

No. A10-402

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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ASIAN WOMEN UNITED OF MINNESOTA

Respondent,

vs.

SINUON LEIENDECKER

Appellant.

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### I. THE RIGHT TO ADVANCED INDEMNIFICATION CANNOT BE DEFEATED BY RESPONDENT'S UNSUPPORTED ALLEGATIONS.

Respondent has repeatedly used unsupported allegations in its brief. Respondent claims to have found financial records that it says *appear* to support its allegations (Am. Compl. ¶¶ 5, 15; App.83-84), yet over the course of two years in this litigation, and over the course of six years when including the previous lawsuits, it provides no evidence whatsoever; even when compelled to do so;<sup>1</sup> in support of its allegations.

Indeed, throughout this litigation Respondent has tried to support its allegations by striving to elevate the significance of the affidavit testimony of its purported accountant (██████████) that was presented in Leiendecker's defamation/wrongful termination case against Respondent in 2008. (Ramsey County Ct. Case #C9-05-8519). Respondent even formulated a table of figures and percentages based upon ██████████ affidavit in its responsive brief. (Resp't Brief p. 4.) Aside from being immaterial in advancement determinations, a careful reading ██████████ affidavit reveals that it is based upon surmise and speculation. The ██████████ affidavit makes clear that: (a) ██████████ was not the Respondent's bookkeeper/accountant during the relevant time period in question (Resp't App. 1, ¶ 1); (b) the affidavit is based on ██████████ "preliminary observations" and "preliminary payroll detail" (*Id.*, 1-2, ¶ 2); and (c) ██████████ based her *preliminary* calculations on the assumption that Leiendecker was authorized to make only \$35,000.00

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<sup>1</sup> (Dist. Ct. April 8, 2005 Order; Add.3);(Dist. Ct. Aug. 23, 2005 Order; Add. 7).

during her employment. (*Id.*, 2, ¶ 3.) The assumption that Leiendecker was to make only \$35,000.00 per year throughout her employment as executive director was clearly proven wrong in the trial court by the Respondent's 1999 Internal Revenue Service filing (form 990) showing Leiendecker was authorized to receive \$40,982.00 from July 1999 through June 2000. (App. 542)(*see also Id.* 402) The assumption was also proven wrong by subsequent pay raises. (Shah Aff. ¶ 2; App.495-496);(Forse Aff. ¶ 7; App.431.)<sup>2</sup> [REDACTED] then ends her testimony by stating that she needs to "verify" the amounts Leiendecker actually received throughout her employment with tax returns for each year. (Resp't App. 2, ¶ 4.) [REDACTED] testimony in the end - in all actuality - is quite meaningless because it is based not on fact, but on a preliminary review of incomplete records that she admits need verification. (*Id.*) It is well established that a litigant may not rely on surmise and speculation in defending a summary judgment motion. Minn. R. Civ. P. 56.05; *Fownes v. Hubbard Broad., Inc.*, 302 Minn. 471, 474, 225 N.W.2d 534, 536 (1975). Be this as it may, Respondent's reliance on its specious allegations is immaterial to the advancement

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<sup>2</sup> The unsupported allegation and assumption that Leiendecker's salary and pay increases were not authorized is also proven wrong by the fact that Minn. Stat. § 309.53 subd. 1 required Respondent to submit detailed annual financial reports, ratified and signed by the board, to the Minnesota Attorney General's Office. (*See Tahnk Aff.* ¶ 2-4; App. 517-518). The assumption is further proven wrong by the fact that Minn. Stat. § 309.53 subd. 3 required that all of Respondent's receipts and expenditures be subject to annual independent auditing. (*See Forse Aff.* ¶ 2, 7; App. 430-431.) In fact, for Respondent's allegations to be right, its accountant [REDACTED] [REDACTED] would've had to have committed malpractice monthly (sixty times over the course of five years) and its independent auditor [REDACTED] [REDACTED] yearly (five times over five years) - to say nothing of the legislative auditor. (*See Leiendecker July 9, 2009 Aff.* ¶ 6; App. 536-537);(*see Resp't Brief p.* 13)(stating that Respondent's funding comes from public sources).

determination under the advanced indemnification provisions of section 317A.521 and Respondent's bylaws.

