

**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 the Report of Special Master filed on November 9, 2007. The Plaintiff, Westar Energy, Inc., filed Objections to the Report of Special Master on December 5, 2007. Similarly, the Defendant, David C. Wittig, filed a Notice of Objections to Special Master Report on December 7, 2007. Since that time, the parties have completed discovery, and additional written materials have been submitted to the Court. On March 13, 2008, a final hearing was held by the Court to consider the Report of the Special Master and to receive additional evidence regarding the advancement of the attorney fees and expenses “reasonably incurred” by Mr. Wittig in the defense of the underlying criminal action which is pending in federal court. Following the hearing, both parties filed written closing arguments and supplemental briefs. Thus, the Court deems the Plaintiff’s claim for declaratory judgment to be submitted for decision.

I. NATURE OF ACTION

The Plaintiff, Westar Energy, Inc., seeks a declaratory judgment clarifying its contractual obligation to advance the legal fees and expenses that have been reasonably incurred by David C. Wittig in the case of *United States v. Wittig and Lake*, 03-40142-JAR, which is currently pending against him in the United States District Court for the District of Kansas. Mr. Wittig is the former President, Chief Executive Officer and Chairman of the Board of Directors of Westar Energy, Inc. The corporation admits that it contractually agreed to advance reasonably incurred attorney fees and expenses on behalf of Mr. Wittig in the underlying criminal case. However, this Court has been asked to resolve the parties' dispute regarding the *reasonableness* of the attorney fees and expenses incurred by Mr. Wittig.

In addition, Westar has asserted a claim against David Wittig for breach of contract. The corporation claims that the legal fees and expenses which it has already advanced on his 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 advancement are reasonable and that they should immediately be advanced by Westar Energy, Inc. Mr. Wittig has not, however, filed a counterclaim, and the deadline for amending the pleadings in this action has expired.

This Memorandum Decision and Order will address the contractual relationship between the parties relating to the advancement of reasonably incurred legal fees and expenses in an attempt to relieve the parties from uncertainty. Likewise, this decision will

address the reasonableness of the legal fees and expenses for which David Wittig seeks advancement from Westar based on Kansas law. In particular, this decision will focus on the fees and expenses incurred by Mr. Wittig from February 1, 2005, to June 30, 2006. This decision will not address the issues of indemnification and/or recoupment since they will not be ripe for ruling until after the underlying criminal case is finally concluded.

II. PROCEDURAL HISTORY

This action was filed by Westar Energy, Inc., on October 5, 2005. In the original Petition, the Plaintiff sought a declaratory judgment pursuant to K.S.A. 60-1701, *et seq.* and asserted a breach of contract claim. Specifically, the Plaintiff challenged the reasonableness of the legal fees and expenses which have been incurred by David Wittig in the federal criminal case of *United States v. Wittig and Lake*, 03-40142-JAR. Prior to the filing of the original Petition in this case, 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.¹

In the original Petition, it was alleged that David Wittig had sought advancement of attorney fees and expenses from Westar totaling \$4,355,860.42. At that time, Westar alleged that it had already advanced legal fees and expenses in the amount of \$3,658,983.26 on behalf of Mr. Wittig. On December 8, 2006, an Amended Petition was filed in which it was

¹ This verdict was rendered at the conclusion of the second jury trial in the criminal case, the first having ended in a mistrial.

alleged that the amount of the advancement for legal fees and expenses which Mr. Wittig had sought from Westar, had risen to \$6,198,877.52. Moreover, in the Amended Petition, Westar alleged that it had been advised by counsel for David Wittig that he had also incurred more than \$1,000,000.00 in legal fees and expenses arising out of the appeal of his convictions.

On January 5, 2007, in the case of *United States v. Lake and Wittig*, 472 F.3d 1247 (10th Cir. 2007), the United States Court of Appeals for the Tenth Circuit reversed David Wittig's convictions in the underlying criminal case. In doing so, the Tenth Circuit held that the wire fraud and money laundering counts asserted against Mr. Wittig cannot be retried. However, the Tenth Circuit found that Mr. Wittig may be retried on counts of conspiracy, circumvention and forfeiture. As such, David Wittig now faces a third trial in the criminal case, which has been scheduled to commence in the United States District Court for the District of Kansas on September 8, 2008. Thus, the amount of legal fees and expenses incurred by Mr. Wittig in the defense of the criminal case continues to grow.²

III. REPORT OF SPECIAL MASTER

On January 5, 2007, the same day the Tenth Circuit reversed David Wittig's criminal convictions, a Motion for Appointment of Special Master was filed on his behalf in this

² It should also be noted that on February 29, 2008, David Witting filed a separate action against Westar Energy, Inc. In Case No. 08-C-340, Mr. Wittig is represented by Jeff Morris of Kansas City, and by Paula Junghans of Washington, D.C., who has been admitted Pro Hac Vice to practice before this Court. The new lawsuit arises out of the same contractual obligations as the present action. However, in Case No. 08-C-340, Mr. Wittig is seeking advancement of attorney fees for professional services rendered by Ms. Junghans since the time she became affiliated with Zuckerman Spaeder, LLP.

action. After reviewing the Tenth Circuit’s opinion, as well as several decisions rendered by the Honorable Julie A. Robinson, the Court found that the ends of justice would be measurably advanced by the appointment of a Special Master to provide assistance in reviewing the reasonableness of the disputed legal fees and expenses. As such, on February 5, 2007, the Court appointed Jack Focht of Wichita, Kansas, to serve as the Special Master based on his substantial experience in the defense of complex white collar criminal cases in both state and federal court.

In the Memorandum Decision and Order appointing Mr. Focht, the Court found that a Special Master who had “substantial experience in the defense of white collar criminal cases would likely be in a better position to attempt to piece together what was actually done by the numerous individuals who billed time to the Wittig criminal case.” The Court specifically directed the Special Master “to review all of the legal fees and expenses billed by the law firms which have represented Mr. Wittig in the underlying case in light of the factors set forth in KRPC 1.5(a).” As Special Master, Mr. Focht was granted all of the powers set forth in K.S.A. 60-253(c), and he was authorized to conduct such proceedings in this case as he found necessary.³

³ Over the next nine (9) months, Mr. Focht diligently performed his duties as Special Master. However, while this action was pending before the Special Master, Judge Julie Robinson issued a decision in federal court which addressed issues which are similar to those raised in this action. Specifically, Judge Robinson addressed Westar’s contractual obligation to advance “reasonably incurred” legal fees and expenses on behalf of Douglas T. Lake. Mr. Wittig’s co-defendant in the criminal case. The Special Master allowed Westar and Mr. Wittig to supplement their submissions in order to discuss the impact, if any, which Judge Robinson’s decision in *Westar Energy, Inc. v. Lake*, 493 F.Supp. 2d 1126 (D.Kan.200&), should have on the present action. (It should be noted that Judge Robinson’s decision is currently on appeal to the

On November 9, 2007, Mr. Focht submitted to the Court a forty-seven (47) page Report of Special Master. In addition, he submitted a notebook containing twenty (20) exhibits in support of the Report. Thus, the Court finds that Jack Focht has completed his statutory duties as Special Master and his assistance in this case is greatly appreciated.

In addition to relying upon the facts contained in the various decisions issued by Judge Robinson and by the Tenth Circuit in the criminal case, the Special Master set forth twenty-one (21) Findings of Fact (not including subparts) in his Report. Mr. Focht also included several factual statements in the Analysis and Discussion section of his Report. Moreover, he noted in his Report that the parties had reached a settlement regarding the amount of legal fees to be advanced to the attorneys who handled Mr. Wittig's appeal.⁴

The primary issues addressed in the Report of the Special Master can be divided into two general areas. The first area was "[t]he reasonableness of the fees billed when considered in light of the factors listed in Kansas Rules of Professional Conduct, 1.5." The second area was "[w]hether allegations of misconduct and unsuccessful motions to change venue and recuse Judge Robinson justify a finding of unnecessary or unreasonable expenditure of time and expenses or an adjustment to advancement requests for the same."

The Special Master recognized that "[t]he obligation to indemnify and to advance fees and expenses to Wittig by Westar was one of contract." In particular, Mr. Focht found that

⁴ Since the parties have resolved their differences regarding this issue, the Court will not address the reasonableness of the legal fees and expenses incurred during the course of the appeal.

the contractual obligation between the parties arose out of the Restated Articles of Incorporation of Westar Energy, Inc., and out of the “Undertaking” signed by David Wittig on September 4, 2004. In addition, the Special Master noted that the relationship between the parties was further defined in a letter from Westar’s legal counsel to the Piper Rudnick law firm dated March 18, 2005, which was signed by Mr. Wittig.

The Special Master then reviewed the legal fees and expenses for which David Wittig seeks an advancement in light of the factors set forth in Kansas Rules of Professional Conduct (hereafter “KRPC”) 1.5(a). Based on this review, Mr. Focht opined that “considering only the factors in KRPC 1.5,” he would find that all of the fees and expenses were “reasonable and necessary.” Next, the Special Master considered the specific objections that were raised in the submissions of Westar Energy, Inc.

