

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWELVE**

DAVID C. WITTIG,
Plaintiff,

v.

Case No. 08-C-340

WESTAR ENERGY, INC.,
Defendant.

MEMORANDUM DECISION AND ORDER

This case comes before the Court on the Motion for Summary Judgment filed by the Plaintiff, David C. Wittig, and on the Motion for Summary Judgment filed by the Defendant, Westar Energy, Inc. The summary judgment motions were filed on September 30, 2008, and both parties filed responses on October 24, 2008. Mr. Wittig filed a Reply on November 6, 2008, and Westar filed a Reply on November 7, 2008. During a telephone status conference held on January 22, 2009, counsel for the parties certified that the 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 the summary judgment motions to be submitted for decision.

I. NATURE OF ACTION

This is an advancement action which was commenced by David C. Wittig on February 29, 2008. In his Petition, Mr. Wittig seeks a declaratory judgment pursuant to K.S.A. 60-1701, *et seq.*, and asserts a claim for breach of contract against Westar Energy, Inc. This action arises out of Westar's contractual agreement to advance the attorney fees and expenses "reasonably incurred" by Mr. Wittig in the criminal case of *United States v. Wittig and Lake*, 03-40142-JAR, which is currently pending in the United States District Court for the District of Kansas. As the parties are aware, this is the second case filed in the District Court of Shawnee County, Kansas, involving the same parties and arising out of the same contractual advancement provisions.¹

The dispute in the present action involves the reasonableness of the attorney fees charged by Paula Junghans after she became affiliated with the Washington, D.C. law firm of Zuckerman Spaeder, LLP, in October 2006. As it did in *Wittig I*, Westar acknowledges that it voluntarily agreed to advance the legal fees and expenses which are "reasonably incurred" by Mr. Wittig in the underlying criminal case. Moreover, during the time period relevant to this action, Westar has been advancing the attorney fees of the Berkowitz Oliver law firm in full at the hourly rates billed to Mr. Wittig by the Kansas City firm. However, Westar challenges the reasonableness of the hourly rates charged by Zuckerman Spaeder and

¹ In this decision, the Court will refer to the first case, *Westar Energy, Inc., v. David C. Wittig*, Case No. 05-C-1267, as *Wittig I*. That case involved the advancement of attorney fees and expenses prior to June 30, 2006. Although it will not repeat all of the findings and conclusions set forth in the two previous Memorandum Decisions entered in *Wittig I*, the Court incorporates those decisions into this Memorandum Decision and Order by reference.

has been advancing the attorney fees billed by Ms. Junghans at an hourly rate which it believes to be reasonable.

II. UNCONTROVERTED FACTS

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. In 1995, Mr. Wittig was hired as Executive Vice President of Western Resources, Inc. In 1998, he was named President, Chief Executive Officer and Chairman of the Board of Western Resources, Inc. Subsequently, the corporation's name was changed to Westar Energy, Inc.

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 and another Westar executive, Douglas Lake. 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.²

² Although the Plaintiff 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. Certainly, this Court does not find the legal fees charged by Debevoise & Plimpton to be representative of the legal fees charged in the Greater Kansas City area. However, the Court has considered the Special Committee report as evidence of the complexity of the criminal case.

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 retained James L. Eisenbrandt, a respected white collar criminal defense attorney in the metropolitan Kansas City area, to represent him. 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 pled not guilty to the bank fraud charges, he submitted his resignation to Westar Energy, Inc.

B. Retention of Kansas City and Washington, D.C. Attorneys by Mr. Wittig

During the course of the bank fraud case, James Eisenbrandt also began representing David Wittig in what has been referred to as the “Westar criminal case/investigation.” Mr. Eisenbrandt testified in *Wittig I* that Mr. Wittig asked him about his “firm’s experience and expertise in handling criminal tax matters” during the fall of 2002. According to Mr. Eisenbrandt, he told Mr. Wittig that although the Berkowitz Oliver law firm had handled several criminal tax matters, “it was going to be necessary to associate . . . with a firm that had expertise in . . . complex criminal tax matters.” Mr. Eisenbrandt testified that at that point in time he 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 further testified 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.” Mr. Eisenbrandt also opined that “those people, at least that [he is] aware of, are practicing law in Washington, D.C.”

