

NO. A10-402

State of Minnesota
In Court of Appeals

ASIAN WOMEN UNITED OF MINNESOTA,
Respondent,

vs.

SINUON LEIENDECKER,
Appellant.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. Is the district court's decision denying Leiendecker's motion for advance indemnification erroneous as a matter of law?

This issue was raised in Leiendecker's counterclaim (Appendix 218-22 ["App."]), in Leiendecker's motions for advanced indemnification, indemnification and default judgment (App. 1-29), and in the parties' competing arguments on the motion. (Transcript of the Oct. 7, 2009 Hearing ["T-'09"]; App. 139.) The district court denied advancement holding that Leiendecker must first establish her right to indemnification at trial. (Addendum 27 ["Add."].) The issue was preserved for appeal by notice of filing of order dated February 15, 2010. (App. 206.)

Barry v. Barry, 824 F. Supp. 178 (D. Minn. 1993), *aff'd*, 28 F.3d 848 (8th Cir. 1994).

Neal v. Neumann Med. Ctr., 667 A.2d 479 (Pa. 1995).

Reddy v. Elec. Data Sys. Corp., 2002 WL 1358761 (Del. Ch. June 18, 2002), *aff'd*, 820 A.2d 571 (Del. 2003) (mem.)(App. 208.)

Minn. Stat. § 317A.521

- II. Is the district court's decision denying Leiendecker's motion for indemnification of costs and expenses associated with the enforcement of her indemnification rights erroneous as a matter of law?

This issue was raised and preserved for appeal in the same manner as the first issue. The district court summarily denied indemnification for costs and fees associated with the vindication of indemnification rights and coupled the denial with its reasoning that Leiendecker was not entitled to any form of indemnification until she prove herself worthy of indemnification through trial. (Add. 27.)

Citadel Holding Corp. v. Roven, 603 A.2d 818 (Del. 1992).

Stifel Fin. Corp. v. Cochran, 809 A.2d 555 (Del. 2002).

Minn. Stat. § 317A.521

- III. Is the district court's decision denying Leiendecker's motion for default judgment erroneous as a matter of law and an abuse of discretion?

This issue was raised in Leiendecker's motions for advanced indemnification, indemnification and default judgment (App.1-29), and during the hearing on the motions. (T-'09: 44/9-15; App. 182) The district court summarily denied Leiendecker's motion for default judgment without comment. (Add. 27.) The issue

was preserved for appeal by notice of filing of order dated February 15, 2010.
(App. 206)

Black v. Rimmer, 700 N.W.2d 521 (Minn. App. 2005).

Minn. R. Civ. P. 55.01

- IV. Is the district court's decision refusing to apply res judicata to Respondent's claims erroneous as a matter of law and an abuse of discretion?

This issue was raised in Leiendecker's answer (App. 215-22), in Leiendecker's motion for summary judgment (App. 223-32), and in the parties' competing arguments on the motion. The district court denied summary judgment holding that that the issues of the prior case are determined solely by the complaint and the answer and Respondent did not then have sufficient information to bring the claims now asserted. (Add. 23) The issue was preserved for appeal by entry of order dated September 12, 2008. (*Id.*)

Hauschildt v. Beckingham, 686 N.W.2d 829 (Minn. 2004).

STATEMENT OF THE CASE

The Respondent, Asian Women United of Minnesota ("AWUM"), operates a nonprofit corporation and is governed by Minn. Stat. Chap. 317A, its bylaws and Minnesota law. The Appellant, Sinuon Leiendecker ("Leiendecker"), is the former executive director of the Respondent.

This case has evolved out of a lengthy history of contentious litigation between the parties that began in December 2003 as an injunction/declaratory judgment action brought by Leiendecker as executive director on behalf of Respondent.¹ In response to that action, Respondent sued Leiendecker in January 2004 for various claims relating to her employment as executive director by way of third-party complaint. (App. 62-68.) This third-party suit included claims for unsanctioned wages and benefits allegedly paid to Leiendecker by Respondent under a breach of contract theory and relief for alleged breach of fiduciary duty. (*Id.*) There, the district court (Judge Higgs presiding) granted Leiendecker's motion for advanced indemnification. (Dist. Ct. April 8, 2005 Order ¶ 3; Add. 3.)² In August 2005, the district court dismissed the lawsuit with prejudice and on the merits in Leiendecker's favor as a sanction for Respondent's repeated refusals to comply with court orders compelling disclosure and compelling advanced indemnification. (Dist. Ct. Aug. 22, 2005 Order, p. 6; Add. 12.)

¹ See Ramsey County Dist. Ct. Case #C3-03-13016: Application for T.R.O. and Decl. J. (See also Dist. Ct. Dec. 18, 2003 Order; Add. 367.)

² The court also granted Leiendecker's motion to compel disclosure and granted her motion to disqualify Respondent's attorney, Frank Mabley, as a fact witness pursuant Minn. R. Prof. Conduct 3.7 (Dist. Ct. April 8, 2005 Order; Add. 73.)

Then in 2008, Respondent commenced its present action against Leiendecker when her defamation/wrongful termination lawsuit against Respondent was in mediation and it appeared to all concerned that the case would settle for a six figure amount - which it ultimately did. (*See* Ramsey County Ct. Case #C9-05-8519; *see also* *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836 (Minn. App. 2007)). Here, Respondent is litigating the same claims as before regarding unsanctioned wages and benefits along with other allegations and claims that equally relate to Leiendecker's previous employment as Respondent's executive director – claims that, like before, involve allegations of breach of contract and breach of fiduciary duty. In this renewed action, Leiendecker counterclaimed for indemnification pursuant Respondent's bylaws and Minn. Stat. § 317A.521 (2008). (App. 218.) Leiendecker's counterclaim went unanswered by the Respondent.³

Leiendecker moved the district court (Judge Johnson presiding) for summary judgment based on res judicata. (App. 223-76.) Leiendecker insisted that the claims in this action were unmistakably litigated in the previous case as evidenced by, *inter alia*, the third-party complaint and Respondent's answers to interrogatories. (*Id.*) Leiendecker further insisted that Respondent's actual knowledge of the claims; as revealed in its court papers and so forth; evidenced that the claims then existed for Respondent to adequately pursue. (*Id.*) Respondent argued that during the previous case it lacked sufficient

³ Respondent did eventually serve an answer to Leiendecker's counterclaim more than a year after it was required by the rules to do so. *See* Minn. R. Civ. P. 12.01. And, it did so only after Leiendecker moved for default judgment - and only after failing to contest her default motion in its responsive memorandum. (*See* Resp't Answer; App.709.)

information to bring the claims because of its purported inability to locate its financial records. (*See* App. 279-80.) Leiendecker argued in reply that, because of the accusations that Respondent made in its informational statement, interrogatory responses and other court documents, Respondent clearly knew that these claims then existed, was then pursuing them, and that Respondent had caused the dismissal of the earlier action due to its own adjudicated misconduct. (App. 296-313.)

The district court refused to apply *res judicata* to Respondent's renewed case. (Dist. Ct. Sept. 12, 2008 Order; Add. 23-23.) In refusing to stay its own hand, the court relied exclusively on various representations of Respondent's counsel that Respondent did not have a fair opportunity to litigate its claims in the prior case and did not then have sufficient information to bring the claims now asserted. (*Id.*, p.3; App. 365.) The court ignored all evidence to the contrary by erroneously deciding that the issues of the prior case are determined solely by the complaint and the answer. (*Id.* at 3-4; App. 365-66.) Leiendecker then sought a writ of mandamus/prohibition, which was denied by this Court. *See In re Leiendecker*, A08-1792 (Minn. App. Dec. 10, 2008 Order Opinion)(stating that review would "be available on appeal from a final judgment."). Review of this Court's writ decision was later denied by the Minnesota Supreme Court by order dated February 25, 2009.

As was determined by the district court in the previous case, Respondent's bylaws and Minnesota statute section 317A.521 provide that Leiendecker is entitled to advanced indemnification. Here, Leiendecker again requested advancement. (App. 106-07.) The advancement request once more included the required affirmation of Leiendecker's good

faith belief that the relevant standard of conduct has been met and a written undertaking to repay the advanced amounts if it is ultimately determined that she is not entitled to indemnification. (*Id.*) However, Respondent again summarily refused the request. (App. 708.) Leiendecker then moved the district court for advanced indemnification, indemnification, and default judgment. (App. 1-29.) Respondent's response to Leiendecker's motions was limited to the advanced indemnification issue and relied entirely upon unsupported allegations and inapposite legal authority. (*See* App. 121-27.) Despite being completely immaterial in advancement proceedings, Respondent also argued that, as a nonprofit, it was financially ill-equipped to pay advancement. (*Id.* at 126);(T-'09: 52/7-53/7; App. 190-91.) Leiendecker's reply memorandum clearly pointed these inadequacies out to the trial court. (App. 128-38.) The Respondent then moved for partial summary judgment on Leiendecker's counterclaim attempting to supplement its previous argument by claiming that Leiendecker "does not deserve" ultimate indemnification. (*See* App. 370-77.) Leiendecker responded by scrupulously advising the district court (with citation to the record) Respondent counsel's misrepresentations of fact and law and the futility of Respondent's motion under established law. (App. 393-411.)

The court denied Respondent's partial summary judgment motion. (Dist. Ct. Jan. 19, 2010 Order; Add. 27-33.) However, the district court also denied Leiendecker's motions for advanced indemnification, indemnification, and default judgment. (*Id.*) The court reasoned that: "[i]f this court were to require advanced indemnification in a case such as this, it would essentially require AWUM to throw good money after bad if it is

determined that plaintiff has prevailed on the merits." (*Id.* at 7; Add. 33.) This appeal follows.

