IN THE IOWA DISTRICT COURT FOR MONROE COUNTY
IOWA BUSINESS SPECIALTY COURT

WINGER CONTRACTING COMPANY, Plaintiff, v. CARGILL, INCORPORATED; HARRIS AND FORD, LLC; HF CHLOR-ALKALI, LLC, SOUTHLAND PROCESS GROUP, LLC, CARL A. NELSON & COMPANY; AMERICA PIPING GROUP, and JEFF BOITNOTT ENTERPRISES, INC., Defendants.	Equity No. EQEQ009184 (ISBC-JDT)
CARGILL, INCORPORATED, Defendant/Cross-Claim Plaintiff v. HF CHLOR-ALKALI, LLC, Cross-Claim Defendant.	
HF CHLOR-ALKALI, LLC, Plaintiff, v. CONVE & AVS, INC. GILBERT INDUSTRIES, INC., SUPERIOR COATINGS OF ILLINOIS, LLC, BRACE INTEGRATED SERVICES, TRACER CONSTRUCTION, LLC, Defendants.	Case No. LALA003789

CONVE & AVS, INC.,

Third-Party Plaintiff,

v.

LEMARTEC ENGINEERING & CONSTRUCTION CORPORATION n/k/a LEMARTEC CORPORATION; WINGER COMPANIES; and EDWARD FIBERGLASS, INC.,

Third-Party Defendants.

LEMARTEC ENGINEERING & CONSTRUCTION n/k/a LEMARTEC CORPORATION,

Third-Party Plaintiff,

v.

ADVANCE CONVEYING TECHNOLOGIES, LLC, BRPH ARCHITECTS ENGINEERS, INC., CARL A. NELSON & COMPANY, and AA PAINTING SERVICE, CORPORATION,

Third-Party Defendants.

LEMARTEC ENGINEER & CONSTRUCTION n/k/a LEMARTEC CORPORATION,

Cross-Claimant,

v.

HF CHLOR-ALKALI, LLC,

Defendant to Cross-Claim.

RULING AND ORDER ON THIRD-PARTY DEFENDANT ADVANCE CONVEYING TECHNOLOGIES, LLC'S MOTION FOR SUMMARY JUDGMENT

WINGER CONTRACTING COMPANY, Plaintiff, v. CONVE & AVS, INC., Defendant.	Case No. LALA003743
HF CHLOR-ALKALI, LLC, Plaintiff, v. EDWARDS FIBERGLASS INC., Defendant.	Case No. LALA003766

The present dispute between Third-Party Plaintiff Lemartec Engineering & Construction Corporation ("Lemartec") and Third-Party Defendant Advance Conveying Technologies, LLC ("ACT") arises out of numerous consolidated actions filed with this Court concerning the construction and financing of a chlor-alkali plant in Eddyville, Iowa. ACT filed the present Motion for Summary Judgment on August 15, 2018. In brief, ACT submits it is entitled to complete dismissal from this litigation in the Iowa Business Court as a third-party defendant because of a favorable result it achieved against Lemartec in parallel litigation in the United States District Court for the Southern District of Iowa. The federal court lawsuit, presided over by the Honorable Charles R. Wolle, culminated in a bench trial and ruling in favor of ACT on all counts, dismissing all of Lemartec's cross-claims against ACT and awarding ACT the unpaid balance of its contract value for services rendered to Lemartec in design and fabrication of a salt conveyor for of the chlor-alkali plant. ACT contends Lemartec is barred from pursuing further

litigation against ACT because all claims and issues implicated in the legal dispute between the parties were already decided in ACT's favor and are precluded by the doctrine of *res judicata*.

Lemartec filed its written Resistance on September 21, 2018, to which ACT replied on October 5, 2018. A hearing was held on October 15, 2018, and counsel argued the Motion to the Court. Third-Party Defendant ACT was represented by Attorney Kevin Caster. Attorneys Andrew Johnson and Daniel Hartnett appeared on behalf of Third-Party Plaintiff Lemartec. The Court, having considered the written and oral arguments of counsel, and the applicable law, enters the following ruling on Third-Party Plaintiff Lemartec's Motion for Summary Judgment:

Factual Background and Proceedings

A. The *Cargill* State Court Litigation.

Cargill, Inc. ("Cargill") owns certain real property in Eddyville, Iowa, which it leased to HF Chlor-Alkali, LLC ("HFCA") for the purpose of constructing, owning and operating a chlor-alkali manufacturing facility. On May 17, 2013, HFCA and Conve & AVS, Inc., entered a contract whereby Conve agreed to design, suppy and construct the chlor-alkali plant. Conve in turn contracted with Lemartec for certain pre-construction, construction and installation services. Lemartec, Third-Party Plaintiff in the present case, was one of the subcontractors hired by Conve. Lemartec contracted with ACT, Third-party Defendant in this action, to design and fabricate equipment and materials for the chlor-alkali facility's salt conveyor system (the "Purchase Order"). Another company, Southland Process Group, LLC ("SPG"), was responsible for on-site assembly and installation of the system fabricated by ACT.

Construction of the chlor-alkali facility did not go as planned. The parties dispute who is to blame. HFCA alleged defects and production delays, and the contractors and subcontractors were not paid in full for their work. HFCA, the plant's owner and end-user, initiated this

litigation is state court by filing suit against Conve and others on November 22, 2016. Conve filed third-party claims against Lemartec and other subcontractors on December 23, 2016. Lemartec, in turn, filed its own third-party petition against ACT and others on June 5, 2017. These are consolidated actions into this present action.

B. Parallel Federal Court Litigation.

On October 6, 2015, prior to the initiation of this litigation in state court, SPG filed suit in United States District Court for the Southern District of Iowa against Lemartec and ACT for unpaid sums due and owing for additional work and cost overruns it incurred while constructing the salt conveyor system for the chlor-alkali facility. (App. 010–12, SPG Pet. ¶ 44). SPG alleged Lemartec directed SPG to perform additional work beyond the scope of the parties' original agreement "as a result of the acts and omissions of Lemartec and/or ACT which included, but were not limited to, defective specifications, schedule delays, equipment delivery delays, and defects in equipment fabrication." (App. 003, SPG Pet. at 3, ¶ 10). SPG asserted contract-based claims against Lemartec,[1] and its allegations against ACT sounded in tort.[2] Both Lemartec and ACT, as co-defendants in the suit brought by SPG, filed cross-claims against each other for indemnity and contribution. (App. 020–21, Lemartec Amended Answer and Cross-Claim at 7–8; App. 037–38, ACT Amended Answer and Cross-Claim at 015–16).