Mr. Eisenbrandt testified that he recommended Stan Mortenson of the Baker Botts law firm and Gerald Feffer of the Williams & Connolly law firm. However, according to Mr. Eisenbrandt, David Wittig asked him about the Piper Rudnick law firm, and specifically mentioned Adam Hoffinger, who was then a Partner of the firm. Although Mr. Eisenbrandt has testified that he did not know Mr. Hoffinger at that point in time, he did know “that Piper Rudnick was an excellent firm that had tremendous resources.” Mr. Eisenbrandt also testified that 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.

During his testimony in *Wittig I*, Mr. Eisenbrandt indicated that although he “did not personally know” Paula Junghans, who was also a Partner of the Piper Rudnick law firm in 2002, he knew she had served as a Deputy Attorney General in the Tax Division. As such, it was Mr. Eisenbrandt’s opinion that “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. . . .” On December 9, 2002, David 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.”

In Mr. Eisenbrandt’s opinion, at the time David Wittig retained the Piper Rudnick law firm to associate with the Berkowitz Oliver law firm, he 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. Mr. Eisenbrandt also testified that he “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. Furthermore, according to the written stipulation filed by the parties in *Wittig I*, “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 Douglas Lake, which constituted possible violations of federal law. On December 3, 2003, Mr. Wittig and Mr. Lake were 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. Thereafter, on July 14, 2004, a First Superseding Indictment was returned against Mr. Wittig and Mr. Lake.

In the First Superseding 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 [superseding] 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 1254.³ At the second trial, “the jury found Mr. Wittig guilty on all counts and . . . decided that many, but not all, 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 Tenth Circuit reversed and remanded on the counts of conspiracy, circumvention and forfeiture.

³ 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 if a third jury trial is held, it will also be conducted by Judge Robinson in Kansas City, Kansas.

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

During his testimony in *Wittig I*, James Eisenbrandt recognized that when the Indictment was ultimately returned against David Wittig, “[t]here were not tax charges” included. However, Mr. Eisenbrandt testified that some tax related issues remained in the case that related 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 “expected to play a primary role” in Mr. Wittig’s defense in the case of *United States v. Wittig and Lake*, 03-40142-JAR. (Transcript of Status Conference Hearing, *United States v. Wittig and Lake*, 03-40142-JAR, January 4, 2005, p. 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 jury trial. As explained in more detail in *Wittig I*, Mr. Hoffinger and Ms. Junghans, together with Douglas Lake’s New York attorneys, were strongly admonished following the first jury trial by Judge Julie Robinson for what she considered to be unprofessional behavior.

Paula Junghans underwent back surgery in 2005 and was unable to be personally present at Mr. Wittig’s second jury trial. As such, Jeff Morris of the Berkowitz Oliver law firm replaced her and joined Mr. Hoffinger as trial counsel at the second trial. It has been represented to the Court in this action that Jeff Morris and Paula Junghans will serve as trial

counsel for Mr. Wittig at the third jury trial. As indicated above, Ms. Junghans is no longer with the Piper Rudnick law firm and has been practicing with the Zukerman Spaeder law firm since October 2006.

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 ⁴

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.

⁴ It is important to note that pursuant to K.S.A. 17-6305(e), the Restated Articles of Incorporation and the resolution passed in October 2002, the delivery of the Undertaking by David Wittig to Westar on September 7, 2004, served as the "trigger" event for his contractual right to receive interim advancement of reasonable attorney fees and expenses.