STATEMENT OF THE FACTS

The following provides this Court with a necessary review of the ad rem history involving the parties that was similarly proffered (along with record citations) to the district court in support of Leiendecker's motions for advanced indemnification, indemnification, and default judgment.

A. **Leiendecker as Respondent's Executive Director.**

Leiendecker served as Respondent's executive director from 1999 until her termination in February of 2004. (Leiendecker Aff. ¶¶ 1, 11; App. 34-36.) During her time as executive director, Respondent's annual operating budget grew from approximately \$220,000 to over \$1,000,000 and its staff increased from five to twenty five persons. (*Id.* ¶ 1.) During 2003, Leiendecker became greatly concerned that Respondent's "board of directors" was out of compliance with the organization's bylaws because: (1) "board members" continued to stay beyond term limits without being replaced, and (2) there were not enough active, valid board members. (*Id.* ¶ 4.) Leiendecker had been advised by various sources that Respondent's failure to comply with bylaws made certain corporate actions, including the continued solicitation of funds and submission of budgets to governmental authorities, potentially illegal. (*Id.* ¶¶ 4-9.)

Leiendecker reported these issues, including alarm of self-dealing behavior exhibited by board members, to the "board" to no avail. (*Id.*) In an effort to seek assistance in resolving the board situation, Leiendecker also reported the issues

surrounding the validity of the board to Respondent's primary financier – the Office of Justice Programs (formerly "Minnesota Center for Crime Victim Services"), a division of the Minnesota Department of Public Safety – and additionally sought advice from various sources including Respondent's consultant [REDACTED] and the Wilder Foundation.

(*Id.*) After Leiendecker made her reports to the "board," she was placed on a sham probation in September 2003, and later learned in November 2003 that the "board" planned to take adverse employment action against her along with other management and staff who were also complaining about improper board activities and its invalid makeup.

(*Id.* ¶¶ 6, 11.) Throughout this time period; and following the recommendation and referral made by the Office of Justice Programs; Leiendecker was consulting with

[REDACTED] an attorney who serves as the Director of Legal and Human Resources Services for MAP for Nonprofits. (*Id.* ¶¶ 5, 8);(Ravine Aff. ¶ 1; App. 38.) They

discussed that invalid board members from the past did not have to be treated as board members, and did not have to be informed about corporate activities, including meetings, financials, or personnel issues. (Ravine Aff. ¶ 6; App. 39.) Leiendecker and [REDACTED] also

discussed the importance of having a complete board that follows its bylaws as well as Leiendecker's fiduciary duties to Respondent to ensure bylaw compliance. (*Id.*) After

having a number of consultations with [REDACTED] Leiendecker ascertained that she could not officially retain [REDACTED] on Respondent's behalf due to the double signature requirement

on all corporate checks requiring board member approval for disbursements. (*See Tahnk Aff.* ¶ 2; App. 50);(*see also Force Aff.* ¶ 8; App. 53)(confirming the two signature

requirement.) Leiendecker then formally brought the matter to Respondent's pro bono

general counsel, attorney Lawrence Leiendecker, for his direct assistance. Attorney Lawrence Leiendecker, already familiar with the board situation and apprised [REDACTED] guidance, conducted his own investigation into the board condition and activities. Based upon his investigation, attorney Lawrence Leiendecker formed a good faith opinion that the existing board was de facto invalid and that there was a reasonable basis that some of the board members had misused corporate funds and had breached fiduciary duties owed to the agency.⁴

Taking both attorneys' advice regarding the invalid condition of the Respondent's "board," and acting in what she believed was in the best interest of Respondent and its staff, Leiendecker; in an open and transparent manner; participated in the creation of a board of directors on November 25, 2003.⁵ Leiendecker also anticipated that the agency

⁴ In fact, board member Pa Vang was subsequently charged and convicted of felony Theft by Diversion of Corporate Property for reportedly stealing \$265,000.00 from agency accounts in the months immediately following resolution of the board issues. (*See* Ramsey County Dist. Ct. Case #K8-06-745).

⁵ To be sure, Leiendecker's duties to Respondent required that she take steps to protect the corporation from an invalid board. The duty of a corporate official to prevent misconduct has long been a tenet of corporation law in Minnesota. *See Horn Silver Mining Co. v. Ryan*, 42 Minn. 196, 44 N.W. 56 (1889). In *Ryan*, a shareholder brought a derivative suit alleging that a director had breached his duty of care by negligently failing to prevent other officers from taking corporate funds. *Id.* at 198-200, 44 N.W. at 57. The Minnesota Supreme Court held that the defendant: "[o]ught to have known the truth in respect to the fraud and misconduct charged, and to have taken steps to prevent and expose the same, which he wholly failed to do...." *Id.* at 200, 44 N.W. at 57. Of course, the district court's later ruling (*see* Dist. Ct. Feb. 25, 2004, Order; Add. 576-82) made much of Leiendecker's efforts to protect the corporation inconsequential. *See supra* note 4.

would seek a declaratory judgment.⁶ In the meantime, Leiendecker and the "new board" sent certified letters to the members comprising the "old board" explaining their invalid status.⁷

B. Respondent Commences Action to Obtain Injunctive & Declaratory Relief.

In December 2003; after the "old board" received the certified letters explaining their invalid status; various members of the "old board" caused Respondent's bank accounts to become frozen by falsely alleging to its bank and to others that Leiendecker had embezzled corporate funds.⁸ Unable to access necessary funds to operate, Respondent (controlled by the "new board") commenced legal action seeking injunctive relief to release its funds and a declaratory judgment to determine which group (the "new board" or the "old board") should be Respondent's governing body. (Dist. Ct. Dec. 18, 2003 Order; Add. 1);(Dist. Ct. Feb. 25, 2004, Order: Findings of Fact ¶ 6-8; Add. 16.) This action was litigated by attorney David Flowers on Respondent's behalf largely on a pro bono basis.

On February 25, 2004 the Honorable Gary W. Bastain ruled that the "old board" should control Respondent, but immediately removed two of its directors and ordered the

⁶ Under Minnesota's Declaratory Judgment Act, courts "have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Minn. Stat. § 555.01 (2008).

⁷ See Ramsey County Dist. Ct. Case #C3-03-13016: Application for T.R.O. and Decl. J., Ex. D.

⁸ Ramsey County Ct. Case #C3-03-13016: Application for T.R.O. & Decl. J., Ex. F and Compl.; US Bank, Dec. 15, 2003, correspondence (US Bank Letter); see AWUM Dec. 15, 2003, Minutes § VI(A)-(E);(see Dist. Ct. Dec. 18, 2003 Order; Add. 367-69.)

remaining directors to elect a successor board within four months. (Dist. Ct. Feb. 25, 2004, Order ¶¶ 10, 11; Add. 19-20.) Even though the court declined to select the "new board" as Respondent's governing body, the sweeping transformation of the "old board" ordered by Judge Bastain (in the end creating a brand-new board of directors) confirmed the advice from three corporate lawyers that Respondent's "old board" was not de jure. Judge Bastain also invalidated the "old boards'" purported termination of Leiendecker as executive director. (*Id.*) However, immediately after receipt of Judge Bastain's Order, Leiendecker's employment was terminated. (Leiendecker Aff. ¶ 11; App. 36.)

C. Judge Higgs Orders Advanced Indemnification for Leiendecker.

The "old board," namely the individuals identified as Defendants/Third-Party Plaintiffs in the injunction and declaratory judgment action, had asserted numerous claims on behalf of Respondent against Leiendecker that allegedly arose out of the events and circumstances surrounding the board problems and Leiendecker's management of Respondent. In anticipation of Leiendecker's forthcoming defamation and wrongful termination suit, the third-party suit also sought the return of alleged unsanctioned wages and benefits paid to Leiendecker by Respondent under a breach of contract theory (*see* Third-Party Compl., Prayer for Relief ¶ 7; App. 67) and relief for alleged breach of fiduciary duty, (*id.* ¶ XIX.)⁹ Because these claims implicated Leiendecker's alleged actions while serving as executive director, she requested indemnification by Respondent

⁹ Parenthetically, Third-Party Plaintiffs had retained attorney Frank Mabley on a contingency basis (Vang Dep. pp. 58-59; App. 72) and were also asserting as damages against Leiendecker purported legal fees incurred as a result of the injunction and declaratory judgment action in the amount of approximately \$29,000.

against any judgment entered against her under Article 5 of Respondent's bylaws and under Minn. Stat. § 317A.521. Leiendecker also requested advanced indemnification under section 5.3 of the bylaws and Minn. Stat. § 317A.521, subd. 3.

Due to Judge Bastian shifting to a different court block, the matter was transferred to The Honorable David C. Higgs. On March 28, 2005, Judge Higgs heard the following motions by Leiendecker: Motion to Compel Discovery, Motion to Disqualify attorney Mabley as counsel for AWUM/Third-Party Plaintiffs, and Motion to Compel Advanced Indemnification. Judge Higgs granted Leiendecker's motion to compel discovery; ordered that Frank Mabley be disqualified as counsel; and granted Leiendecker's motion for advanced indemnification. In granting Leiendecker's motion for advanced indemnification, Judge Higgs wrote: "Clearly, the advance indemnification clause contemplates that [the] ultimate issue, should it be resolved against Leiendecker, will trigger her obligations for repayment of any advance." (Dist. Ct. April 8, 2005 Order ¶ 3; Add. 3-5)(alteration supplied). As a result of Respondent's repeated failures to comply with the court's orders, including payment of advanced indemnification, Judge Higgs; by order dated August 22, 2005; dismissed the case with prejudice and on the merits. (Dist. Ct. Aug. 22, 2005 Order, p. 6; Add. 12.) The court also reduced the order granting Leiendecker's indemnification to a judgment against the Respondent. (*Id.*)

D. Respondent Sues Leiendecker *Again* for Alleged Actions while Serving as its Executive Director.

On February 28, 2008; during the pendency of Leiendecker's defamation and wrongful termination case against Respondent (*see* Ramsey County Ct. Case No. C9-05-

8519; *see also Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836 (Minn. App. 2007), *rev. denied* (Minn. Aug. 7, 2007)) and during the pendency of the post-judgment collection matter before this Court (*see Asian Women United of Minn. v. Shanker*, A07-1133, *unpublished* (Minn. App. 2008)); Respondent sued Leiendecker again for alleged actions while employed as its executive director. Respondent's complaint was subsequently amended as of right on March 11, 2008. (App. 583-90.) Respondent contends that while Leiendecker was serving as its executive director she engaged in alleged activities that constitute conversion, fraud and misrepresentation, fraudulent concealment, breach of fiduciary duty, and breach of contract. (*Id.*) Leiendecker served her answer and counterclaim on March 31, 2008 emphatically denying Respondent's false and vicious allegations. (App. 218-22.) Leiendecker counterclaimed insisting, as she did before, that Respondent comply with its indemnification obligations under Article 5 of its bylaws and section 317A.521. (*Id.*) This counterclaim went unanswered.

