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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

WESTAR ENERGY, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 05-4116-JAR
)	
DOUGLAS T. LAKE,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff Westar Energy, Inc.’s (“Westar”) Motion to Dismiss Defendant Douglas Lake’s Counterclaim, Motion for Judgment on the Pleadings as to the Second Affirmative Defense, and Motion to Strike Immaterial Matters from Defendant’s Amended Answer and Counterclaim (Doc. 23). Westar seeks, in part, a declaratory judgment as to the legal fees and expenses reasonably incurred by defendant for his defense of several matters, most significantly the criminal case and his appeals therefrom. Defendant Lake has brought a Counterclaim asserting that Westar’s refusal to honor its advancement obligation in full is a breach of contract right not subject to any reasonableness requirement. Westar filed the instant motion to dismiss and for judgment on the pleadings, asserting that defendant’s Counterclaim and Second Affirmative Defense are contrary to the language of Westar’s Articles of Incorporation, the Undertaking defendant provided plaintiff, and the Kansas statutory provision for advancement to corporate officers and directors. For the reasons explained in detail below, Westar’s motions are denied.

I. Procedural Background

After the motion to dismiss was filed, the case was stayed in anticipation of a settlement between the parties. That settlement ultimately proved unsuccessful, however, and on November 7, 2006, Magistrate Judge O'Hara entered an Order (Doc. 54), staying all discovery in this matter until this Court rules on defendant's Motion for Summary Judgment (Doc. 60), which recently went under advisement,¹ or until the Tenth Circuit Court of Appeals rules in the related criminal case, *United States v. David C. Wittig and Douglas T. Lake*, 03-40142-JAR (the "criminal case").²

Defendant's recent motion for summary judgment addresses the reasonableness limitation as well as plaintiff's alleged refusal to advance defendant fees related to his defense of the various proceedings.

II. Complaint/Counterclaim

A. Westar's Complaint

The Court summarizes Westar's Complaint as follows:

On December 4, 2003, defendant Lake was indicted by a grand jury in the United States District Court for the District of Kansas for engaging in conduct that defrauded Westar, as well as conspiring to do the same with co-defendant David Wittig. A Superseding Indictment was filed July 14, 2004.

Article XVIII (2)(a) of Westar's Restated Articles of Incorporation provides in relevant part:

¹Defendant was granted an extension of time until March 29, 2007, to file a reply to Westar's response to its motion for summary judgment.

²On March 20, 2007, the parties filed a joint status report indicating that they could not agree on whether the stay should continue and requesting a status conference (Doc. 71).

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 (hereinafter 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 or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust or other enterprise, including service with respect to employee benefit plans, 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, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than said law permitted the Corporation to provide prior to such amendment), 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: provided, however, that, except as provided in paragraph (b) hereof, the Corporation shall indemnify any such person seeking indemnification in connection with a proceeding (or part thereof) initiated by such person only if such proceeding (or part thereof) was authorized by the Board of Directors of the Corporation. 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: provided, however, that, if the Kansas General Corporation Law requires, the payment of such expenses incurred by a director or officer in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such person while a director or officer, including, without limitation, service to an employee benefit plan) in advance of the final disposition of a proceeding, shall be made only 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. The Corporation may, by action of its Board of Directors, provide indemnification to employees and agents of the Corporation with the same scope and effect as the foregoing indemnification of directors and officers. (emphasis added)

In or around June 2004, defendant Lake demanded advancement of legal fees and expenses incurred in the criminal case. Thereafter, in connection with his demand, defendant executed and delivered to Westar his Undertaking, which states:

I, Douglas T. Lake, 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 of **In re Westar Energy, Inc. Securities Litigation**, No. 03-4081-JAR, and **U.S. v. Wittig**, 03-CR-40142-JAR (each pending in the United States District Court for the District of Kansas) in the event it is ultimately determined, in accordance with Westar's organizational documents and 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.

On September 12, 2005, defendant was found guilty by a jury in the criminal case of multiple counts arising out of his employment at Westar, including conspiracy, circumvention of internal controls, wire fraud and money laundering.