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 at Issue in the Present Action

Since joining the Zuckerman Spaeder law firm, Paula Junghans has billed Mr. Wittig at the rate of \$625 an hour for professional services rendered during 2007. She increased her rate to \$675 an hour for professional services provided to Mr. Wittig during 2008. In contrast, the Berkowitz Oliver law firm billed Mr. Wittig at the rate of \$400 per hour for the professional services rendered by Mr. Eisenbrandt during 2008. Moreover, the Berkowitz Oliver law firm charged Mr. Wittig for the professional services rendered by Mr. Morris at the rate of \$325 an hour during 2007 and at the rate of \$350 per hour during 2008.

During the time period relevant to the present action, Westar has been advancing the full amount of the Berkowitz Oliver attorney fees and expenses. In addition, it has been advancing the Zuckerman Spaeder law firm at the rate of \$395 an hour for the services provided to David Wittig by Paula Junghans. Although Westar contends that \$395 an hour is reasonable, Mr. Wittig contends that the Zukerman Spaeder fees should be advanced in the “full amount” at Ms. Junghans’ “customary” hourly rate.

III. LEGAL ANALYSIS AND CONCLUSIONS

A. Standard of Review

As indicated above, both parties have moved for summary judgment in this case. The familiar standard of review for summary judgment is set forth in K.S.A. 60-256 and Kansas Supreme Court Rule 141. “Summary judgment practice is an efficient and appropriate method to decide 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)). Likewise, the determination of the reasonableness of attorney fees is a matter left to the sound discretion of the Court. See *Conner v. Occidental Fire & Cas. Co. of North Carolina*, 281 Kan. 875, 888, 135 P.3d 1230 (2006) (citing *Hawkins v. Dennis*, 258 Kan. 329, 349, 905 P.2d 678 (1995)). Thus, the Court finds that it is appropriate to resolve the issues presented in this action by way of summary judgment.

B. Interim Advancement of Fees and Expenses

In the previous Memorandum Decisions entered in *Wittig I*, this 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). In particular, K.S.A. 17-6305, which authorizes contractual advancement provisions in Kansas, is based on 8 Del. C. § 145. 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). Thus, the Court will continue to look to Delaware law for guidance in the present action.

“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 204, 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 Delaware Supreme Court found that

unlike an indemnification proceeding commenced after the underlying case has been concluded, an advancement proceeding has a “limited and narrow focus. . . .” 888 A.2d at 214. “If it is subsequently determined that a corporate official is not entitled to indemnification, he or she will have to repay the funds advanced.” *Id.*

K.S.A. 17-6305 provides the statutory authority for both indemnification and advancement in Kansas. “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 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)). 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)).

In *Citadel Holding Corp. v. Roven*, the Delaware Supreme Court held that the parties in an advancement proceeding “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, the *Roven* court found that a corporation’s duty to make advancements “is subject to a reasonableness requirement.” 603 A.2d at 823. Clearly, 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 also found that the burden “to demonstrate the reasonableness of any expenses” for which an advance payment is being sought is upon the officer or director seeking the advancement. 603 A.2d at 825. The *Roven* court recognized 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. Therefore, because it is undisputed that the parties have a contractual agreement providing for the advancement of “reasonably incurred” legal fees and expenses, the Court will focus on the reasonableness of the interim advancements sought by David Wittig in the present action.

C. Declaratory Judgment Claim

_____ In the present action, David Wittig seeks a declaratory judgment relating to Westar’s contractual obligation to advance “reasonably incurred” legal fees and expenses on his behalf 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 a determination of the interim rights and obligations of the parties under the terms of the contractual advancement provisions is an appropriate issue for resolution in a declaratory judgment action.

It is important to recognize that Westar did not contract to pay or advance all of David Wittig's attorney fees and expenses incurred in the underlying criminal action. Likewise, Westar did not give Mr. Wittig a "blank check" or an unconditional right to advancement. In fact, as noted by this Court in *Wittig I*, 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.

