in Bemis's bankruptcy as a general unsecured creditor.

There are additional compelling factual and legal reasons to hold that Warren is not entitled to attorney's fees upon its acceptance of Bemis's Offer. First, there is the unimpeached testimony of Ms. Saidian that Wantland told her he understood the offer to allow Warren's claim in the Bemis bankruptcy did not include attorney's fees. Second, Bemis had been in bankruptcy more than two years when it made the offer to Warren. Despite Warren's repeated assertion that its claim was something other than a general unsecured claim, there is nothing in the record that would support such a legal conclusion. The attorney's fees requested by Warren against Bemis began accruing on October 15, 2002, the date of the first time entry by Ogden. The Bemis bankruptcy petition was filed on September 27, 2002. There is simply no legal basis for a creditor to tack post-petition attorney's fees onto a pre-petition claim unless one, and only one condition exists: the creditor must hold an over-secured claim.[96] In that event, the creditor is entitled, where its contract so provides, to receive attorneys fees and interest in addition to its claim. Here, Warren has no "collateral." Indeed, because Warren's claims arise out of bonded public works projects, Warren could not take a lien in the underlying property. If there are Warren documents that would support the attachment and perfection of a security interest in the parts sold by Warren to Bemis, those documents have not been placed in evidence. What is in evidence are Warren's "responses" to Bemis's First Requests for Admission,

[96] 11 U.S.C. § 506(b).

in which Warren responds to a Bemis request that Warren admit it is not a secured creditor:

> Admitted only that a security agreement was not executed by Bemis for parts installed and service performed on Bemis equipment during the year 2002 . . . .[97]

Without a secured claim, Warren had no right to any post-petition "enhancements" under § 506(b). Because the attorney's fees it demands are for services rendered post-petition, Warren cannot recover them as part of its allowed claim under 11 U.S.C. § 502(b) which states, in part, that the Court shall "determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition . . . ." As of the date of filing, Warren had incurred none of the fees requested and, accordingly, is not entitled to have them allowed as part of its unsecured claim.

The Bemis Offer did not include costs and attorney's fees as a matter of law, and as supported by the parol evidence adduced at trial. Wantland confirmed this fact before Warren communicated its unequivocal acceptance of the Bemis Offer.

C. Warren's Request for Fees

Even if Warren were legally entitled to costs and attorney's fees in addition to what was contained in the offers, its request would be denied for several reasons. As a preliminary matter, the Court observes that Warren's attorney's fees and costs would, in any event, be limited by Rule 68 itself. The cutoff date for accrued costs (and attorney fees) is the date of the offer of judgment.[98]

The Court's review of Warren's fee request is made more difficult by the fact that Warren has not used the

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[97] Ex. KK, Request No. 9, p.5.

[98] *See Sussman v. Patterson*, 108 F.3d 1206 (10th Cir. 1997). Thus, Warren would not be entitled to costs and attorney's fees accruing after December 13, 2004 (MC Offer) and December 15, 2004 (Bemis Offer). None of Warren's exhibits purport to show the costs and attorney's fees accrued as of these dates and in fact, Warren seeks recovery of post-judgment attorney's fees and costs.

appropriate time period. As the fee applicant, Warren has the burden of establishing its entitlement to an award and the reasonableness of its fees and costs.[99]

1. D. Kan. R. 54.2

The Rules of Practice for the United States District Court for the District of Kansas apply in this Court unless they are expressly modified by local bankruptcy rule. When Ogden and Wantland were admitted to practice before this Court pro hac vice, they subjected themselves to compliance with these rules. Notwithstanding that, neither one complied with D. Kan. R. 54.2 which expressly provides that "[t]he court will not consider a motion to award statutory attorneys fees made pursuant to Fed. R. Civ. P. 54(d)(2) until the moving part shall have first advised the court in writing that after consultation promptly initiated by the moving party, the parties have been unable to reach an agreement with regard to the fee award." Nowhere in the pleadings does this Court find such written advice. That alone is sufficient basis to deny the attorney's fees requested by Warren.