In addressing the number of persons who had worked on the case and the hours that were billed, the Special Master found that “the bulk of the work was performed by a relatively small group of professionals.” Nevertheless, after examining the unpaid invoices of the Piper Rudnick law firm, Mr. Focht recommended that 138 hours relating to weekend travel should be deducted from the time billed by “Associate H. Walther” and 138 hours relating to weekend travel should also be deducted from the time billed by “Paralegal J. Willis, II.” In addition, he recommended a deduction of .75 hours billed by an associate, “J. Sullivan,” for a meeting held on February 23, 2005.

In addressing the lack of specificity in the Piper Rudnick legal bills, the Special Master reported that he had performed a “comparison of the bills of the law firms with each

other and with the docket sheet . . . in the Criminal Case. . . .” Based on this comparison, Mr. Focht came “to the conclusion that the bills of all lawyers [with the exception of those noted in the previous paragraph] meet the standard of being reasonable and necessary.” In addition, he noted “the potential devastating effect on the strategy of Wittig’s case if the government knew what was being researched, what was being thought or who was being interviewed.”

The Special Master also recommended a reduction in the amount of \$12,000 for expenses relating to the weekend travel by Associate Walther and Paralegal Willis. Moreover, he recommended a reduction in the amount of \$3,325.00 for an expense labeled “Local Counsel Fees” on Piper Rudnick Invoice #1787467 and for an expense in the amount of \$16,084.43 found on Piper Rudnick Invoice #1656046, which was also labeled “Local Counsel Fees.” However, Mr. Focht did not recommend any adjustment of the legal fees and expenses relating to the Motion to Change Venue or the Motion for Recusal, which were filed in the underlying criminal case.

In the Conclusion to his Report, the Special Master found that the legal fees and expenses billed by the Berkowitz Oliver law firm, in the amount of \$470,468.18, were reasonable and necessary. In addition, after reducing the bills by the amount of \$95,576.93, the Special Master found that \$1,991,086.73 of the fees and expenses billed by Piper Rudnick were reasonable. Thus, based on his calculations, the Special Master recommended that an additional \$2,461,554.91 in legal fees and expenses should be advanced by Westar Energy, Inc., on behalf of David C. Wittig, for the relevant time period.

IV. FINDINGS OF FACT

This Court has reviewed hundreds, if not thousands, of pages of documents contained in the record of this case and in the record of *United States v. Wittig and Lake*, 03-40142-JAR. In addition, to the factual findings set forth in the Report of Special Master, the Court has also considered the evidence presented by the parties following the submission of the Report. This additional evidence includes the written stipulations filed by the parties on March 13, 2008, and on June 18, 2008, as well as the evidence presented at the hearing on March 13, 2008. Thus, in this section of the Memorandum Decision and Order, the Court will attempt to summarize the material facts relating to the issue of advancement.

A. Relationship between David Wittig and Westar Energy, Inc.

David C. Wittig is a Kansas resident and was formerly an executive of Westar Energy, Inc. Originally organized on March 6, 1924, Westar Energy, Inc., is a publicly traded corporation and is the largest electrical utility company in Kansas. Over the years, the corporation has been known by various names, including the Kansas Power and Light Company. In 1992, the Kansas Power and Light Company merged with the Kansas Gas and Electric Company to become Western Resources, Inc. In 1995, after a successful career on Wall Street, Mr. Wittig was hired as Executive Vice President of Western Resources, Inc.

In 1998, David Wittig was named President, Chief Executive Officer and Chairman of the Board of Western Resources, Inc. The corporation's name was later changed to Westar Energy, Inc. Shortly thereafter, the United States of America commenced an investigation of Westar Energy, Inc., which ultimately led to a federal grand jury returning

an indictment against Mr. Wittig. Following the receipt of subpoenas from the grand jury in September 2002, Westar's Board of Directors formed a Special Committee to investigate matters relating to the management of the corporation. To assist in the internal investigation, the Special Committee retained the New York law firm of Debevoise & Plimpton as its legal counsel.⁵

On November 7, 2002, while the investigation of the Westar management was ongoing, David Wittig was indicted by a federal grand jury on bank fraud charges in a case which was not directly related to his employment by the corporation. In the bank fraud case, Mr. Wittig was represented by James L. Eisenbrandt, a respected white collar criminal defense attorney in the metropolitan Kansas City area. Mr. Eisenbrandt is a named partner in the law firm of Berkowitz, Oliver, Williams, Shaw & Eisenbrandt (hereafter "Berkowitz Oliver"). On November 22, 2002, less than a week after Mr. Wittig plead not guilty to the bank fraud charges, he submitted his resignation to Westar Energy, Inc.

B. Retention of the Berkowitz Oliver and Piper Rudnick law firms by Mr. Wittig

During the course of his representation of David Wittig in the bank fraud case, James Eisenbrandt also began representing Mr. Wittig in what he referred to as the "Westar criminal case/investigation." During the fall of 2002, Mr. Wittig asked Mr. Eisenbrandt about his "firm's experience and expertise in handing criminal tax matters." He told Mr. Wittig that

⁵Although the Defendant points out that the Special Committee paid \$9,178,319.37 in attorney fees and expenses to the Debevoise & Plimpton law firm, neither the reasonableness of such fees nor the Committee's decision to retain a New York law firm are at issue in the present action.

the Berkowitz Oliver law firm had handled several criminal tax matters. However, since the firm primarily handled litigation, “it was going to be necessary to associate . . . with a firm that had expertise in . . . complex criminal tax matters.” At that point in time, Mr. Eisenbrandt anticipated that any indictment which may be returned by the federal grand jury investigating the management of Westar would include criminal tax charges.

Mr. Eisenbrandt testified in the present action that the “most important” reason he wished to “associate” with another law firm during the investigation stage was “that under the tax laws and regulations a subject or target of a tax investigation under federal law has the right to seek a hearing at Main Justice from the Tax Division before any indictment can be returned.” It was Mr. Eisenbrandt’s opinion that “while local lawyers may be able and are able to have such a review, it is more important in that review who the person is; does that person have credibility with the Tax Division; is it someone that the Tax Division will recognize as knowing what they’re talking about . . . and can the attorney get a review at the highest levels of the Tax Division, which is what [he] felt was needed in this case.” According to Mr. Eisenbrandt, “those people, at least that I am aware of, are practicing law in Washington, D.C.”

James Eisenbrandt recommended to Mr. Wittig that he consider Stan Mortenson of the Baker Botts law firm and Gerald Feffer of the Williams & Connolly law firm. It was Mr. Wittig who asked Mr. Eisenbrandt about the Piper Rudnick law firm, and specifically mentioned Adam Hoffinger, a Partner of the firm during the relevant time period. Although, Mr. Eisenbrandt did not know Mr. Hoffinger, he did know “that Piper Rudnick was an

excellent firm, that had tremendous resources.” He subsequently spoke to Earl Silbert, a well-known Senior Partner in the Piper Rudnick law firm, on behalf of Mr. Wittig and discovered that Mr. Silbert had “complete confidence” in the legal abilities of Adam Hoffinger.

Furthermore, Mr. Eisenbrandt testified that although he “did not personally know” Paula Junghans, who was also a Partner of the Piper Rudnick law firm during the relevant time period, he knew she had served as a Deputy Attorney General in the Tax Division. As such, “by virtue of her service in the Justice Department, there was no question in [his] mind that she had the contacts to present our case at the highest levels of the Justice Department. . . .” Thus, on December 9, 2002, Mr. Wittig signed an engagement letter with Piper Rudnick, in which it was agreed that the law firm would join his defense team “in connection with matters concerning [his] employment at Westar Energy, including those under investigation by the United States Attorney’s Office for the District of Kansas.”

At the time David Wittig retained the Piper Rudnick law firm to associate with the Berkowitz Oliver law firm, Mr. Eisenbrandt did not think there was any law firm or individual lawyer in Kansas City, or its surrounding area, that could have provided the same level of expertise in the area of complex criminal tax law. He also “did not believe that there was anyone in the Kansas City area that did not have some kind of conflict that could have handled the case” at that point in time. Moreover, according to the written stipulation filed in this action on March 13, 2008, “David Wittig did not attempt to find a law firm in the Kansas City or Kansas area to perform the role performed by Piper Rudnick.”

C. The Indictment of Mr. Wittig and Mr. Lake in the Westar Criminal Case

On April 29, 2003, the Special Committee issued a 366-page report regarding the results of the internal investigation to the Board of Directors of Westar Energy, Inc. The Report of the Special Committee cited a number of activities performed by David Wittig and another Westar executive, Douglas Lake, which were possible violations of federal law. On December 3, 2003, Mr. Wittig was indicted by a federal grand jury in the United States District Court for the District of Kansas on charges relating to his employment at Westar Energy, Inc.

In the Indictment, it was alleged that David Wittig and his co-defendant, Douglas Lake, “conducted a far-reaching scheme to milk [Westar] for all they could through a pattern of fraud and deceit.” *United States v. Lake and Wittig*, 472 F.3d at 1249. “The indictment charged 7 counts of wire fraud, 17 counts of money laundering, 14 counts of circumvention of internal financial controls, and 1 count of conspiracy to engage in these substantive offenses. A fortieth count sought forfeiture of the fruits of the alleged offenses.” 472 F.3d at 1250. “The defendants’ first trial ended in a mistrial on December 20, 2004, because the jury failed to agree on a verdict.” 472 F.3d at 1254 (citing *United States v. Wittig*, 425 F.2d 1196, 1204 (D. Kan. 2006)).