E. Leiendecker's Present Request for Advanced Indemnification is Summarily Denied.

Article 5 of Respondent's bylaws; Bylaws art. 5 (App. 101-05); specifically provide for advanced indemnification of fees and expenses incurred by one who is made a party to a proceeding by reason of the former official capacity of the person. Bylaws § 5.3 (App. 102-03); *see* Minn. Stat. § 317A.521, subd. 3 (same). In her answer and counterclaim, Leiendecker demanded indemnification. (App. 221.) Leiendecker also requested advanced indemnification by letter dated October 17, 2008. (App. 106-07.) Respondent summarily denied this Indemnification Request by letter dated October 20,

2008. (App. 108.) And like before, there is no indication that the request was even presented to the Respondent's board for a proper determination pursuant the bylaws or section 317A.521.¹⁰ Once again, Respondent deliberately flouted its mandatory obligations under its bylaws and state law.¹¹

¹⁰ This denial was made only three days following service of the Indemnification Request; hardly sufficient time to properly notice a board meeting under Respondent's bylaws, which require five days written notice. Bylaws §§ 3.3.3, 5.5.1 (App. 98, 103.) Moreover, the Indemnification Request was served by facsimile and US Mail on Friday, October 17, 2008; the denial was drafted one business day later on Monday, October 20, 2008. This bad-faith conduct by Respondent occurred before in the earlier case. During the previous case, when questioned at her deposition, then board member and treasurer ██████ testified that she did not recall ever seeing the Indemnification Request document (Vang Dep. pp. 5-6; 54-55; App. 71.) Similarly, then board member Akiko ██████ testified that she had not seen the Indemnification Request document, that the board did not vote on the issue, and, in fact, "didn't even consider it." (Tanaka Dep., pp. 18-22; App. 110.) In fact, the only alleged "discussion" of the indemnification occurred by an exchange of emails between ██████ and attorney Frank Mabley. (*Id.* pp. 20-21.)

¹¹ It is noteworthy to point out that Respondent has persistently disregarded court orders as well. Respondent defied the court in February 2004 by summarily terminating Leiendecker without holding a formal board meeting upon proper notice pursuant to Judge Bastian's explicit instructions. (*See* Dist. Ct. Feb. 25, 2004 Order ¶ 10; Add. 61); *see also* *Leiendecker*, 731 N.W.2d at 839 (stating that "[w]ithin an hour of receiving the order, AWUM summarily terminated Leiendecker's employment"). Respondent also defied the order to elect a successor board by July 1, 2004, (Dist. Ct. Feb. 25, 2004 Order ¶ 10; Add. 61)(Dist. Ct. Aug. 22, 2005 Order, Findings of Fact ¶¶ 2-3; Add. 77), and refused to abide by the court's orders compelling discovery and indemnification, (*id.*) Even during post-judgment proceedings Respondent's new executive director failed to comply with a court ordered subpoena to appear at a deposition to obtain financial information. *See Asian Women United of Minn. v. Shanker*, A07-1133, *unpublished* (Minn. App. 2008). The executive director's violation of the subpoena to appear was at the direction of Respondent's attorney Frank Mabley. (March 27, 2007 Ct. Hearing Tr., 2/17 – 4/14; App. 112-15.) Attorney Frank Mabley also defied the court's April 8, 2005 order disqualifying him as Respondent's counsel. (*Id.* at 2/17 – 3/6; App. 113-14)(*see also* Dist. Ct. April 8, 2005 Order; Add. 73.)

As stated previously, Leiendecker moved for dismissal based on *res judicata*, which was denied by the district court. (Dist. Ct. Sept. 12, 2008 Order; Add. 23-26.) Leiendecker also moved the district court for advanced indemnification, indemnification, and default judgment. Despite having been previously granted by the earlier court (Judge Higgs presiding), Leiendecker's motion for advancement was denied. The court also summarily denied Leiendecker's other motions. (Dist. Ct. Jan. 19, 2010 Order; Add. 27-33.) Leiendecker requests that this Court reverse the district court's decisions and grant judgment in her favor.

STANDARD OF REVIEW

The standard of review on appeal of questions of law is *de novo* as to the erroneous application of the law. *Modrow v. JP Foodservice, Inc.*, 656 N.W. 2d 389, 393 (Minn. 2003). On appeal from a district court order denying a motion for summary judgment, the appellate court will review whether there are genuine issues of material fact and whether the district court erred as a matter of law. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995). Summary judgment is a particularly appropriate means of resolving 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." *Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co. LLC*, 853 A.2d 124, 126-27 (Del. Ch. 2004) (citation omitted); *accord*

Homestore, Inc. v. Tafeen (Homestore II), 888 A.2d 204, 213 (Del. 2005); *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 389 (Del. Ch. 2008).¹²

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT REFUSED TO GRANT LEIENDECKER'S MOTION FOR ADVANCED INDEMNIFICATION.

Like so many nonprofit corporations seeking to secure a talented workforce and abundant volunteers, Respondent has adopted an indemnification bylaw that protects its officers, directors, employees and agents. (Bylaws art. 5; App. 101-05.) Respondent's indemnification bylaw is maximally broad, requiring indemnification to the full extent mandated by Minnesota law; Minn. Stat. § 317A.521 (2008); and beyond in the case of its desire to indemnify its agents as well. (Bylaws § 5.1.1.)

Statutory rights to "indemnification and advancement are deeply rooted in the public policy of ... corporate law." *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2005). Indeed, the principle of indemnification and its policy underpinnings date back to the nineteenth century. *United States v. Stein*, 435 F. Supp. 2d 330, 353-55 (S.D.N.Y.

¹² The significant number of corporate entities incorporated under its laws makes Delaware the most prolific jurisdiction for case law discussing indemnity and advancement. Admittedly, Delaware case law is merely persuasive authority in Minnesota courts. However, it has been recognized that the law of indemnification and advancement is "rather a Delaware specialty." *Int'l Airport Centers, LLC v. Citrin*, 455 F.3d 749, 750 (7th Cir. 2006) (Judge Posner writing for the court); *see also In re Ivan F. Boesky Sec. Litig.*, 129 F.R.D. 89, 97 (S.D.N.Y. 1990) (explaining that Delaware "has long been recognized as the fountainhead of American corporations and that its Courts of Chancery are known for their expert exposition of corporate law."). For this reason, Delaware indemnity and advancement case law should be deemed highly instructive. It should be further noted that while the Delaware indemnification statute (§ 145) is permissive, Delaware courts are regularly confronted with bylaw and contractual provisions that make indemnification and advancement mandatory.

2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008). In Minnesota, the right to costs and expenses in advance of the final disposition of a proceeding is a significant statutory and contractual right that, once provided, cannot be unilaterally terminated by the corporation. Minn. Stat. § 317A.521, subd. 4 (2008). The frustration of advancement rights by a corporation can be very consequential. The Delaware Supreme Court has explained that, "the failure to advance fees affects the counsel the director may choose and litigation strategy that the executive or director will be able to afford" and could "force [employees] ... to compromise their own litigations in the face of cost concerns." *Homestore, Inc. v. Tafeen (Homestore I)*, 886 A.2d 502, 505 (Del. 2005)(alteration supplied). Indeed, so significant is the right to advancement the material interference of which by the government in a criminal matter is a violation of the Sixth Amendment's Counsel Clause. *United States v. Stein*, 541 F.3d 130, 136, 148 (2d Cir. 2008). In recognition of the considerable public policy endorsement, corporate indemnification and advancement rights have traditionally been vigorously enforced by the courts. *See generally*, Karl E. Strauss, Note, *Indemnification in Delaware: Balancing Policy Goals and Liabilities*, 29 Del. J. Corp. L. 143 (2004). However, in this case, the district court has chosen to abrogate Leiendecker's statutory and contractual entitlement to advanced indemnification on account of the specious allegations made against her. The district court's decision must be reversed as it is clearly erroneous as a matter of law.

A. Respondent is Suing Leiendecker By Reason of Her Official Capacity.

Respondent's bylaws and section 317A.521 provide for mandatory indemnification and advances whenever an officer, director or employee is "made or threatened to be

made a party to a proceeding by reason of the former or present official capacity of the person." Minn. Stat. § 317A.521, subd. 2(a); Bylaws § 5.2 (App. 102.) Courts have construed the "by reason of" requirement broadly in favor of indemnification. *See Barry v. Barry*, 824 F. Supp. 178, 184-85 (D. Minn. 1993) (citations omitted)(holding that the "by reason of" language "is broad enough to encompass not only suits directly alleging that corporate officers or directors have breached their official duties, but also suits that arise more tangentially from their role, position, or status as officers or directors."), *aff'd*, 28 F.3d 848 (8th Cir. 1994); *see also Homestore II*, 888 A.2d at 214 (citations omitted)(holding that "if there is a nexus or causal connection between any of the underlying proceedings contemplated by [indemnification provisions] and one's official corporate capacity, those proceedings are 'by reason of the fact' that one was a corporate officer, without regard to one's motivation for engaging in that conduct.")(alteration supplied).