2. Poor Documentation and Duplicative Billing

Warren's fee documentation demonstrates billing practices that border on abusive at worst and evidence poor "billing judgment" at best. The documents themselves are of questionable value because of the numerous batched entries,[100] inconsistencies, excessive time for routine tasks, apparent unproductive time, and duplications pointed up previously in this Memorandum Opinion. Moreover, applying the familiar standards that govern the allowance of attorneys fees, there is simply no justification for what the Mullinix

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[99] *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1201 (10th Cir. 1986), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983).

[100] *See In re Recycling Industries, Inc.*, 243 B.R. 396, 406 (Bankr. D. Colo. 2000) (discussing reasons that practice of "lumping" is universally disapproved by bankruptcy courts).

Firm charged, particularly in relation to the result its client, Warren, agreed to accept.

The Mullinix Firm's monthly statements betray the lawyers' apparent conclusion that because this case in some way implicated a fee-shifting statute, economical and efficient prosecution of this case was no longer necessary. This Court simply does not believe that a business client of even passing sophistication would unquestioningly pay lawyers' bills like these. Certainly this Court is required to apply at least that level of scrutiny to the instant application.

The lodestar formulation (reasonable hours multiplied by reasonable hourly rates) is the normal starting point for determining the reasonableness of a statutory fee award.[101] The number of hours spent by the Mullinix Firm over the approximate two year period this adversary proceeding has been pending are excessive and unproductive. An inordinate amount of time was devoted to preparation for routine scheduling conferences and repeated extensions of scheduling deadlines. Indeed, very little time was spent on substantive legal work during the entire first year of the adversary. Little, if any, discovery activity is evident from the monthly billings. After Mid Continent communicated its initial settlement offer in March, 2004, there was a lengthy delay before the Mullinix Firm zeroed in on the key legal issue raised by Mid Continent. The monthly statements suggest that it was not until the Fall of 2004 that the Mullinix Firm focused its discovery and research efforts on the core "used or consumed" legal issue. Indeed, the Court questions whether the Mullinix Firm has not devoted more time and energy post-offer to the recoverability of attorney's fees than it has to the merits of Warren's claim against the bond.

As to the reasonableness of the hourly rates, the Court has previously noted the inconsistencies in

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[101] *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453-54 (10th Cir. 1988).

the rates between the Mullinix Firm's billing statements and the affidavits and trial exhibits submitted in support of its application. The Court is also hamstrung by the lack of any evidence presented regarding the reasonableness of the hourly rates. And as noted previously, the Court discounted the proffered expert testimony of local attorney Thomas J. Lasater as to the reasonableness of the total fee request.[102]

The Court concludes that the lodestar fee sought by the Mullinix Firm here far exceeds the bounds of reasonableness. Nothwithstanding this conclusion, the Court adheres to its duty to further evaluate the requested fees. In *Ramos v. Lamm*,[103] the Tenth Circuit Court of appeals adopted the twelve *Johnson*[104] factors to gauge the "reasonableness" of a fee request and whether any adjustment should be made to the lodestar fee.[105] The Court has reviewed the Mullinix Firm's fee request in light of those *Johnson* factors not subsumed in the lodestar analysis that are pertinent here: (1) the novelty and difficulty of the issues; (2) the requisite skill; (3) preclusion of other employment; (4) time limitations; (5) amount involved and results obtained; (6) experience, reputation and ability of attorneys; (7) undesirability of case; and (8) the nature and length of the professional relationship with the client. With these factors and the lodestar formulation

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[102] *See Ramos v. Lamm*, 713 F.2d 546, 555 n. 6 (10th Cir. 1983) (Noting court disdain for the practice of presenting experts to testify as to the total fee that should be awarded in a given case and finding such practice to be unhelpful.)

[103] 713 F.2d 546 (10th Cir. 1983), *overruled on other grounds by Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed. 2d 585 (1987).

[104] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

[105] The lodestar formulation itself incorporates a number of the *Johnson* factors (e.g. the time and labor required) and the Tenth Circuit has concluded that the *Johnson* factors are appropriately used to determine the reasonableness of attorney's fees in bankruptcy cases. *See In re Permian Anchor Services, Inc.*, 649 F.2d 763, 768 (10th Cir. 1981).

in mind, the Court makes the following comments.

