IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS DIVISION TWELVE

WESTAR ENERGY, INC.,

Plaintiff,

v. Case No. 05-C-1267

DAVID C. WITTIG,

Defendant.

MEMORANDUM DECISION AND ORDER

This case comes before the Court on various motions filed by the parties. On August 25, 2008, the Plaintiff, Westar Energy, Inc., filed a "Motion to Revise and Clarify July 15, 2008 Order and Vacate Order to Extent Injunctive Relief is Given or, Alternatively, to Determine Bond or Stay Any Injunctive Portion of July 15, 2008 Order." The Plaintiff also filed a "Motion for Partial Summary Judgment on Liability as to Count II - Breach of Contract" on August 25, 2008, and a "Motion for Partial Summary Judgment on Defendant Wittig's Affirmative Defenses of Release and Estoppel" on October 9, 2008. In addition, the Defendant, David C. Wittig, filed a "Motion to Dismiss Count II of Plaintiff's Amended Petition" on August 25, 2008. During a telephone status conference held on January 22, 2009, counsel for the parties certified that all of the pending motions would be ready for ruling following the submission of supplemental briefs on February 6, 2009. Thus, since the issues presented have now been fully briefed, the Court deems each of the motions to be submitted for decision.

I. PROCEDURAL HISTORY

This action was commenced by Westar Energy, Inc., on October 5, 2005, and an Amended Petition was filed on December 8, 2006. In the Amended Petition, the Plaintiff sought a declaratory judgment pursuant to K.S.A. 60-1701, *et seq.* and asserted a breach of contract claim against the Defendant. The Plaintiff's claims arise out of the corporation's agreement to advance the attorney fees and expenses "reasonably incurred" by David C. Wittig in the criminal case of *United States v. Wittig and Lake*, 03-40142-JAR.

Prior to the filing of this action, Mr. Wittig had been found guilty in federal court of multiple criminal counts relating to his former employment as the President, Chief Executive Officer, and Chairman of the Board of Directors of Westar Energy, Inc. However, on January 5, 2007, Mr. Wittig's criminal convictions were reversed in the case of *United States v. Wittig and Lake*, 472 F.3d 1247 (10th Cir. 2007). Although the Tenth Circuit held that several counts against Mr. Wittig could not be retried, the criminal case was remanded to the United States District Court for the District of Kansas on the counts of conspiracy, circumvention, and forfeiture.¹

In addition to challenging the reasonableness of the attorney fees and expenses which have not yet been paid, Westar claims that the fees and expenses which it has previously advanced on Mr. Wittig's behalf exceed an amount which is reasonable pursuant to Kansas law. In response, Mr. Wittig contends that the attorney fees and expenses for which he seeks

¹ At this point, two (2) jury trials have been held in the underlying criminal case and the date for a third jury trial sought by the United States has not been set pending the outcome of an appeal to the Tenth Circuit.

advancement are reasonable and that they should be paid by Westar. Moreover, Mr. Wittig contends that Westar's breach of contract claim is premature until the underlying criminal case has been finally resolved.

It should be noted that David Wittig has not filed a counterclaim in this case, and the deadline for amending the pleadings in this action has expired. Moreover, Mr. Wittig has not filed a petition for further relief in an attempt to enforce the declaratory judgment entered by this Court on July 15, 2008. He has, however, filed a motion seeking dismissal of the breach of contract claim set forth in Count II of the Amended Petition filed by Westar Energy, Inc.²

II. SUMMARY OF COURT'S PREVIOUS DECISION

On July 15, 2008, this Court issued a 53-page Memorandum Decision and Order addressing the Special Master's Report as well as Westar's request for a declaratory judgment. After reviewing the agreement of the parties in light of the applicable law, the Court issued a declaratory judgment regarding the reasonableness of the unpaid attorney fees and expenses incurred by David Wittig in the underlying criminal action from February 1, 2005 to June 30, 2006. However, the Court found that it would be premature to address the merits of Westar's claims for recoupment and/or setoff since those issues should be resolved, if necessary, after the underlying criminal case is finally concluded.

² David Wittig has filed a separate action against Westar which is also assigned to Division 12. In Case No. 08-C-340, Mr. Wittig seeks to require the corporation to advance unpaid legal fees and expenses incurred in the underlying criminal case for the professional services rendered by Paula Junghans after she became affiliated with Zuckerman Spaeder, LLP. There are also several motions pending in Case No. 08-C-340 which will be addressed in a separate Memorandum Decision and Order.