In *Barry*, the Eighth Circuit Court of Appeals construing the same "by reason of" requirement in the Minnesota Business Corporation Act affirmed the district court decision by agreeing that the "by reason of" language of section 302A.521 is broad enough to encompass allegations that the officers misrepresented financial information and exploited the company for financial benefits substantially in excess of a reasonable salary. *Barry*, 28 F.3d at 851. The allegations in the present case are similar to those advanced in *Barry* in that they expressly allege that Leiendecker took advantage of her position as executive director for her own personal benefit. This is sufficient to establish the necessary connection between the proceeding and Leiendecker's official corporate

capacity. *See Brown v. LiveOps, Inc.*, 903 A.2d 324, 329 (Del. Ch. 2006) (corporate powers were employed for the commission of the alleged misconduct); *see also Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *6 (Del. Ch. May 3, 2002) (holding that "it was his status as officer that enabled him to embezzle... or to transfer the corporate funds for his benefit.")(App. 599.)¹³

Additionally, this Court need not linger over this particular question because Respondent has *never* disputed that its claims implicate Leiendecker's former official capacity. Even the district court believes, at least implicitly, that Leiendecker is being sued in an indemnifiable capacity by proclaiming: "[i]f, after a trial on the merits, plaintiff is unable to prove the allegations against defendant, she would certainly have a right to indemnification." (Dist. Ct. Jan. 19, 2010 Order p.7; Add.33.) The Respondent agrees:

MR. MABLEY: If the findings come out that, you know, that everything is explained, then I think she deserves indemnity.

THE COURT: I agree with you. I think that is the logical result. I mean, assuming I were to grant your motion that it would impact advanced indemnity as opposed to indemnity in general.

MR. MABLEY: Yes. And I agree with that.

(T-'09: 26/22-27/6; App. 164-65.)

But even if the Respondent were to change its position on this, its allegations easily lead to the conclusion that Leiendecker is being sued by reason of her official capacity. And, even though indemnification is not limited to only suits involving the

¹³ The Court should note that the portion of the *Perconti* decision pertaining to the denial of "fees on fees" was overruled by the Delaware Supreme Court's landmark *Stifel Fin. Corp. v. Cochran* decision one month later. 809 A.2d 555, 561 (Del. 2002). *See infra* Section II.

breach of a duty, Respondent's pleadings make clear that the corporate powers entrusted to Leiendecker were instrumental in carrying out the self-dealing activities that are loosely alleged in Respondent's amended complaint. Even Respondent's contractual claim is premised on the same allegedly improper actions taken by Leiendecker in her official capacity. Here, Respondent's pleadings demonstrate that the fiduciary duty, contract, conversion, misrepresentation and concealment claims are all based on common assertions which precludes it from even attempting to argue that its claims are based purely on Leiendecker's personal obligations under her employment contract.¹⁴

Indeed, Respondent has pleaded; in very broad, sweeping and generalized (if not speculative) averments, which noticeably violate rule 9.02; that Leiendecker made use of entrusted corporate powers to engage in that which gives rise to all of the claims made against her.¹⁵ In essence, Leiendecker is - as alleged - being sued for wrongfully discharging her corporate powers. The fact that Respondent contends or *believes* that the alleged conduct was committed with a self-dealing purpose does not obscure this reality in the least. *Homestore II*, 888 A.2d at 213-14; see *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *6, 8 (Del. Ch. June 18, 2002), *aff'd*, 820 A.2d 571 (Del. 2003) (mem.)

¹⁴ ("Defendant, as executive director of AWUM, had fiduciary duties to AWUM to manage their [sic] funds responsibly and not to take advantage of her position for her own personal benefit....") ("Defendant's duties under the contract included management [sic] the finances of the [sic] AWUM") ("Defendant mismanaged the finances of AWUM for her own benefit.") (App. 587, 589.)

¹⁵ Respondent's fraud and misrepresentation claims lack the required specificity under rule 9.02 and Minnesota case law. Thus, they are without merit. Minn. R. Civ. P. 9.02; *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 747 (Minn. 2000).

(App. 212.)¹⁶ Therefore, this Court must hold that Respondent's claims, because they involve Leiendecker's former role as executive director, implicate the mandatory indemnification protections promised in Respondent's bylaws and Minn. Stat. § 317A.521.

B. The "Facts Then Known" Do Not Preclude Indemnification.

Subdivision 3 of section 317A.521 requires that a corporation provide reasonable costs and expenses in advance of the final disposition of the proceeding upon receipt of a written affirmation and undertaking by the party seeking advancement when "after a determination that the facts then known to those making the determination would not preclude indemnification under this section." Minn. Stat. § 317A.521, subd. 3; Bylaws § 5.3 (App. 102-03.) Just as in the previous case, Leiendecker moved the district court for advanced indemnification after Respondent denied her advancement request. (App. 108.) In support of her motion, Leiendecker - even though not required to do so to support her good faith affirmation - provided the court with substantial evidence showing that her good faith belief that the indemnification criteria has been satisfied was well-grounded in fact. (App. 17-21.) Indeed, this evidentiary showing by Leiendecker substantiates her innocence thereby making the indemnification criteria immaterial. (*Id.*) Respondent in turn relied upon unsupported allegations and inapposite legal authority in response to

¹⁶ In *Reddy*, the court held that the breach of contract claim implicated Reddy's official capacity because "the actions that Reddy supposedly took in breach of his contractual obligations--falsifying and manipulating the books and records of EDS--are identical to the tort claims the company has asserted." *Reddy*, 2002 WL 1358761 at *8. (App. 215.)

Leiendecker's motion. (App. 121-27.) Leiendecker clearly pointed these inadequacies out to the district court in her reply memorandum. (App. 128-38.)

In the end, Respondent has never pointed to any "facts then known" that would "preclude indemnification under this section." Minn. Stat. § 317A.521, subd. 3(2); Bylaws § 5.3(b) (App. 103.) Nor can it, as there has yet to be a judicial determination concerning liability.¹⁷ Respondent's reliance on its allegations clearly does not suffice. *Allegations are simply not facts.* Making matters worse, Respondent's allegations are based on mere speculation and suspicion.¹⁸ It is well established that a litigant may not rely on unverified accusations in defending a summary judgment motion. Minn. R. Civ. P. 56.05; *see Fownes v. Hubbard Broad., Inc.*, 302 Minn. 471, 474, 225 N.W.2d 534, 536 (1975) ("surmise and speculation" cannot be relied on in meeting the burden of showing a genuine issue as to a material fact.).¹⁹ Here, Respondent has obviously frustrated Leiendecker's right to advancement by resting its denial solely upon the allegations that give rise to the need for advancement. This is bad-faith. *See Murphree v. Federal Ins.*

¹⁷ Other than the previous litigation, which was resolved on the merits in Leiendecker's favor. (Dist. Ct. Aug. 22, 2005 Order p.6; Add. 76-82); *see also infra* Section IV.

¹⁸ (AWUM employees have discovered records that appear to show unauthorized payments to Defendant during her tenure as AWUM Executive Director...."); ("AWUM believes that more careful analysis of this information could possibility exonerate Defendant of some of those suspicious transactions, but is also likely to confirm and uncover others."); ("It is believed that Defendant actively sought to conceal these transactions from the board of AWUM, as well as the funders of AWUM.")(App. 583-90.)

¹⁹ Additionally, arguments of counsel are not evidence. *State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004); *see Trinsey v. Pagliaro*, 229 F. Supp. 647, 659 (E.D. Pa. 1964) ("[s]tatements of counsel in their briefs or argument while enlightening to the Court are not sufficient for purposes of granting a motion to dismiss or summary judgment.").

Co., 707 So.2d 523, 534-35 (Miss. 1997) (holding that a question of fact existed regarding the imposition of punitive damages based on the corporation's bad faith denial of an officer's advancement request when the corporation viewed the officer's indictment as the equivalent to his being "adjudged liable."). In Minnesota, once the "statutory requirements for indemnification or advances are met, a corporation must indemnify or provide advances." *Barry*, 824 F. Supp. at 183 (explaining that in Minnesota the statutory presumption is mandatory not permissive).

Quite simply, Respondent has not met its burden to show that the "facts then known" would "preclude indemnification *under this section*." Minn. Stat. § 317A.521, subd. 3(2) (emphasis added); Bylaws § 5.3(b) (App. 103.)²⁰ Respondent, by resting on its allegations, attempts to discard the "under this section" language from the statute and its bylaws. *Id.*; see Bylaws § 5.3(b)(using: "under this Article."). It is very apparent by the plain language of section 317A.521; and the bylaws; that in order to be precluded from indemnification the indemnitee must first be adjudicated liable in some respects and secondly fail to meet the indemnification criteria, which includes having acted in good faith. Minn. Stat. § 317A.521, subd. 2; Bylaws § 5.2 (App. 102.) The Minnesota

²⁰ In fact, the mandatory nature of the indemnification provisions shifts the burden of proof to Respondent to demonstrate that Leiendecker is not entitled to indemnification coverage as a matter of law. See *VonFeldt v. Stifel Fin. Corp.*, 1999 WL 413393, at *3 (Del. Ch. June 11, 1999) ("By using the phrase 'shall indemnify,' the bylaw not only mandates indemnification; it also effectively places the burden on [the corporation] to demonstrate that the indemnification mandated is not required")(App. 609); see also *Stockman v. Heartland*, 2009 WL 2096213, at *13 (Del. Ch. July 14, 2009) (same) (App. 628); compare Minn. Stat. § 302A.521, subd. 6(a)(5)(denoting the burden is on person seeking indemnification) with Minn. Stat. § 317A.521, subd. 6(a)(5)(wherein the burden language is noticeably absent).

