

advancement provisions in its Articles of Incorporation require no such security. If he had the money to do that, he would have the money to pay his legal fees, and he does not.

Westar's motion is a sham, with no basis either procedurally or substantively, designed only to delay compliance with the Court's Order. For the reasons set forth below, the Court should hold Westar in civil contempt for disobeying the Order and impose sanctions sufficient to ensure compliance and compensate Lake for his losses.

STANDARD FOR FINDING CIVIL CONTEMPT

A court can hold a party in civil contempt where (a) a court enters a valid order; (b) a party has knowledge of the order; and (c) the party disobeys the order. *See Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1315 (10th Cir. 1998). Civil contempt sanctions may "be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *Law v. Collegiate Athletic Ass'n*, 134 F.3d 1438, 1442 (10th Cir. 1998).¹ A party sanctioned for civil contempt "carries the keys of his prison in his own pocket," meaning that the party can release itself from the sanctions simply by complying with the court's order. *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994) (internal quotation omitted). Here, where the party to be charged is a corporation, the appropriate sanction is a significant daily fine to run as long as the corporation is in contempt. *Cf. United States v. United Mineworkers of America*, 330 U.S. 258, 304 (1947) (stating that in crafting a fine to secure compliance, a court must "consider the amount of [contemnor's] financial resources and the consequent seriousness of the burden to that particular [contemnor]"). Finally, a party's willfulness in disobeying a court order is irrelevant

¹ A court may not impose civil contempt sanctions for the purpose of "punish[ing] the contemnor, vindicat[ing] the court's authority, or deter[ing] future misconduct." *United States v. Lippitt*, 180 F.3d 873, 876 (7th Cir. 1999).

to whether that party should be held in civil contempt. *See United States v. Dimitt*, No. 93-1065-JTM, 1997 WL 1037875, at *2 (D. Kan. June 20, 1997).

STATEMENT OF FACTS

On June 28, 2007, the Court issued its Memorandum Order and Opinion (Doc. 82) deciding Lake's Motion for Summary Judgment (Doc. 58). The June 28th Order directed in plain language that Westar 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. Upon entry of the Order, the parties' attorneys simultaneously received electronic notification through the ECF system. That same day, Westar publicly acknowledged receipt of the Order *and communicated to the press that it intended to comply*.² Lake's attorneys immediately followed up by contacting Westar's attorneys to request immediate payment of \$3,226,503.07, which is the amount calculated pursuant to the terms of the Order. Little Decl. at ¶ 2 & Exh. 1. Although Westar has agreed that the amount is correctly calculated,³ it has refused to pay anything. *Id.* at ¶¶ 3-4.

To date, almost a full month after entry of the Order, Westar has not complied with the Order and has not moved for a stay of the Order. Instead, on July 16, 2007, its lawyers filed a Motion to Set Bond ("Bond Motion") (Doc. No. 86), feigning a newfound belief that the Order is really a preliminary injunction and demanding under Rule 65(c) that the Court set a multi-million dollar bond. *Id.* at ¶ 7. Westar cites no authority that would allow it to simply ignore a valid Federal Court order requiring "immediate" compliance. Rule 65 provides no such

² Dan Margolies, *Westar Must Pay Legal Fees For Wittig, Lake, Judge Rules*, KC Star, June 28, 2007, available at <http://www.kansascity.com/business/story/169855.html> ("Kara Olsen, a spokeswoman for the utility, said Westar would comply with [Judge] Robinson's order.").

³ Westar has agreed that "the amount to be paid under the Court's order as to 'outstanding requests' equals \$3,226,503.07." Westar Motion to Set Bond at ¶ 1 (Doc. No. 86).

safe haven. Indeed, the time for arguing that Lake's motion for partial summary judgment and interim order was really a motion for a "preliminary injunction" was when Westar first responded to Lake's motion, not after the Court ruled on it and issued the Order. Even then, as indicated in the accompanying response to Westar's Bond Motion, the Court's interim order could not be regarded as a "preliminary injunction." See Lake Mem. in Opp. to Bond Motion at 6-7 (filed concurrently herewith).

Apparently anticipating that its tactic of demanding a bond will not work, Westar is attempting to cover itself for its contempt of the Court's Order by announcing that "[i]f 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"⁴ Bond Motion at ¶ 7. Westar yet again cites no rule or statute excusing its contempt by moving for a bond first. The time for filing such a motion has long passed, and Westar should be estopped from filing a stay motion now.⁵ There must be a stop to this gamesmanship. Lake continues to incur substantial legal fees in this endless battle to get Westar to honor its obligations under its own Articles of Incorporation and comply with the Court's Order recognizing those obligations.