In its previous Memorandum Decision and Order, the Court held that the interpretation of the contractual relationship between Westar and David Wittig is controlled by Kansas law. The Court found as a matter of law that the Kansas Declaratory Judgment Act, K.S.A. 60-1701 *et seq.*, grants district courts the authority to enter declarations which "have the full force and effect of a final judgment." K.S.A. 60-1701. The Court further found that those "having an interest under a . . . written contract or other writings constituting a contract . . . may seek a determination of any question of construction . . . arising under that . . . document or agreement and may obtain a declaration of rights, status or other legal relations thereunder." K.S.A. 60-1704. Thus, the Court concluded that the issue of the reasonableness of interim advancements of unpaid attorney fees and expenses during the pendency of the underlying criminal case was an appropriate issue for resolution in a declaratory judgment action.

Turning to the merits of Westar's claims, the Court recognized in its previous Memorandum Decision and Order that "[i]n deciding the reasonableness of attorney fees, the eight factors set forth in Rule 1.5(a) of the Kansas Rules of Professional Conduct should be considered." *Ortiz v. Biscanin,* 34 Kan. App. 2d 445, Syl. 17, 101 P.3d 253 (2004). Furthermore, the Court noted that "[t]he standards used in determining whether fees have been 'reasonably incurred' are similar to the standards used by courts in awarding fees." *Merritt-Chapman & Scott Corp. v. Wolfson,* 321 A.2d 138, 143 (Del. Supr. 1974). In addition, it was found that although the ultimate determination of reasonableness must be made by the Court, it was appropriate to look to a Special Master who has expertise in the

representation of clients in complex white collar criminal cases for guidance regarding the hours billed and the services performed in the underlying criminal case.

In its previous decision, the Court also reviewed the law relating to Advancement and Indemnification.³ In doing so, the Court found that "[a]dvancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant ongoing expenses inevitably involved with investigation and legal proceedings." *Homestore, Inc. v. Tafeen,* 888 A.2d 204, 211-12 (Del. 2005). The Court also found that although indemnification and advancement are related legal concepts, "[t]he right to advancement is not dependent on the right to indemnification." *Homestore, Inc.,* 888 A.2d at 212, citing *Citadel Holding Corp. v. Roven,* 603 A.2d 818, 822 (Del. 1992).

In its Memorandum Decision and Order, the Court next discussed K.S.A. 17-6305, which provides the statutory authority for both advancement and indemnification. The Court noted that "[t]he 'right to receive the costs of defense in advance . . . is separate and distinct from any right of indemnification they may later be able to establish." Kansas Corporation Law & Practice, § 7.58.3 (Kansas Bar Association 1998), quoting *Ridder v. City Fed. Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995). In addition, the Court also noted that K.S.A. 17-6305 "provides that any advance must be conditioned 'upon receipt of an undertaking by or on

³ The Court looked to Delaware cases for guidance since the Kansas Corporation Code was based on Delaware law. See *Kansas Heart Hospital, LLC v. Ibeis*, 286 Kan. 183, 197, 184 P.3d 866 (2008). Moreover, it has been recognized that the law of advancement is "rather a Delaware specialty." *Int'l Airport Centers, LLC v. Citrin*, 455 F.3d 749, 750 (7th Cir. 2006). As noted in the Court's previous Memorandum Decision and Order, K.S.A. 17-6305 is based on 8 Del. C. § 145.

behalf of the director or officer to repay such amount if it is ultimately determined that the director or officer is not entitled to be indemnified by the corporation. . . . " Id.

In its previous decision, this Court looked to Justice Joseph T. Walsh's opinion in the *Roven* case as support for the propositions that the enforcement of a contractual advancement provision is conditioned on reasonableness and that the parties in an advancement action "retain their rights to an 'ultimate determination' of their responsibilities" until an indemnification action is commenced following the conclusion of the underlying case. *Roven*, 603 A.2d at p.822, fn.4. The Court noted that "a balance of fairness and efficiency concerns would seem to counsel deferring fights about the details until a final indemnification proceeding, by which time the details may not even matter. . . ." *Fasciana v. Electronic Data Systems Corp.*, 829 A. 2d 160, 177 (Del. Ch. 2005). Furthermore, the Court discussed the case of *Kaung v. Cole National Corporation*, 884 A. 2d 500 (Del. 2005), in which the Delaware Supreme Court held that "an advancement proceeding is . . . not appropriate for litigating indemnification or recoupment." 884 A.2d at 510.