At the same time, it is also important to recognize that "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." *Radiancy v. Azar*, 2006 WL 224059, at *1 (Del. Ch. 2006). As such, the Court finds as a matter of law that Westar voluntarily agreed to advance "reasonably incurred" legal fees and expenses on behalf of David Wittig in a prompt manner. Thus, because Westar is already advancing the attorney fees billed by the Berkowitz Oliver law firm at the hourly rates charged for the time period relevant to the present action, the sole remaining issue for the purposes of the declaratory judgment claim is whether the hourly rates charged by the Zukerman Spaeder law firm are reasonable as that term is defined by Kansas law.

"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). "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). Although there is no particular factor which is controlling, the weight to be given to a particular factor is dependent on the unique circumstances presented in a particular case. Although there is no particular factor which is controlling, the weight to be given to a particular factor is dependent on the unique circumstances presented in a particular case. Therefore, in order to determine the respective rights and obligations of the parties under the terms of the contractual advancement provisions, the Court will review the legal fees and expenses at issue in the present action in light of the factors set forth of KRPC 1.5(a).

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

As this Court previously found in *Wittig I*, the underlying criminal case is clearly complex in nature. This fact is confirmed by reviewing the filings in *United States v. Wittig*, 03-40142-JAR, as well as the Special Committee’s Report dated April 29, 2003. As the parties are well aware, there have already been two (2) jury trials in the underlying criminal case and it is anticipated that a third jury trial will be held in the future. As such, the defense of the criminal case continues to require a significant amount of professional time and labor.

Thus, although the underlying criminal case does not directly involve federal tax charges, it still involves difficult questions and continues to require a substantial amount of skill by the defense attorneys in order to perform the legal service properly.⁵

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

As this Court recognized in *Wittig I*, the Kansas Supreme Court has found that “it is common knowledge that the longer a case goes on the more other business it precludes.” *Johnson v. Westhoff Sand Co., Inc.*, 281 Kan. 930, 941, 135 P.3d 1127 (2006). Hence, it is reasonable to conclude that Paula Junghans has 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.

As the Court found in *Wittig I*, the “locality” for the purposes of determining the issue of reasonableness of the attorney fees and expenses incurred in the underlying criminal case is the greater Kansas City metropolitan area. 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 as well as in *Wittig I*, the Court finds that attorneys who have expertise in the defense of complex white collar criminal cases in the

⁵ Although Mr. Wittig’s counsel believes this is no longer a relevant factor to consider, this Court continues to take the reported incidents of unprofessional behavior during the first jury trial very seriously. Certainly, the Court understands the emotions which can come in the “heat of the moment” during a complex jury trial. However, because Paula Junghans was not present at the second jury trial, the Court can only hope that she has, upon reflection, taken the admonishment by Judge Julie Robinson to heart and that she will not repeat the mistakes of the past the next time she is before a jury in the underlying criminal case.

greater Kansas City area charge substantially lower hourly rates than those charged by attorneys with similar experience in Washington, D.C.

As indicated above, the record reveals that the hourly rate charged to David Wittig by James Eisenbrandt, a very experienced and well-respected member of the white collar criminal defense bar in the greater Kansas City area, was \$400 during 2008. Similarly, Jeff Morris, who Judge Robinson has recognized as having “a very good reputation” in her court, billed Mr. Wittig at a rate of \$350 an hour during 2008. However, Paula Junghans, who has practiced law eight (8) years less than Mr. Eisenbrandt, billed her time to Mr. Wittig at a rate of \$675 an hour during 2008. As such, Ms. Junghans’ time is being billed at a rate which is **\$275 an hour higher** than Mr. Eisenbrandt’s time and **\$325 an hour higher** than Mr. Morris’ hourly rate when each of these attorneys are providing similar professional services to the same client in the same case.

(4) The amount involved and the results obtained.