Warren argued at trial and in its papers that its fees were necessitated by Mid Continent's legal analysis of its claim. Stated briefly, Warren believes that the Oklahoma public works statute entitles it to recover from the bond any indebtedness owed Warren and incurred by Bemis in the course of a bonded project. Mid Continent differs, asserting that notwithstanding the language of the public works statute, the only bonded indebtedness is that which Bemis incurred in acquiring materials or parts that were "used or consumed" in the particular bonded project. Both Ogden and Lerner testified as to their view of the Oklahoma case law in this connection.

Certainly the collation and attribution of nearly 400 invoices to various job sites is laborious. It appears, however, that most of this work was done by Mid Continent. An exhibit that attributes invoices to particular jobs where possible, was prepared by Mike Dill, one of Mid Continent's vice presidents, from documents discovered from Warren.[106] Warren hired a former employee of Bemis, Debbie Smith, to perform a similar analysis. There is some reference in the statements of the Mullinix Firm to lawyer involvement in the collation process, but by no means does this activity make up more than a fraction of the Mullinix Firm's work. As noted above, little time was spent by the Warren lawyers communicating with their counterparts for Mid Continent and Bemis. Whether or not this Court agrees that the "used or consumed" standard is the applicable view of Oklahoma bond law, much of the time incurred by the Mullinix Firm seems to have been unnecessary. If the "used or consumed" standard was the stumbling block in the case, an early motion for summary judgment based on Debbie Smith's work might have afforded this Court an opportunity

[106] Ex. NN.

to rule on the legal merits of that issue. Instead, the parties repeatedly sought to extend discovery and no summary judgment motion was filed until the day Warren accepted the Mid Continent and Bemis offers.

Warren asserts that Bemis should be jointly liable for its attorneys fees. Setting aside the fact that unsecured claimants are not entitled to post-petition fees, Warren pursued other strategies against Bemis that in hindsight were simply wrong-headed. Warren had to file two proofs of claim and amend its complaint before accurately setting out the predicate for its claim. Over a year before the Bemis Offer was made, Bemis informally offered Warren the allowance of an unsecured claim (all that it ultimately recovered) and Warren refused. Although Ogden denied receiving this offer, Saidian's December 20, 2003 letter contains it.[107] Apparently, Warren never responded. By mischaracterizing the nature of its claim as unpaid rentals and repeatedly asserting (apparently without any justification) that it held a secured claim, Warren invited Bemis's objections. It then filed a separate demand that all other unsecured claims be equitably subordinated to its claim, but failed, as Ogden admitted on the stand, to name as defendants or serve any of the other creditors whose interests were at stake.

There is no reason that Warren should have included Bemis in this adversary proceeding at all. It is a commonplace of bankruptcy law that bonds or other forms of assurance of a debtor's performance are rarely the property of the bankruptcy estate.[108] Warren did not need to file an adversary proceeding to

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[107] Ex. R ("Please understand that given that we have agreed that you will have an unsecured claim in the bankruptcy less any amounts you receive from the bond [sic] company, the debtor is not particularly interested in participating in voluminous depositions, as it does create a cost for the estate.")

[108] *See* William L. Norton, Jr., 2 BANKRUPTCY LAW AND PRACTICE 2D, § 36:7, p. 36-31 (2004) ("Nor is the automatic stay violated when a surety makes payment on the debtor's behalf, because the surety's duty to pay is unaffected by the debtor's bankruptcy."); *Globe Const. Co. v. Oklahoma City Housing*, 571 F.2d 1140 (10th Cir. 1978), *cert. denied* 439 U.S. 835 (1978) (general contractor's bankruptcy did not bar claims against surety that had issued performance bond to

secure that finding. Warren's proof of claim served the same purpose as a complaint against Bemis in asserting what Warren was entitled to recover from the Bemis estate. And, as noted, Warren's half-baked equitable subordination effort was not even brought against the proper parties.

Finally, Warren mounted an unnecessary and expensive effort to convince Bemis to prosecute a bad faith refusal to pay insurance claim against Mid Continent "on behalf of the estate."[109] While this may have had some tactical value to Warren, the Court cannot see how this claim would have benefitted the estate. Instead, the Court views this sally as merely another way for Warren's counsel to take advantage of a fee-shifting statute to maximize their fees at the expense of Mid Continent and the Bemis estate.