These advancement provisions clearly presume that "the corporation will front the expenses before any determination is made of the corporate official's ultimate right to indemnification." *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at \*9 (Del. Ch. June 18, 2002)(App. 216); *see Advanced Mining Sys., Inc. v. Frickle*, 623 A.2d 82, 84 (Del. Ch. 1992)(observing that advancement can be thought of as an extension of credit, the final repayment of which is conditioned on whether a corporate official is ultimately entitled to indemnification). It cannot be ignored that the requirement that an indemnitee affirm satisfaction of the subdivision 2 criteria and undertake an obligation to repay if it is ultimately determined that the indemnitee is not entitled to indemnification makes plain that advancement cannot be defeated by mere allegations. *See Neal v. Neumann Med. Ctr.*, 667 A.2d 479, 483 (Pa. 1995)(stating that otherwise "no corporate officer or director could get advance litigation expenses merely because of allegations."). While there is admittedly a bit of surface tension between the mandatory advancement right and the "facts then known" language in subdivision 3, the "facts then known" language cannot be read to render the compulsory nature of the statute completely meaningless. The legislature does not intend results that are absurd or unreasonable. Minn. Stat. § 645.17(1). The same is true for bylaw provisions. *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990)(contracts are interpreted to give all their provisions meaning and effect – a construction that leads to an absurd result should be avoided).

As explained in Leiendecker's opening brief, the "facts then known" language can only be understood to mean "*facts* then known," not allegations then known. (App. Brief. p. 21-26.) Once understood in this fashion any ostensible tension within the statute disappears. Clearly, under section 317A.521, and bylaw provisions that do not opt out of the statutory scheme, advancement determinations in civil proceedings are limited to:

- (1) whether the indemnitee is being sued in an indemnifiable capacity as evidenced by the complaint;
- (2) whether the indemnitee complied with the affirmation requirement;
- (3) whether the indemnitee complied with the undertaking to repay requirement; and
- (4) in terms of the subdivision 2 requirements (*previously affirmed by the sworn affirmation requirement*), whether there exists a judicial determination pertaining to the same alleged liability that:
  - (a) the indemnitee is indemnified by another organization,<sup>3</sup>
  - (b) the indemnitee received an *improper* personal benefit, or
  - (c) in terms of the state of mind requirements (*also previously affirmed by the sworn affirmation requirement*), the indemnitee failed to act in good faith or did not reasonably believe that the conduct was in the best interests of the corporation, et cetera.

See Minn. Stat. § 317A.521, subd. 2; see Bylaws § 5.2 (App. 426). Here, Leiendecker is being sued in an indemnifiable capacity. She has complied with the affirmation and undertaking to repay requirements. And, the *only* judicial determination regarding

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<sup>3</sup> This factor in many instances could be readily ascertained without judicial determination by a trier of fact. However, the fact that this factor is intentionally listed in the subdivision 2 criteria (requiring sworn affirmation by the indemnitee), reflects the expectation that determination of the obliged indemnitor is often times disputed and is equally a question to be determined by a trier of fact.

Leiendecker's conduct relating to her official capacity as Respondent's executive director is the August 25, 2005 district court order dismissing Respondent's prior suit against Leiendecker with prejudice and on the merits in her favor. (Dist. Ct. Aug. 22, 2005 Order, p. 6; Add. 12.) Therefore, the advancement of Leiendecker's litigation expenses is required due to there being no "facts then known" that would "preclude indemnification under this section." Minn. Stat. § 317A.521, subd. 3(2); Bylaws § 5.3(b) (App. 427.)

This conclusion cannot be overcome by Respondent's misplaced reliance on *Oarfin Records v. Delange*, 2003 WL 348168 (Minn. App.) (Resp't App. 6.) *Oarfin Records* is conspicuously inapposite. That case did not involve advanced indemnification, but rather indemnification. *Id.* at \*2.<sup>4</sup> In *Oarfin Records*, the case was also submitted to the trial court, by consent of the parties, for the ultimate indemnification determination without an evidentiary hearing. *Id.* at \*4. This most definitely is not the case here.<sup>5</sup> Moreover, *Oarfin Records* involved section 302A.521, subd. 6(a)(5), wherein

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<sup>4</sup> In fact, Respondent has failed to specifically address the advance indemnification provisions of subdivision 3 and section 5.3 of its bylaws in its responsive brief. Respondent instead chose to provide unsupported allegations and argue the ultimate indemnification criteria of subdivision 2 and section 5.2 of its bylaws. (Resp't Brief. p. 8-15).