As this Court noted in *Wittig I*, it is clear that the underlying case pending against David Wittig in federal court involves the potential of significant criminal penalties. Moreover, this Court certainly understands that the outcome of the criminal case is extremely important both to Mr. Wittig and to his family. Likewise, the outcome of the underlying criminal case is very important to the employees, the shareholders and the ratepayers of Westar Energy, Inc. Obviously, the underlying criminal case is important to the United States of America or it would not be seeking a third jury trial. Thus, the Court has no difficulty concluding that what is at stake in the underlying criminal case is substantial.

Regarding the “results obtained” in the underlying criminal case, it is undisputed that the first jury trial in the underlying criminal case ended in a mistrial and that the non-local counsel present at the first trial, including Paula Junghans, were admonished by Judge Julie Robinson for unprofessional behavior. In the second jury trial, Mr. Wittig was convicted of all charges. Although Ms. Junghans was personally unable to attend the second trial due to health problems, she has represented to this Court that she continued to actively participate in Mr. Wittig’s defense since December 2002. Fortunately for Mr. Wittig, the Tenth Circuit reversed the convictions, and the date for the third jury trial has not yet been set. Thus, the results obtained by the defense team up to this point in time have been mixed, and the ultimate resolution of the underlying criminal case remains to be seen.

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

It is reasonable to conclude based on a review of the record that David Wittig’s attorneys have been required to meet the deadlines set by Judge Robinson and by the Tenth Circuit in the underlying criminal case. It does not appear, however, that Mr. Wittig has placed any time or expense limitations on his attorneys. Of course, as this Court noted in *Wittig I*, 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.

Paula Junghans first became involved in Mr. Wittig’s case when she was a partner of the Piper Rudnick law firm. With the exception of being unable to personally attend the

second jury trial in 2005, Ms. Junghans has continued to be actively involved in Mr. Wittig's defense since December 2002. As indicated above, it has been represented to the Court that Paula Junghans and Jeff Morris will serve as trial counsel for Mr. Wittig at his third jury trial in the underlying criminal case.

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

The record reflects that Paula Junghans graduated from the University of Maryland Law School in 1976. Since that time, she has developed expertise in the defense of complex criminal tax cases as discussed in more detail in the Memorandum Decision and Order entered by this Court in *Wittig I* on July 15, 2008. She is licensed to practice law in Maryland and in Washington, D.C. From 1998 to 2001, Ms. Junghans served as Deputy Assistant Attorney General and Acting Assistant Attorney General of the Tax Division of the United States Department of Justice. Notwithstanding the behavior observed by Judge Robinson and the jury at the first criminal trial, it appears from the record that Ms. Junghans generally enjoys a good professional reputation and that no disciplinary action has ever been taken against her.

(8) Whether the fee is fixed or contingent.

As one would expect in a criminal matter, the attorney fees in the underlying criminal case are billed to David Wittig at an hourly rate and are neither fixed nor contingent.

After reviewing all of the evidence in the record as applied to the factors set forth in KRPC 1.5(a), the Court continues to find as it did in *Wittig I* that it is not reasonable to

require Westar to advance hourly rates for non-local attorneys that are significantly higher than those charged by white collar criminal defense attorneys in the greater Kansas City area for the same or similar services. However, the Court also continues to find that it is reasonable for Westar to advance an hourly rate for the professional services rendered by Paula Junghans which is somewhat higher than that charged by white collar criminal defense attorneys in the greater Kansas City area for similar services. Furthermore, the Court continues to find that the rates charged by James Eisenbrandt and Jeff Morris reflect a reasonable hourly rate for attorneys with expertise in white collar criminal defense in similar cases in the Kansas City area.⁶

As this Court also found in *Wittig I*, although Mr. Wittig clearly has the freedom to choose whoever he wants to represent him in the underlying criminal case, this freedom does not mean that Westar agreed to advance an amount greater than that which is 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 charged locally.” *Arbor Hill Concerned Citizens v. County of Albany*, 493 F.3d 110, 119 (2d Cir. 2007). Thus, the Court concludes that the fee customarily charged in the locality for the same or similar legal services must be given substantial consideration in determining whether the legal fees and expenses were

⁶ This is particularly true since the Berkowitz Oliver law firm and Paula Junghans continue to render professional services to the same client in the same criminal case. A review of the record reveals that the Berkowitz Oliver attorneys, especially Jeff Morris, have provided similar (and in some cases identical) services to those provided by Ms. Junghans.