ARGUMENT

By its own terms, the Order took immediate effect. Westar violated the Order when it failed to comply with its unambiguous, unconditional terms. As the Tenth Circuit has

⁴ Presumably, by separating the Bond Motion and a stay motion, Westar believes it can increase the length of delay before some judicial mechanism finally forces it to pay Lake. Aware that civil appeals take some time, Westar apparently hopes that if it avoids paying the advancement ordered by the Court until the resolution of an appeal, the criminal case will already be resolved by a conviction, arguably mooting the advancement issue.

⁵ As discussed in Lake's opposition to Westar's Bond Motion, the Order is not appealable and, even if it were, Westar is not entitled to a stay, as demonstrated by analogous Delaware case law analyzing a company's motion for a stay pending appeal of an order to advance legal fees while the executive faces prosecution. Lake Mem. in Opp. to Bond Motion at 13-15.

held, “[a] district court may exercise broad discretion in using its contempt power to assure compliance with its orders.” *Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1231 (10th Cir. 2001), *cert. denied*, 534 U.S. 1055 (2001). The Court should hold Westar in civil contempt because, as established by the facts set forth above, (a) the Court entered a valid order; (b) Westar was aware of the Order; and (c) Westar refuses to comply with the Order. *See Reliance Ins. Co.*, 159 F.3d at 1315.

To justify its noncompliance with the Order, Westar’s Bond Motion cites *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461 (10th Cir. 1987), in support of its claim that the Order is unenforceable and therefore invalid. But even under Westar’s incorrect characterization of the Order as a “preliminary injunction,” it was still required to comply with the Order immediately. The *Coquina* case does not authorize a party to disregard an injunction in the absence of a bond. To the contrary, the court in *Popular Bank of Florida v. Banco Popular de Puerto Rico*, 180 F.R.D. 461 (S.D. Fla. 1998), specifically ruled that *Coquina* did not address the question of “whether the defendants are entitled to disregard the unambiguous terms of a preliminary injunction because the Court has not yet ruled on the matter of bond where no request for bond has been made and no evidence has been presented as to the appropriate amount.” *Id.* at 463-64. Indeed, even in a situation where the order is a “preliminary injunction,” the Court may hold the disobeying party in contempt if it “ignore[s] the mandates of a preliminary injunction where the trial court has not yet set bond because the issue was not addressed by the parties prior to the issuance of the preliminary injunction.” *Id.* There is no justification for Westar’s continuing contempt.

Although the Court should not consider Westar's willfulness in disobeying the Order in determining whether to hold Westar in civil contempt,⁶ Westar's conduct is certainly relevant to the Court's consideration in employing its discretion to craft a sanction that will be serious enough to coerce Westar into complying with the Order, while at the same time compensating Lake for the harm caused to him by Westar's disobedience.

Westar has a history of using any and all means to avoid advancing Lake the funds he needs for his legal defense. After the first criminal trial ended in a mistrial, Westar took advantage of the government's attempt to forfeit the legal fees by stopping payment altogether. Westar did this despite the Court's repeated admonitions that it should not use freeze orders in the criminal case to avoid its contractual obligations.⁷ Westar thus did not pay the legal fees into escrow as it should have done. After the second trial ended, after the jury returned a special verdict that the legal fees should not be forfeited, and the Court vacated the freeze order, Westar still did everything it could to avoid paying anything. It argued that, despite the broad language of its Articles of Incorporation, it could demand that Lake hire local counsel at local rates (when it has hired prominent national firms for its own representation), but this "rate argument" was specifically rejected by the Court.⁸ It also argued that Lake's counsel supposedly spent too many hours on defending Lake – although Westar refused to pay anything at all – but this "hours

⁶ See *Dimitt*, 1997 WL 1037875, at *2; *Popular Bank of Florida*, 180 F.R.D. at 466 (good faith belief that order was invalid not enough to avoid finding of contempt).

⁷ See June 27, 2007 Mem. Order and Opinion in *United States v. Wittig and Lake*, No. 03-40142-JAR (D. Kan.) (Doc. No. 836), at 16 n.34 ("[T]he Court admonished Westar that it was not the Court's intent that Westar use the restraining order as a means to avoid its contractual obligation to defendants. Nevertheless, Westar specifically cited the restraining order in refusing to advance defendant Lake's legal fees in the second trial.").