Wittig and Lake “were retried six months later.” 472 F.3d at 1254.⁶ At the second trial, “the jury found Mr. Wittig guilty on all counts and . . . decided that many, but not all,

⁶ It should be noted that both jury trials were conducted by the Honorable Julie A. Robinson in Kansas City, Kansas. At this point in time, it appears that the third jury trial will also be conducted by Judge Robinson in Kansas City, Kansas.

of the assets listed in the forfeiture count should be forfeited.” 472 F.3d at 1254. Following the second trial, Judge Robinson sentenced David Wittig to imprisonment for a term of eighteen (18) years, fined him \$5 million, and ordered him to pay approximately \$14.5 million in restitution. 472 F.3d at 1254. As indicated above, on January 5, 2007, the United States Court of Appeals for the Tenth Circuit reversed Mr. Wittig’s convictions and remanded the counts of conspiracy, circumvention and forfeiture for retrial.

D. The Lawyers Representing Mr. Wittig in the Westar Criminal Case

During his testimony in the present case, James Eisenbrandt recognized that when the Indictment was ultimately returned against David Wittig, “[t]here were not tax charges” included. However, he testified that some tax related issues remained in the case, specifically relating to Mr. Wittig’s personal use of corporate aircraft. Notwithstanding, after the Indictment was returned in December 2003, attorneys from the Berkowitz Oliver law firm believed that they would “play a primary role” in Mr. Wittig’s defense in the case of *United States v. Wittig and Lake*, 03-40142-JAR.

Following the first jury trial in the underlying criminal case, Jeff Morris, one of Mr. Eisenbrandt’s partners made the following representation to the Honorable Julie A. Robinson:

When the [criminal] case was first filed [in December 2003], Judge, our firm expected to play a primary role at that point in time, so we entered a number of lawyers as counsel of record. When it became clear that we would be serving a local counsel role, Mr. Eisenbrandt and Rogers, frankly, stopped working on the case. And that’s reflected in the billing statements . . . I would not want to hold Mr. Eisenbrandt and Mr. Rogers

responsible to try a case that they have not been involved with for almost a year. (Emphasis added.)

(Transcript of Status Conference Hearing - January 4, 2005, page 49, lines 4 to 17.)

It is unclear from the record when it was decided that the Berkowitz Oliver law firm would not “play a primary role” in the first jury trial. Moreover, it is unclear from the record why Mr. Wittig decided to limit the role of the Berkowitz Oliver law firm in the first jury trial. However, the record reflects that Adam Hoffinger and Paula Junghans of Piper Rudnick served as the trial attorneys for David Wittig at the first trial. As will be discussed in more detail below, Mr. Hoffinger and Ms. Junghans, together with Douglas Lake’s New York attorneys, were strongly admonished by Judge Julie Robinson for the unprofessional behavior which they displayed during the first trial.

Because Paula Junghans underwent back surgery and was unable to serve as one of Mr. Wittig’s lead attorneys at the second trial, Jeff Morris of the Berkowitz Oliver law firm replaced her and joined Mr. Hoffinger in an active role at the second trial. Mr. Eisenbrandt testified in the present action that it is anticipated that Paula Junghans and Jeff Morris will serve as the trial attorneys on behalf of David Wittig at the third jury trial scheduled to begin in September 2008. It should be noted that most of the Piper Rudnick attorneys who represented Mr. Wittig, including Ms. Junghans and Adam Hoffinger, are no longer with the law firm - which is now known as DLA Piper.

E. Agreement Between Mr. Wittig and Westar for Advancement of Legal Fees

It is undisputed that the Restated Articles of Incorporation of Westar Energy, Inc.

provide a “contract right” for the advancement of “reasonably incurred” legal fees and expenses on behalf of David Wittig, subject to the delivery of an Undertaking to the corporation “to repay all amounts so advanced if it shall ultimately be determined that [Mr. Wittig] is not entitled to be indemnified” following the final conclusion of the underlying criminal action.

The Restated Articles of Incorporation, as authorized by K.S.A. 17-6305, state:

Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (herein a “proceeding”), by reason of the fact that he or she, or a person of whom he or she is the legal representative, is or was a director or officer, of the Corporation . . . whether the basis of such proceeding is alleged action in an official capacity as a director, officer, employee or agent or in any other capacity while serving as a director, officer, employee or agent, shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the Kansas General Corporation Law . . . against all expense, liability and loss (including attorneys’ fees, judgments, fines, ERISA excise taxes or penalties and amounts paid or to be paid in settlement) reasonably incurred or suffered by such person in connection therewith and such indemnification shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of his or her heirs, executors and administrators . . . the right to indemnification conferred in this Section 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, by or on behalf of such director or officer, to repay all amounts so advanced if it shall ultimately be determined that such director or officer is not entitled to be indemnified under this Section or otherwise. . . . (Emphasis added.)

In October 2002, the Board of Directors of Westar Energy, Inc. passed a resolution authorizing the advance payment of:

“all expenses, including attorney fees, reasonably incurred by any person . . . who is or was a director, officer, employee or agent of the Company . . . in connection with an investigation by the United States Attorney’s Office in Topeka, Kansas, including a related investigation by a special committee of the Company’s Board of Directors, subject to the receipt of an undertaking by or on behalf of such Indemnified Person to repay the amount advanced upon a determination that such Indemnified Person is not entitled to be indemnified for such expenses. . . .” (Emphasis added.)

On September 7, 2004, nearly two (2) years after he retained the Piper Rudnick law firm to “associate” with the Berkowitz Oliver law firm, David C. Wittig delivered to Westar Energy, Inc., the following Undertaking:

UNDERTAKING

I, David C. Wittig, hereby ***agree that I will immediately repay Westar Energy, Inc. (“Westar”) any payment it has advanced to me to cover my reasonable attorney’s fees and other expenses in connection with cases brought against me which involves my service as director and officer of Westar in the event it is ultimately determined,*** in accordance with Westar’s organizational documents and the applicable law, ***that I am not entitled to be indemnified by Westar.*** I understand that this means, among other things, that as defined under applicable law I am only entitled to be indemnified by Westar if I acted in good faith and in a manner I reasonably believed to be in or not opposed to the best interests of Westar, and I had no reasonable cause to believe my conduct was unlawful. (Emphasis added.)

Signed:
DAVID C. WITTIG

Furthermore, on March 18, 2005, Mr. Wittig signed a letter drafted by Charles T. Spada, an attorney representing Westar Energy, Inc., relating to the advancement of legal fees and expenses billed by Piper Rudnick LLP. The letter, which was addressed to Adam S. Hoffinger, a Partner of the Piper Rudnick law firm stated in relevant part as follows:

[Westar] has reviewed these bills and has considered the relevant law. ***Based on the information currently available, the Company has concluded that these bills and the total amount contained therein for services through January 31, 2005, are unreasonable. As such, the Company does not believe that advancement of these invoices is appropriate.*** The Company notes that the present issue is one of advancement of the fees necessary to conduct Mr. Wittig's defense and not about the ultimate obligation of repayment, or indemnification, as to which this Company continues to reserve all its rights.

We understand that you disagree with the Company's position concerning advancement and the reasonableness of your firm's bills. As discussed, in order to avoid litigating these issues at this time, the Company and your firm and Mr. Wittig agree to the following:

1 - The Company will advance fees for your firm's unpaid invoices for services through January 31, 2005.

2 - Neither the Company nor Mr. Wittig will litigate the issue of further advancement for any of the bills for services through January 31, 2005.

3 - In order to give the Company additional assurance for advancement for Mr. Wittig's legal bills beyond the undertaking signed by Mr. Wittig, Mr. Wittig agrees that in the event of a criminal conviction after final determination of guilt of Mr. Wittig in United States v. Wittig and Lake, Mr. Wittig will forfeit to the Company any rights he might have to any assets being held by the Company (including any shares, RSUs, vacation pay, etc.) to the extent necessary to satisfy repayment of advances for legal fees.

Therefore, and *without conceding that any of the fees or expenses incurred are reasonable, the Company will advance unpaid legal fees and expenses to Mr. Wittig for your bills through January 31, 2005. Furthermore, the Company expressly reserves all of its rights to object to any future advancements requested by Mr. Wittig on any grounds, including reasonableness of the bills, and Mr. Wittig agrees that any advancements toward his legal fees and expenses in the criminal case that have been made or may be made in the future by Westar shall not be considered a waiver of Westar's right to challenge the reasonableness of such legal fees and expenses in the future for purposes of advancement or indemnification.* We understand that Mr. Wittig reserves his rights with respect to seeking full indemnification of fees and expenses to the extent applicable under Westar's articles of incorporation. (Emphasis added.)

F. The Attorney Fees and Expenses Billed by Wittig's Defense Team

Prior to the filing of the present action, Westar had already advanced a total of \$3,389,613.14 to the Piper Rudnick law firm and had advanced \$269,370.12 to the Berkowitz Oliver law firm on behalf of David Wittig. Since this action was filed, Westar has advanced an additional amount of attorney fees and expenses to the attorneys who represented Mr. Wittig during the successful appeal of his criminal convictions. As such, this action involves a request for an additional advancement on behalf of Mr. Wittig in the amount of \$2,077,663.33 in legal fees and expenses billed by the Piper Rudnick law firm and in the amount of \$470,468.18 in legal fees and expenses billed by the Berkowitz Oliver law firm. These bills cover the time period from February 2005 to June 2006.