The federal court granted summary judgment in favor of ACT and against SPG on August 28, 2017. The court concluded there was no contractual relationship between ACT and SPG and, accordingly, ACT owed no legal duties to SPG in either contract or tort. (*See* App. 59–60, 08/28/17 Order at 3–4). After further briefing, the federal court also granted partial summary judgment in favor of ACT and against Lemartec on September 19, 2017. (*See* App. 061–62,

[1] SPG brought suit against Lemartec for breach of contract, quantum meruit, and unjust enrichment.
[2] SPG brought suit against ACT for general negligence and negligent design.

9/19/17 Order at 1–2). The court held Lemartec's claim for contribution failed as a matter of law "since on this record there can be no finding of common liability on the issues asserted by [SPG]." (App. 061). The court denied ACT's motion as to Lemartec's cross-claim for indemnity, however, ruling that "genuine issues of material fact on the several theories for equitable or legal indemnity" precluded judgment as a matter of law on that matter. (*Id.*).

Shortly after the federal district court's ruling Lemartec and SPG settled, (App. 63), and the parties obtained leave from the federal district court to amend their pleadings and prepare for trial. ACT filed its amended cross-claim, answer and affirmative defenses to Lemartec's cross-claim on October 25, 2017, (*See* App. 069–73). ACT asserted in its amended cross-claim that it had fully and satisfactorily performed its obligations to design, fabricate, and supply Lemartec with a salt conveyor system for the chlor-alkali facility, and that any defects were either cured or accepted by Lemartec. (*See* App. 072–73, ACT's Amended Cross-Claim and Answer to Lemartec's Cross-Claim ¶¶ 2–8, 10–11). ACT further alleged that although it had fulfilled its obligations under the contract, Lemartec failed to pay ACT for amounts due and owing for its work under the Purchase Order. (App. 072, ¶¶ 13–16).

Following the initiation of the present litigation in the Iowa Business Court, Lemartec filed an amended counterclaim in state court against Conve and HFCA, (App. 075–79, 87–96), and third-party petition against ACT on October 26, 2017, (App. 079–87). In addition to seeking payment from Conve and HFCA for its own work on the chlor-alkali facility, Lemartec asserted breach of contract claims against ACT for its performance under the Purchase Order and sought indemnification for damages resulting from the defective construction of the chlor-alkali facility it might be liable for. Lemartec alleged that any amount Lemartec was required to pay HFCA

and Conve was the result of ACT's faulty design and defective fabrication of the salt conveyor system.[3]

In the federal case, Lemartec filed its answer to ACT's amended cross-claim and its own restated and amended counterclaim to ACT's amended cross-claim the following day on October 27, 2017.[4] In this amended pleading Lemartec added claims for breach of contract and indemnification that were nearly identical to those claimed in the state Business Court litigation; Lemartec alleged any amount it owed SPG for additional work and cost overruns was the result of ACT's faulty design and defective fabrication of the salt conveyor system under the terms of the Purchase Order.[5]

A bench trial in the federal case between Lemartec and ACT was held on April 9–12, 2018, and the case was tried to the court with the Honorable Charles Wolle presiding. In an order dated May 21, 2018, Judge Wolle entered judgment against Lemartec and in favor of ACT for $317,467.07, dismissing Lemartec's cross-claims for indemnification, breach of contract, and breach of warranty. (*See* App. 111, Findings of Fact, Conclusions of Law and Judgment in favor of Cross-Defendant at 1). "Pared down to essentials," the federal court observed, "the remaining issues for trial were whether either of the two remaining parties owes money to the other for money earned, but unpaid; project delays; and for additional work that was required to make the conveyor system functional." (App. 112, Judgment at 2). The trial revolved around a variety of

---

[3] In its amended state court third-party petition, Lemartec claimed statutory and common law indemnification, breach of contract, breach of implied warranty of workmanlike construction, breach of implied warranty of fitness for a particular purpose, and breach of express warranty against ACT. (App. 079–87, ¶¶ 25–26, 33, 36–37, 43–44, 47–49).

[4] Lemartec filed its amended and substituted answer to ACT's amended cross-claim on October 31, 2017, including only minor changes to include an affirmative defense of recoupment and setoff. (*See* App. 132, Lemartec's Amended and Substituted Answer to ACT's Amended Cross-Claim ¶ 8).

[5] In its amended federal court cross-claim, Lemartec claimed indemnification, breach of contract, breach of implied warranty of workmanlike construction, breach of implied warranty of fitness for a particular purpose, breach of express warranty, negligent design, and negligent misrepresentation. *See also* Def.'s Reply Brief tbl. A (comparing Lemartec's federal and state court amended pleadings).

theories of recovery, including breach of contract, set-off, indemnification, breach of implied warranty of workmanlike construction, breach of implied warranty of fitness for a particular purpose, and breach of express warranty. (*Id.*, Judgment at 2 n.2). Judge Wolle concluded: "ACT proved that it had completed the work called for by the purchase order of December 18, 2013; that it did not breach any provision of the contract; and that it had not been paid the amount of $317, 467. 07." (App. 114, Judgment at 4). The federal court continued:

> Lemartec failed to prove that ACT breached the purchase order. Other parties, and in large part Lemartec itself, caused the delays that Lemartec failed to prove were caused by ACT. Moreover, Lemartec failed to prove that ACT breached any implied or express warranty of merchantability or fitness for a particular purpose. Nor did Lemartec prove its claim that ACT should be required to indemnify Lemartec, whether expressly or equitably, for what Lemartec paid to SPG, the original plaintiff in this case.

(ACT App. 114–15, Judgment at 4–5) (internal citations omitted). Lemartec has since appealed Judge Wolle's ruling to the United States Court of Appeals for the Eighth Circuit.

C. ACT's Motion for Summary Judgment.

1. ACT's Position.

ACT moved for summary judgment in the present consolidated state court action on August 15, 2018. In essence, ACT argues Lemartec's claims against it in this forum must be dismissed because the doctrine of *res judicata* precludes Lemartec from pursing further legal action against ACT after the federal litigation resulted in a judgment adverse to Lemartec's claims.