⁸ Order at 25 ("Had Westar intended to limit an indemnified party's choice of counsel by rates or region, it was free to do so in drafting its advancement and indemnification provisions. The time to have limited Lake in his choice of counsel was at the time of contract formation.").

argument” was dealt with by the Court in ordering them to make an immediate partial advancement of 50% of Lake’s lead counsel’s fees (and 100% of his local counsel’s fees at much lower, local rates) for the obvious reason that the company should at least pay something, with the rest to be litigated later. Westar now argues that – “come to think of it” – wasn’t Lake’s motion for an order of at least partial payment really a motion for preliminary injunction, possibly requiring a bond? Moreover, Westar’s baseless demand goes to the heart of the financial relief Lake sought through his summary judgment motion and would render the relief ordered by the Court a nullity. Westar knows full well that Lake is unable to post any significant bond, much less a bond equal to the full amount of his advancement right. Indeed, before the Court ordered the partial relief it did by way of the June 28th Order, his situation was so bad because of Westar’s tactics that his counsel were compelled to move to withdraw from his representation.⁹

For Westar and its lawyers to remain silent until the Court issued the June 28th Order and then suddenly come up with the strained argument that Lake must post an enormous bond is perturbing, to say the least. Beyond the arrogance of such a maneuver, it is not even technically correct. Even if Lake’s motion for an order granting partial relief were a “preliminary injunction,” which it is not, Rule 65 requires by its own terms that issue of a bond be decided “[b]efore” entry of an Order, and up until Westar’s lawyers just came up with this latest maneuver, Westar never once characterized Lake’s motion for partial summary judgment and interim order as one for a preliminary injunction.¹⁰ The Rule 65 motion is baseless both

⁹ See *United States v. Wittig and Lake*, No. 03-40142-JAR (D. Kan.) (Doc. No. 823), Motion of Hughes Hubbard and Hite Fanning to Withdraw as Counsel for Defendant Lake.

¹⁰ See Lake Mem. in Opp. to Bond Motion at 2-7.

procedurally and substantively, and Westar's latest excuse for not advancing fees is contemptuous.

Making matters worse, Westar has not moved for a stay of the Order during the pendency of its Bond Motion but warns that it will do so if its Bond Motion is denied, as it plainly should be, and that it will also take an appeal, although the Order is plainly not appealable. Presumably Westar will also seek a stay from the Court of Appeals if it is not given one by this Court. All this is driven, not by a real dispute on the merits, but by Westar's decision to string out the advancement dispute as long as possible, preferably past the third trial of the criminal case, so that it will never advance any fees. That result, however, would be the ultimate injustice. Lake has two rights under Westar's Articles of Incorporation: (a) a right to advancement of his legal fees as they are incurred so he can obtain good, competent representation; and (b) a right to ultimate indemnification at the end of the case if he is owed any additional amounts. Westar has a corresponding right to be indemnified back by him if he is ultimately determined not to be entitled to advancement. Westar is apparently operating under the hope that if it delays advancement through the third trial – thus increasing the chances Lake will be convicted – it will never have to pay anything.¹¹ In short, it hopes to deny Lake any advancement. There must be a final end to this endless maneuvering to avoid a clear contractual right, as recognized by the Court in its June 28th Order. Because Westar is a company with vast resources and has shown a willingness to use them in these dilatory tactics, it is important for the Court to impose a large enough daily fine to ensure immediate compliance.

¹¹ Counsel do not concede this point as there is a compelling argument that if Westar does so, it will have to advance fees to Lake's counsel anyway and seek reimbursement from Lake.

In addition, we respectfully request the Court to impose an additional sanction, as permitted by law, to compensate Lake on a “real time basis”¹² for the mounting legal fees he continues to incur in fighting Westar’s noncompliance, as well as interest on the amount the Court ordered Westar to advance under the June 28th Order. Little Decl. at ¶ 5. Accordingly, as a compensatory sanction, we respectfully request the Court to order Westar to pay Lake’s counsel’s legal fees and costs incurred in enforcing the Court’s Order, as well as interest (calculated at the Kansas legal rate of 10.25%) on the \$3,226,503.07 award calculated from the date of the Order, June 28, 2007.

RECORD ON MOTION

This motion is based on this document, on the attached Declaration of Edward J.M. Little, on all of the pleadings and papers already on file in this action and the referenced documents from *United States v. Wittig and Lake*, No. 03-40142-JAR (D. Kan.), and on whatever argument and evidence is presented at the hearing of this motion.

CONCLUSION

For the foregoing reasons, the Court should grant Lake’s motion and order Westar to show cause why it should not be held in civil contempt of the Court’s June 28, 2007 order and impose sanctions on Westar sufficient both to coerce it into compliance and to compensate Lake for his losses as a result of Westar’s noncompliance.

Respectfully submitted,

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/s/ Edward J.M. Little

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¹² See Westar Mem. In Opp. to Mot. for Summary Judgment at 6 (Doc. No. 66) (Westar stating, “[a]s Lake recognizes, advancement rights are designed to provide real time funding.”).

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 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 all counsel of record.

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