<sup>5</sup> Respondent misrepresents the nature of the proceedings in the trial court as having been submitted for a final determination on indemnification. (Resp't Brief. p. 15.) The assertion by Respondent that the summary judgment motions in the district court involved the ultimate indemnification determination negating "the necessity for a trial on the merits" (*Id.*) is patently false:

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

the statute states that "the person seeking indemnification... has the burden of establishing that the person is entitled to indemnification...." Minn. Stat. § 302A.521, subd. 6(a)(5) (2008). There is no similar language in Minn. Stat. § 317A.521 allocating the burden to the indemnitee. *See* Minn. Stat. § 317A.521, subd. 6(a)(5) (2008). And, as mentioned in Leiendecker's opening brief (App. Brief p.23, n.20), the mandatory nature of the indemnification provisions under section 317A.521 and Respondent's bylaws shifts the burden of proof to Respondent to demonstrate that Leiendecker is not entitled to indemnification coverage as a matter of law.

Additionally, Respondent's reliance on *Fidelity Federal Savings & Loan Association v. Felicetti*, 830 F. Supp. 262 (E.D. Pa. 1993), for the proposition that its directors have a fiduciary duty not to follow state law and its bylaw provisions mandating advancement and indemnification, is not at all persuasive. (Resp't Brief. p. 15.) First, the proposition ignores that the advancement of litigation expenses is an enforceable contractual right, *under statutory auspice*, that belongs to Leiendecker. Second; as the Pennsylvania Supreme Court noted in declining to follow *Felicetti*; because Respondent's bylaws were adopted for Respondent's own benefit, Respondent's directors have a

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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 164-165) This would not be the first time that Respondent's attorney Frank Mabley has made inaccurate representations to a court. (*See* App. Brief p. 32); *see also Douglas v. Schuette*, 607 N.W.2d 142, 148 (Minn. Ct. App. 2000) (affirming the district court's finding, in awarding sanctions, that "appellant [represented by Frank Mabley] inaccurately represented the law to the district court.")

fiduciary duty under state law to enforce its mandatory provisions. *Neal*, 667 A.2d at 583. As a matter of fact, the mandatory language of section 317A.521, and that of Respondent's bylaws, has the effect of protecting Respondent (and corporations like Respondent that have not opted out of the statutory scheme) from duty of loyalty claims for providing advancement and indemnification to its directors and officers. For the Respondent to now eschew that protection under the guise of purportedly violating a duty of care, while completely ignoring the accompanying duty of obedience, is quite disingenuous. *See Diedrick v. Helm*, 217 Minn. 483, 497, 14 N.W.2d 913, 921 (1944)(corporate bylaws have the same force and effect as provisions of a corporation's charter or articles of incorporation and must be obeyed by the corporation and its directors, officers, and shareholders.)<sup>6</sup>

Respondent's reliance on *United States v. J & D Enters. of Duluth*, 955 F. Supp. 1153 (D. Minn. 1997) is equally unconvincing. *J & D Enterprises* involved the right to indemnification among joint tortfeasors. *Id.* at 1157. Here, the present case involves advancement and indemnification of corporate officers and directors pursuant state statute and Respondent's bylaws. Even still, as the Eighth Circuit Court of Appeals recently noted when discussing *J & D Enterprises*:

Although "indemnification will not be allowed if its application would violate public policy," *United States v. J & D Enters. of Duluth*, 955 F. Supp. 1153, 1159 (D. Minn. 1997), a contract is not void as against public policy in Minnesota "unless it is injurious to the interests of the public or

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<sup>6</sup> *See also* Minnesota Attorney General, *A Guide for Board Members From the Office of Minnesota Attorney General*, <http://www.ag.state.mn.us/charities/fiduciaryduties.asp>.

contravenes some established interest of society." *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W. 2d 90, 93 (Minn. 2006) (citation omitted). A court's power "to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and . . . should be exercised only in cases free from doubt." *Hollister v. Ulvi*, 271 N.W. 493, 498-99 (Minn. 1937) (quoting *Cole v. Brown-Hurley Hardware Co.*, 117 N.W. 746, 747 (Iowa 1908)).

*Katun Corp. v. Clarke*, 484 F.3d 972, 976 (8th Cir. 2007).