As of October 5, 2005, the date of the Complaint, defendant has sought advancement of legal fees and expenses incurred in the criminal case in the amount of \$8,484,964.62. On information and belief, defendant has incurred substantial additional legal fees and expenses in the criminal case for which he intends to seek advancement from Westar. As of the date of the Complaint, pursuant to its Restated Articles of Incorporation and the Undertaking executed by

defendant, Westar had advanced to defendant, under a reservation of all rights, \$4,644,731.99 for legal fees and expenses incurred in the criminal case. Westar has not paid \$3,820,232.63 of the invoices submitted by defendant for legal fees and expenses incurred in the criminal case.

Westar contends that under its Restated Articles of Incorporation, it is only required to advance to defendant legal fees and expenses reasonably incurred for his defense in the criminal case. Westar asserts that the legal fees and expenses that defendant has incurred and that have been advanced and for which he seeks advancement for the criminal case are “unreasonable, extraordinary, unnecessary and excessive.”

Westar seeks a declaratory judgment declaring the rights and obligations of the parties concerning advancement of legal fees and expenses reasonably incurred by defendant for his defense of the criminal case as well as the amount of legal fees and expenses that were reasonably incurred. Westar also seeks damages for breach of contract in that the amount by which Westar has already advanced to defendant for legal fees and expenses incurred exceed the amount of reasonable fees and expenses.

B. Defendant Lake’s Counterclaim

The Court summarizes defendant Lake’s Counterclaim as follows:

Defendant Lake asserts a Counterclaim for the full amount of fees and expenses that he has incurred in the criminal case and other matters. Defendant contends that Westar has admittedly failed to advance in whole, or even a significant fraction of, the requested funds for the criminal case, and refuses to advance any more funds. Defendant contends that Westar’s failure to advance all attorneys’ fees and expenses already billed to defendant is a breach of contract. Defendant’s claim is based on the allegation that once he tendered his Undertaking

promising to refund any non-indemnifiable amounts to Westar upon ultimate determination, Westar's advancement obligation became "absolute and unconditional." Defendant asserts that the advancement obligation simply is not subject to any reasonableness qualification.

Defendant has submitted bills to Westar on a regular, monthly basis. Westar has admittedly failed to advance in whole the requested funds for the criminal case, which defendant purports to be in the millions of dollars. Defendant contends that, pursuant to the Restated Articles of Incorporation, Westar is obligated to advance him the expenses, including legal fees, incurred in defending the criminal case and other matters pending final disposition, so long as he has submitted an Undertaking promising to repay any amount Westar advances him that is ultimately determined not to be eligible for indemnification. Although defendant has submitted an Undertaking, Westar has not advanced the expenses incurred as is defendant's contract right and Westar's "unconditional" contract obligation.

Article XVIII (2)(b), which Westar fails to cite in its Complaint, is entitled "Right of Claimant to Bring Suit," and states 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.

Defendant contends that this paragraph explicitly gives him a cause of action if Westar fails to advance attorneys' fees within thirty days of billing, so long as he has tendered an Undertaking.

III. Rule 12(b)(6) Standard

A court may dismiss a complaint for “failure to state a claim upon which relief can be granted.”³ Dismissal is appropriate “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”⁴ “The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true.”⁵

On a Rule 12(b)(6) motion, the court judges the sufficiency of the complaint accepting as true the well-pleaded factual allegations and drawing all reasonable inferences in favor of the plaintiff.⁶ The court construes the allegations in the light most favorable to the plaintiff.⁷ These deferential rules, however, do not allow the court to assume that a plaintiff “can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged.”⁸ “[I]f the facts narrated by the plaintiff ‘do not at least outline or adumbrate’ a viable claim, his complaint cannot pass Rule 12(b)(6) muster.”⁹ Dismissal is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interest of justice.¹⁰

The Court finds it is appropriate to consider Westar’s Articles and defendant Lake’s

³Fed. R. Civ. P. 12(b)(6).

⁴*Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citation omitted).

⁵*Mounkes v. Conklin*, 922 F.Supp. 1501, 1506 (D. Kan. 1996) (quotation omitted).