In reviewing the contractual advancement provision voluntarily entered into by Westar and David Wittig, the Court found that the corporation's obligation was limited to advancing those legal fees and expenses which were "reasonably incurred" in the defense of the underlying criminal action. The Court then reviewed the unpaid legal fees and expenses incurred by Mr. Wittig in light of the factors set forth in KRPC 1.5(a). In doing so, the Court found that no single factor is controlling. Rather, the Court concluded that all eight (8)

factors must be considered based on the unique circumstances presented in a particular case.⁴

After applying the factors set forth in KRPC 1.5(a) to the evidence presented regarding the unpaid legal fees and expenses incurred on behalf of David Wittig between February 1, 2005 and June 30, 2006, the Court declared that the full amount of the unpaid attorney fees billed by the Berkowitz Oliver law firm were "reasonably incurred" and should be advanced by Westar without undue delay. The Court also declared that a portion of the unpaid attorney fees billed by the Piper Rudnick law firm were "reasonably incurred" and should be advanced by Westar without undue delay. In addition, the Court declared that a portion of the unpaid expenses billed by the two (2) law firms representing Mr. Wittig in the underlying criminal case were "reasonably incurred" and should be advanced by Westar without undue delay.

Recognizing that there were still remaining disputes between the parties, including Westar's breach of contract claim, the Court directed Westar and Mr. Wittig to make a good faith attempt to resolve their disagreements based on the findings and conclusions set forth in the Memorandum Decision and Order entered on July 15, 2008. Subsequently, the parties participated in Mediation with the Honorable Terry L. Bullock. Unfortunately, they were unable to reach an amicable settlement and it is now necessary for the Court to rule on the pending motions.

⁴It should be noted that although "locality" was one of the factors considered by the Court, hourly fees were approved for several of the Piper Rudnick attorneys which were slightly higher than the hourly rates for similar services in the Kansas City market during the relevant time period.

III. REVIEW OF TENTH CIRCUIT'S OPINION IN WESTAR v. LAKE

On January 21, 2009, the United States Court of Appeals for the Tenth Circuit rendered an opinion in the case of *Westar Energy, Inc. v. Lake,* 552 F.3d 1215 (10th Cir. 2009). As the parties are aware, the *Lake* case involves a claim for the advancement of unpaid legal fees and expenses incurred by Mr. Wittig's co-defendant in the underlying criminal case – Douglas Lake.⁵ Similar to the present case, Mr. Lake sought advancement under the terms of Westar's Articles of Incorporation and pursuant to the terms of an Undertaking which he had executed. 552 F.3d at 1218-19. Thus, due to the similarities between the two (2) cases, the Court finds the Tenth Circuit's opinion in *Westar Energy, Inc. v. Lake* to be instructive on several of the issues presented in this action.

As this Court had previously found, the Tenth Circuit recognized in *Lake* that the "right to advancement is a contractual right originating in Westar's Articles of Incorporation." 552 F.3d at 1225. The Tenth Circuit also noted that "[a]dvancement is a distinct right complementary to the right of indemnification." <u>Id.</u>, citing *Homestore*, *Inc.*, 888 A.2d at 212 (Del. 2005). Like this Court, the Tenth Circuit found that "the Kansas Corporate Code was modeled after the Delaware Corporation Code and the Kansas Supreme Court relies upon Delaware case law as persuasive authority in interpreting rights under the code." <u>Id.</u>, fn. 8, citing *Arctic Fin. Corp. v. OTR Exp., Inc.*, 272 Kan. 1326, 38 P. 3d 701, 703 (2002).

⁵As in the present action, "Westar filed [a] declaratory judgment action . . . seeking a determination of its obligation to advance." 552 F.3d at 1220. Unlike the present action, however, "Lake brought a counterclaim for breach of contract." Id.

Similar to the present action, Westar did "not dispute that its contract with Lake requires it to advance attorney fees in some amount." 552 F.3d at 1227. Rather, the corporation contested the reasonableness of the fees and expenses which were incurred in defending the underlying criminal case. <u>Id</u>. The Tenth Circuit found that "Westar unquestionably has a legal duty to pay some advancements" on behalf of Mr. Lake under the terms of the Articles of Incorporation. <u>Id</u>. However, the *Lake* court also found that "with respect to the difference between the amount Westar believes in good faith it owes and the amount it was compelled to pay, it cannot be said at this stage of the litigation that Westar has a legal duty to pay." Id.