It would be utterly absurd if the indemnification provisions of Respondent's bylaws; that track the mandatory language of section 317A.521; were to be considered void for being in contravention of sound public policy. Respondent's argument in this regard is just patently wrong. Indeed, the public policy of the State of Minnesota; as is clearly expressed by the legislative enactment of both the Minnesota Nonprofit Corporation Act and the Minnesota Business Corporation Act in 1989; favors the indemnification of corporate officers and directors - so much so that officer and director indemnification is mandatory in the State of Minnesota unless a corporation specifically opts out of the statutory scheme. *Barry v Barry*, 28 F.3d 848, 851 (8th Cir. 1994).

Respondent's unsupported allegations are immaterial to the advanced indemnification determination. Respondent's arguments put forth in its responsive brief are meritless as they ignore the advancement provisions of section 317A.521 and section 5.3 of its bylaws. Leiendecker asks that this Court reverse the district court and grant her advanced indemnification.

**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.**

Respondent did not specifically address this issue in its responsive brief.

Therefore, Leiendecker refers the Court to her opening brief discussing the issue. (App. Brief. p. 33-40.)

### **III. LEIENDECKER IS ENTITLED TO DEFAULT JUDGMENT ON HER COUNTERCLAIM.**

Under the Minnesota Rules of Civil Procedure a plaintiff must serve an answer to a counterclaim in the defendant's answer within 20 days after service of the answer. Minn. R. Civ. P. 12.01. ("The plaintiff *shall* serve a reply to a counterclaim in the answer within 20 days after service of the answer.")(emphasis added). When a party fails to plead or otherwise defend a claim within the time allowed by the law, default judgment shall be entered. Minn. R. Civ. P. 55.01(b) ("judgment by default *shall* be entered" and "the court shall ascertain, by a reference or otherwise, the amount to which the plaintiff is entitled, and order judgment therefor")(emphasis added); *Doe v. Legacy Broad. of Minn., Inc.*, 504 N.W.2d 527, 528 (Minn. App. 1993).

In *Black v. Rimmer*, this Court upheld default judgments of \$1.5 million and \$3.6 million against a pro se defendant who had appeared in the action for over a year but had failed to timely file an answer or otherwise defend. 700 N.W.2d 521, 529 (Minn. App. 2005), *rev. dismissed* (Minn. Sept. 28, 2005). Arguably, the pro se defendant didn't know that he was supposed to file an answer or otherwise defend under Rule 12. This Court, in upholding the default judgments, held that pro se defendants are "generally held to the same standard as attorneys and must comply with court rules." *Id.* at 527. (citing *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001)).

Here, Respondent is represented. In fact, Respondent was represented by the same counsel even during the previous litigation against Leiendecker. (*See* Dist. Ct. April 8, 2005 Order; Add. 3-6) Given the history of litigation between the parties - a history that includes a judgment in Leiendecker's favor involving Respondent's refusal to pay indemnification in the past (Dist. Ct. Aug. 22, 2005 Order, p. 6; Add. 12). Respondent's failure to answer Leiendecker's indemnification counterclaim for over sixteen months past the deadline is inexcusable. Contrary to Respondent's argument, this was not a "technical error." (Resp't Brief. p. 16.) Indeed, Respondent's failure to timely answer was obviously strategic in nature as it knew from the prior litigation that any answer denying Leiendecker's entitlement to indemnification would immediately invoke the jurisdiction of the district court to make the advance indemnification determination. Minn. Stat. § 317A.521, subd. 6(a)(5); Bylaws § 5.5.1(c) (App. 103)

Respondent, after failing to even contest the default judgment motion in the district court, now comes to this Court arguing that its participation in the district court in pursuit of *its claims* against Leiendecker qualify as "otherwise defend" on Leiendecker's indemnification counterclaim under the rules. (Resp't Brief. pp. 5-6, 16.) Leiendecker moved for advanced indemnification, indemnification, and default judgment simultaneously after over a year of having not received an answer from Respondent. (*See* App. 30) So how Respondent could have "otherwise defend[ed]" Leiendecker's counterclaim in the district court before that time is anyone's best guess.