The Court is convinced that the time and labor required was substantially less than the Mullinix Firm expended in this case. The questions at hand were neither novel nor difficult, except that Warren's litigation approach vastly complicated the prosecution and adjudication of this case. Similarly, had this case been efficiently handled, it would have required no extraordinary legal talent. Time limitations were not an issue for most of the case's duration. Ogden and Wantland appear to be competent lawyers and scriveners, although their judgment in the pursuit of many facets of this matter is open to question. There was certainly nothing "undesirable" about the case and Warren was a long-standing client of Ogden's. All of these

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general contractor; surety bonds not property of estate); *In re Dunbar*, 235 B.R. 465 (9th Cir. BAP 1999) (contractor's bond was not property of estate); *In re Lockard* 884 F.2d 1171 (9th Cir. 1989) (contractor's license bond was not property of estate); *In re McLean Trucking Co.*, 74 B.R. 820 (Bankr. W.D.N.C. 1987) (surety bonds not property of estate).

[109] KAN. STAT. ANN. § 40-256 (2000) establishes a cause of action against insurers who fail, without just cause or excuse, to pay valid insurance claims. The independent intentional tort of bad faith is not recognized in Kansas (*Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914, 611 P.2d 149 (1980)) but is available under Oklahoma law (*Christian v. American Home Assur. Co.*, 577 P.2d 899 (Okla. 1977)) and may be applied to surety companies (*Worldlogics Corp. v. Chatham Reinsurance Corp.*, 108 P.3d 5 (Okla. Civ. App. 2004)).

conclusions cut against the extraordinarily high fees requested by Warren.

Perhaps the most damning factor is that of the amount involved and results obtained.[110] Here, Warren will recover $40,000 from Mid Continent and, when the final distribution is made, some small fraction of its claim against Bemis. The evidence suggests that distribution may not reach $10,000 because of the scarcity of resources in the Bemis estate. Thus, Warren will receive less than half of its original demand and an even smaller proportion of the fees it claims. Assuming Warren were legally entitled to a fee award in addition to the judgments (an argument this Court has rejected), this Court could not possibly countenance an award of fees in excess of $135,000, especially when the case did not reach trial.

The Court accordingly concludes that Warren is not entitled to recover any costs or fees, the same having been unambiguously provided for in the Mid Continent Offer and excluded by the Bemis Offer. Warren accepted both offers. In the alternative, the Court finds that Warren failed to demonstrate the reasonableness or necessity of incurring fees over $135,000 in pursuit of a $124,835 claim and upon which it ultimately accepted payment of $40,000 and the allowance of an unsecured claim in the Bemis case. Because of the inconsistencies in the Mullinix Firm's statements, summaries, and Ogden's testimony, Warren did not meet its burden of proving that its fee request is reasonable, assuming it was entitled to receive one in these circumstances. Accordingly, Warren's Motion to Establish Post-Acceptance Procedure, Motion for Fees and Costs, and Motions to Amend Judgment are DENIED. Bemis and Mid Continent will present the appropriate orders.

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[110] *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983) (the most critical factor is the degree of success obtained; lodestar fees may be an excessive amount where only partial or limited success is achieved)

NOTICE TO COUNSEL

Counsel are reminded that Motions to Alter or Amend this Order must be filed within ten days of this Order's being entered on the docket under Fed. R. Civ. P. 59(e) as it is applied to bankruptcy by Fed. R. Bankr. P. 9023. Motions to alter and amend judgment serve a limited purpose. Such motions are only appropriate when a court has misapprehended the facts, a party's position, or controlling law.[111] It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.[112] Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law; (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.[113] Any such motion filed in this matter **shall be limited to 10 pages in length, *inclusive* of any attachment, cover page, and appropriate certificates of service.**

IT IS SO ORDERED.

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[111] *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

[112] *Id. See also, Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991).

[113] *Servants*, 204 F. 3d at 1012; *Brumark Corp. v. Samson Resources, Corp.*, 57 F.3d 941, 948 (10th Cir. 1995).