“reasonably incurred” as that term is used in the contractual advancement provisions entered into by the parties.

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 hereby declares:

1. That an hourly rate of up to \$425 for the professional services rendered to David Wittig by Paula Junghans during 2007 was reasonable;
2. That an hourly rate of up to \$450 for the professional services rendered to David Wittig by Paula Junghans during 2008 was reasonable;
3. That an hourly rate of up to \$475 for the professional services rendered to David Wittig by Paula Junghans during 2009 is reasonable; and,
4. That an hourly rate of up to \$500 for the professional services to be rendered to David Wittig by Paula Junghans during 2010 would be reasonable.

D. Breach of Contract Claim

The Court now turns to David Wittig’s claim for breach of contract. In the Petition, it is alleged that “Westar’s failure and refusal to advance the *full amount* of expenses and attorneys’ fees incurred by Mr. Wittig in connection with the Criminal Case is a breach of its contractual obligations to Mr. Wittig and in violation of Mr. Wittig’s rights under Kansas law, Westar’s Articles of Incorporation, and the October 2002 Resolution of Westar’s Board of Directors.” (Emphasis added.) Petition, paragraph 36. Furthermore, in the prayer for relief contained in the Petition, Mr. Wittig asks this Court to find “that Westar has breached [his] contractual rights, under Westar’s Articles of Incorporation and the October 2002

Resolution of Westar’s Board of Directors, to advancement of attorneys’ fees and expenses for his third criminal trial and related proceedings. . . .” Petition, p. 12.

Mr. Wittig also contends that Westar is contractually obligated to pay the “customary rate” charged by the attorneys he retains to defend him in the underlying criminal case. However, the plain and unambiguous language of the contractual advancement provisions does not require Westar to pay either the “customary rate” charged or the “full amount” billed by Mr. Wittig’s attorneys. Rather, as this Court held in *Wittig I*, Westar’s contractual obligation is to advance the ongoing legal fees and expenses which are “reasonably incurred” by David Wittig in the underlying criminal action. Thus, Mr. Wittig only has a right to receive interim advancement of those attorney fees and expenses which are found to be reasonable – he is legally entitled to no more and no less.

Although it is certainly possible that the “full amount” billed or the “customary rate” charged by a particular attorney or law firm is reasonable, as this Court has found to be true of the Berkowitz Oliver legal fees, Westar has no legal duty to advance legal fees and expenses in excess of what this Court has found to be reasonable under the factors set forth in KRPC 1.5(a). As the Tenth Circuit recognized in *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1227 (10th Cir. 2009), “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.” 552 F.3d at 1227. This point is also true in the present action – Westar had no legal or contractual obligation to pay the “full amount” or the “customary rate” charged to David Wittig by Paula Junghans.

It is undisputed that Westar has been advancing 100% of the attorney fees billed by the Berkowitz Oliver law firm during the time period relevant to this action and that Westar has been advancing an hourly rate of \$395 for the services provided by Ms. Junghans during the relevant time period. Hence, the present action does not involve a corporation that is ignoring its contractual obligation to make advancements. Rather, this action involves a legitimate dispute over what is and is not reasonable in light of the factors set forth in KRPC 1.5(a).

While Westar has been advancing attorney fees at the rates that it believes to be reasonable, Mr. Wittig believes all of the attorney fees and expenses he has incurred are reasonable. Although the Court has found this dispute between the parties to be appropriate for resolution in a declaratory judgment action, this does not mean that either party has breached their contractual obligation to the other. In fact, from a review of Delaware case law, it is apparent that it is not unusual for the parties to contractual advancement provisions to need the assistance of courts from time to time to “make the call” regarding the reasonableness of the fees which a corporate officer has incurred.