Like this Court, the Tenth Circuit found that "the reasonableness factors of Rule 1.5 of the Kansas Rules of Professional Conduct" are applicable "both when statutes allow for the recovery of reasonable attorneys' fees and when a contract provides for the recovery of attorney fees." 552 F.3d at 1228. The Tenth Circuit held that although "local rates are one factor Kansas uses to determine the reasonableness of attorney fees under Rule 1.5," the trial court "did not abuse its discretion in refusing to foreclose the award of out-of-state rates." 552 F.3d at 1229.6

The Tenth Circuit further held that "once advances have been made, they cannot be recouped until indemnification is adjudicated." <u>Id.</u>, citing *Kaung v. Cole Nat'l Corp.*, 884

⁶ It is important to note that unlike this Court, the Tenth Circuit was not reviewing the evidence presented in light of the factors set forth in KRPC 1.5. Rather, the Tenth Circuit was reviewing the decision of the Honorable Julie A. Robinson under an abuse of discretion standard. Ultimately, the case was remanded to Judge Robinson with instructions "to assign the burden of proving the reasonableness of requests for advances to Lake." 552 F.3d at 1230.

A.2d 500, 510 (Del. 2005). The *Lake* court also held that "[i]f corporations cannot make recoupment claims until the indemnification stage, they should not be permitted to achieve the same result by setting off current payments against past ones." <u>Id</u>. Therefore, consistent with the conclusion reached by this Court on the same issue, the Tenth Circuit concluded that "[t]o the extent it believes it has already advanced fees sufficient to cover the entirety of Lake's legal defense, Westar must save that argument for the indemnity proceeding." <u>Id</u>.

IV. LEGAL ANALYSIS AND CONCLUSIONS

A. Motion to Revise and Clarify

In its "Motion to Revise and Clarify July 15, 2008 Order and to Vacate Order to Extent Injunctive Relief is Given, or Alternatively, to Determine Bond or Staying Any Injunctive Portion of July 15, 2008 Order," Westar seeks to have this Court determine the reasonableness of the legal fees and expenses which it has previously advanced on behalf of David Wittig. In addition, Westar seeks a clarification regarding whether the Court's previous Memorandum Decision and Order requires the corporation to pay any money to Mr. Wittig and/or his attorneys. Westar also seeks to vacate any portion of the Court's previous Memorandum Decision and Order which may require it to pay money to Mr. Wittig and/or his attorneys.

In response to the Motion to Revise and Clarify, Mr. Wittig contends that Westar is not entitled to a declaratory judgment regarding the attorney fees and expenses which have already been paid since a recoupment or setoff claim is premature until after the underlying

already been advanced until the underlying criminal case has been finally concluded. Mr. Wittig further contends that the previous decision of this Court should be deemed to require Westar to advance the unpaid legal fees and expenses which were determined to be "reasonably incurred" between February 1, 2005 to June 30, 2006. Moreover, Mr. Wittig contends that neither the posting of a bond nor the granting of a stay is necessary in this case.

1. Requirement to Pay Money

The Court will first address the issue of whether the Memorandum Decision and Order entered on July 15, 2008, requires Westar to pay money to David Wittig and/or his attorneys. The simple answer is, at this point in time, it does not. Unlike the *Lake* case, Mr. Wittig has not asserted a counterclaim in the present action nor has he sought injunctive relief. Other than the filing of Case No. 08-C-340, Mr. Wittig has asserted no formal claim to recover a monetary judgment against Westar.

Furthermore, Kansas law does not grant this Court the power to order further relief based on the declaratory judgment entered on July 15, 2008, in the absence of the filing of an appropriate motion and reasonable notice provided to Westar. See K.S.A. 60-1703. See also *Kansas East Conference v. Bethany Medical Center*, 266 Kan. 366, 382-83, 969 P.2d 1998 (1998). Simply asking for a monetary judgment in a brief is clearly not an appropriate procedure. Thus, as this case currently stands, although the Court has declared certain rights

⁷ Frankly, once it became apparent that the parties could not reach a settlement following the entry of the previous Memorandum Decision and Order on July 15, 2008, the Court anticipated that Mr. Wittig would file a petition seeking further relief pursuant to the provisions of K.S.A. 60-1703. To date, however, no petition for further relief has been filed. Thus, this Court has no authority to order the Plaintiff to pay any money based on the declaratory judgment.

and obligations which the parties have under the terms of the contractual advancement provision, it has not ordered Westar to pay any money nor has it granted an injunction.

2. Issues Appropriate for Determination in this Action

The question of whether to grant declaratory relief is a matter of discretion. See K.S.A. 60-1708 and *Aselco, Inc. v. Hartford Ins. Group,* 28 Kan. App. 2d 839, 844, 21 P.3d 1011 (2001). "Declaratory relief is not to be entertained for the purpose of settling abstract questions, however interesting or important to the public generally. . . ." *In re Estate of Keller,* 273 Kan. 981, 984, 46 P.3d 1135 (2002). Furthermore, absent a "justiciable issue," declaratory relief is usually not an appropriate remedy. *Johnson Co. Sports Authority v. Shanahan,* 210 Kan. 253, 259, 499 P.2d 1090 (1972).