Supreme Court has made it crystal clear that good faith is a question of fact to be determined by the trier of fact. *Augustine v. Arizant, Inc.*, 751 N.W.2d 95, 100-101 (Minn. 2008) (citing *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985)). As a consequence, under Minnesota law, determinations of the "facts then known" that would "preclude indemnification *under this section*" cannot be made until a trier of fact has spoken on the subject. *Id.*; see *Neal v. Neumann Med. Ctr.*, 667 A.2d 479, 482-83 (Pa. 1995) (finding that there was no judicial determination that the officers failed to act in good faith, which would preclude indemnification, and holding that to otherwise deny advancement "no corporate officer or director could get advance litigation expenses merely because of allegations.").

Indeed, any other interpretation would inappropriately engraft a requirement into the indemnification provisions that an indemnitee show a probability of success on the merits as a precondition to advancement; a requirement that would render the affirmation and undertaking requirement completely superfluous.²¹ For this reason, unless a corporation explicitly opts out of the statutory scheme under subdivision 4, the eligibility for advancement cannot be defeated by the very allegations that create the need for advancement. See *Citrin*, 455 F.3d at 751 (citations omitted)("entitlement to advancement is independent of the merits of the suit for which the money is sought..."); see *Homestore II*, 888 A2d at 212 (same); see also *Reddy*, 2002 WL 1358761, at *9 (noting that "the clear authorization of advancement rights presupposes that the corporation will front the

²¹ See Minn. Stat. § 645.16 (2008) ("Every law shall be construed, if possible, to give effect to all its provisions."); see *Id.* § 645.17 (2)("the legislature intends the entire statute to be effective and certain.").

expenses before any determination is made of the corporate official's ultimate right to indemnification.")(App. 216.)

This conclusion, however, does not render the "facts then known" language meaningless. As contemplated by the statute, the determination of liability is quite different than the determination of whether the culpable conduct was performed with an indemnifiable state of mind. *See* Minn. Stat. § 317A.521, subd. 2(b) ("[t]he termination of a proceeding by judgment... does not, of itself, establish that the person did not meet the criteria in this subdivision."). To be sure, an adverse adjudication is a precondition to the added inquiry behind the result into the indemnification criteria. *Id.* Thus, the advancement language requiring that the "facts then known ... would not preclude indemnification under this section" is surely meant that any unfavorable facts are derived from a collateral proceeding where there has already been a final disposition of culpability; and a subsequent determination of the state of mind criteria; concerning the same behavioral incident of the accused.²² Certainly, it is not uncommon for corporate actors to be exposed to multiple proceedings. *See e.g., Cochran*, 809 A.2d at 561. (indemnatee subjected to investigative, criminal, and civil proceedings.). Moreover, the fact that a person is not being sued in an indemnifiable capacity or has been indemnified by another organization would obviously preclude indemnification "under this section" as well. Minn. Stat. § 317A.521, subd. 2(a)(1).²³

²² *See Sun-Times*, 954 A.2d at 403-04 (construing "final disposition").

²³ It is also foreseeable that a corporation may preclude indemnification for specific types of claims in its bylaws. Minn. Stat. § 317A.521, subd. 4. Such a specific limitation might

Absent a determination on the state of mind requirements in subdivision 2, the district court completely lacked the factual wherewithal to deny advancement. Therefore, because Respondent's allegations cannot form the basis of an advancement denial, Respondent was required to provide Leiendecker with advancement upon receipt of Leiendecker's written affirmation and undertaking.

C. The District Court's Reasoning Is Erroneous As A Matter of Law.

The district court's ruling is implicitly founded on the following mistaken beliefs: (1) Respondent, because it is suing its former executive director, is exempt from having to provide Leiendecker advanced litigation costs; (2) Leiendecker would be unable or unwilling to repay any advancement if it were ultimately determined that she was not entitled to indemnification; and (3) because of the motivation ascribed to Leiendecker's alleged conduct by Respondent and its supposed financial risk, Leiendecker must shoulder her own defense costs until she proves herself worthy of indemnification. (*See* Dist. Ct. Jan. 19, 2010 Order at 6-7; App. 204-07.)

First, the fact that Respondent is the complaining party is of no significance in indemnification or advancement determinations. Section 317A.521, and Respondent's bylaws, make clear that a proceeding includes "a proceeding by or in the right of the corporation." Minn. Stat. § 317A.521, subd 1(d); Bylaws § 5.1.2 (App. 101-02); *see also Neal*, 667 A.2d at 483 (stating that "[i]n our opinion, the trial court was unduly

be sufficient to preclude indemnification as a preliminary matter and would render the indemnification criteria immaterial.

influenced in its decision by the fact that [the nonprofit corporation] itself brought the action against the Officers.")(alteration supplied).

Second, the belief that Leiendecker would be unwilling or unable to repay advanced litigation costs if it were later determined that she is not entitled to indemnification is also immaterial. Section 317A.521, and Respondent's bylaws, establish that the required undertaking to repay "need not be secured and must be accepted without reference to financial ability to make the repayment." Minn. Stat. § 317A.521, subd. 3; Bylaws § 5.3 (App. 102-03.) At the same time, the "throw good money after bad" idiom used by the court reveals its bent conviction that Respondent would have difficulty collecting from Leiendecker if it were ultimately determined that she was not entitled to indemnification. In spite of its immateriality, there is no evidence in the record that even comes close to suggesting that Leiendecker would be unable or unwilling to fulfill the obligation set forth in her signed undertaking.

Third, the belief that - because of the motivation ascribed to Leiendecker's alleged conduct by Respondent and its supposed financial risk - Respondent should not have to pay litigation costs to Leiendecker until she satisfies the indemnification criteria defies the express mandate of the indemnification provisions which require that Respondent advance litigation expenses once the *advancement* requirements have been met. Minn. Stat. § 317A.521, subd. 3; Bylaws § 5.3 (App. 102-03); *Barry*, 824 F. Supp. at 183. To be sure, requiring that an indemnitee establish her right to indemnification before allowing advancement is a classic example of putting the cart before the horse.

There can be no doubt that the benefit of a mandatory advancement provision is lost if the party seeking advancement is forced to litigate or defend the merits of the underlying allegations prior to the claim for advancement being decided. The advancement proceeding, therefore, does not depend on the merits of the underlying claims but is limited to an examination of whether the indemnitee is entitled to advance litigation expenses under the applicable terms of the bylaws and/or statute. *Senior Tour Players*, 853 A.2d at 126-127; *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995). The position that courts should look to the merits of the case before deciding whether the advancement provision applies is visibly contrary to the purpose for which the advancement provision was included in the statutes or bylaws. Indeed, such an approach to advancement proceedings would make advancement benefits illusory; which is exactly the result here.²⁴ The Delaware Court of Chancery addressed this situation in *Reddy*. There, the corporation argued that because the corporate officer was motivated by personal greed it should not have to pay advancement. *Reddy*, 2002 WL 1358761 at *5. (App. 211.) In soundly rejecting this argument, the court explained:

The problem with [the corporation's] argument is that it has no logical stopping point. It is not uncommon for corporate directors, officers, and employees to be sued for breach of the fiduciary duty of loyalty, and to have to defend claims that they took official action for the primary purpose of diverting corporate resources to their own pocketbooks - in the form of contractual compensation benefits (e.g., severance payments or stock options) or an unfair return on a self-dealing transaction. Therefore, it is highly problematic to make the advancement right of such officials dependent on the motivation ascribed to their conduct by the suing parties.

²⁴ Additionally, the district court's reasoning creates an inference of wrongdoing by Leindecker that is simply not borne out by any of the facts in the record.

To do so would be to largely vitiate the protections afforded by [the statute] . . . and contractual advancement rights.

Corporate advancement practice has an admittedly maddening aspect. At the time that an advancement dispute ripens, it is often the case that the corporate board has drawn harsh conclusions about the integrity and fidelity of the corporate official seeking advancement. The board may well have a firm basis to believe that the official intentionally injured the corporation. It therefore is reluctant to advance funds for his defense, fearing that the funds will never be paid back and resisting the idea of seeing further depletion of corporate resources at the instance of someone perceived to be a faithless fiduciary.

But, to give effect to this natural human reaction as public policy would be unwise. Imagine what [the company] . . . believes to be unthinkable: that [it] . . . is in fact wrong about [the officer] What if he in fact did not do anything that was even grossly negligent? In that circumstance, it would be difficult to conceive of an argument that would properly leave him holding the bag for all of his legal fees and expenses resulting from two cases centering on his conduct as an employee of [the company] That result would make the promise made to [the officer] . . . an illusory one.

Id. at *5-6 (citations omitted, alterations supplied).²⁵

The district court's position that Respondent should not be made to finance Leiendecker's defense "in a case such as this" because of the risk of "throw[ing] good money after bad;" (*see* Add. 27-33); is also apparently premised on Respondent's argument that financial hardship should liberate it from its advancement obligations, (*see* Pl.'s Resp. Mem. pp. 2, 6; App. 122, 126);(Pl.'s July 9, 2009 letter to the court; App. 635);(T-'09: 52/7-53/7; App. 190-91.) However, financial hardship is not a legally cognizable defense to advancement. *See Barry*, 28 F.3d at 851 (stating that in Minnesota,

²⁵ In the broader policy sense, because the cost of defense can be significant, a decision not to advance litigation fees can effectively force capitulation of indemnitees to adversarial demands, irrespective of guilt or innocence. *Homestore I*, 886 A.2d at 505. Although this may serve the opposition's narrowest tactical aims, it does not serve the interests of truth-seeking or justice.