ACT first asserts claim preclusion bars Lemartec's state court action. ACT contends Lemartec's claim for indemnification was fully adjudicated in the federal bench trial before Judge Wolle. Lemartec's claims for indemnity and breach of contractual warranty in the present state court litigation, ACT argues, arise from the same underlying transaction—the Purchase

Order whereby ACT agreed to supply Lemartec with a salt conveyor system for the chlor-alkali facility. Because ACT's liability to Lemartec under the Purchase Order has been fully litigated to valid and final judgment in the federal case, ACT asserts these matters cannot be re-litigated in the state forum. The only difference between the state and federal cases, ACT contends, is the first-party plaintiffs that sued Lemartec and the type of damages upon which Lemartec claims it is entitled to indemnity.

Alternatively, ACT asserts Lemartec's action is barred by issue preclusion. ACT argues that even if Lemartec's claims are not barred in their entirety, Lemartec cannot prevail as a matter of law because the necessary elements of those claims have already been decided against Lemartec and in favor of ACT. Lemartec cannot be allowed to re-litigate the issue of indemnification, ACT contends, because Judge Wolle already concluded Lemartec was not entitled to indemnification and ruled Lemartec failed to prove ACT was liable for breaching the contractual duties upon which Lemartec's claims are based.

2. Lemartec's Resistance.

In resistance, Lemartec contends the federal court case—what Lemartec terms the "delay" case—and the state court litigation—referred to by Lemartec as the "defect" case—are fundamentally different lawsuits. Lemartec argues it is not barred from pursuing further claims against ACT in the present consolidated action despite the adverse judgment against it in the federal case because the federal "delay" case was limited to the narrow question of who would bear the additional costs claimed by SPG in completing the installation of the chlor-alkali facility salt conveyor system; by contrast, it asserts that the present state "defect" suit contemplates damages stemming from the unsatisfactory work on the plant itself, with the end-user asserting design and construction defects wholly independent from SPG's claim seeking compensation for

cost overruns.[6] The larger dispute, Lemartec claims, reflects two different lawsuits by two discrete subsets of parties; each lawsuit alleges different injuries, seeks different remedies, and implicates different relevant facts. Because only the question of indemnity from SPG's claims were raised and litigated in the prior federal case, Lemartec argues that it is not be barred from litigating the question of its right to indemnity regarding HFCA's and Conve's claims.

Applicable Law and Analysis

I. Summary Judgment Standard.

Summary judgment is appropriate "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 the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017). The moving party bears the burden of proving an absence of disputed fact and affirmatively demonstrating that it is entitled to judgment as a matter of law. *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 286 (Iowa 2011); *Hallett Const. Co. v. Meister*, 713 N.W.2d 225, 229 (Iowa 2006). In ruling on a motion for summary judgment, the facts must be viewed in a light most favorable to the non-moving party. Iowa R. Civ. P. 1. 981(5); *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005). However, speculation and mere allegations are not material facts that preclude a legal judgment. *Hlubek*, 701 N.W.2d at 95–96.

Whether the elements of *res judicata* are fulfilled is a question of law that may be appropriately adjudicated by summary judgment. *Emp'rs Mut. Cas. Co. v. Van Haaften*, 815

[6] Lemartec points out that *res judicata* is an affirmative defense, and because ACT has failed to plead it in its Answer to Lemartec's Third-Party Petition, neither doctrine of *res judicata* can form the basis to grant ACT's request for relief as a matter of law. ACT acknowledged this procedural deficiency and moved to amend its Answer to include *res judicata* as an affirmative defense on October 31, 2018. For the reasons described in Part III, *infra* at pp. 30–31, ACT's motion to amend is granted.

N.W.2d 17, 22, 30 (Iowa 2012) (affirming summary judgment on issue preclusion grounds to establish civil liability); *Pavone v. Kirk*, 807 N.w.2d 828, 832, 839 (Iowa 2011) (affirming summary judgment to bar civil action based on the doctrine of claim preclusion). "It is axiomatic that the determination of whether a party is entitled to judgment as a matter of law is a legal question, not a matter of factual resolution." *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 905 (Iowa 1998). Indeed, summary disposition of a case is appropriate "when the record reveals only the legal consequences of undisputed facts are in issue." *Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016) (citing *City of Fairfield v. Harper Drilling Co.*, 692 N.W.2d 681, 683 (Iowa 2005)); *see also Wallace v. Des Moines Indep. Sch. Dist. Bd. of Directors*, 754 N.W.2d 854, 857 (Iowa 2008) ("A matter may be resolved on summary judgment if the record reveals only a conflict concerning the legal consequences of undisputed facts.").

II. Analysis.

The doctrine of *res judicata* contemplates claim preclusion and issue preclusion. *Pavone*, 807 N.W.2d at 835. "Res judicata in the sense of claim preclusion means that further litigation on the claim is barred." *Iowa Coal Mining Co. v. Monroe Cty.*, 555 N.W.2d 418, 441 (Iowa 1996). Issue preclusion, by contrast, "prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action." *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 103 (Iowa 2011) (quoting *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)); *accord* Rest.2d Judgments § 27 (Am. Law Inst. 1982). Iowa law closely follows the Second Restatement of Judgments, which is often consulted as a primary source of authority on *res judicata* issues. *Villarreal v. United First & Cas. Co.*, 873 N.W.2d 714, 719 & n.3 (Iowa 2016).

ACT moves to dismiss Lemartec's third-party petition as a matter of law under both theories of *res judicata*. Because the Court concludes Lemartec seeks to re-litigate matters decided adversely to it in the federal bench trial, Lemartec's claims against ACT are barred. Under either theory, principles of *res judicata* preclude further litigation on matters pertaining to ACT's performance under the Purchase Order and the company's obligation to indemnify Lemartec under that written agreement.

The Court will address each aspect of *res judicata* in turn.

A. Claim Preclusion.

"The general rule of claim preclusion provides a valid and final judgment on a claim precludes a second action on that claim or any part of it." *Arnevik v. Univ. Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002); *see also* Rest.2d Judgments § 19 ("A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same action."). The doctrine of claim preclusion is

> based on the principle that a party may not split or try his claim piecemeal, but must put in issue and try his entire claim or put forth his entire defense in the case on trial. An adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination. A party must litigate all matters growing out of his claim at one time and not in separate actions.

Iowa Coal, 555 N.W.2d at 441 (quoting *B&B Asphalt Co.*, 242 N.W.2d 279, 268 (Iowa 1976)). To establish claim preclusion and successfully bar subsequent litigation the moving party must demonstrate (1) the parties in the first and second actions are the same or in privity; (2) the prior action resulted in a final judgment on the merits of the dispute; and (3) the claim in the second lawsuit could have been fully and fairly adjudicated in the earlier case—"i.e., both suits involve the same cause of action." *Pavone*, 807 N.W.2d at 836.