As the Court found in its previous Memorandum Decision and Order, Westar's claims for recoupment and/or setoff relating to fees and expenses previously advanced must wait to be resolved until after the underlying criminal case has been finally concluded. Likewise, as indicated above, the Tenth Circuit found in the *Lake* case that "[i]f corporations cannot make recoupment claims until the indemnification stage, they should not be permitted to achieve the same result by setting off current payments against past ones." 552 F.3d at 1229. Notwithstanding, Westar contends that both this Court and the Tenth Circuit were wrong in refusing to address issues relating to the attorney fees and expenses which it has previously advanced.

⁸ As noted in the Court's previous decision, Westar voluntarily advanced \$3,389,613.14 to Piper Rudnick and \$296,370.12 to Berkowitz Oliver prior to the filing of this lawsuit without seeking a judicial determination of the reasonableness of such legal fees and expenses.

The major focus of Westar's argument is an attempt to distinguish the Delaware Supreme Court's decision in *Kaung v. Cole National Corp.*, 884 A.2d 500 (Del. 2005). As the parties are aware, *Kaung* was cited by this Court, by the Honorable Julie A. Robinson, and by the Tenth Circuit as support for the principle that issues involving fees and expenses previously advanced must be saved until after the underlying criminal case has been concluded. It should be noted, however, that it is not accurate to assert that this Court "based" its conclusion on the *Kaung* case. Although this Court previously found (and continues to find) the *Kaung* decision to be instructive regarding the scope of this proceeding, it is one of several decisions which support the same conclusion.

Westar contends that *Kaung* and the other Delaware cases which limit the scope of the proceedings in actions arising out of a contractual advancement provision are not applicable to the present action because K.S.A. 17-6305 does not contain a provision similar to 8 Del. C. § 145(k). Specifically, Westar argues that the rationale of the Delaware courts for limiting the scope of actions for enforcement of contractual advancement provisions is

⁹Westar contends that since Kansas has no statutory counterpart to § 145(k), there is no reason to look to Delaware case law for guidance regarding the scope of this proceeding arising out of the obligations of the parties to a contractual advancement provision. The first sentence of §145(k) provides "the Court of Chancery has exclusive jurisdiction to hear and determine actions for advancement of expenses or indemnification." Because Kansas does not have a Court of Chancery, it falls upon the District Court to determine questions of both law and equity. The second sentence of §145(k) provides: "The Court of Chancery *may* summarily determine a corporation's obligation to advance expenses (including attorney fees)." (Emphasis added.) As such, this provision permits (but does not require) advancement actions to be handled in a summary fashion. In Kansas, parties *may* also request summary relief in an advancement action pursuant to K.S.A. 60-256 (summary judgment action) and/or K.S.A. 60-257 ("The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar.").

"because an advancement proceeding is a 'summary proceeding' under subsection (k) of the Delaware indemnification statute, Del. Code tit. 8, § 145." *Plaintiff's Supplemental Memorandum*, p. 1. However, a review of Delaware decisions, both prior to and after the enactment of § 145(k), reveals that the limited scope of advancement proceedings is not dependent upon the procedure used to obtain a judicial determination.

One of the primary cases which this Court looked to for guidance in its previous Memorandum Decisions and Order is *Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992). The Delaware Supreme Court's decision in *Roven* is important because it has served as the foundation upon which subsequent case law involving the enforcement of contractual advancement provisions has been built. It is also significant because Justice Joseph T. Walsh wrote the *Roven* decision two (2) years *prior* to the 1994 enactment of 8 Del. C. § 145(k). Like many Delaware cases filed both before and after 8 Del. C. § 145(k) became law, the procedural mechanism used to bring the issue before the trial court in the *Roven* case was a motion for summary judgment. 10

advancement disputes, because 'the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought." *Jackson Walker, L.L.P. v. Spira Footwear, Inc.,* 2008 WL 2487256, at *3 (Del. Ch. June 23, 2008), quoting *Weinstock v. Lazard Debt Recovery GP, L.L.C.,* 2003 WL 21843254 (Del. Ch. Aug. 8, 2003). Other Delaware cases which addressed the obligations of a contractual advancement provision by way of summary judgment prior to the enactment of § 145(k) include *Advanced Mining Systems, Inc. v. Fricke,* 623 A.2d 82 (Del. Ch. 1992); *Salaman v. National Media Corp.,* 1992 WL 808095 (Del. Super. Oct. 8, 1992); and, *Delphi Easter Partners Ltd. Partnership v. Spectacular Partners, Inc.,* 1993 WL 328079 (Del. Ch. Aug. 6, 1993). Thus, because Delaware courts decided advancement disputes presented on motions for summary judgment prior to the enactment of § 145(k), it is logical to conclude that the second sentence of the new provision was a codification of existing law rather than an attempt to change the law.