"indemnification and advances are mandatory unless the corporation chooses to alter this scheme."); see *Ridder*, 47 F.3d at 87 ("[i]t is not the province of judges to second-guess these policy determinations."). Clearly, the plain language of section 317A.521 controls whether or not a reviewing court considers the result to be "reasonable" or "good policy." *Hyatt v. Anoka Police Dep 't*, 691 N.W.2d 824, 826-28 (Minn. 2005). From the contractual standpoint, the axiom is the same. See *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999) (courts are not free to remake contracts for parties but rather must enforce the contract the parties intended, "even if the result is harsh."); see *In re Src Holding Corp.*, 545 F.3d 661, 667 (8th Cir. 2008) ("[i]n the absence of contractual ambiguity, whether policy coverage 'makes sense' as a business matter is largely irrelevant....").²⁶

So, at the end of the day, what "defies logic and common sense;" as the district court put it; is not Respondent having to advance litigation costs to the very person that it is repeatedly suing, but that Respondent failed to take advantage of its ability to narrowly tailor its indemnification provisions and now demands that the court plug the holes in the dam that Respondent itself bored on a clear day long ago. Here, Chancellor Chandler of the Delaware Court of Chancery said it best when confronted with the identical argument that a former director was not entitled to advancement because of a supposed worthless promise to repay and alleged financial hardship created by the corporation's bylaws:

The defense is novel because it reminds one of a sinner who suddenly finds religion - the conversion is breathtaking. Content to adopt advancement

²⁶ As a matter of fact, the Legislature has already settled the financial hardship question in favor of the indemnitee. *Ridder*, 47 F.3d at 87.

and indemnification bylaws drafted with holes large enough to drive a truck through, the defendant company (like so many others in this Court of late) suddenly "finds religion" - insisting on a rigorous interpretation of its loosely written bylaws.

Tafeen v. Homestore, 2004 WL 556733, at *1 (Del. Ch. Mar. 22, 2004)(App. 636), *aff'd*, 888 A.2d 204 (Del. 2005); *see also Id.* at *10 - n.71 (explaining that "this Court will not permit corporations to do retrospectively what [they could have] precluded [themselves] from doing ex ante.")(citations omitted; alterations in original)(App. 650-51.)

To be sure, Respondent has had nearly unfettered contractual discretion; *see* Minn. Stat. § 317A.521, subd. 4; in determining whether to limit or prohibit advancement and indemnification in its bylaws. There can be no doubt that the district court has allowed Respondent to escape the consequences of its own contractual freedom. By doing so, the court clearly erred by refusing to enforce the duties that were imposed by statutory law: duties that were indeed welcomed with open arms by the Respondent as ratified by its own hand in its bylaws. *See Radiancy v. Azar*, 2006 WL 224059, at *1 (Del. Ch. Jan. 23, 2006) ("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.")(App. 653.) Although Leiendecker's financial freedom from funding her own legal defense is subject to an ultimate indemnity determination if found liable, until such a finding is made against her, Respondent is required to advance Leiendecker her litigation expenses.

D. The District Court's Decision Ignored The Collateral Estoppel Issue.

Leienhecker argued to the district court that the doctrine of collateral estoppel barred Respondent's denial of advanced indemnification. (App. 15-16.) Respondent failed to respond to this issue in its responsive memorandum. (See App. 121-28.) However, at the October 7, 2009 hearing, Respondent's counsel claimed that the previous court decision was not binding upon the present court because the Respondent was unrepresented during the relevant hearings involving indemnification and dismissal. (T-'09: 47/9-48/4; App. 185-86.) However, the court's orders clearly reveal that Respondent's counsel *himself* appeared at the March 28, 2005 hearing and argued the advancement issue before the court (Dist. Ct. April 8, 2005 Order; Add. 3-6) and that Respondent was represented thereafter by other legal counsel at subsequent hearings (Dist. Ct. Aug. 22, 2005 Order, p. 1, ¶¶ 11, 12, 16-18; Add. 10-11.).²⁷ Nevertheless, even if Respondent was unrepresented at the time, this does not; contrary to Respondent's suggestion; lead to the conclusion that the court's rulings were erroneous by that fact alone and therefore unworthy of collateral estoppel application as a result. *See Heinsch v. Lot 27, Block 1 For's Beach*, 399 N.W.2d 107, 109 (Minn. App. 1987) (pro se parties are held to the same rules and standards as attorneys); *see also Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 973-74 (1979) (collateral estoppel, *inter alia*, preserves the courts' integrity by preventing inconsistent results.).

Collateral estoppel applies when the following are met:

²⁷ *See Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 754 (Minn. 1992) (In Minnesota, a corporation must be represented by an attorney in legal proceedings.).

(1) the issue must be identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Hauschildt v. Beckingham, 686 N.W.2d 829, 837 (Minn. 2004). Here, the issue involving Leiendecker's advancement right is identical to the issue determined by the prior court. (Dist. Ct. April 8, 2005 Order; Add. 3-6.) There was a final judgment on the merits. (Dist. Ct. Aug. 22, 2005 Order; Add. 7-13.) Respondent was clearly a party in the prior adjudication. *Id.* And, Respondent was given a full and fair opportunity to be heard on the issue. *Id.* Therefore, collateral estoppel applies to the advancement issue. *See State Farm Mut. Auto. Ins. Co. v. Spartz*, 588 N.W.2d 173, 175 (Minn. App. 1999), *rev. denied* (Minn. March 30, 1999)(no genuine issues of material fact remain when collateral estoppel conclusively precludes relitigation of an issue); *see also Plunkett v. Lampert*, 231 Minn. 484, 492, 43 N.W.2d 489, 494 (1950) (a decision that is arbitrary, capricious, or not in conformity with law is an abuse of discretion.).

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT REFUSED TO GRANT LEIENDECKER'S MOTION FOR INDEMNIFICATION OF COSTS RELATED TO THE VINDICATION OF HER INDEMNIFICATION RIGHTS.

Leiendecker also moved the district court to compel Respondent to indemnify her for all costs associated with the enforcement of her indemnification rights under Respondent's bylaws and Minn. Stat. § 317A.521. Respondent failed to respond to this motion in its responsive papers. The trial court summarily denied Leiendecker's motion and partnered the denial with its reasoning that Leiendecker was not entitled to any form of indemnification until she prove herself worthy of indemnification through trial. (Dist.

Ct. Jan. 19, 2010 Order: Memorandum p.2; Add. 27.) However, section 317A.521 and Respondent's bylaws make clear that Leiendecker is entitled to all costs attributable to the enforcement of her right to indemnification.

In the advancement context, once Leiendecker establishes her right to advanced indemnification, all costs attributable to the enforcement of her advancement rights require indemnification due to having prevailed in the affiliated proceeding regarding advancement. Indeed, in accordance with the policy of indemnification, Respondent's bylaws contemplate full and complete indemnification:

Section 5.2 INDEMNIFICATION REQUIRED

The corporation shall indemnify a person made... a party to a proceeding by reason of the former or present official capacity of the person against judgments, penalties, fines, including, *without limitation*... reasonable expenses, including attorneys' fees and disbursements, incurred by the person *in connection with the proceeding*....

Bylaws § 5.2 (emphasis added)(App. 102); *see also* Minn. Stat. § 317A.521, subd. 2(a)(same).

It cannot be denied that the right to advancement, including the enforcement of that right, is inextricably connected with the proceeding that Respondent has brought against Leiendecker. But for the claims asserted against her by Respondent; thereby triggering the mandatory indemnification provisions; and Respondent's denial of her advancement request, Leiendecker would not have to litigate her indemnification rights. Indemnification would be incomplete if Leiendecker were required to incur the costs associated with the vindication of her indemnification rights when Respondent's bylaws, *without limitation*, indemnify reasonable attorneys' fees and disbursements incurred *in*

connection with the proceeding. Moreover, the bylaws do not exclude such fees, as required if desired under subdivision 4 of section 317A.521. *See Barry*, 824 F. Supp. at 183 (stating that language opting out of the mandatory statutory scheme must be precise.)

The Delaware courts have addressed the issue of "fees on fees" and have held that corporations with broad indemnification provisions are required to indemnify all reasonable costs and expenses that arise out of exposure to the predicate proceeding. *Cochran*, 809 A.2d at 561. In *Cochran*, the claimant (Cochran) had been an officer and director for Stifel Financial Corporation and had been convicted on several counts of fraud in federal court. *Id.* at 557.²⁸ The Tenth Circuit ultimately reversed his conviction. *Id.* Afterwards, Cochran filed an action for indemnification and for expenses incurred in bringing the indemnification action. *Id.* The Delaware Supreme Court reasoned that the indemnification statute is intended to be remedial in nature and to deny a director the costs incurred in pursuit of indemnification rights would run counter to the purpose of indemnification leaving indemnification of directors incomplete. The court explained:

An attorney representing a former director who is being denied statutorily authorized indemnification must seek compensation from his client or

²⁸ Stifel had also terminated Cochran during the SEC investigation into his conduct. *Cochran*, 809 A.2d at 556-557. Cochran then refused to repay excess compensation and the balance of a promissory note as required by his employment agreement. *Id.* This resulted in an arbitration action involving Cochran's alleged breach of contract and breach of fiduciary duty. *Id.* Cochran prevailed on the fiduciary duty claim but lost on the contract claim. *Id.* Indemnification was ultimately disallowed for the arbitration expenses relating to the breach of contract claim. *See Id.* at 562 (holding that Cochran's refusal to repay the excessive compensation and promissory note after termination was purely personal in nature and not related to his official capacity); *see also Reddy*, 2002 WL 1358761, at *7 (noting that *Cochran* did not "involve a situation in which the officer's alleged breach of his employment agreements was argued to be the identical conduct that was also averred to be a breach of fiduciary duty.")(App. 214.)

remain uncompensated, a result "inimical to the interests" of the former director and contrary to the express purpose of § 145 to protect directors from personal liability for corporate expenses.