It is also important to remember the “interim” nature of an advancement proceeding as more fully discussed in the decisions issued by this Court in *Wittig I*. If necessary, any claims for breach of contract can and should be resolved after the underlying criminal case is finally concluded. Thus, just as this Court found that Westar’s breach of contract claim against Mr. Wittig should be dismissed without prejudice, the Court finds that Mr. Wittig’s breach of contract claim against Westar should also be dismissed without prejudice.

E. Request for “Fees on Fees”

David Wittig also seeks to recover “fees on fees” in this action. Specifically, he seeks to recover the fees and expenses he has incurred in bringing this advancement proceeding. In support of his claim, Mr. Wittig cites the language of Article XVIII, Section (2)(b) of the Restated Articles of Incorporation. This provision states, in part, as follows:

“If a claim under paragraph (a) of this Section is not paid in full by the Corporation within thirty days after a written claim has been received by the Corporation, the claimant may at any time thereafter bring suit against the Corporation to recover the unpaid amount of the claim and, if successful in whole or in part, the claimant shall be entitled to be paid also the expense of prosecuting such claim.”

Once again, it is important to recognize that Westar has been advancing 100% of the Berkowitz Oliver legal fees in compliance with the contractual advancement provisions. In addition, Westar has been advancing Paula Junghans’ legal fees at the rate of \$395 an hour for the time period relevant to the present action. This is the rate that Westar contends is reasonable. Although the parties had a legitimate dispute regarding the reasonableness of Ms. Junghans’ hourly rate, the \$395 an hour being advanced represents 93% of the amount this Court has declared to be reasonable for 2007 and 88% of the amount found to be reasonable for 2008.

As indicated above, Westar has no contractual obligation or legal duty to advance attorney fees at a rate which has been found by this Court to be reasonable pursuant to the factors set forth in KRPC 1.5(a). Clearly, this Court found the hourly rates charged by Paula Junghans to be excessive for the purposes of this litigation. It is the declaratory judgment

entered by the Court in this Memorandum Decision and Order which establishes the extent of Westar's contractual obligations to David Wittig. As explained in more detail in *Wittig I*, this Court cannot enter a monetary judgment based on a declaratory judgment unless a petition for further relief has been properly filed and served.

Applying the plain language of Article XVIII (2)(b) to this action for interim advancement, the Court finds that the contractual agreement requires Mr. Wittig to make "a written claim" in order to give Westar the opportunity to advance any additional sums necessary to fulfill the corporation's obligation as declared in this Memorandum Decision and Order. If Westar pays the amount declared by the Court to be reasonable "within thirty days after [the] the written claim has been received," further relief would be warranted. However, in the unfortunate event that Westar fails to advance an amount consistent with that found to be reasonable in this Memorandum Decision and Order in response to Mr. Wittig's written claim, he may then file a petition for further relief and include a "fee on fees" claim at that point in time. Thus, the Court concludes that David Wittig's claim for "fees on fees" should be dismissed without prejudice.

CONCLUSION

_____Therefore, the Court enters a Declaratory Judgment on the terms set forth in this Memorandum Decision and Order. The Court finds that the Plaintiff’s breach of contract claim should be and hereby is dismissed without prejudice until the underlying criminal case is finally concluded. Furthermore, the Court finds that the Plaintiff’s claim for “fees on fees” should also be dismissed without prejudice.

This Memorandum Decision and Order shall serve as the final judgment of the Court. No further Journal Entry shall be required.

IT IS SO ORDERED.

Entered on this _____ day of May, 2009.

David E. Bruns
District Court Judge

CERTIFICATE OF SERVICE

_____The undersigned hereby certifies that on the ___ day of May, 2009, she served a true and correct copy of the above and foregoing pleading by United States mail, first class postage prepaid on:

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