In *Roven*, the Delaware Supreme Court held: "At the appropriate time in the future, if necessary, the parties may litigate their rights under the indemnification provision of the Agreement." 603 A.2d at 826. In reaching this conclusion, the *Roven* court found that while the underlying case is still pending, it is only appropriate for the parties to seek enforcement of the advancement provision and "to test the reasonableness of any advances demanded." Id. Moreover, the *Roven* court noted that "nothing we say here regarding advances should be construed to effect the parties rights under the indemnification provisions of the Agreement . . . the parties retain their rights to an 'ultimate determination' of their responsibilities under those provisions." (Emphasis added.) 603 A.2d at 822, fn. 4.11

In its previous Memorandum Decision and Order, this Court also looked to the Delaware Supreme Court's decision in *Homestore, Inc. v. Tafeen*, 888 A.2d 204 (Del. 2005) for guidance in concluding that the scope of this proceeding should be limited to the advancement of unpaid legal fees and expenses. As indicated above, it was held in *Homestore* that contractual advancement provisions are intended to provide "*immediate*"

¹¹ K.S.A. 17-6305(e), which authorizes contractual advancement provisions in Kansas, provides for repayment "if it is *ultimately determined* that the . . . officer is not entitled to be indemnified by the corporation. . . ." (Emphasis added.) Likewise, Westar's Restated Articles of Incorporation state that "the right to indemnification conferred . . . shall be a contract right and shall include the right to be paid by the Corporation the expenses incurred in defending any such proceeding in advance of its final disposition . . . upon delivery to the Corporation of an undertaking . . . to repay all amounts so advanced if it shall *ultimately be determined* that such director or officer is not entitled to be indemnified. . . ." (Emphasis added.) Furthermore, the Undertaking signed by David C. Wittig on September 7, 2004, provides that he will "repay Westar Energy, Inc. (Westar) any payment it has advanced to me . . . in the event it is *ultimately determined* . . . that I am not entitled to be indemnified by Westar." (Emphasis added.) As such, there is no statutory or contractual right to seek repayment of fees already advanced until an "ultimate determination" of the parties rights and responsibilities are made at the indemnification stage following the final conclusion of the underlying criminal case.

ongoing expenses inevitably involved with investigation and legal proceedings." (Emphasis added.) 888 A.2d at 211. It is for this reason that "[t]he scope of an advancement proceeding is . . . *limited to determining the issue of entitlement in accordance with* the corporation's own uniquely crafted *advancement provisions*." (Emphasis added.) 888 A. 2d at 212-13 ("Performing such an allocation analysis on a provisional basis could turn out to be a waste of the parties' and the court's resources.").

In its previous decision, this Court also found the case of Fasciana v. Electronic Data Systems Corp., 829 A.2d 160 (Del. Ch. 2003) to be instructive regarding the limited scope of this proceeding. The Fasciana court compared an advancement provision to "a credit advanced to a director, officer, employee or agent of a corporation." 829 A.2d at 175. The Fasciana court found that "a balance of fairness and efficiency concerns would seem to counsel deferring fights about details until a final indemnification proceeding by which time the details may not even matter as [the officer] may (depending on the outcome of the Criminal and Civil Actions) be obligated to repay all of the funds." (Emphasis added.) 829 A.2d at 177.

On July 30, 2008, shortly after this Court entered its previous Memorandum Decision and Order, the Delaware Court of Chancery entered a decision in the case of *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380 (Del. Ch. 2008). In the *Sun-Times* case, the court found that "advancement through the final disposition of a proceeding is best read as temporally connected to the 'ultimate determination' of entitlement to indemnification, which

only becomes ripe once the underlying proceeding is truly final." 954 A.2d at 397. Thus, the Court concluded that claims seeking "repayment or setoff" of advancements which were previously paid during the course of a criminal action are "not appropriate [for determination] until there is a final, non-appealable conclusion to the [underlying] proceeding." (Emphasis added.) 954 A.2d at 408-09.

It is important to note that courts from other jurisdictions have also found *Kaung* and the other Delaware decisions to be instructive on the issue presented. In *Miller v. U.S. Foodservice, Inc.*, 405 F. Supp. 2d 607 (D. Md. 2005), a corporation argued that it should be able to withhold any legal fees and expenses it was required to advance on behalf of the company's former Chief Executive Officer on the basis of recoupment or setoff. 405 F. Supp. 2d at 620. However, the *Miller* court held: "Consistent with the approach advanced by the Delaware courts, this court will not allow [the corporation's] recoupment and setoff claims to delay the payment of attorney's fees to [the former CEO]." <u>Id</u>. Thus, the *Miller* court concluded that "the possible *reimbursement of fees, recoupment and setoff can be addressed at the conclusion of the [underlying] case.*" (Emphasis added.) <u>Id.</u>, citing *Lipson v. Supercuts, Inc.*, 1996 WL 560191, at *2 (Del. Ch. Sept. 10, 1996).