In *Black*, this Court explained that "otherwise defend" refers to "attacks on the service, or motions to dismiss, or for better particulars, and the like, *which may prevent*

*default without presently pleading to the merits.*" 700 N.W.2d at 526 (emphasis added)(quoting *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir. 1949)). This Court concluded that mere "cooperation" by attending depositions and appearing at scheduled court hearings "does not satisfy the requirement of 'otherwise defend' as contemplated by Minn. R. Civ. P. 55.01." *Id.*

Respondent has once again ignored the rules<sup>7</sup> and hopes that this Court will do the same. To be sure, Respondent's failure to answer and to contest the default judgment motion in the trial court in this case simply cannot be reconciled with this Court's decision in *Black* affirming the trial court's granting of default judgment. *Id.* at 529. This is especially so since Respondent still refuses to even address the four-part test set forth in *Black*. *Id.* at 526. Therefore, Leiendecker asks that this Court grant default judgment on her indemnification counterclaim against the Respondent.

#### **IV. RESPONDENT'S CLAIMS REQUIRE THE APPLICATION OF RES JUDICATA.**

Respondent argues that it was not, and could not have, litigated its present claims in the previous lawsuit because its third-party complaint did not specifically list its present legal theories, and that it could not have then pursued the claims because: (1) it "had no data on January 16, 2004 when the Third-Party Complaint was signed upon which to base" its allegations, (Resp't brief. p. 21) and (2) its claims were not ripe at the time the third-party complaint was issued, (*Id.*, at 18-22). Respondent further claims that Leiendecker did not timely disclose to Respondent the location of Respondent's files after her departure from the agency. (*Id.*, at 19.)

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<sup>7</sup> Respondent has a history of ignoring the rules. (*See App. Brief p. 14, n.10.*)

Respondent's argument that res judicata is inapplicable because it did not specifically list its present claims in the third-party complaint is without merit. A change in legal theory cannot avoid the absolute bar of res judicata. *Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000). Respondent's argument that it only asked for money in two paragraphs of its prayer for relief; involving the costs associated with the declaration of the board (Third-Party Compl., Prayer for Relief ¶ 6; App. 67) and the other involving Leiendecker's wages and benefits (*Id.* ¶ 7; App. 67); does not save it from res judicata application either. *See Howe v. Nelson*, 271 Minn. 296, 301, 135 N.W.2d 687, 691 (1965)(stating that the res judicata effect of a judgment in a declaratory judgment action is essentially no different from the res judicata effect of any other judgment.).

Indeed, the fact that Respondent argues that it only asked for monetary damages centering on the board issue, and Leiendecker's participation in that issue, does not obscure the reality that Respondent was then suing Leiendecker for actions taken in her official capacity as Respondent's executive director. Respondent seeking return of Leiendecker's wages and benefits under breach of contract and fiduciary duty theories makes this particularly clear. (Third-Party Compl. ¶ XIX, Prayer for Relief ¶ 7; App. 67.) Further, in making its puzzling argument Respondent conveniently forgets that:

1. it asked questions about its present conversion claim in its December 19, 2003 discovery request (Def.'s Reqs. Produc. of Docs. ¶ 3; App. 244);
2. it inquired about conversion in its rule 36.01 requests (Third-Party Pl.'s Reqs. for Admis. & Denials, ¶ 19; App. 254);

3. it claimed in its interrogatory responses 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. 305);
4. it pointedly asserted in its informational statement to the district 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. 256-257); and
5. that its prayer for relief in the third-party complaint asked for "[s]uch other relief as the court deems appropriate." (Third-Party Compl., Prayer for Relief ¶ 8; App. 67.)

All of this evidence and yet Respondent still maintains that it was not litigating its present claims in the earlier litigation. Moreover, Respondent also conveniently forgets that it admitted in Leiendecker's defamation/wrongful termination case in 2008 - just prior to the commencement of the present litigation - that the \$10,000 back pay issue that formed the substance of Leiendecker's defamation claim was part of the operative facts of the previous third-party litigation. In denying Respondent's motion for summary judgment the court (Judge Higgs presiding) wrote:

Defendant's argue that Plaintiff's Defamation Claim is barred by the doctrine of res judicata because, they suggest, Plaintiff's Defamation Claim is based upon the same operative facts alleged in the underlying case which was resolved in August 2005.

(Dist. Ct. Feb. 5, 2008 Order)<sup>8</sup>

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<sup>8</sup> Respondent's motion was denied, not because Leiendecker's defamation claim (for Respondent claiming that she improperly took the \$10,000 back pay) didn't arise from the same operative facts as the underlying case, but because her defamation claim was a permissive counterclaim that does not receive res judicata sanction. (Dist. Ct. Feb. 5, 2008 Order, Mem. p.2-3)(citing *GAW v. GAW*, 596 N.W.2d 284, 288 (Minn. App. 1999)).