A review of the Piper Rudnick monthly billing statements during the relevant time period reveals that the hourly fee of Earl Silbert was \$595; the hourly fee of Paula Junghans

ranged from \$515 to \$560; the hourly fee of Adam Hoffinger ranged from \$575 to \$620; and, the hourly fee of Robert Salerno was \$450. There were numerous other individuals at Piper Rudnick who performed work on Mr. Wittig's case, including Hank Walther (a 2001 law school graduate) whose hourly fee was \$330 in 2005.

In contrast, the record reflects that the Berkowitz Oliver law firm billed \$295 an hour for James Eisenbrandt's time throughout the relevant time period. The record further reveals that during the time period in question, the Berkowitz Oliver law firm billed the time of Jeff Morris (a 1993 law school graduate) at the rate of \$260 an hour. Moreover, the hourly rate of Heather Garretson (a 1996 law school graduate) ranged from \$190 to \$200 during the relevant time period.

A review of the statements for the professional services at issue in this case reveal that the Berkowitz Oliver bills are much more descriptive regarding the actual work performed than the bills of the Piper Rudnick law firm. For example, while the Berkowitz Oliver bills for the period of February to May of 2005 show that work was being performed on the recusal motion and for the mandamus action, the Piper Rudnick bills for the same period seldom mention any specific motion being worked on. The Court also finds that there are many instances reflected in the Piper Rudnick statements in which multiple attorneys and paralegals appear to have been billing for the same or substantially similar tasks.

There are also numerous entries on the Piper Rudnick bills which simply use such generic terms as "research project," "research exercise," "legal research" and other similar terms which provide the Court with little guidance in attempting to determine whether the

time billed was reasonably incurred. Likewise, there are numerous entries on the Piper Rudnick bills which simply state “conference” and provide no further guidance regarding the work performed. As such, it is extremely difficult to determine what work was actually performed based on the vagueness of the Piper Rudnick bills.

Adam Hoffinger, who served as one of Mr. Wittig’s lead attorneys at both the first and second trials, recognized in his deposition given in the present case that the Piper Rudnick “time sheets themselves are pretty spare.” (Hoffinger Depo. p. 31, lines 21-25.) According to Mr. Hoffinger, the goal of Piper Rudnick’s time keeping was to provide just enough information to be paid while, at the same time to protect Mr. Wittig by not revealing something that would hurt him in the criminal prosecution. In particular, Mr. Hoffinger indicated that he was concerned about providing too much information on the time sheets because Westar was producing the bills to the federal government in response to a subpoena.

It does appear from the record that the attorneys who billed time to Mr. Wittig’s criminal case charged their customary rates for the locality in which their offices are located. In other words, the Kansas City attorneys charged hourly rates which are customary for the metropolitan Kansas City area while the attorneys from Washington, D.C. charged hourly rates which are customary for the metropolitan D. C. area. These rates are listed on each of the Berkowitz Oliver monthly bills and are reflected on some of the Piper Rudnick monthly billing statements. However, it is important to note that there are several Piper Rudnick statements on which the hourly rates were not listed.

G. Motion for Recusal and Petition for Writ of Mandamus

During the relevant time period, the most significant events in the underlying criminal case was the second jury trial and the commencement of the appeal to the United States Court of Appeals for the Tenth Circuit. In addition, Mr. Wittig's attorneys billed a substantial amount of time during this time period in an attempt to seek the recusal or disqualification of the Honorable Julie A. Robinson. After the recusal motion was appropriately denied by Judge Robinson, counsel for Mr. Wittig filed a Petition for Writ of Mandamus in the United States Court of Appeals for the Tenth Circuit asserting the same argument.

In her "Memorandum Order Denying Recusal and Memorandum Order of Trial Procedures" entered on April 4, 2005, Judge Robinson described the "egregious conduct by defense counsel" which had occurred during the first Wittig trial. (Memorandum Order (4/4/05) at 1.) During the trial, which began on October 12, 2004, Judge Robinson "observed numerous instances of improper conduct by defense counsel." *Id.* at 2. She referred to several instances of "unethical behavior" and to "prolific instances of misconduct" in her Memorandum Order.⁷ *Id.* at 4-5.

The "summary of some of the most egregious conduct" included the fact that "defense counsel laughed, snickered and made comments in the background" as Judge Robinson conducted voir dire of potential jurors. *Id.* at 5. However, Judge Robinson found this

⁷ The Court recognizes that the conduct of Douglas Lake's non-local counsel during the first jury trial was likely more "egregious" than that displayed by Mr. Wittig's non-local counsel. However, this does not excuse Mr. Wittig's non-local counsel from being responsible for their own behavior.

behavior to be “overshadowed by the conduct of defendant Wittig’s counsel, Adam Hoffinger.” *Id.* at 6. In particular, she found that Mr. Hoffinger violated her order regarding voir dire on several occasions. *Id.*

Furthermore, Judge Robinson found “the nature of Mr. Hoffinger’s violation was extremely egregious.” *Id.* Likewise, she referred to his improper conduct as an “abusive and volatile practice” which resulted in admonishment on more than one occasion. *Id.* at 6 to 7. Judge Robinson concluded that “Mr. Hoffinger not only violated the Court’s Order, but he also misrepresented the law to the potential jurors.” *Id.* at 8.

As a result of the repeated violations of the Court’s order, Judge Robinson “called all counsel, including the prosecutors and defense counsel, into chambers and had an off the record discussion with Mr. Hoffinger about the professional duties and responsibilities of counsel.” *Id.* Ultimately, Judge Robinson “told Mr. Hoffinger that he could not ask any further questions during voir dire.” *Id.* “During the trial, Mr. Hoffinger’s disorderly and disruptive conduct largely diminished.” *Id.*

Notwithstanding, Judge Robinson found that “Paula Junghans, and defendant Lake’s counsel, Edward Little . . . continued to engage in repeated instances of misconduct.” *Id.* at 9. She listed several instances where Ms. Junghans and other non-local defense counsel “repeatedly interrupted the Court when it made rulings, and repeatedly continued to argue with the Court after it had ruled.” *Id.* Despite repeated admonitions by the Court to stop the behavior, defense counsel continued to blatantly disrespect the Court’s rulings. . . .” *Id.* “After the Court ruled, defense counsel would often persist in arguing, ignoring or

challenging the Court's attempts to end the bench conference," and Judge Robinson concluded that such actions "can only be characterized as abusive conduct." *Id.* at 10.

In speaking to the jurors after the first trial, Judge Robinson was told that "defense counsel would often leave the bench, storming back to their tables with theatrical mannerisms." *Id.* "Sometimes [she] could hear snippets of remarks that were critical of not only [her] rulings, but also the Court." *Id.* In fact, Judge Robinson went so far as to note on the record that the role of a judge "is not one of a 'playground monitor.'" *Id.* Although she recognized that she "did not hear and see everything," Judge Robinson noted that the jury described other conduct by defense counsel during the first trial that "would offend almost anyone's sensibilities." *Id.*

The jurors "expressed their uniform disenchantment with behavior that they perceived as disrespectful to both the Court and the jury." *Id.* at 23. In addition to the improper conduct set forth above, the jurors commented that "[t]he younger defense lawyers behaved better than [Lake's attorneys] and Hoffinger and Ms. Junghans." *Id.* at 24. The jurors further commented to Judge Robinson that "Mr. Hoffinger pretended to be asleep at times, as if the evidence meant nothing." *Id.*

On January 4, 2005, Judge Robinson "spent about forty minutes addressing defense counsel's prolific instances of misconduct during the [first] trial." *Id.* She "read extensively from the *Code of Trial Conduct* promulgated by the American College of Trial Lawyers." *Id.* Judge Robinson found that defense counsel were "apparently still unchastened for their misconduct and disrespect to the jury, the Court and the judicial system. . . ." *Id.*

Judge Robinson correctly held that “[t]he Court’s attempt to maintain decorum in the courtroom and rebuke attorneys for unethical conduct simply may not form the basis for recusal.” *Id.* at 28. Specifically, Judge Robinson held that one “cannot force disqualification by attacking the judge and then claiming that these tactics must have caused the judge to be biased against him.” *Id.* at 32 (quoting *FDIC v. Sweeney*, 136 F.3d 216, 219 (1st Cir. 1998)). Finally, Judge Robinson invoked certain trial procedures to be followed in the future, “with the goal of conducting a retrial in an atmosphere of decorum, order and mutual respect of the Court, jurors, litigants and counsel.” *Id.* at 37 (citing ABA Criminal Justice Standards). Several of these procedures were specifically aimed at Mr. Hoffinger and Ms. Junghans. *Id.* at 38, 42- 43.