Lemartec and ACT, third-party plaintiff and third-party defendant in the present state court litigation, were both parties to the previous litigation in federal court as cross-claim plaintiff/counterclaim defendant and cross-claim defendant/counterclaim plaintiff, respectively. (*See generally* ACT App. 069–074, 097–106). There was a final adjudications on the merits of those cross-claims that culminated in a bench trial that awarded judgment in favor of ACT. (*See generally* App. 111–116, 117).[7] The present dispute hinges on the final element: whether the claims made in this case were or could have been fairly raised and adjudicated in the prior federal action.

Iowa law follows the "transactional approach" to claim preclusion to determine whether a particular claim is barred by *res judicata*. *See Villarreal*, 873 N.W.2d at 719–720 & n.3; *Pavone*, 807 N.W.2d at 837.

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Rest.2d Judgments § 24, at 196 (Am. Law Inst.1982).[8] Recent Iowa case law has relied on the comments to this section of the Second Restatement to further explain this transactional approach:

---

[7] Though Lemartec has appealed Judge Wolle's Findings of Fact and Conclusions of Law to the Eighth Circuit Court of Appeals, "[t]he judgment of the trial court is res judicata until set aside, modified or reversed." *Van Haaften,* 815 N.W.2d at 25; *see also* Rest.2d Judgments § 13 cmts. *c*, *f*, at 133, 135.

[8] Prior to the Second Restatement's being published in 1982, Iowa applied a "same-evidence" approach to claim preclusion. *See Villarreal*, 873 N.W.2d at 719 n.3. Since this time Iowa jurisprudence on *res judicata* has

> The expression "transaction, or series of connected transactions," is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. And underlying the standard is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim.
> . . .
> In general, the expression connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes.

Id. cmt. *b*, at 198–99. To be sure, "[a] [t]ransaction may be single despite different harms, substantive theories, measures or kinds of relief." *Villarreal*, 873 N.W.2d at 721 (quoting Rest.2d Judgments § 24 cmt. *c*, at 199).

Claim preclusion applies to those matters actually litigated as well as those that could have been presented for the first court's determination but were not. *Pavone*, 807 N.W.2d at 835 ("Claim preclusion may preclude litigation on matters the parties never litigated in the first claim."); *Arnevik*, 642 N.W.2d at 319 ("The rule applies not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which could have been offered for that purpose."); *Iowa Coal*, 555 N.W.2d at 441. "Therefore, a party must litigate all matters growing out of the claim, and claim preclusion will apply 'not only to matters actually determined in an earlier action but to all relevant matters that could have been determined.'" *Pavone*, 807 N.W.2d 836 (quoting *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 398 (Iowa1998)); *accord Shumaker v. Iowa Dep't Transp.*, 541 N.W.2d 850, 852 (Iowa 1995). Indeed, "[a] plaintiff is not entitled to a second day in court simply by alleging a new ground of recovery for the same wrong." *Westway Trading Corp. v.*

"continued to discuss and apply the older 'same-evidence' test in tandem with the more recent transactional approach of the Restatement." *Id.*

River Terminal Corp., 314 N.W.2d 398, 401 (Iowa 1982). "To determine whether the cause of action is the same [and could have been fully and fairly adjudicated in the prior case], [courts] examine (1) the protected right, (2) the alleged wrong, and (3) the relevant evidence." *Iowa Coal*, 555 N.W.2d at 441.

Several recent Iowa Supreme Court decisions involving duplicitous litigation for indemnity and breach of contract guide the *res judicata* analysis in this case. In *Arnevik v. University of Minnesota Board of Regents*, an employee of the University of Minnesota caused a car accident while travelling for work, severely injuring the other driver involved. 642 N.W.2d at 317. In the first case, the district court dismissed the employee's cross-petition against her employer for indemnification under a theory of *respondeat superior*. *Id.* The employee brought a second suit alleging the university's official policies obligated it to indemnify her. *Id.* at 318. Affirming the district court's grant of summary judgment in favor of the employer, the Iowa Supreme Court concluded that because both law suits stemmed from the plaintiff's claim for indemnity of her liability relating to the auto accident, the second suit was barred by claim preclusion. *Id.* at 320 ("[O]nce [the employee] started down the path in the first action seeking indemnification from the University, she was required to bring all theories of recovery at that time."). "The only difference between [the employee]'s first and second claim," the Court held, was "the ground upon which she asserted entitlement to indemnification." *Id.* at 319.

Pavone v. Kirk involved multiple lawsuits concerning an alleged breach of a promise to negotiate in good faith in a casino management contract. 807 N.W.2d at 830–31. In the first action, the management company alleged the developer violated the parties' future development contract when it purported to terminate that agreement and failed to negotiate in good faith when the developer was awarded a gaming license to build a casino in Emmetsburg, Iowa. *Id.* at 831.

A jury awarded the management company $10 million in damages, and the Supreme Court affirmed the verdict. *Id.* During the course of the first lawsuit, however, the development company was awarded a second gaming license to develop another casino on the other side of the state in Clinton, Iowa. *Id.* The developer did not contact or negotiate with the management company regarding the second casino, and while litigation in the first action was ongoing, the management company filed a subsequent, separate action against the developer for violating the same agreement by failing to negotiate in good faith. *Id.* at 831–32. The Supreme Court held the second suit was barred by claim preclusion, even though the second breach of the parties' agreement occurred after the lawsuit regarding the first breach was filed and being litigated. *Id.* at 837–38. Because the second lawsuit concerned "the same protected right" and "the same alleged wrong" under the contractual relationship at issue, *res judicata* barred further litigation as the defendant's "alleged breach created a single cause of action for all claims for damages based on its remaining rights to performance under the [] agreement." *Id.*

Finally, in *Villarreal v. United Fire and Casualty Co.*, the Supreme Court held a subsequent bad faith claim brought against the insurer after a successful suit for breach of an insurance contract was barred by claim preclusion. 873 N.W.2d at 731. Even though the first-party bad-faith claim required some sort of additional proof not needed in the underlying breach of contract suit, the Court held the claim "nevertheless challenges the same basic conduct as the underlying breach-of-contract claim—namely, the insurer's refusal to pay benefits that were rightly owed." *Id.* at 729. Thus, the plaintiffs "could have raised" their bad faith claim in their prior breach of contract action and were precluded from bringing a subsequent suit to recover. *Id.* (quoting *Arnevik*, 642 N.W.2d at 319).