Despite all of this, Respondent tries to avoid the application of res judicata by arguing that it lacked awareness that its present claims then existed. But, as noted in Leiendecker's opening brief (App. Brief p. 44), it is not the knowledge of claims that is determinative, but the existence of claims that controls. *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). If Respondent were to have it its way, the doctrine of res judicata would be nearly neutered by lack of awareness attestations (feigned or not). Respondent's assertion that Leiendecker did not timely disclose the location of agency files (Resp't brief. p. 19) shows that under its mistaken understanding of the res judicata doctrine even the bogus laying of blame on another for the supposed lack of awareness can be used in an attempt to avoid res judicata application.

To this end, Respondent's counsel submitted an affidavit to the district court wherein he testified that *he asked* for information regarding the location of agency files during the early months of 2004. (Mabley Aff. ¶ 1; App. 290.) In support, Respondent's counsel provided unsigned copies of letters to Leiendecker's attorney at the time along with his affidavit. (*Id.*, Ex. A; App. 287-290.)<sup>9</sup> Then, in the unsworn memorandum of law Respondent's counsel wrote: "Repeated requests were made to Defendant, through her counsel, for passwords to computers and location of records with very little

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<sup>9</sup> The Court should also note that the requests made to Paychex corporation for copies of payroll records were not made until early 2008. (Mabley Aff. Ex. B.; App. 285-286.)

response." (Pl.'s Mem. in Opp'n to Motion to Dismiss p. 4; App. 283.) He also wrote the following:

It was only *after discovering missing files* and *not getting data or passwords or other information from this Defendant and her attorney* following her discharge in late February 2004 that Plaintiff began to suspect that even more mischief had occurred....

(*Id.* p. 7; App.283.)(emphasis added) However, Leiendecker's attorney at the time *did* respond to the inquiries shortly after they had been made. (*See* Strathman Letter 4-15-04 ¶¶ 3,4; App. 340-341);(*see also* Reply Mem. of Law in Supp. Def.'s Motion for Summ. J. p. 4-6; App. 298-300).

Here, Respondent's counsel set up the falsehood in the sworn affidavit by truthfully stating that requests were made, but then completed the falsehood in the unsworn memorandum of law by falsely stating that Leiendecker and her attorney failed to respond to the requests. (Pl.'s Mem. in Opp'n to Motion to Dismiss p. 7; App. 283-284.) Further, it cannot be overlooked that in the memorandum of law Respondent claimed that it had "discover[ed] missing files" during this time period in early 2004. (*Id.*) This conflicts with ████████ testimony that missing records were discovered in February 2008. (Resp't App. 1, ¶ 2.) Maybe they were just *re-discovered* in 2008. Nevertheless, Leiendecker clearly informed Respondent of the location of its records in April 2004 (*see* Strathman Letter 4-15-04 ¶¶ 3,4; App. 340-341) and repeated to Respondent the location of agency files at Respondent's 2004 deposition of her. Respondent now admits that these files were in the exact location that Leiendecker and her attorney said they would be. (Resp't App. 1, ¶ 2.)

Perhaps more illuminating is the fact that in order for Respondent to have asserted to the district court in 2004 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"<sup>10</sup> and to have 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,"<sup>11</sup> it would've had to have had detailed financial information; spanning the five years of Leiendecker's employment as executive director; from which it based its claims.<sup>12</sup>

The fact that Respondent had access to its financial records and had made use of them in 2004 makes Respondent's ripeness argument completely groundless. (Resp't Brief p. 18-19.) As this Court explained in *Leiendecker*:

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies...." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807, 123 S. Ct. 2026, 2030 (2003) (quotation omitted). Thus, a justiciable controversy must exist in order for a litigant's claim to be properly before a court. *Lee v. Delmont*, 228 Minn. 101, 110, 36 N.W.2d 530, 537 (1949) ("Issues which

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<sup>10</sup> (Pl.'s Inform. Stmt. Form ¶3 at p.2; App. 256-257)

<sup>11</sup> ." (Def.'s/Third-Party Pl.'s Ans. to Third-Party Def. Sinuon Leiendecker's Interrogatories, #9(5) at p.16; App. 305)

<sup>12</sup> Respondent would've also had to have had testimonials from its board members (the ones removed by court order because of Leiendecker's whistle blowing activities) stating: (1) the specifics of the misrepresentations that Leiendecker allegedly made to them, and (2) that the amounts, as revealed by the financial records, had not been authorized.