It should be noted that Judge Robinson specifically recognized that “defendant Lake and defendant Wittig engaged local counsel who enjoyed good reputations in [the Kansas District]. . . .” *Id.* at 46. As a result of the conduct of the non-local counsel, however, she ordered “that local counsel be present throughout the entire retrial proceeding.” *Id.* at 47 (citing ABA Criminal Justice Standard 6-3.11). As indicated above, Jeff Morris of the Berkowitz Oliver law firm ultimately replaced Ms. Junghans as one of Mr. Wittig’s lead attorneys in the second trial because she was recovering from back surgery. Fortunately, it appears from a review of the record that non-local counsel’s behavior during the second trial was much improved from that displayed at the first trial.

Following the denial of their recusal motions, both David Wittig and Douglas Lake filed petitions with the United States Court of Appeals for the Tenth Circuit seeking a writ

of mandamus seeking to have Judge Robinson disqualified from the criminal case. However, the Tenth Circuit quickly denied both Petitions for Writ of Mandamus. *See In re: David C. Wittig*, Case No. 05-3160 and *In re: Douglas T. Lake*, Case No. 05-3171 (10th Cir. May 3, 2005). In the Tenth Circuit’s Order denying the Petitions, it was found that “[i]n light of counsel’s behavior, we do not regard Judge Robinson’s comments as disproportionate or intemperate.” *Id.* at 2 (citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)). Furthermore, following the second trial, the Tenth Circuit found that Judge Robinson did “not display a disqualifying bias” in admonishing counsel following the first trial. *United States v. Lake and Wittig*, 472 F.3d at 1267.

VI. LEGAL ANALYSIS AND CONCLUSIONS

A. Standard of Review

Westar Energy, Inc., seeks a declaratory judgment relating to its contractual obligation to advance “reasonably incurred” legal fees and expenses to David Wittig arising out of the criminal case currently pending against him in the United States District Court for the District of Kansas. The Kansas Declaratory Judgment Act, K.S.A. 60-1701 *et seq.*, grants this Court the authority to enter declarations which “have the full force and effect of a final judgment.” K.S.A. 60-1701. “Any person 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 finds that the issue presented in this case is appropriate for resolution in a declaratory judgment action.

_____ “A district court is considered an expert on the issue of attorney fees. It may apply its own knowledge and professional experience in determining the value of services rendered.” *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, Syl. 4, 135 P.3d 1127 (2006). See also *Werrick v. Employers Mutual Insurance Co.*, 35 Kan. App. 2d 582, Syl. 11, 132 P.3d 970 (2006). “In 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 Kansas Supreme Court has found that “[f]ees which are not supported by ‘meticulous, contemporaneous time records’ that show specific tasks being billed should not be allowed.” *Davis v. Miller*, 269 Kan. 732, 748, 7 P.3d 1223 (2000) (quoting *Case v. Unified School District No. 233, Johnson County*, 157 F.3d 1243, 1250 (10th Cir. 1998)).

“The 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). “While fixing a reasonable hourly rate is ‘a logical beginning,’ [citation omitted], other factors may be considered.” 321 A.2d at 143. Like Kansas, Delaware looks to the factors set forth in Rule 1.5 in determining the reasonableness of contractual attorney fees. See *Mahani v. EDIX Media Group, Inc.*, 2007 Del. LEXIS 389, *7-12 (Del. September 4, 2007). It is also appropriate to “consider whether the number of hours devoted to litigation was ‘excessive, redundant, duplicative or otherwise unnecessary.’” *Mahani*, 2007 Del. LEXIS 389, *13 (quoting *All Pro Maids, Inc. v. Layton*, 2004 Del. Ch. LEXIS 192, *16 (Del. Ch. August 9, 2004.))

The fact that a district court may apply its own knowledge and experience, however, does not mean that a judge is required to use only his or her own “expertise” to determine the reasonableness of attorney fees. See *Link, Inc. v. City of Hays*, 268 Kan. 372, 382, 997 P.2d 697 (2000). Rather, a district court may look to recognized experts in a particular area of the law for assistance. See *Davis v. Miller*, 269 Kan. at 750-51. See also *Homestore, Inc. v. Tafteen*, 888 A.2d 204, 209 (Del. 2005). As indicated above, the Court in the present action obtained the assistance of a Special Master who has expertise in the representation of clients in complex white collar criminal cases in both federal and state courts.

Depending on the circumstances presented, courts “may adopt the report [of a Special Master] or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.” K.S.A. 60-253(e)(2). Regardless, the “ultimate objective [in] this exercise is to determine a reasonable fee.” *Ortiz*, 34 Kan. App. 2d at 471 (citing *Wolf v. Mutual Benefit Health & Accident Association*, 188 Kan. 694, 713, 366 P.2d 219 (1961)). Thus, in this case, the Court will consider all of the relevant factors set forth in KRPC 1.5(a), using the Report of Special Master for guidance, in determining the amount of attorney fees and expenses which have been “reasonably incurred” by David C. Wittig from February 1, 2005, to June 30, 2006.

B. Advancement and Indemnification Law

It is important to recognize that this action involves only the issue of advancement. “Advancement 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.*, 888 A.2d at 211 (citing *Kaung v. Cole Nat’l Corp.*, 884 A.2d 500 (Del. 2005)). “Although the right to indemnification and advancement are correlative, they are separate and distinct legal activities. The 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)).

“[C]orporations may confer a right to advancement that is *greater* than the right to indemnification and . . . advances must be repaid if it is ultimately determined that the corporate official is not entitled to be indemnified.” *Homestore, Inc.*, 888 A.2d at 212-13. “The scope of an advancement proceeding is . . . limited to determining the issue of entitlement in accordance with the corporation’s own uniquely crafted advancement provisions.” *Homestore, Inc.*, 888 A.2d at 213.

“The limited and narrow focus of an advancement proceeding precludes litigation of the merits of entitlement to indemnification of defending one self in the underlying proceedings. If it is subsequently determined that a corporate official is not entitled to indemnification, he or she will have to repay the funds advanced.”

Homestore, Inc., 888 A.2d at 214.

In Kansas, K.S.A. 17-6305 provides the statutory authority for both indemnification and advancement. “K.S.A. 17-6305(e) authorizes a corporation to advance the expenses of a legal proceeding. The ‘right to receive the costs of defense in advance does not depend upon the merits of the claims asserted . . . and is separate and distant 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)). The statute “provides that any advance must be conditioned ‘upon receipt of an undertaking by or on 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.* (quoting K.S.A. 17-6305(e)).

Specifically, K.S.A. 17-6305 provides in relevant part as follows:

(a) A corporation shall have the power to indemnify any person who was or is a party . . . to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigate . . . by reason of the fact that such person is or was a director, officer, employee or agent of the corporation . . . ***against expenses . . . reasonably incurred by such person in connection with such action . . . including attorney fees***, if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the corporation; and, with respect to any criminal action or proceeding, had no reasonable cause to believe such person’s conduct was unlawful. The termination of any action, suit or proceeding by . . . conviction, or upon a plea of nolo contendere or its equivalent, shall not of itself, create a presumption that the person did not act in good faith and in a manner which such person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause, to believe that such persons conduct was unlawful.

* * * *

(c) To the extent that a present or former director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsection[] (a) . . . such director, officer, employee or agent shall be indemnified ***against expenses actually and***

reasonably incurred by such person in connection therewith, including attorney fees.

(d) Any indemnification under subsection[] (a) . . . , unless ordered by a court, *shall be made by the corporation only as authorized in the specific case upon a determination that indemnification* of the present or former director, officer, employee or agent . . . has met the applicable standard of conduct set forth in subsection[] (a). . . .

(e) *Expenses, including attorney fees*, incurred by a director or officer in defending a civil, criminal, administrative or investigative action, suit or proceeding *may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on 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* as authorized in this section. Such expenses, including attorney fees, incurred by former directors and officers or incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the board of directors deems appropriate.

* * * *

(j) *The indemnification and advancement of expenses provided by, or granted pursuant to this section shall*, unless otherwise provided when authorized or ratified, *continue as to a person who has ceased to be a director, officer, employee or agent* and shall inure to the benefit of the heirs, executors and administrators of such a person. (Emphasis added.)

The public policy behind statutes authorizing the advancement of defense costs to corporate officers and directors has been explained as follows:

“The statutory provisions authorizing the advancement of defense costs, conditioned upon an agreement to repay if a right of indemnification is not later established, primarily reflect a legislative determination to avoid deterring qualified persons from accepting responsible positions . . . for fear of incurring

liabilities greatly in excess of their means, and to enhance the reliability of litigation-outcomes involving directors and officers of corporations by assuming a level playing field.”

Ridder v. City Fed Financial Corp., 47 F.3d 85, 87 (3rd Cir. 1995) (“It is not the province of judges to second-guess these policy determinations.”).

As Justice Joseph T. Walsh noted in the *Roven* case, the parties in an action involving the issue of advancement “retain their rights to an ‘ultimate determination’ of their responsibilities” in an indemnification action commenced following the conclusion of the underlying case. *Roven*, 603 A.2d at 822, n.4. Moreover, even if the contractual provisions in this case did not so provide, a corporation’s duty to make advancements “is subject to a reasonableness requirement.” 603 A.2d at 823. As the Delaware Supreme Court recognized, an agreement to advance legal fees and expenses should never be viewed as “a blank check.” 603 A.2d at 824.