Here, Lemartec's claims for indemnification from ACT in both cases are premised on the contractual relationship between Lemartec and ACT under the Purchase Order for the design and fabrication of a salt conveyor system at the Eddyville chlor-alkali facility. The Purchase Order, and the parties' performance under that agreement, is undoubtedly the "same transaction" underlying both federal and state court lawsuits. In both cases, Lemartec sought relief under the Purchase Order on a variety of theories: statutory and common law indemnification, breach of contract, breach of implied warranty of workmanlike construction, breach of implied warranty of fitness for a particular purpose, and breach of express warranty. (*See* Def.'s Reply at 14 tbl. A; *compare* App. 75–96 *with* App. 97–106, 130–139). And in both cases, Lemartec asserted ACT's design and fabrication of the salt conveyor system was not adequate performance of its obligations under the Purchase Order. (App. 040–56, Lemartec Resistance to ACT Mot. Summ. J.; App 305–410, Trial Exhibits). In short, the present action in state court concerns "the same protected right," addresses "the same alleged wrong," and would involve "much of the same relevant evidence" as that which was litigated and adjudicated in the federal case. *Villarreal*, 873 N.W.2d at 729; *see also Pavone*, 807 N.W.2d at 838. Here, Lemartec asserts the same implied and equitable theories of indemnity as grounds for recovering from ACT under the same written agreement between them concerning the same conduct of ACT. The only difference is the first-party plaintiff seeking damages from Lemartec forming the basis for its claim of indemnity from ACT. But the merits of Lemartec's claims regarding ACT's liability for its performance under the Purchase Order does not change just because the nature of the dispute transforms and a different party alleges damages. *Cf. R&R Real Estate Inv'rs., LLC v. Urbandale West, LLC*, No. 4:17-cv-00243, 2017 WL 5634152, at *3 (S.D. Iowa, Nov. 6, 2017) (holding a second action to determine "cause" to effect a buy-out of a member of a business organization was *res judicata*

because a prior lawsuit between the parties, seeking to remove the member, also sought a finding of "cause" under the same operating agreement; thus, "[b]ecause Defendant was seeking a determination of Cause to remove [Plaintiff] in the first place, they could have brought the buy-out clause as well"). Allowing Lemartec's claims against ACT to continue would require this Court to re-interpret the Purchase Order and re-evaluate the evidence surrounding Lemartec's management of the project and ACT's fabrication of the salt conveyor system, with the possibility of making contrary findings and arriving at a different conclusion than was already reached by Judge Wolle in the federal bench trial. Therefore, claim preclusion bars Lemartec from re-litigating these conclusions in the state court.

Lemartec contends that claim preclusion cannot bar its indemnity claim against ACT in the present state court "defect" litigation because the damages alleged, remedies sought, and parties involved are fundamentally different than those in the federal "delay" case, but the Court finds this characterization of the Eddyville chlor-alkali facility litigation unpersuasive. Lemartec first argues it could not join HFCA and Conve to the prior federal action because doing so would have destroyed diversity of citizenship between the parties and deprived the federal court of subject matter jurisdiction over the case. *See* 28 U.S.C. §§ 1332(a)(1), 1367(b). Lemartec asserts could not have fully and fairly litigated its claim for indemnity arising from the alleged latent defects in the chlor-alkali facility because jurisdictional requirements of federal court barred the opportunity of Lemartec assert its indemnity claim for the damages sought by HFCA and Conve.

Even though Lemartec was prohibited from joining HFCA and Conve as non-diverse parties, however, Lemartec was not prevented from fully litigating the underlying transaction between Lemartec and ACT itself. Lemartec takes too narrow a view of the "claim" that constitutes the underlying transaction of the federal case. As discussed above, the matter at issue

between Lemartec and ACT in federal court was, fundamentally, the rights and obligations of the parties under the Purchase Order and whether any duties under that written agreement had been breached. The matter that Lemartec had the opportunity to litigate—and did in fact litigate—is the much broader question of the parties' performance under the Purchase Order and ACT's corresponding liability to Lemartec to indemnify Lemartec for losses sustained as a result of ACT's performance. *See Pavone*, 807 N.W.2d at 838–39 (holding the accrual of additional damages does not permit a party to re-litigate the merits of the underlying transaction when those damages stem from an alleged breach of the same underlying contract); Rest.2d Judgments § 24 cmt. *b*, at 189–99 (reflecting a broad view of the underlying transaction or occurrence). Both lawsuits concern the Purchase Order and ACT's performance under that agreement, sharing a common nucleus of operative facts and are closely related in time, space, origin, and motivation. *Pavone*, 807 N.W.2d at 838. Lemartec was able to fully litigate that matter in federal court when it sought indemnity for the cost overruns claimed by SPG without HFCA and Conve, even though those parties allege different types of damages, because both accrued from the same contract and hinged on Lemartec's and ACT's respective conduct.[9] *See Pavone*, 807 N.W.2d at 838–39; *R&R Real Estate Inv'rs*, 2017 WL 5634152, at *3; *see also Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 96 N.E.3d 737, 7447–48 (N.Y. 2018) (concluding investors' subsequent lawsuit concerning a covenant not to sue in a contract was based on the "same

[9] Had Lemartec believed HFCA and Conve were indispensable parties that were necessary to fully and fairly litigate its claim for indemnity against ACT under the Purchase Order, Lemartec was not without recourse. Though Lemartec was jurisdictionally barred from joining HFCA and Conve to the federal action as non-diverse parties, Lemartec could have moved to dismiss the federal action and litigate its indemnity claims with HFCA and Conve in state court. *See* Fed. R. Civ. P. 19(b) (permitting the district court to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed" when a necessary party cannot be joined). Lemartec did not raise this point regarding the federal court's subject matter jurisdiction and ability to afford complete relief among the parties; thus "jurisdiction was not an issue in this case because [Lemartec] did not make it an issue." *Shumaker v. Iowa Dep't Transp.*, 541 N.W.2d 850, 852, 854 (Iowa 1995); *see also Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 398 (Iowa1998). Instead, Lemartec chose to amend its federal cross-claims and proceed to trial against ACT. (App. 097–106, 130–139, 152–226).

transaction" as a prior federal action alleging fraud-type allegations because both necessarily implicated the construction, validity, and scope of various contractual terms and documents); *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 803 S.E.2d 519, 529 n.25, 532 (W. Va. 2017) (barring a home builder's third-party petition for contribution and indemnification against development owner and construction company in state court construction litigation brought by plaintiff-homeowners because that claim was previously dismissed voluntarily in the prior federal diversity action brought by the home builder against the development owner and construction company); *cf. In re Stevenson*, 40 A.3d 1212, 1223–42 & n.9 (Pa. 2012) (holding a prior, unappealed determination by a federal district court that a statute was unenforceable absent legislative amendment was preclusive of a second suit in state court seeking to enforce the same statute against different plaintiffs).