⁶*Shaw v. Valdez*, 819 F.2d 965, 968 (10th Cir. 1987).

⁷*Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991).

⁸*Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983) (footnote omitted).

⁹*Mounkes*, 922 F. Supp. at 1506 (citing *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988)) (quotation omitted).

¹⁰*Id.*

Undertaking attached to Westar's motion to dismiss. It is accepted practice that, "if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss."¹¹ "If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied."¹² These documents are the same documents that Westar has specifically referenced in its Complaint and defendant in his Counterclaim, and they are central to both claims.

IV. Analysis

A. Motion to Dismiss

A corporate officer or director may be indemnified for expenses incurred by reason of the fact of that status.¹³ The touchstone for awarding fees in an indemnification action by a corporate officer is reasonableness.¹⁴ Given the length of many investigations and legal proceedings, indemnification is of diminished value to the employee if it comes at the end of the case.¹⁵ Accordingly, most states have enacted statutory provisions enabling companies to

¹¹*GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997); *see also Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, . . . the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment.") (citation omitted).

¹²*See GFF*, 130 F.3d at 1385.

¹³*See generally* 18B AM. JUR. CORPORATIONS § 1649 (2007).

¹⁴*May v. Bigmar, Inc.*, 838 A.2d 285, 289 (Del. Ch. 2003).

¹⁵*See generally* DAN K. WEBB, CORPORATE INTERNAL INVESTIGATIONS § 5.04 (2006).

advance officers and directors costs of defending civil and criminal actions.¹⁶ “Indemnification” is basically a right to reimbursement by the corporation after the agent has been determined to be entitled to have the corporation bear his or her losses.¹⁷ The statutory authorization for a corporation to advance the agent’s often considerable defense expenses prior to such a determination is a distinct legal right, which can be either mandatory or permissive.¹⁸ At issue in this case is whether those advanced fees are also subject to a reasonableness requirement.

Westar contends that defendant’s Counterclaim should be dismissed because it seeks relief premised solely on Westar’s obligation to advance attorney fees without regard to the reasonableness of those fees. Defendant argues that his Counterclaim also asserts that Westar has breached its contract by refusing to advance even reasonable fees.

The specific provision for advancement in Westar’s Articles does not contain the word “reasonable.” The text of Article XVIII sheds little light on whether the advancement clause is subject to a reasonable requirement. This omission gives rise to the parties’ various contentions, including whether the advancement right can be foreclosed by Westar’s unilateral declaration that the fees requested to be advanced are unreasonable, and whether Westar must advance all fees and expenses incurred by defendant, without regard to reasonableness. Both Westar and defendant cite Delaware case law in support of their respective positions.

For purposes of this Rule 12(b)(6) motion, the Court need not decide which interpretation of Article XVIII is correct. The Court notes that Westar has overly simplified the bases for

¹⁶*See id.*

¹⁷*See generally* JOHN F. OLSON & JOSIAH O. HATCH, DIRECTOR & OFFICER LIABILITY § 5:13 (2006).

¹⁸*Advanced Min. Sys. v. Fricke*, 623 A.2d 82, 83 (Del. Ch. 1992).

defendant's Counterclaim, which is for money damages incurred as a result of Westar's breach of contract based on Westar's wholesale refusal to advance any monies, and which appears to extend beyond the lack of a reasonableness condition to the advancement right. For example, defendant raises the issue of Westar's inconsistent positions regarding advancement of fees at different stages of the criminal proceedings, and that Westar has breached its contract by refusing to advance *any* fees, much less reasonable fees. Moreover, Westar fails to acknowledge Article XVIII(2)(b), which gives an indemnified person who has submitted a proper Undertaking a cause of action if Westar fails to advance attorneys' fees within thirty days of billing. Certainly, defendant has a contractual right to file suit against Westar on this basis, regardless of any reasonableness requirement. Thus, even if Westar's interpretation that a reasonableness requirement can be imputed into its advancement obligation is correct, dismissal of defendant's Counterclaim is not warranted.