Cochran, 809 A.2d at 561. The court went on to note that there are significant policy reasons that prevent a narrow reading of its indemnification statute and that to do so would disserve the public policy embodied in the indemnification statute. *Id.* The court further observed:

Allowing indemnification for the expenses incurred by a director in pursuing his indemnification rights gives recognition to the reality that the corporation itself is responsible for putting the director through the process of litigation. Further, giving full effect to § 145 prevents a corporation from using its "deep pockets" to wear down a former director, with a valid claim to indemnification, through expensive litigation. Finally, corporations will not be unduly punished by this result. They remain free to tailor their indemnification bylaws to exclude "fees on fees," if that is a desirable goal.

Id. Clearly, the court's rationale for recognizing the right to "fees on fees" was to ensure that corporate officials do not achieve a Pyrrhic victory in indemnification cases, whereby what they receive is largely offset by their costs of prosecution. As the *Cochran* court noted, such a result is plainly inconsistent with the long established public policy authorizing corporate indemnification. *Id.* The same rationale and policy considerations justifying "fees on fees" for indemnification claims equally support an award of fees for the successful prosecution of an advancement claim as the right to advancement is no less of a right than the ultimate right to indemnification. *See Reddy*, 2002 WL 1358761 at *9 (granting "fees on fees" in advancement proceeding)(App. 217); *see also DeLucca v.*

KKAT Mgmt. L.L.C., 2006 WL 224058, at *15-16 (Del. Ch. Jan. 23, 2006 (same)(App. 673-74.)

The justification for "fees on fees" is also harmonious with the rationale that requires that pre-judgment interest be granted to a director from the date of his or her demand upon the corporation. *See Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992)(holding that in the "contractual scenario" presented in the case the party seeking advancement was "entitled to interest computed from the date of the demand."). The Delaware Court of Chancery has since explained in *Finkelstein v. Liberty Digital, Inc.*, an appraisal action, that:

The purpose of the pre-judgment interest award is twofold: first, it compensates the petitioner for the loss of the use of his or her money . . . and second, it forces the respondent to disgorge any benefit that it has received from employing the petitioners' money in the interim.

2005 WL 1074364, at *26 (Del. Ch. Apr. 26, 2005)(App. 703); *see also Citrin v. Int'l Airport Centers LLC*, 922 A.2d 1164, 1168 (Del. Ch. 2006) (awarding pre-judgment interest on advanced indemnification). The same is true in the "fees on fees" context. The corporation must also be forced to disgorge any benefit that it receives by using, what can be fairly said to be, the petitioner's money against the petitioner in opposing the vindication of his or her indemnification rights. *See Stein*, 541 F.3d at 151 (citing *Stein*, 435 F. Supp. 2d at 367)(stating that because the defendants reasonably expected to have their legal fees paid by the corporation, such fees "were, in every material sense, their

property.").²⁹ This appreciation is in keeping with the *Cochran* court's expectation that enforcement of "fees on fees" generally deters unnecessary litigation and that it levels the playing field for those with a valid claim to indemnification. *Cochran*, 809 A.2d at 561.

The instant case is particularly fitting to the reasoning supporting "fees on fees" because Respondent knew from the prior litigation that advancement and indemnification are mandatory and that the district court had previously determined that Leiendecker was entitled to advancement. Despite knowing that Leiendecker's right to advancement and indemnification is a vested statutory and contractual right which cannot be unilaterally terminated; *see* Minn. Stat. § 317A.521, subd. 4; Respondent once again summarily denied Leiendecker's advancement request and has since forced Leiendecker to spend her own monies to assert the very same mandatory advancement rights that were previously adjudicated in her favor. Here, it can be fairly said that Respondent is employing Leiendecker's own money against her. "Fees on fees," and advancement together with accrued interest from the date of demand, would disgorge Respondent of the benefit that it has received by the interim use of that money.

Additionally, the requirement that Respondent pay "fees on fees" is also independently mandated by virtue of Leiendecker's counterclaim. In *Roven*, the Delaware Supreme Court held that a director's pursuit of counterclaims also require indemnification. *Roven*, 603 A.2d at 824. There, the court explained that, due to the

²⁹ *See also* E. Allan Farnsworth, *Contracts* 679 (4th ed. 2004) (noting that contract rights are a type of property); *see also United States v. Rosen*, 487 F. Supp. 2d 721, 730 n.14 (E.D. Va. 2007) (noting that contractual rights to attorneys' fees are property rights for constitutional purposes).

compulsory counterclaim rule, any counterclaims asserted by a director are necessarily part of the same dispute when "advanced to defeat, or offset" the claims being defended.

Id.; see *Duthie v. CorSolutions Medical, Inc.*, 2008 WL 4173850, at *1 (Del. Ch. Sept. 10, 2008) (granting advancement of fees on defamation counterclaim)(App. 707); see also *Pearson v. Exide Corp.*, 157 F. Supp. 2d 429, 439-40 (E.D. Pa. 2001) (applying *Roven*).³⁰

Here, Leiendecker's counterclaim for indemnification is "in connection with the proceeding" and is situated to offset any potential judgment resulting from Respondent's action.³¹

To be sure, an adverse judgment no matter its complexion does not by itself preclude indemnification. Minn. Stat. § 317A.521, subd. 2(b). Even a conviction in a criminal matter does not create a presumption of ineligibility. *Id.*; see, e.g., *Augustine*, 751 N.W.2d at 100. Clearly, under the indemnification provisions, a director found guilty or liable is still entitled to indemnification if he or she can satisfy the indemnification criteria of having acted in good faith and so forth. This is the very nature

³⁰ The *Roven* decision centered on interpreting the term "in defending" that was part of the indemnification agreement. *Roven*, 603 A.2d at 824. The court determined that it had broad meaning. *Id.* Here, on the other hand, Respondent's bylaws and Minn. Stat. § 317A.521, subd. 2 do not contain the "in defending" limitation. Rather, the noticeably more expansive "in connection with the proceeding" language is used.

³¹ Incidentally, this is why a reversal of the district court's res judicata decision would not render advanced indemnification completely moot for appellate review. While advancement concerning the predicate proceeding would be rendered moot by a reversal of the res judicata decision (as the advancement amounts, including interest, owed by Respondent would automatically convert to an indemnification obligation), the advancement obligation going forward regarding Leiendecker's counterclaim and the continued enforcement of Leiendecker's indemnification rights would remain. This would foreseeably involve defending any motion contesting the reasonableness of attorneys fees and would also include sanction proceedings related to Respondent's misconduct.

of indemnification.³² Here, Leiendecker's counterclaim, because it is fairly designed to offset any possible liability arising from the predicate action, is also subject to advancement and indemnification under the bylaw and statutory provisions that mandate the indemnification of costs and expenses incurred "in connection with the proceeding." Bylaws § 5.2 (App. 102); Minn. Stat. § 317A.521, subd. 2.

Therefore, because the costs associated with the enforcement of her indemnification rights are properly indemnifiable under the broad and mandatory language of Respondent's bylaws and section 317A.521, Leiendecker is entitled to all costs and expenses attributable to the vindication of her right to advanced indemnification and indemnification including the accrued interest on those amounts.

III. THE DISTRICT COURT ERRED BY SUMMARILY REFUSING TO GRANT DEFAULT JUDGMENT ON LEIENDECKER'S COUNTERCLAIM WHEN RESPONDENT FAILED TO SERVE AN ANSWER TO LEIENDECKER'S COUNTERCLAIM FOR MORE THAN A YEAR AFTER SERVICE.

Upon application and when the required facts are shown by affidavit; (App. 30); a party is entitled to entry of a default judgment when the defendant fails to answer or

³² The indemnification provisions also contemplate that an officer can be only partially successful; having for instance defeated all but one of the counts; and receive automatic indemnification for the successful portion while having the unsuccessful portion of the case subject to the indemnification criteria. *See Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. 1974) (partial indemnification allowed when claimant was successful on only one count of a multiple-count indictment); *see Perconti*, 2002 WL 982419, at *3 (the "[d]ismissal of the charges against Perconti by the government, for whatever reason, constituted 'success.'")(App. 594-95); *see Green v. Westcap*, 492 A.2d 260, 265 (Del. Super. 1985) (a director who is successful in defense is entitled to indemnification without a separate determination of the scienter prerequisites); *see Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 96 (2d Cir. 1996) (holding that "[e]scape from an adverse judgment or other detriment, for whatever reason, is determinative.").

otherwise defend. Minn. R. Civ. P. 55.01(b). The decision to grant or deny a motion for a default judgment generally lies within the discretion of the district court. *Coller v. Guardian Angels Roman Catholic Church*, 294 N.W.2d 712, 715 (Minn. 1980). A district court abuses its discretion when its ruling is based on an erroneous view of the law. *See Almor Corp. v. County of Hennepin*, 566 N.W.2d 696, 701 (Minn. 1997). But when, as here, the district court fails to employ the four-factor test when making its decision this Court applies the test de novo. *See Carter v. Anderson*, 554 N.W.2d 110, 115 (Minn. App. 1996) (applying de novo the four-factor test in rule 60.02 motion to vacate), *rev. denied* (Minn. Dec. 23, 1996).