Lemartec next argues *res judicata* does not bar it from seeking indemnification from ACT for construction defects in the chlor-alkali facility because those alleged damages stem from facts arising after the initiation and adjudication of the federal action. In other words, Lemartec contends that the type of damages sought by HFCA and Conve for damage to the salt conveyor system itself did not come to fruition or were not known until recent discovery disclosures in the present case and points to a "bright-line rule that *res judicata* does not apply to events post-dating the filing of the initial complaint." *Howard v. City of Coos Bay*, 871 F.3d 1032, 1039 (9th Cir. 2017) (quoting *Morgan v. Covington Twp.*, 648 F.3d 172, 177–78 (3d Cir. 2011)); *see also* Rest.2d Judgments § 24 cmt. *f* ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first."). Relatedly, Lemartec asserts the present litigation over

damages for alleged latent defects in the chlor-alkali facility salt conveyor system will involve different evidence than that presented in the federal case for delays and cost overruns in the system's construction.

First, the "same evidence" approach emphasized by Lemartec is not the standard for *res judicata* under Iowa law. *Villarreal*, 873 N.W.2d at 729 ("Perfect identity of evidence is not the standard in Iowa for whether claim preclusion applies."); *see also* Rest.2d § 24 cmt. *b*, at 199 (noting the absence of evidence overlap between two actions is not fatal to the application of claim preclusion where the second action "stems from the same transaction or series"); *id.* § 25, at 209 ("The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action . . . [t]o present evidence or grounds or theories of the case not presented in the first action . . . ."). Iowa follows the Restatement's broad transactional approach and rejects attempts to litigate claims in piecemeal fashion, even where different facts might be necessary to prove the right of recovery. *See Villarreal*, 873 N.W.2d at 728–29 & n.6; *Arnevik*, 642 N.W.2d at 318–19. Moreover, different evidence should not be necessary to litigate the nature of the contractual rights and obligations between Lemartec and ACT because both actions ultimately hinge on the same written agreement and ACT's conduct. (App. 305–406). To the extent that it does, the Court concludes it does not outweigh the other factors weighing in favor of claim preclusion or otherwise affect the *res judicata* analysis.

Second, as noted by the Iowa Supreme Court in *Pavone*, the accrual of additional damages does not create new "material operative facts" that comprise a separate underlying transaction. 807 N.W.2d at 838–39. Iowa law already contemplates the "federal rule" urged by Lemartec to the extent that *res judicata* has no effect on claims in subsequent litigation that could not have been brought in a prior action. *See Villarreal*, 873 N.W.2d at 729 (noting that a

subsequent bad faith action concerning conduct occurring after the initial breach of contract case is filed is "a different kettle of fish").[10] The fact that two lawsuits allege different types of damages, *Villarreal*, 873 N.W.2d at 721–22, 729, or damages from different sources, *Pavone*, 807 N.W.2d at 838, does not change the underlying transaction that is central to *res judicata*. Here, the identity of the entity that is the ultimate plaintiff suing Lemartec does not alter the terms of the parties' agreement or their respective performances of their duties. And regardless of the *type* of loss that the damages ultimately reflect—whether it be unpaid sums for cost overruns or construction defects and lost profits—Lemartec's theory of indemnification stems from the singular transaction between itself and ACT—the Purchase Order—and ACT's performance of those obligations. All aspects of Lemartec's indemnity claim necessarily arise from the same transaction because they are rooted in the same contract and performance; Lemartec's theory that ACT is responsible because it breached the terms of the Purchase Order by designing and fabricating a salt conveyor system that did not conform to specifications is the same in both actions. *See* Def.'s Reply tbl. A.

Finally, Lemartec alternatively posits that ACT acquiesced to Lemartec's litigation of "delay" and "defect" damages in different venues because ACT failed to contemporaneously object to the splitting of its claims for indemnity.

> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

---

[10] State courts are to apply their own state law on *res judicata* questions in determining whether a judgment rendered by a federal district court sitting in diversity is entitled to preclusive effect in state court when the prior judgment was based on state substantive law. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509, 121 S. Ct. 1021, 1029 (2001). Judgements in federal-question cases, by contrast, are determined by federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891, 128 S. Ct. 2161, 1271 (2008).

Rest.2d Judgments § 26 cmt. *a*. As applied under Iowa law, a party waives the defense of claim preclusion when the plaintiff brings two simultaneous suits alleging recovery on the same transaction or occurrence but the party fails to assert *res judicata* before judgment in the prior action. *Noel v. Noel*, 334 N.W.2d 146, 149 (Iowa 1983); *see also Pagel v. Notbohm*, 186 N.W.2d 638, 639–40 (Iowa 1971).

Pagel is a prototypical example of acquiescence to claim splitting and waiver of *res judicata* as a defense. There, the plaintiff, his son, and the defendant were involved in a car accident, killing the plaintiff's son, injuring the plaintiff, and damaging the plaintiff's car. The plaintiff first filed suit as the fiduciary of his son's estate and sought wrongful death damages on behalf of his son; he filed a second suit individually seeking damages for his own personal injuries and damages to the vehicle. *Pagel*, 186 N.W.2d at 639. The defendant filed answers to both actions but did not move to consolidate or object to the simultaneous litigation. *Id.* After the first suit resulted in a judgment for the plaintiff, defendant asserted the second action was barred by claim preclusion. *Id.* The Supreme Court held the defendant had acquiesced to the multiple lawsuits by failing to plead *res judicata* as a defense despite answering both petitions. *Id.* at 640; *see also* Rest.2d Judgments § 26 cmt. *a* illus. 1.

In *Noel*, the son of a farmer leased a farm from his father and brought suit seeking a declaratory judgment supporting his continuous tenancy and right to purchase pursuant to an oral agreement between him and his father. 334 N.W.2d at 147. When the father died before the first case was tried, the son brought a second action in probate alleging he was entitled to the value of repairs and improvements to the leased farm along with his one-fifth inheritance by which he could purchase the farm, again based on an oral agreement with his father. *Id.* After judgment in the first declaratory action was entered in favor of the father's estate, the Supreme Court

permitted the probate action to go forward because, though based on the same underlying transaction, the executor of the father's estate had failed to raise *res judicata* as a defense in the subsequent declaratory action. *Id.* at 149.