Incidentally, it is incredibly dubious, to say the least, that the very directors that authorized Leiendecker's wages between 1999 - 2004; *see supra* note 2; once having been removed and ordered to elect a successor board as a result of Leiendecker's whistle blowing activities (and in the case of two directors, sued by Leiendecker for defamation) afterward would allege that five years of her salary was actually unauthorized.

have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable. Neither the ripe nor the ripening seeds of controversy are present.").

731 N.W.2d at 841. Respondent pretends that its present claims did not exist before the signing of the third-party complaint on January 16, 2004. But, this is not a situation; like that in *Drewitz v. Motorwerks, Inc.*; where claims were brought on material facts that were not in existence at the time of the original suit. 728 N.W.2d 231, 240 (Minn. 2007). Rather, Respondent's allegations make clear that the material facts giving rise to Respondent's present claims existed *prior* to the issuance of the third-party complaint in 2004. Clearly, Leiendecker could not have directed that she receive unauthorized salary and benefits following December 18, 2003 when the district court ordered that Respondent's Shelter Manager [REDACTED] and The Honorable Ramsey County District Court Judge Mary Louise Klass manage Respondent's finances in the interim. (Dist. Ct. Dec. 18, 2003 Order ¶ 4) Leiendecker was terminated as Respondent's executive director within an hour of receiving the February 25, 2004 district court order. *Leiendecker*, 731 N.W.2d at 839 (stating that "[w]ithin an hour of receiving the order, AWUM summarily terminated Leiendecker's employment"). Because Respondent's finances were being directed by persons other than Leiendecker in the weeks following the issuance of the third-party complaint through Leiendecker's termination, Respondent's claims had to have existed prior to January 16, 2004. To be sure, the allegations Respondent made during the earlier litigation in its discovery requests, interrogatories and informational statement reveal this to be true. Accordingly, the claims were ripe at the time of the third-party complaint. *See Surf & Sand, Inc. v. Gardebring*, 457 N.W.2d 782, 786 (Minn. App.

1990)(citation omitted)("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings"), *rev. denied* (Minn. Sept. 20, 1990).

Respondent's assertion that it wasn't litigating its present claims in the previous action, despite being quite dubious considering the facts, does not mean that it could not have amended its third-party complaint. Respondent could have freely amended its third-party complaint during the previous litigation to include the claims it is now reasserting against Leiendecker. Amendment under rule 15 is freely allowed. Minn. R. Civ. P. 15.01. This would have been especially so considering that Respondent was already conspicuously pursuing the claims. In fact, Respondent admits that it had successfully amended its third-party complaint during the litigation. (Resp't Brief p. 18, n. 20.) So, it is no excuse that amendment of the third-party complaint would have been difficult. (*See* Resp't Brief p. 18.) It is because the rules of civil procedure are so liberal in facilitating the presentation of claims in the first action that res judicata can be so uncharitable in barring a second bite at the apple. *See Gulbranson v. Gulbranson*, 408 N.W.2d 216, 218 (Minn. App. 1987)(holding that "[r]es judicata as merger or bar forbids a party from withholding a claim from the initial action, where it could be joined and easily adjudicated, in order to retain a cause of action" for later lawsuit).

Here, Respondent failed to take advantage of the liberal rules regarding the presentation of claims and the condoning of amendment. In fact, there were no procedural barriers whatsoever 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 of the case "with prejudice and on the merits" by its failure to abide by repeated court orders. (Dist. Ct. Aug. 22, 2005 Order; Add. 7-13). Therefore, Leiendecker asks that this Court reverse the district court and grant judgment in her favor.

### **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: May 7, 2010

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Case No. A10-402

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Asian Women United of Minnesota,

Respondent,

v.

**CERTIFICATION OF BRIEF  
LENGTH**

Sinuon Leiendecker,

Appellant.

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is less than 7,000 words. This brief was prepared using Microsoft Word 2007 in Word 97-2003 compatibility mode.

Date: May 7, 2010

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