

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WESTAR ENERGY, INC.,)	
)	
Plaintiff,)	
v.)	Case No. 05-CV-4116-JAR-JPO
)	
)	
DOUGLAS T. LAKE,)	
)	
Defendant.)	

**MOTION TO SET BOND AS TO
THE COURT’S JUNE 28, 2007 ORDER**

Pursuant to Fed. R. Civ. P. 65(c) and Fed. R. Civ. P. 52(b), Plaintiff Westar Energy, Inc. (“Westar”) requests that the Court require Defendant to provide a bond in the amount of \$4.2 million as appropriate security for the payment of such costs and damages as may be incurred or suffered by Westar if it is determined that the preliminary injunctive relief awarded against Westar in the Court’s Order of June 28, 2007 (“Order”) was wrongfully granted and that the Court make additional findings to support requiring security in connection with the Order. In support of this motion, Westar states:

1. The Court’s Order granted “retrospective relief” to Defendant Lake by ordering Westar to make “immediate payment of 50% of the outstanding requests for out-of-state counsel, Hughes Hubbard and Wilmer Hale, and payment in full for local counsel, Hite Fanning.” (Order at 33.) The parties agree that the amount to be paid under the Court’s order as to “outstanding requests” equals \$3,226,503.07.

2. The Order also granted “prospective relief” to Defendant Lake by ordering Westar to “pay Lake’s legal fees and expenses within 30 days of receipt, at his chosen lawyer’s

customary rates” subject to specified procedures for reviewing the requests. (Order at 36.)

3. By its terms, the Order is interlocutory as the Court specifically found that “the overall reasonableness of the legal fees and expenses for which Lake seeks advancement involves material questions of disputed facts.” (Order at 35.) Likewise, the Court did not rule on all claims made in this case or certify that there was “no just reason for delay” of entry of judgment as required for a final judgment under Rule 54. The Court did, however, order Westar to take affirmative steps – payment of money – without reaching or ruling the “reasonableness” issue at the heart of this lawsuit.

4. In issuing this interlocutory, preliminary injunctive relief, the Court did not consider what appropriate security Lake should provide as required by Rule 65(c). Without such consideration, the Court’s order appears to be unenforceable and not appealable at this stage of the proceeding. A preliminary injunction that does not include consideration of a bond is “an unenforceable injunction and [is not] an appealable interlocutory order.” Coquina Oil Corp. v. Transwestern Pipeline Co., 825 F.2d 1461, 1462 (10th Cir. 1987). “The trial judge’s consideration of the imposition of bond is a necessary ingredient of an enforceable order for injunctive relief.” Id. Westar intends to appeal the Order at the appropriate time.

5. In setting the amount of security bond, the Court should be guided by the fact that \$3.2 million at issue involves only the “retrospective relief,” unknown additional sums which are likely to be substantial are at issue as to “prospective relief,” and Defendant Lake does not have the ability to repay even the \$3.2 million if it is determined that the preliminary injunctive relief was improperly issued. As to prospective relief, Westar believes that an additional \$1 million would be sufficient at this stage of the proceeding given the Court’s

understanding that “the third trial would be much less complicated to try, as much of the previous work may be duplicated.” (Order at 36.)

6. Lake has represented to the Court in the Criminal Case that he “has no assets sufficient to pay legal fees and expenses for his defense in the third trial, or to satisfy the legal fees and expenses already charged for the two prior trials and related proceedings.” (Motion to Withdraw (Doc. #823 in Case No. 03-CR-40142) at 2, ¶ 5.) Because Lake has admitted that he cannot repay the \$3.2 million, it would be improper to order Westar to pay \$3.2 million to Lake on a preliminary basis – with no ruling on the issue of whether this amount is “reasonable” – without substantial security because Westar ultimately may not be able to get the money back. Cf. Winnebago Tribe of Nebraska v. Stovall, 341 F.3d 1202, 1206 (10th Cir. 2003) (trial court appropriately found no bond was necessary given “an absence of proof showing a likelihood of harm”). Given Lake’s admitted financial condition, the Undertaking he has given is no security.

7. If the Court does not order security, then Westar intends to file a motion for partial stay of the Order in so far as it grants retrospective relief and requires Westar to make “immediate payment of 50% of the outstanding requests for out-of-state counsel, Hughes Hubbard and Wilmer Hale, and payment in full for local counsel, Hite Fanning.”¹ However, if the Court orders security to cover all of the \$3.2 million to be paid for “outstanding requests”

¹Westar does not currently plan to seek a stay as to the portion of the Order relating to prospective relief. (Order at 35-37.) However, Westar does not agree with the Court’s ruling as to prospective relief, and therefore intends to appeal that portion of the ruling as well. Counsel for Westar has so advised counsel for Lake. Indeed, since soon after the Order was entered, counsel for the parties have been involved in substantial discussions about possible courses of action and/or resolutions as to some of the matters in this case, but those discussions have not yielded agreement.

and an additional amount for “prospective relief,” Westar would not need a stay of the Order because it would be fully protected by the security.

WHEREFORE, Westar Energy, Inc. respectfully requests, pursuant to Fed. R. Civ. P. 65(c) and Fed. R. Civ. P. 52(b), that the Court require Defendant Lake to provide a bond in the amount of \$4.2 million as appropriate security for the payment of such costs and damages as may be incurred or suffered by Westar if it is determined that the preliminary injunctive relief awarded against Westar in the Court’s Order of June 28, 2007 was wrongfully granted and that the Court make additional findings to support requiring security in connection with the Order.

Respectfully submitted,

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/s/ Jason M. Hans

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record receiving electronic notification and that I served the foregoing by first class mail, postage prepaid, upon any counsel of record not receiving electronic notification.

/s/ Jason M. Hans

Jason M. Hans #18881