In contrast to *Noel* and *Pagel*, Lemartec did not communicate any intent to split its claims because it asserted the same claim—indemnification from ACT for the same breach of contract—in both federal and state lawsuits. Lemartec cannot maintain an action on its contractual rights under the Purchase Order after previously bringing suit on an alleged breach of that same agreement. *See* Rest.2d Judgments § 26 cmt. *g*, at 240 (noting that where a plaintiff sues for total breach of contract "a judgment extinguishing the claim under the rules of merger or bar precludes another action by him for further recovery on the contract"). Waiver does not apply where Lemartec has not alleged even another, subsequent breach, but merely asserted identical causes of action based on the same underlying contract. *Cf. Pavone*, 807 N.W.2d at 838.

In conclusion, Lemartec's third-party petition for indemnity from ACT stems from the same written agreement underlying transaction as that litigated and adjudicated in federal court. The transaction underlying the dispute between Lemartec and ACT consists of the parties' performance under the Purchase Order and their respective rights under that written agreement. Judge Wolle already made findings of fact and conclusions of law regarding the parties' performance under the Purchase Order and determined fault for the problems arising from the salt conveyor did not lie with ACT's design or fabrication. To allow Lemartec to re-litigate this matter would invite this Court to make findings and conclusions contrary to those found by another judge on the same underlying transaction. Thus, the Court concludes Lemartec's claims against ACT are barred by claim preclusion.

B. Issue Preclusion.

Viewed as a duplicitous "claim" or "issue," Lemartec's indemnity action in the present case is barred by *res judicata*. The doctrine of issue preclusion prevents parties from re-litigating issues of fact and law raised and resolved in a previous legal action. *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 103–04 (Iowa 2011) (quoting *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)); *see also* Rest.2d Judgments § 27 (1982). The party invoking issue preclusion must fulfill four elements:

> (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa 2012). The prior determination must be "final" to be given a preclusive effect. *Id.* at 22. Moreover, the "necessary and essential" requirement is narrowly applied, precluding only "those facts vital or crucial to the previous judgment, or those properly characterized as ultimate facts without which the previous judgment would lack support." *Comes v. Microsoft Corp.* 709 N.W.2d 114, 119 (Iowa 2006).

"[T]he same issue is presented 'if the question [at issue] is one of the legal effect of a document identical in all relevant respects to another document whose effect as adjudicated in a prior action.'" *Soults Farms*, 797 N.W.2d at 104 (quoting Rest.2d Judgments § 27 cmt. *c*, at 253). Here, the issues in both the prior federal litigation and the present action are identical—namely, the nature of the contractual rights and obligations of the parties under the Purchase Order; whether ACT breached that agreement in fabricating the parts for the salt conveyor system; and whether ACT's performance entitled Lemartec to indemnity under theories of breach of contract and implied or equitable warranties. Though Lemartec contends the issues are different because they involve different first party plaintiffs and different types of damages that form the basis of Lemartec indemnification claim, "[n]either of these variations alter the issue

presented in the [federal] litigation or this case"—the parties' performance under the Purchase Order and their respective rights under that agreement. *See id.*

Indeed, the issue of indemnity rights arising under the Purchase Order has been raised and litigated in the prior federal action. Throughout litigation between the parties in federal court, the primary contention was whether ACT's design and fabrication of the salt conveyor system breached the terms of the Purchase Order or violated any express, implied, or equitable warranties contained in that agreement. In its initial resistance to ACT's motion for summary judgment, in federal court, Lemartec argued ACT's design and fabrication of the salt conveyor system was unsatisfactory and outlined numerous deficiencies with ACT's work. App. 047–48, 50, 52, 53, 54, Lemartec Resistance to ACT Mot. Summ. J. at 8–9, 11, 13, 14, 15). In a supplemental brief, Lemartec stressed that these deficiencies constituted genuine issues of material fact that precluded summary judgment in favor of ACT because the alleged "defective components" raised a question as to whether ACT's performance under the Purchase Order fulfilled its contractual duties to supply a salt conveyor system that was guaranteed to be "100% operable and functional" under that agreement. (App. 240–41, 242, 243, Lemartec Final Resistance Brief at 4–5, 6, 7).

In other pretrial submissions, Lemartec stated its view of the crucial factual issues that would arise at trial to include: "ACT's work was not of quality construction as required by the Purchase Order"; "ACT failed to provide the conveying system components in accordance with the drawings and specifications as required by the Purchase Order"; "Many of the component parts of the conveyor system were not fabricated properly by ACT"; "Many of the component parts of the conveyor system fabricated by ACT did not fit together properly"; and "Many of the component parts of the conveyor system delivered to the project site by ACT had to be re-

engineered or otherwise modified in the field." (App. 290, Proposed Final Pre-Trial Order at 7; *see also* App. 294–96). By contrast, ACT alleged that it was Lemartec's own management of the project that breached the Purchase Order, caused the need for design revisions and field modifications, and excused ACT's performance under that agreement. (App. 289–90, 292–93).

These issues concerning ACT's design and fabrication of the salt conveyor system and Lemartec's management of the project—and the defects alleged—were ultimately the central feature at trial. Numerous trial exhibits were introduced by both parties to illustrate the alleged defects and deficiencies to the rail hopper chute (App. 305), conveyor legs and piers (App. 306–08), hand rails (309–27), bucket elevators (App. 328–371), tripper car, festoon supports, alignment piers, and chute & diverter (App. 372–402), along with 30 other "action items" (App. 403–06).[11] The trial testimony was likewise replete with discussion of alleged defects and deficiencies in ACT's work. (App. 230, Owen Testimony Word Index; App. 232, Holcombe Testimony Word Index). To top it off, Lemartec itself proposed factual findings of flawed design and defective fabrication, in violation of the Purchase Order and the warranties contained in that agreement, for the Court to consider after the conclusion of the bench trial. (Pl.'s Ex. 3, Lemartec Proposed Ruling, at 4–5, 8, 10; Ex. 5, Lemartec Amended Proposed Ruling, at 11, 15–16). ACT proposed the opposite: that any defects in the salt conveyor system or required on-site modification of its parts was the result of Lemartec's management of the project and the contractor's election of a "fast track" delivery method. (*See generally* Pl.'s Ex. 6, ACT Proposed Final Order). The federal court litigation was obviously not simply a "delay case" but in fact a "defect" case as well.