A similar conclusion was reached in *Ficus Investments, Inc. v. Private Capital Management, LLC*, 872 N.Y.S.2d 93 (N.Y.A.D. 2009). In *Ficus*, the New York Appellate Court noted that "Delaware courts have had ample opportunity to address these issues of indemnification for and advancement of expenses and, although not binding [in other jurisdictions], their holdings can be instructive." 872 N.Y.S.2d at 99. After discussing

several Delaware Supreme Court decisions, the *Ficus* court held: "Given the separate purposes of indemnification and advancement . . . the relief available to a corporate officer at the conclusion of the [underlying] proceedings and that which is available while the proceedings are ongoing" is distinguishable. 872 N.Y.S.2d at 99.

In United States of America v. Stein (Stein III), 452 F. Supp. 2d 230 (S.D.N.Y. 2006), vacated on other grounds, 452 F.3d 753 (2d Cir. 2007), it was held that the issue of "recoupment of sums previously advanced" is "necessarily... reserved for subsequent determination" after the conclusion of the underlying case. (Emphasis added.) 452 F. Supp. 2d at 271-72, citing Kaung, 884 A.2d at 509; Homestore, Inc., 886 A.2d at 503; and, Radin, "Sinners Who Find Religion": Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing, 25 REV. LITIG. 251, 265-66 (2006). Furthermore, the Stien court held that the same principle also applies to a claimed "set-off" against legal fees and expenses previously advanced. 452 F. Supp. 2d at 272.

In discussing the rationale for delaying indemnification, recoupment and/or setoff claims until the conclusion of the underlying case, the *Stein* court found:

"[T]he principle is not found in the language of 145(k) and in any event antedates its enactment in 1994. It rests ultimately on the proposition that advancement of defense costs serves important interests, [citations omitted] that a right to advancement is independent of any right to indemnification [citations omitted], and that disputes concerning advancement must be determined promptly if any right to advancement is to be meaningful."

452 F. Supp. 2d at 272, fn. 172.

Hence, the *Stein* court held that "[t]his principle concerns something considerably more than merely the procedure by which an advancement claim is presented. If a right to advancement of defense costs exists, the inherent nature of the right is to receive the funds as the defense costs are incurred." 452 F. Supp. 2d at 272. Thus, the *Stein* court concluded that "[t]hese considerations make clear that rules governing the issues properly considered in determining a claim for advancement of defense costs are matters of substance, not procedure." 452 F.Supp.2d at 273.

Clearly, the primary purpose of a contractual advancement provision is to provide "immediate interim relief from ... ongoing expenses inevitably involved with investigation and legal proceedings." (Emphasis added.) Homestore, Inc., 888 A.2d at 211-12. As the Delaware Court of Chancery found in Radiancy v. Azar, 2006 WL 224059, at *1 (Del.Ch. 2006), "corporations that voluntarily extend to their officers and directors the right to indemnification and advancement ... have a duty to fulfill their obligations under such provisions with good faith and dispatch." (Emphasis added.) Thus, the Court finds the limited scope of proceedings to determine the rights and obligations of the parties to a contractual advancement provision is not based on a particular statute but is based on the voluntary agreement of a corporation to provide "immediate interim relief" to its officers or directors by advancing "ongoing" legal fees and expenses in a prompt manner.

Therefore, the Court finds that until the underlying criminal case has been finally resolved, there is no justiciable issue relating to the legal fees and expenses which Westar Energy, Inc. has already advanced on behalf of David C. Wittig. As such, the Court stands

by its earlier decision and exercises its discretion not to address the reasonableness of the legal fees and expenses previously advanced by Westar for the professional services rendered to Mr. Wittig prior to February 1, 2005. At some point in the future, after the "dust has settled" in the underlying criminal case, the parties will have an adequate opportunity to fully and completely litigate all issues relating to indemnification, recoupment and/or setoff.

B. Motion for Partial Summary Judgment - Breach of Contract

Westar has filed a "Motion for Partial Summary Judgment on Liability as to Count II - Breach of Contract" in which it contends that the legal fees and expenses which were previously advanced on behalf of David Wittig for services rendered prior to February 1, 2005, were not reasonable in light of the factors set forth in Rule 1.5. Westar is not challenging the reasonableness of the legal fees and expenses charged by the Berkowitz Oliver law firm during this time period. It contends, however, that the legal fees and expenses it has already paid to the Piper Rudnick law firm were unreasonable.