Respondent failed to answer Leiendecker's counterclaim within the time proscribed by law. Minn. R. Civ. P. 12.01. In fact, Respondent failed to serve an answer for over a year. (App. 709.) It was only after Leiendecker moved for default judgment that Respondent served an answer. But even that was after it had failed to address the default judgment motion in its responsive papers. (*Id.*) To date, Respondent has never responded to the required four-part test set forth in *Black v. Rimmer*, 700 N.W.2d 521, 526 (Minn. App. 2005). The district court failed to address the test as well. (*See Add. 27-33.*)

As presented in Leiendecker's moving memoranda in the district court (App. 1; 22-29); and repeated in her responsive memorandum to Respondent's later motion for partial summary judgment (App. 408-10); Respondent fails the four-factor test. First, Respondent does not have a reasonable defense on the merits because its claims violate rules 9.02 and 13.01. Furthermore, the evidence already in the public record; namely the

testimony of Respondent's accountant (App. 50-51), its independent auditor (App. 52-54), and the documented pay increases (App. 120, 117-118); substantiates Leiendecker's innocence. Second, Respondent does not have a reasonable excuse for its failure and neglect to answer. Having failed to even contest the default judgment motion in the district court in its responsive papers, or at oral argument, Respondent clearly fails this factor. Third, Respondent has not acted with due diligence after notice (of the entry of judgment). Respondent's failure to provide an answer for over a year until after Leiendecker moved for default judgment, while exhibiting some diligence, does not satisfy the due diligence requirement because of it coming as a consequence of Leiendecker having to move for default judgment in the first-place. This Court should recognize that due diligence under this factor is the defendant's burden; a burden that is not to be shared with the petitioner. Furthermore, Respondent's failure to even address the default judgment motion and the four-factor test exhibits a complete disregard for its due diligence obligations. Fourth, as discussed in *Black*, where this Court noted that "purposeful delays" and an "intentional ignoring of process" can color "the prejudice with a deeper hue," Respondent's purposeful failures; especially in light of the history of litigation between the parties; results in substantial prejudice to Leiendecker. *Black*, 700 N.W.2d at 528 (citations omitted). Therefore, Leiendecker asks that this Court reverse the district court's summary decision denying default judgment on Leiendecker's counterclaim.

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT LEIENDECKER'S MOTION FOR SUMMARY JUDGMENT BASED ON RES JUDICATA.

The availability of res judicata on particular facts is an issue of law subject to de novo review, but the decision to apply the doctrine lies within the discretion of the district court. *Erickson v. Comm'r of Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992). A district court abuses its discretion when its ruling is based on an erroneous view of the law. *Almor*, 566 N.W.2d at 701.

The elements of the doctrine of res judicata are well-settled. Res judicata applies as an absolute bar to a subsequent claim when: (1) the prior claim involved the same set of factual circumstances; (2) the prior claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Hauschildt*, 686 N.W.2d at 840. Res judicata operates as an absolute bar, both as to claims actually litigated and as to claims or defenses that might have been litigated. *Id.* It is undisputed that there was a final judgment on the merits in the prior action and that the same parties are involved in both actions.

In the prior action, Respondent - while suing Leiendecker for breach of contract and breach of fiduciary duty - clearly raised claims of conversion and misrepresentation in its court papers. That action sought, among other things, the recovery of purported unsanctioned wages and benefits allegedly paid to Leiendecker by Respondent. (Third-Party Compl., Prayer for Relief ¶ 7; App. 67.) Respondent pointedly asserted in its informational statement to the court that Leiendecker had been "taking an additional \$10,000 per year in wages not authorized by the board, by falsely asserting that the same

was required by public funding sources of the agency." (Pl.'s Inform. Stmt. Form ¶3 at p.2; App. 256-57.) In its interrogatory responses, Respondent also claimed that it had sustained damage due to "Leiendecker's excessive wages received over the past years in excess of that authorized by action of the board of directors." (Def.'s/Third-Party Pl.'s Ans. to Third-Party Def. Sinuon Leiendecker's Interrogatories, #9(5) at p.16; App. 227.) There can be no doubt that Respondent's knowledge and flagrant pursuit of these particular claims in the previous action is more than sufficient to establish that the same claims now being asserted against Leiendecker; at the very least; *existed* in the prior litigation between the parties. *See Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986)(stating that "it is not necessary to ask if the plaintiff knew of his present claim at the time of the former judgment, for it is the existence of the present claim, not party awareness of it, that controls."), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571 (1987).

Nevertheless, Respondent argued to the district court that the issues of a case are controlled solely by the pleadings and that, because the claims weren't specifically mentioned in the complaint, *res judicata* did not apply. (Pl.'s Mem. in Opp'n to Mot. to Dismiss, pp.5, 8; App. 281, 284.) Leiendecker pointed the flaws in Respondent's argument out to the district court. (*See Reply Mem. of Law in Supp. of Def.'s Mot. for Summ. J.*; App. 295-313.) But the court believed Respondent's position to be an accurate expression of the law. (Dist. Ct. Sept. 12, 2008 Order, p.4; Add. 23.) Clearly though, Respondent's postulate is an erroneous statement of the law. First, *res judicata* determinations involve, not "issues," but "claims" as that is understood to mean "a group of operative facts giving rise to one or more bases for suing." *Martin ex rel. Hoff v. City*

of *Rochester*, 642 N.W.2d 1, 9 (Minn. 2002); see *Hauschildt*, 686 N.W.2d at 837 (res judicata applies more generally to a set of circumstances giving rise to entire claims or lawsuits.) Secondly, claims litigated, *or could have been litigated*, can indeed be derived from the subject matter of depositions, interrogatories, and the like, as these also testify to the group of operative facts and the claims then being litigated by the parties, including those litigated by consent. Minn. R. Civ. P. 15.02; see *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954) (matters litigated by consent are treated as though they were raised in the pleadings.). What's more, Respondent's position completely ignores rule 56 where summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. Unfortunately, the court's mistaken belief in the validity of Respondent's argument allowed the court to look away from the implausibility of Respondent's claim of ignorance based on its so-called lack of financial information.

To this end, Respondent again relied on mere argument trying to substantiate that it did not have a fair opportunity to litigate the matters in the previous action because it could not then find its financial records - which were ultimately located in Respondent's own file cabinet where corporate records are customarily stored for safe-keeping. (App. 405);(App. 399-400);(App. 398-300.) The district court bought this argument too. (Dist. Ct. Sept. 12, 2008 Order, p.3-4; Add. 23-26.) But, the *evidence* tendered to the district court clearly establishes that Leindecker and her attorney informed Respondent in 2004

that corporate records would be found in a file cabinet in the very same location where Respondent admits they were ultimately located. (See Strathman Letter 4-15-04 ¶¶ 3,4; App. 340-41; see *Leiendecker* Nov. 11, 2004 Dep. 101/18 - 102/5; App. 712-13.)

At the same time, one has to seriously wonder how Respondent could even make the allegations that it did in its 2004 court papers in the absence of its financial records. Moreover, the April 8, 2005 district court order compelling Respondent to disclose corporate documents to *Leiendecker* belies Respondent's contention that it did not have access to its records and that *Leiendecker* was uncooperative with discovery in the case. (Dist. Ct. April 8, 2005 Order; Add. 3-6.) Clearly, had the court found that Respondent was then unable to locate its records and did not have documents to turn over, it would not have issued repeated orders compelling Respondent to do so. To be sure, it was Respondent that defied repeated court orders to disclose evidence to *Leiendecker* in the prior action - not the other way around. (See *Id.*; see Dist. Ct. Aug. 22, 2005 Order ¶¶ 8, 20, 22-24; Add. 7-13.) Thus, the district court's finding in its September 12, 2008 order that Respondent had serious difficulty in obtaining accurate financial records; while derived from Respondent counsel's dubious arguments to the court; is not supported by the evidence in the record and is therefore clearly erroneous. See *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983) (findings of fact are clearly erroneous when they are not "reasonably supported by evidence in the record considered as a whole."); see *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-70 (Minn. 1997) (a genuine issue for trial must be established by substantial evidence.).

Quite simply, there were no procedural barriers preventing Respondent from fully litigating its current claims in the previous action. *State v. Joseph*, 636 N.W.2d 322, 328 (Minn. 2001). The record clearly establishes that Respondent had a full and fair opportunity to then litigate the claims as it was Respondent - and no one else - that caused the dismissal "with prejudice and on the merits" by failure to abide by repeated court orders. In fact, the district court gave Respondent numerous opportunities to comply with its orders before finally dismissing the action in Leiendecker's favor. (Dist. Ct. Aug. 22, 2005 Order; Add. 7-13.)

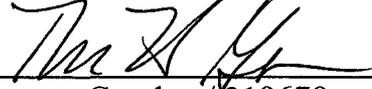
Respondent is once again litigating the same claims as those advanced in the earlier case. The allegations Respondent then made in its court documents make this particularly clear. As a result, Respondent must be made to inherit its own wind. Respondent's continuing attempts to raise claims that were raised in the previous litigation between the parties is precisely the situation to which res judicata applies. *See Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978) (a party "should not be twice vexed for the same cause..."). Therefore, this Court must reverse the district court and grant judgment in favor of Leiendecker.

CONCLUSION

For all of the reasons cited above, this Court should reverse the district court's decision denying advanced indemnification, indemnification, and default judgment. This Court should also reverse the district court's denial of summary judgment based on res judicata.

Date: March 29, 2010

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IN COURT OF APPEALS

Asian Women United of Minnesota,

Respondent,

v.

**CERTIFICATION OF BRIEF
LENGTH**

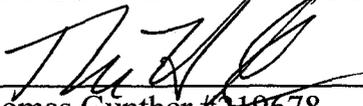
Sinuon Leiendecker,

Appellant.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,660 words. This brief was prepared using Microsoft Word 2007 in Word 97-2003 compatibility mode.

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