Because the Court's discretion to resolve this issue in the context of a Rule 12(b)(6) motion is constrained, it concludes that interpretation of Article XVIII would be more appropriately addressed in the context of defendant's pending motion for summary judgment, which discusses the issue in detail. Westar's motion to dismiss is denied.

The Court further notes that it appears that events occurring subsequent to the filing of the pending motions may impact these proceedings. When Westar filed this case, defendant had been found guilty of multiple criminal counts relating to his employment at Westar. As the parties are well aware, the United States Court of Appeals for the Tenth Circuit reversed defendant's convictions in the criminal case on January 5, 2007.¹⁹ In so doing, the Tenth Circuit

¹⁹*United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007).

held that the wire fraud and money laundering counts cannot be retried, but that the counts for conspiracy, circumvention and forfeiture could be retried. Although the government has foregone reconsideration of this decision by the Tenth Circuit, it has not indicated which counts, if any, it will seek to have retried in this Court. Needless to say, the legal fees and expenses incurred by defendant in the criminal case and related appeal have increased since the date of the Complaint in this case and may continue to grow in the future if the criminal case is retried. On the other hand, if the government chooses not to retry to criminal case, the matter has reached its final disposition, and there are no more fees to be advanced, raising the possibility that the issue has become one of indemnification.

B. Motion for Judgment on the Pleadings

Westar has presented its objection to the sufficiency of defendant's second affirmative defense as a motion for judgment on the pleadings. That affirmative defense asserts that Westar's claims are barred because its advancement obligations under the Articles are absolute, without regard to any reasonableness condition. The Court will construe Westar's motion as a motion to strike pursuant to Rule 12(f). A motion to strike an affirmative defense is evaluated under the materially same legal standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim.²⁰ For the reasons set forth above, Westar's motion is denied.

²⁰*Detlefsen v. Deffenbaugh Indus., Inc.*, Case No. 04-2577-JWL, 2005 WL 2323225, at *1 n.2 (D. Kan. Sept. 22, 2005) (citing *Spruill v. Gillis*, 372 F.3d 218, 223 (3d Cir. 2004)).

C. Motion to Strike Immaterial Matters

Westar moves pursuant to Fed. R. Civ. P. 12(f) to strike allegations in defendant's Counterclaim that are "redundant, immaterial, impertinent or scandalous." Westar contends that defendant makes several allegations that are completely collateral to the cause of action based on the reasonableness of legal fees. Specifically, Westar takes issue with defendant's allegations concerning the retention of counsel in and fees allegedly paid based on the hourly rates and work performed in several other matters separate from the criminal case, including the civil securities case brought by Westar shareholders,²¹ as well as other unrelated white-collar cases.

"The purpose of Rule 12(f) is to minimize delay, prejudice, and confusion by narrowing the issues for discovery and trial."²² Although motions to strike are generally disfavored, "the decision to grant a motion to strike is within the discretion of the court."²³ When allegations in a complaint "are entirely collateral and immaterial to the underlying claims," they should be stricken.²⁴

Defendant argues that the allegations are important to provide the background and context for the Counterclaim, especially the issue of reasonableness of the legal fees. Defendant further argues that Westar's payment of fees to other attorneys is relevant to its claim that defendant's attorneys charged unreasonable fees. Where there is any doubt as to whether under

²¹*In re Westar Energy, Inc. Sec. Litig.*, No. 03-4003-JAR.

²²*Geer v. Cox*, 242 F. Supp. 2d 1009, 1025 (D. Kan. 2003) (citations omitted).

²³*Id.* (citation omitted).

²⁴*Id.* (citations omitted).

any circumstance an allegation may raise an issue, the motion to strike should be denied.²⁵

Accordingly, Westar's motion to strike is denied.

IT IS THEREFORE ORDERED BY THE COURT that plaintiff Westar's Motion to Dismiss Counterclaim, Motion for Judgment on the Pleadings and Motion to Strike (Doc. 23) is DENIED.

IT IS SO ORDERED.

Dated this 30th day of March 2007.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

²⁵*Nwakupda v. Falley's, Inc.*, 14 F. Supp. 2d 1213, 1215 (D. Kan. 1998).