In *Roven*, the Delaware Supreme Court found that the burden “to demonstrate the reasonableness of any expenses for which he demands advances” is upon the officer or director seeking the advancement. 603 A.2d at 825. Hence, the *Roven* court held that the corporation in question was required to “advance to [a former director] all reasonable costs incurred in defending [a] federal action and that [the former director] may not assert attorney-client privilege or the work product doctrine to deflect [the corporation’s] attempts to discover evidence of the reasonableness of any costs as incurred.” 603 A.2d at 826. The court also found that “[a]t 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.

An “advancement is best thought of as a credit advanced to a director, officer, employee, or agent of a corporation.” *Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 160, 175 (Del. Ch. 2003) (citing *Advanced Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992)). See also *Majkowski v. American Imaging Management Services, LLC*, 913 A.2d 572, 587 (Del. Ch. 2006) (“A grant of advancement rights is essentially a decision to advance credit to the company’s officers and directors because the officer or director must repay all sums advanced to him if it is later determined that he is not entitled to be indemnified.”).

The *Fasciana* court further 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 agent] may (depending on the outcome of the Criminal and Civil Actions) be obligated to repay all of the funds.”

829 A.2d at 177.

Furthermore, in *Kaung v. Cole National Corporation*, 884 A.2d 500 (Del. 2005), a corporation initially advanced all of the legal fees and expenses incurred by a former employee. After several months, however, the corporation began to question the reasonableness of the advancements being sought by the former employee. *Kaung*, 884 A.2d at 504. The Delaware Supreme Court ultimately affirmed a lower court’s determination that a portion of the legal fees and expenses were “not reasonably incurred . . . and that [the law firm representing the former employee] was not entitled to advancement of its unpaid legal fees.” 884 A.2d at 510.

Notwithstanding, the *Kaung* court found that the lower court had “prematurely” decided issues relating to the recoupment or offset of the legal fees and expenses that had previously been advanced by the corporation on behalf of its former employee. Specifically, the court held that “an advancement proceeding is . . . not appropriate for litigating indemnification or recoupment.” 884 A.2d at 510. Thus, the Delaware Supreme Court concluded that the only issues which can appropriately be addressed by courts at the advancement stage are whether the former employee is entitled to advancement of unpaid legal fees and expenses and whether the legal fees and expenses were “reasonably incurred.” 884 A.2d at 510.

C. Interpretation of Contractual Agreement in the Present Action

_____ Since this action involves a Kansas corporation seeking a declaratory judgment regarding a contractual obligation to advance attorney fees and expenses on behalf of a Kansas resident pursuant to the terms of an Undertaking and Restated Articles of Incorporation authorized by a Kansas statute, the Court finds that the issues presented in this case are controlled by Kansas law. Nevertheless, it is appropriate for this Court to look to Delaware decisions for guidance since the Kansas Corporation Code “was inspired substantially from the text of the Delaware corporation law of 1967. . . .” Revisor’s Note, 1972 Kansas General Corporation Code, K.S.A. Chapter 17, Articles 60 to 74. This is particularly appropriate in the present action since K.S.A. 17-6305, was specifically based on 8 Del. C § 145. See “Source or prior law,” K.S.A. 17-6305.

Other than the numerous decisions relating to the underlying criminal case against David Wittig, the Court does not find that it is necessary to look to federal cases to resolve the issues presented in this advancement action. However, because counsel for the parties have spent a great deal of time and energy debating the impact of various federal decisions, the Court has also reviewed a number of federal cases in researching the issues presented. In doing so, one of the cases which this Court reviewed was *Stein v. KPMG, LLP*, 486 F.3d 753 (2nd Cir. 2007).

The *Stein* decision is worth noting in the present action for two reasons. First, the decision arises out of what “is said to be the largest criminal tax case in American history.” 486 F.3d at 756. Second, the Second Circuit found that claims for advancement between criminal defendants and their former employers are contractual in nature and constitute “garden variety state law claims, albeit for large sums.” 486 F.3d at 761. Thus, the *Stein* decision supports the proposition that state law controls contractual disputes regarding the advancement of attorney fees.

Certainly, this Court agrees with the Tenth Circuit when it found that the purpose of a contractual attorney fee agreement “is to give the parties the benefit of the bargain, and the court’s responsibility is to enforce that bargain.” *C.J.C., Inc. v. Western States Mechanical Contractors, Inc.*, 834 F.2d 1533, 1548 (10th Cir. 1987). The real question, however, is what is the “benefit of the bargain” to be enforced by the Court in this particular case? Looking to the plain and unambiguous language of the Undertaking signed by David Wittig, which is consistent with the terms of the Restated Articles of Incorporation, it is clear that both

parties recognized that the “benefit of the bargain” was for Westar to advance *reasonable* attorney fees and expenses incurred in cases brought against Mr. Wittig involving his service as an officer and director of the corporation.

Unlike the *C.J.C., Inc. v. Western States* case, Westar did not contract to pay or advance “*all*” of David Wittig’s attorney fees and expenses. Rather, the corporation only agreed to advance and/or pay those attorney fees and expenses which are “*reasonable*” or “*reasonably incurred*” in the defense of the underlying criminal case. Neither the Restated Articles of Incorporation nor the Undertaking grant Mr. Wittig an unconditional right to advancement. Moreover, the granting of an unconditional right to advancement would be in direct violation of the terms of K.S.A. 17-1605, which only authorizes a corporation to pay or advance legal fees and expenses which are “reasonably incurred . . . in connection with [the] action” being defended.

Hence, the Court finds that the provisions of K.S.A. 17-1605, the provisions of the Undertaking and the provisions of the Restated Articles of Incorporation each place a condition or limitation on Westar’s contractual obligation to advance legal fees and expenses on behalf of David Wittig - the condition of reasonableness. As a highly sophisticated businessman, Mr. Wittig knew or should have known that a contractual agreement between a Kansas resident and a Kansas corporation, which is specifically authorized by a Kansas statute, would be controlled by Kansas law. Furthermore, as Mr. Wittig specifically recognized in the Undertaking which he signed, Westar was contractually obligated to advance only his “reasonable legal fees and expenses” incurred in the defense of the criminal

action. Thus, if Mr. Wittig had any questions regarding how the reasonableness of attorney fees is determined under Kansas law, he could have simply asked one of his attorneys who could have pointed him to the provisions of KRPC 1.5(a).

D. Application of KRPC 1.5(a) Factors in Present Action

In order to enforce the “benefit of the bargain” between the parties in this case, the Court will review the legal fees and expenses incurred by David Wittig in light of the factors set forth of KRPC 1.5(a). In doing so, the Court recognizes that no particular factor is controlling. Rather, the Court will consider all eight (8) factors based on the unique circumstances presented in this case.

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

From a review of the record, as well as a review of the various decisions rendered by the Honorable Julie A. Robinson and by the Tenth Circuit, the Court concludes that the underlying criminal case is clearly complex in nature. Moreover, the criminal case continues to require a significant amount of professional time and labor. Thus, although the underlying criminal case does not involve federal tax charges, it still involves difficult questions and continues to require a substantial amount of skill by the attorneys in order to perform the legal service properly.⁸

⁸ However, the Court continues to have serious concerns regarding the conduct and lapses in professional judgment displayed by non-local counsel in the first jury trial, which ultimately led to the filing of the Motion for Recusal and Petition for Writ of Mandamus..

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

As the Kansas Supreme Court noted in *Johnson v. Westhoff Sand Co., Inc.*, 281 Kan. 930, 941, 135 P.3d 1127 (2006), “it is common knowledge that the longer a case goes on the more other business it precludes.” In the underlying criminal action, there have already been two jury trials, and a third trial is set to begin in September. Thus, it is reasonable to conclude that the attorneys who have worked on the underlying criminal case have been precluded from working on other legal matters while working on the Wittig case.

(3) The fee customarily charged in the locality for similar legal services.

In this case, the Court defines the “locality” as the greater Kansas City metropolitan area since the place of trial is Kansas City, Kansas. Based on its own knowledge of the legal fees customarily charged by attorneys in Kansas and Missouri, as well as from a review of the evidence presented by the parties in this case, the Court finds that attorneys who have expertise in the defense of complex white collar criminal cases in the greater Kansas City area charge substantially lower hourly rates than those charged by attorneys with similar experience in Washington, D.C. In fact, by simply comparing the Piper Rudnick bills with the Berkowitz Oliver bills, the significant difference in the rates charged for similar services in the Wittig criminal case is obvious.

As indicated above, the record reveals that the hourly rate of James Eisenbrandt, a distinguished and well respected member of the white collar criminal defense bar in the greater Kansas City area, was \$295 during the relevant time period. By comparison, an

attorney with 22 years' less experience than Mr. Eisenbrandt, Robert Salerno of the Piper Rudnick law firm, charged an hourly rate of \$450 during the same time period. Similarly, Jeff Morris, who Judge Robinson has recognized as having "a very good reputation" in her court, billed his time at a rate of \$260 an hour during the relevant time period. During the same time period, a Piper Rudnick associate with eight (8) years less experience than Mr. Morris, Hank Walther, charged an hourly rate of \$330 an hour.