Westar appears to recognize that the analysis of the reasonableness of the legal fees and expenses charged by Piper Rudnick prior to the return of the Indictment against Mr. Wittig in the United States District Court for the District of Kansas may be different than the analysis of the fees and expenses charged after the return of the Indictment. However, Westar argues that even if the fees and expenses charged by the Piper Rudnick law firm prior to the return of the Indictment are deemed to be reasonable, Mr. Wittig still violated the terms of the Revised Articles of Incorporation and the Undertaking because he obtained advancements for an unreasonable amount after the Indictment was returned. Westar does

concede, however, that the amount of damages arising out of the alleged breach of contract would be a question of fact.

It is certainly possible that it may ultimately be determined that Mr. Wittig should repay all or part of the attorney fees and expenses which Westar has advanced on his behalf. However, as to those legal fees and expenses which were advanced on behalf of Mr. Wittig prior to the filing of this action seeking a judicial determination of reasonableness, the Court concludes that Westar's breach of contract claim should be deferred until after the underlying criminal case is finally resolved. Therefore, for the reasons set forth above as well as for the reasons set forth in the Memorandum Decision and Order entered on July 15, 2008, the Court finds that Westar's motion for partial summary judgment on the breach of contract claim should be denied.

C. <u>Motion for Partial Summary Judgment - Release and Estoppel</u>

Westar has also filed a "Motion for Partial Summary Judgment on Defendant Wittig's Affirmative Defenses of Release and Estoppel." In the motion, Westar asks this Court to determine as a matter of law that its breach of contract claim is not barred by release or equitable estoppel. Specifically, Westar contends that it did not release its right to challenge the reasonableness of the attorney fees and expenses which it previously advanced on behalf of David Wittig and that it is not equitably estopped from challenging the reasonableness of the legal fees and expenses which have already been advanced.

As indicated above, the Court has found that the ultimate determination of the rights and obligations of the parties to indemnification, recoupment and/or setoff should be made

after the underlying criminal action has been finally concluded. At that time, if necessary, the parties will have an adequate opportunity to present their arguments regarding whether Mr. Wittig should repay to Westar any or all of the amounts the corporation has advanced on his behalf. Therefore, the Court concludes that the motion for partial summary judgment on the issues of release and equitable estoppel should be denied.

D. Motion to Dismiss Count II of Amended Petition

Finally, David Wittig has moved for the dismissal of Count II of Westar's Amended Petition pursuant to K.S.A. 60-212. In support of his motion, Mr. Wittig contends that the breach of contract claim asserted by Westar should not be heard until after the conclusion of the underlying criminal case. He points out that this Court previously recognized that only issues related to advancement of unpaid attorney fees and expenses should be addressed in this action. In response, Westar argues that there is "a present, concrete dispute between the parties as to their respective contractual obligations" under the terms of the contractual advancement provision.

As indicated above, the present action arises out of the parties' rights and obligations under the contractual advancement provision entered into by the parties. Hence, this is not the appropriate action for Westar to seek recoupment of or setoff against the fees and expenses which the corporation previously advanced. Rather, the Plaintiff should wait to assert a breach of contract claim involving the fees and expenses which have been previously advanced until the conclusion of the underlying criminal action. Therefore, the Court finds that the Plaintiff's breach of contract claim should be dismissed without prejudice.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the Memorandum

Decision and Order entered on July 15, 2008, the Court finds that the granting of a monetary

judgment and/or injunctive relief to David C. Wittig is inappropriate at this point in time

since he has not filed a counterclaim nor has he formally requested further relief pursuant to

the terms of K.S.A. 60-1703. Moreover, the Court finds that the motions for partial summary

judgment filed by Westar Energy, Inc., should be and hereby are denied. Notwithstanding,

the parties shall continue to have the right to an ultimate determination of their contractual

rights and responsibilities, if necessary, after the underlying criminal action has been finally

concluded. Furthermore, the Court finds that Mr. Wittig's Motion to Dismiss Count II of the

Amended Petition should be granted and the breach of contract claim asserted by Westar is

hereby dismissed without prejudice.

This Memorandum Decision and Order shall serve as the final judgment of the Court.

No further Journal Entry is required.

IT IS SO ORDERED.

Entered on this ___ day of April, 2009.

David E. Bruns

District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that a co	opy of the above and foregoing MEMORANDUN
DECISION AND ORDER was fa	axed and mailed on this day of April, 2009, to th
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