[11] (App. 305–371, ACT Trial Exhibits; App. 372–410, Lemartec Trial Exhibits).

Judge Wolle sided with ACT. (App. 113–15, Judgment at 3–5). The issue of ACT's performance under the Purchase Order and the corresponding rights of the parties under that agreement was material and relevant—and essential to the ultimate judgment of the federal lawsuit—in two ways. First, the issue of whether ACT committed a material breach under the Purchase Order was central to the question of ACT's liability for the cost overruns and ACT's obligation to indemnify Lemartec for the sums sought by SPG in Lemartec's indemnification cross-claim. Had the federal court concluded ACT's performance breached the warranties of the Purchase Order, it could have found ACT liable to indemnify Lemartec for those damages resulting as an outgrowth of its deficient performance. *See* Iowa Code § 554.2714(1), (3) (2018) (buyer entitled to "the loss resulting in the ordinary course of events from the seller's breach" as well as "incidental and consequential damages under section 554.2715" for nonconforming goods); *see also* Iowa Code §§ 554.2313(1) (express warranties), 554.2314(1) (implied warranty of merchantability), 554.2315 (implied warranty of fitness for a particular purpose). Second, this issue was crucial to determining Lemartec's liability for the unpaid sums due to ACT for the salt conveyor system under the Purchase Order, and whether ACT was entitled to the full contract price as sought in ACT's cross-claim. Had the federal court concluded ACT's performance breached the warranties of the Purchase Order, such a finding would likely have led to the conclusion that Lemartec was allowed to deduct the amount of loss arising out of the defectively fabricated conveyor system from the purchase price owed to ACT. *See* Iowa Code §§ 554.2714(1) (stating "the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach"), 554.2717 (allowing the buyer to "deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract").

Instead, the district court held ACT did not breach the Purchase Order, or any implied warranties, because the problems associated with the salt conveyor system "were the direct result of Lemartec's inadequate supervision and management of the project." (App. 114–16, Judgment at 4–6 (citing *Iowa Arboretum, Inc. v. Iowa 4H Found.*, 886 N.W.2d 695, 706 (Iowa 2016))). Consequently, the federal court ruled Lemartec was not entitled to indemnity, "whether expressly or equitably," under "any implied or express warranty of merchantability or fitness for a particular purpose" contained in the Purchase Order. (*Id.* (citing *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 469 (Iowa 2009))). The court therefore ordered Lemartec to pay ACT the full sum for its work under that agreement. (*Id.*).

The matter of ACT's performance under the Purchase Order, and the issue of whether that performance breached the agreement or any applicable express, implied, or equitable warranties has been raised, litigated, and adjudicated. In sum, Lemartec cannot prevail on its indemnity action because the crucial issue of whether ACT breached the duties it owed under the Purchase Order has already been decided against Lemartec. Even if this Court sets aside its conclusion that Lemartec's indemnity action is barred by claim preclusion, issue preclusion operates to make it impossible for Lemartec to succeed on the merits because fault between Lemartec and ACT has already been apportioned to fall on Lemartec, not ACT.

III. ACT's Motion to Amend.

At hearing concerning ACT's motion for summary judgment, counsel for ACT made an oral motion to amend ACT's answer to Lemartec's third-party petition to include the additional affirmative defense of *res judicata*. *See Bertran v. Glens Falls Ins. Co.*, 232 N.W.2d 527, 531 (Iowa 1975) (holding "the rule that a party who desires to set up a prior adjudication as a bar to a

claim made by an opposing party must properly plead such adjudication before evidence is admissible in regard to it"). ACT filed a written motion to amend on October 31, 2018. "Leave to amend . . . shall be freely given when justice so requires." Iowa R. Civ. P. 1.402. The Court finds good cause[12] to allow ACT to amend its answer to include the affirmative defenses of claim preclusion and issue preclusion. *See Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 765 (Iowa 2002) (affirming the district court's discretion in granting a party leave to amend an additional affirmative defense one week prior to trial).

RULING

In conclusion, *res judicata* bars Lemartec from pursuing further litigation against ACT for indemnity on the basis that ACT's performance under the Purchase Order violated express, implied, or contractual warranties. The underlying transaction in the prior federal lawsuit and the present litigation in the Iowa Business Court concerns the rights and obligations of the parties under the same written agreement entered into by Lemartec and ACT for ACT to design and fabricate a salt conveyor system for the Eddyville chlor-alkali facility. Under either a theory of claim preclusion or issue preclusion, Lemartec has had the full and fair opportunity to litigate the matter of ACT's performance under the Purchase Order and whether it is entitled to

[12] ACT filed a Reply to Lemartec's Resistance to ACT's Motion for Leave to Amend Answer filed on November 15, 2018. The Court takes note of the fact that ACT's reply references information from Lemartec's website to the effect that Lemartec has nearly $7 billion in revenue and impliedly contrasts the more modest financial position of ACT. As ACT's counsel is well aware, the relative wealth or poverty of litigants is inadmissible as evidence and entirely irrelevant to the merits of the underlying dispute. *See Kinseth v. Weil-McLain*, 913 N.W.2d 55, 71 (Iowa 2018) ("While earning power is important to be shown and proper to be argued in connection with the claim of damages, it is nevertheless improper for a jury to consider relative wealth in the process of determining which, if either, party is entitled to recover. By the same token any *comparison* of respective earning powers or financial or economic conditions is entirely improper." (emphasis in original) (internal quotations omitted)). Further, such information is entirely outside the record of the pending motions. The Court's ruling to grant summary judgment in favor of ACT was finalized well prior to the date ACT's filed its reply and any information concerning Lemartec's revenues played no part in the Court's decision.

indemnification from ACT for damages arising out of the parties' agreement. Lemartec litigated its claims and lost; it must live with the results.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Third-Party Defendant's Motion for Summary Judgment is GRANTED. Third-Party Defendant ACT is hereby dismissed as a party from this litigation. Costs are assessed to Lemartec as the Third-Party Plaintiff.

IT IS FURTHER ORDERED that Third-Party Defendant's Motion to Amend is GRANTED.

All of the above is SO ORDERED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LALA003789	HF CHLOR-ALKALI LLC V CONVE & AVS INC ET AL

So Ordered

John Telleen, District Court Judge,
Seventh Judicial District of Iowa