Certainly, the Court recognizes that due to the cost of living and other economic factors, it may be justifiable for an attorney in Washington, D.C. to charge a higher hourly fee for similar services than an attorney in Kansas or Missouri. Likewise, the Court recognizes that an attorney and a sophisticated client should have the freedom to contract for a higher fee than that customarily charged in Kansas or Missouri for similar legal services under certain circumstances. However, since this Court is only reviewing the contractual agreement between David Wittig and Westar Energy, Inc., it cannot simply ignore the fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

Although there are cases which involve more money (such as the *Kinder Morgan* case currently pending before this Court) and cases which involve more severe penalties (such as capital murder cases), there is no doubt that the underlying federal criminal case pending against David Wittig involves significant penalties. Moreover, the Court recognizes that the outcome of the criminal case is extremely important to Mr. Wittig and to his family. At the same time, the Court recognizes that the outcome of the underlying criminal case is important

to the employees, the shareholders and the ratepayers of Westar Energy, Inc. The underlying case is also important to the United States of America, which has decided to pursue a third jury trial.

Although the Court recognizes that trial attorneys help “create the record” used on appeal, this can be good or bad depending on the circumstances. Nevertheless, it is undisputed that the first trial ended in a mistrial and in the admonishment of the non-local counsel by Judge Julie Robinson for unprofessional behavior. Moreover, in the second trial, Mr. Wittig was convicted of all charges, he was sentenced to eighteen (18) years in prison, he was fined \$5 million, and he was ordered to pay approximately \$14.5 million in restitution. Thus, the results obtained at trial up to this point in time are, at best, mixed.

(5) The time limitations imposed by the client or by the circumstances.

Clearly, David Wittig’s attorneys were required to meet the deadlines set by Judge Robinson in the underlying criminal case. It does not appear, however, that Mr. Wittig placed any time or expense limitations on his attorneys. Of course, it is unknown whether Mr. Wittig would have placed time or expense limitations on his attorneys had Westar not contractually agreed to advance his reasonable legal fees and expenses.

(6) The nature and length of the professional relationship with the client.

The Berkowitz Oliver attorneys have had a lengthy relationship with David Wittig and, as indicated above, the law firm represented him in a previous federal criminal case which was unrelated to his employment at Westar Energy, Inc. Although most of the Piper Rudnick attorneys who provided representation to Mr. Wittig have subsequently left for other

law firms, the relationship with the law firm began in December 2002. Furthermore, the Court has been advised that Paula Junghans⁹ and Jeff Morris will serve as trial counsel for Mr. Wittig at his third jury trial. Both of these attorneys have had a professional relationship with David Wittig for more than five (5) years.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

All of the lead attorneys who have represented David Wittig in the underlying criminal action have expertise in the defense of complex white collar criminal cases. In addition, Paula Junghans, who graduated from the University of Maryland Law School in 1976, has expertise in the defense of complex criminal tax cases. Furthermore, all of the attorneys representing Mr. Wittig appear to enjoy a generally good professional reputation.

Notwithstanding, this Court must take into consideration the inappropriate behavior displayed by non-local counsel which was described by Judge Robinson and noted by the Tenth Circuit. “Civility plays an important role in the administration of civil and criminal justice. Without it, ***litigation becomes even more expensive*** and public trust and confidence in the administration of justice is undermined.” (Emphasis added.) *Kaung*, 884 A.2d at 507. “Litigation tainted with incivility ***and its resulting expense*** has the opposite effect.” (Emphasis added.) 884 A.2d at 507-08. In the underlying criminal action, the conduct of non-local counsel in the first jury trial can be directly linked to the expense incurred in pursuing the recusal motion and the Petition for Writ of Mandamus during the spring of 2005.

⁹ Ms. Junghans is currently a Partner in the Zuckerman Spaeder law firm.

(8) *Whether the fee is fixed or contingent*

The attorney fees in the federal criminal case are neither fixed nor contingent.

E. Reasonableness of Hours Billed

Based on a review of the record in light of the factors set forth in KRPC 1.5(a), the Court agrees with the Special Master's conclusion regarding the reasonableness of the hours billed by the Berkowitz Oliver law firm from February 1, 2005, to June 30, 2006. However, it is much more difficult to determine whether the hours billed by the Piper Rudnick law firm are reasonable. Although the Court understands that white collar criminal defense attorneys must be careful to avoid disclosing information that could damage a client's case, the Piper Rudnick bills are far from "meticulous" and leave much to the imagination.

Notwithstanding, the Special Master appointed by this Court has reviewed the Piper Rudnick time entries and found the vast majority of the hours spent on the criminal case to have been reasonably incurred based on his expertise in the defense of complex white collar criminal cases. As such, for the purposes this advancement action, the Court will yield to the expertise of the Special Master regarding the hours billed by the Piper Rudnick law firm during the relevant time period. Thus, the Court finds that, with the exception of 138 hours of Hank Walther's time, 138 hours of Paralegal Willis' time and .75 hours of J. Sullivan's time, the hours billed by Piper Rudnick were reasonable based on the factors set forth in KRPC 1.5(a).

F. Reasonableness of Hourly Rates

Turning to the hourly rates charged by Mr. Wittig's attorneys in light of the factors set forth in KRPC 1.5(a), the Court finds that the rate of \$295 an hour for James Eisenbrandt was reasonable based on his training and experience. Likewise, the Court finds that the rate of \$260 an hour charged by Jeff Morris was reasonable. The Court also finds that the rates billed by the Berkowitz Oliver law firm for the other attorneys and paralegals who worked on the Wittig file were reasonable. Thus, the Court hereby adopts the Special Master's recommendation that the amount of \$470,468.18 in legal fees and expenses billed by the Berkowitz Oliver law firm during the time period of February 1, 2005, to June 30, 2006, should be found to be reasonable based on the factors set forth in KRPC 1.5(a).

However, the Court does not find that the hourly rates charged by the Piper Rudnick law firm during the relevant time period were reasonable when reviewed in light of the factors set forth in KRPC 1.5(a). As indicated above, although the "locality" factor is not controlling, it is clearly an important consideration in determining the reasonableness of attorney fees pursuant to Kansas law. Furthermore, it is clear from a review of the record that the hourly rates charged by the Piper Rudnick attorneys were substantially higher than those charged by attorneys with similar training and experience handling complex white collar criminal cases in the greater Kansas City area during the relevant time period.

The Court finds that the professional services provided by the Berkowitz Oliver law firm were similar to those provided by the Piper Rudnick law firm. This is particularly true for the services provided during the time period in question, which covers the second jury

trial in the underlying criminal case. As the Special Master pointed out in his Report, Jeff Morris of the Berkowitz Oliver law firm successfully moved from the role of “local counsel to trial counsel” for the second jury trial. Moreover, it has been represented to this Court that Mr. Morris will once again actively participate in the third jury trial. In addition, the record reflects that Douglas Lake will be represented by attorneys from Kansas City at the third jury trial. Thus, although the services rendered may not have been identical, it is apparent that the legal work provided by the Piper Rudnick law firm was “similar” to that provided by Jeff Morris and other attorneys from the greater Kansas City area which handle the defense of complex white collar crime.

Although Mr. Wittig clearly had the freedom to choose whoever he wanted to represent him at trial, this freedom does not mean that Westar agreed to advance an amount greater than those found to be reasonable based on the factors set forth in KRPC 1.5(a). As the United States Court of Appeals for the Second Circuit has found, courts should “presume . . . that a reasonable, paying client would in most cases hire counsel from within his district, or at least counsel whose rates are consistent with those charging locally.” *Arbor Hill Concerned Citizens v. County of Albany*, 493 F.3d 110, 119 (2d Cir. 2007). In this case, Mr. Wittig voluntarily made the decision to have a law firm from Washington, D.C., which he knew charged substantially higher rates than those charged by his Kansas City attorneys to serve as lead counsel at trial in Kansas City, Kansas, even after he knew the Indictment did not include any federal tax charges as originally anticipated.

Had David Wittig at least attempted to find attorneys from Kansas or Missouri to perform the role performed by the Piper Rudnick attorneys following the issuance of the Indictment, the Court's decision may have been different. However, as stated in the written stipulation filed by the parties on March 13, 2008, Mr. Wittig "did not consider hiring a Kansas City or Kansas area law firm in addition to Berkowitz Oliver." Furthermore, he "did not attempt to find a law firm in the Kansas City or Kansas area to perform the role performed by Piper Rudnick." Thus, the Court finds that there is no legitimate reason why Westar should be required to pay substantially higher hourly rates on behalf of Mr. Wittig than those which are charged by attorneys in the greater Kansas City area for similar professional services.

Although there was previously some confusion over the issue, James Eisenbrandt clarified during his testimony at the final hearing conducted by this Court that it was actually David Wittig who brought up the name of Adam Hoffinger of the Piper Rudnick law firm. At that time, Mr. Eisenbrandt did not even know Mr. Hoffinger. Although there is no doubt that Mr. Hoffinger is an experienced white collar criminal defense attorney, so are Mr. Eisenbrandt and Jeff Morris, as well as numerous other attorneys licensed to practice law in Kansas and Missouri. In fact, other than Paula Junghans, there is no evidence in the record that any of the attorneys from the Piper Rudnick law firm who worked on the Wittig criminal case had any truly unique expertise which could not be found in Kansas or Missouri.

As indicated above, at the time the Piper Rudnick firm was retained, it was believed that the Grand Jury would likely indict David Wittig for violations of federal tax law. Hence,

prior to the return of the Indictment, it was understandable that the Berkowitz Oliver law firm would wish to associate with an attorney who had expertise in dealing with the tax issues before the Department of Justice in Washington, D.C. At that point, prior to the Indictment, a legitimate argument can be made that Washington, D.C. was the “locality” for the purposes of KRPC 1.5(a). In other words, the “locality” is determined by the venue in which the case proceeds.

Once the Indictment was ultimately returned and filed in the United States District Court for the District of Kansas, however, it was clear that there were no federal tax charges included and that the District of Kansas would serve as the “locality” for trial. Moreover, the Court finds it significant that after the Indictment was returned and charges were filed in the District of Kansas, the Berkowitz Oliver law firm anticipated that it would “play a primary role” in the defense of David C. Wittig. As a result, Berkowitz Oliver law firm entered the appearances of several of its attorneys in anticipation of the “primary role” it would be playing in the underlying criminal case.

Finally, it is also difficult for this Court to find that Westar should be required to advance substantially higher hourly rates for the non-local attorneys who displayed unprofessional behavior at the first trial than those charged by the local attorneys who have displayed professional conduct throughout the underlying criminal case. As indicated above, the actions of non-local counsel during the first trial are material to the Court’s decision in this advancement action since the bills in question include a substantial amount of time and expense incurred by the Piper Rudnick attorneys in seeking the recusal of Judge Robinson

and in seeking a writ of mandamus from the Tenth Circuit. Although the actions of non-local counsel in the underlying case appear to be an anomaly, the Court finds that their conduct resulted in an increase in fees and expenses that must be considered in determining reasonableness under the provisions of KRPC 1.5(a).

Therefore, for the purposes of this advancement action, and after consideration of all of the factors set forth in K.R.P.C. 1.5(a), the Court finds that the following hourly fees are reasonable for the work performed by the Piper Rudnick law firm during the relevant time period, from February 1, 2005, to March 31, 2006:

<u><i>Attorney</i></u>	<u><i>Admittance to Bar</i></u>	<u><i>2005</i></u>	<u><i>2006</i></u>
Earl Silbert	1960	\$500	\$550
Paula Junghans	1976	\$375	\$400
David Clarke, Jr.	1981	\$350	\$375
Adam Hoffinger	1982	\$350	\$375
Robert Salerno	1990	\$275	\$300
James Sullivan	-----	\$200	\$225
Bridget Fitzpatrick	2000	\$150	\$175
Hank Walther	2001	\$135	\$150
Demme Joannou	2003	\$120	\$130
Charis Menschel Drant	2004	\$115	\$125
E ___ Jones	----	\$115	\$125
Claudio Romain Ochoa	2005	\$110	\$120
<i>Paralegals and Other Non-Attorneys:</i> _____		\$100	\$110

It should be noted that the Court has taken into account the skill and experience of the various Piper Rudnick attorneys who represented David Wittig in the underlying criminal action. For example, the Court has recognized the experience and reputation of Earl Silbert as well as the special skill and expertise of Paula Junghans in the area of criminal tax law.

In fact, the Court has approved hourly rates for four (4) of the Piper Rudnick attorneys which are significantly higher than the hourly rates charged by the Berkowitz Oliver law firm during the relevant time period for similar services. In doing so, the Court has also recognized that the Piper Rudnick attorneys were likely precluded from working on other cases during the time that they worked on the Wittig case.

G. Lodestar or Presumptively Reasonable Fee Analysis

In *Gidget v. Cities Service Oil Co.*, 241 Kan. 304, 319, 737 P.2d 18 (1987), which involved the award of attorney fees in a Class Action lawsuit, the Kansas Supreme Court found that “the lodestar factors, time and hourly rates, are two of the factors we require the district court to consider. . . .” Of course, these are two (2) of the factors which this Court has already considered in analyzing this case pursuant to KRPC 1.5(a). Moreover, it should be noted that the *Shutts* factors discussed in the *Gidget* decision are very similar to the factors under KRPC 1.5(a). Thus, if the Court were to perform a lodestar or presumptively reasonable fee analysis, the result would be the same as that set forth above.

H. Reasonableness of Expenses Incurred

The Special Master recommended that several items of expense be deducted from the Piper Rudnick bills. First, Mr. Focht recommended that \$12,000 in travel expenses be deducted from the expenses claimed for advancement. Second, he recommended that an item designated as “Local Counsel Fees - \$3,325” be deducted from the claimed expenses. Finally, the Special Master recommended that an item designated as “Local Counsel Fees - \$16,084.43” be deducted from the claimed expenses.

No objection has been raised to the recommended deduction for weekend travel expenses. However, counsel for David Wittig has submitted an Affidavit signed by Adam Hoffinger and additional documentation regarding the items designated as “Local Counsel Fees,” in support of his position that these are legitimate litigation expenses. The documentation reveals that the sum of \$3,325.00 was paid to Professor Robert C. Downs of the University of Missouri-Kansas City School of Law, who was designated as an expert witness in the underlying criminal case, and that the sum of \$16,084.43 was paid to Karen Kesh Redden, M.S., for her time and expenses in working on the Wittig case.

Since Professor Downs was a designated expert in the underlying criminal case, the Court will allow the expense in the amount of \$3,325.00. However, the Court will accept the Special Master’s recommendation regarding the expense in the amount of \$16,084.43 since there is simply not sufficient information in the Affidavit or in the supporting documentation upon which this Court can determine the reasonableness of Ms. Redden’s bill. In fact, since the Affidavit refers to Ms. Redden as a “trial consultant,” while the documentation refers to a “Wittig Mock Trial,” the Court does not know what services she actually performed on behalf of Mr. Wittig.

VII. SUMMARY OF FINDINGS

Based upon the contractual agreement of the parties, the Court finds that Westar Energy, Inc. voluntarily agreed to advance the legal fees and expenses reasonably incurred by David C. Wittig in the criminal case currently pending before him in the United States District Court for the District of Kansas. The interpretation of the contractual relationship

between Westar and Wittig is a matter of Kansas law. Likewise, the Court must look to the eight (8) factors set forth in Rule 1.5(a) of the Kansas Rules of Professional Conduct in deciding the reasonableness of attorney fees.

Since this is an advancement action, the Court finds that it would be premature to determine whether David Wittig will ultimately be entitled to indemnification from Westar Energy, Inc. Likewise, the Court finds that it would be premature to determine whether Westar is entitled to recoupment or an offset for the legal fees and expenses which the corporation has previously advanced on behalf of Mr. Wittig. Rather, the Court finds that these issues can only be determined after the underlying criminal case has been finally resolved.

As such, the Court finds that the attorney fees and expenses which are subject to review in this advancement action are those incurred by David Wittig from February 2005 to June 2006.¹⁰ Specifically, Mr. Wittig seeks the advancement of \$470,468.18 in fees and expenses billed by the Berkowitz Oliver law firm during the relevant time period. In addition, he seeks advancement of \$2,077,663.33 in fees and expenses billed by the Piper Rudnick law firm during the same time period.

After reviewing the record in light of the eight (8) factors set forth in Rule 1.5(a) of the Kansas Rules of Professional Conduct, and for the reasons more fully set forth in this Memorandum Decision and Order, the Court hereby declares:

¹⁰ It appears that the last bill from the Piper Rudnick law firm was for services rendered in March 2006.

1. That the attorney fees and expenses billed to David Wittig during the relevant time period by the Berkowitz Oliver law firm of Prairie Village, Kansas, in the full amount of \$470,468.18, were reasonably incurred and should be advanced without undue delay by Westar Energy, Inc.;
2. That the attorney fees billed to David Wittig during the relevant time period by the Piper Rudnick law firm of Washington, D.C., should be reduced in the amount of \$847,946.50, based on the reasonable hourly fees approved by the Court.¹¹
3. That the attorney fees billed to David Wittig during the relevant time period by the Piper Rudnick law firm of Washington, D.C., in the adjusted amount of \$1,031,504.75, were reasonably incurred and should be advanced without undue delay by Westar Energy, Inc.
4. That the expenses billed to David Wittig during the relevant time period by the Piper Rudnick law firm, should be reduced in the amount of \$28,084.43.
5. That the expenses billed to David Wittig during the relevant time period by the Piper Rudnick law firm, in the adjusted amount of \$170,127.65, were reasonably incurred and should be advanced without undue delay by Westar Energy, Inc.

¹¹ The Court has attached a Summary of Approved Legal Fees (Feb. 2005-March 2006) as Appendix “A,” which is incorporated herein by reference.

CONCLUSION

_____ This Memorandum Decision and Order shall serve as the Declaratory Judgment of the Court and no further Journal Entry shall be required. The parties are directed to confer in good faith to arrange for the advancement of the reasonably incurred attorney fees and expenses set forth above. In addition, the parties are directed to confer regarding the status of the Plaintiff's breach of contract claim. Within ten (10) business days from the date of this Memorandum Decision and Order, counsel shall advise the Court regarding any agreements which have been reached. If there are further matters in this case which will require Court intervention, counsel for the parties shall contact the Division 12 Administrative Assistant to set up a telephone status conference.

IT IS SO ORDERED.

Entered on this _____ day of July, 2008.

David E. Bruns
District Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of July, 2008, she served a true and correct copy of the above and foregoing pleading by e-mail and by United States mail, first class postage prepaid, on:

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