UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA, Plaintiff, vs. TAREK IBN ZIYAD ACADEMY, et al. Defendants.	Court File No.: 09-cv-00138 (DWF/JJG) **MEMORANDUM OF LAW IN SUPPORT OF THE TIZA DEFENDANTS' RULE 12(C) AND (H)(3) MOTIONS**

Plaintiff has failed to plead prima facie claims against Asad Zaman, Asif Rahman, Mahrous Kandil, Mona Elnahrawy, Moira Fahey and Mohamed Farid (the individual TiZA Defendants) in their individual capacities, and its claims against TiZA and the individuals in their official capacities are barred by the Eleventh Amendment. Further, the crossclaims of Defendants Islamic Relief USA (IRUSA) and Commissioner Seagren (Seagren) impermissibly seek indemnification for their own conduct and from violations of their own statutory obligations in contravention of public policy.

Defendants Tarek ibn Ziyad Academy (TiZA) and the individual TiZA Defendants move the Court pursuant to Federal Rules of Civil Procedure 12(b)(1), (c), and (h)(3) for an Order:

1.(a) Dismissing the individual TiZA Defendants in their individual capacities for Plaintiff's failure to plead prima facie claims under 42 U.S.C. § 1983 and the Minnesota Constitution;

(b) Alternatively, the individual TiZA Defendants in their individual capacities may invoke qualified immunity as to retrospective monetary relief and are entitled to dismissal as to prospective injunctive relief;

2. Dismissing TiZA and the individual TiZA Defendants in their official capacities for lack of subject matter jurisdiction based upon Eleventh Amendment immunity; and

3. Dismissing IRUSA and Seagren's crossclaims against TiZA.

ISSUES

A. WHETHER PLAINTIFF FAILED TO PLEAD PRIMA FACIE CLAIMS AGAINST THE INDIVIDUAL TIZA DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES.

B. IN THE ALTERNATIVE, WHETHER THE INDIVIDUAL TIZA DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES ARE ENTITLED TO QUALIFIED IMMUNITY AS TO RETROSPECTIVE MONETARY RELIEF AND DISMISSAL AS TO INJUNCTIVE RELIEF.

C. WHETHER TIZA AND THE INDIVIDUAL TIZA DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE IMMUNE FROM SUIT PURSUANT TO THE ELEVENTH AMENDMENT.

D. WHETHER IRUSA AND SEAGREN'S CROSSCLAIMS MUST BE DISMISSED BECAUSE TIZA DID NOT AGREE TO INDEMNIFY THEM FOR THEIR OWN CONDUCT AND BECAUSE THEY CANNOT SEEK INDEMNITY FOR VIOLATING THEIR OWN STATUTORY OBLIGATIONS.

FACTS

For the purposes of this Motion only and in accordance with *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009) (to avoid dismissal, a complaint must include "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."), the facts alleged by Plaintiff in its First Amended Complaint are accepted as true.

Citation to relevant portions of the pleadings are identified as needed in the Argument section, *infra*.

ARGUMENT

I. STANDARD OF ANALYSIS

A party may move for judgment on the pleadings at any point after the close of pleadings but early enough to avoid a delay of trial. Fed. R.Civ. P 12(c). Judgment on the pleadings under Rule 12(c) requires the Court to "accept as true all factual allegations set out in the complaint and to construe the complaint in the light most favorable to the [Plaintiff], drawing all inferences in [its] favor." *Ashley County v. Pfizer*, 552 F.3d 659, 665 (8th Cir. 2009) (*citing Wishnatsky v. Rovner*, 433 F.3d 608, 610 (8th Cir.2006)). "Judgment on the pleadings is appropriate only when there is no dispute as to any material facts and the moving party is entitled to judgment as a matter of law, the same standard used to address a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Id.* (citation omitted).

The objection that a federal court lacks subject-matter jurisdiction may be raised by a party or *sua sponte* by the court at any stage in the litigation. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 126 S. Ct. 1235 (2006); Fed.R. Civ.P 12(h)(3). Specifically, Rule 12(h)(3) provides: "If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." In a facial challenge under Rule 12(b)(1), the court accepts the factual allegations in the pleadings as true and views the facts in the light most favorable to the nonmoving party. *See Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008); *see also Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990) (stating that in a facial attack under Rule 12(b)(1), the court "restricts itself to the face of the pleadings," without consideration of matters outside the pleadings). The

pleadings include matters of public record and orders. *Porous Media v. Pall*, 186 F.3d 1077, 1079 (8th Cir. 1999) (defining "pleadings" as complaint, exhibits attached to complaint, matters of public record and orders). The Court may properly consider matters of public record when reviewing both a Rule 12(c) and a Rule 12(b)(1) motion. *Id.; see Stahl v. United States Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) (holding the district court may take judicial notice of public records and may consider them on a motion to dismiss under Rules 12(b)(1) and Rule 12(c)).

To avoid dismissal, a complaint must include "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quotations and citation omitted). "A claim has facial plausibility when the plaintiff has pleaded factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly*, 550 U.S. at 556). A complaint must, after taking all facts alleged in the complaint as true, "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Although a complaint need not contain detailed factual allegations, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action, will not do.'" *Ashcroft*, at 1949 (*quoting Twombly*, 550 U.S. at 555); *see also Soltan v. Accor North America, Inc.*, No. 09-1412 (2010 WL 187477), at *2 (D.Minn. Jan. 11, 2010) [Doc # 31] (same). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility," and

must be dismissed. *Ashcroft*, at 1949 (quoting *Twombly*, 550 U.S. at 557) (quotations omitted).

II. PLAINTIFF FAILED TO PLEAD PRIMA FACIE CLAIMS AGAINST THE INDIVIDUAL TIZA DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES.

A. Plaintiff has failed to plead a Section 1983 claim against the individual TiZA Defendants in their individual capacities.

Plaintiff has failed to plead prima facie Section 1983 claims against the individual TiZA Defendants in their individual capacities. To establish a prima facie case under Section 1983, Plaintiff must allege two elements: (1) the action occurred "under color of law" and (2) the action is a deprivation of a constitutional right or a federal statutory right. *Hott v. Hennepin County*, 260 F.3d 901, 905 (8th Cir. 2001).

1. As a threshold matter, Plaintiff has failed to expressly state claims against the individual TiZA Defendants in their individual capacities.

A Plaintiff must distinguish between claims against public officials in their individual capacities versus those in their official capacities:

> Public servants may be sued under [42 U.S.C. §] 1983 in either their official capacity, their individual capacity, or both. . . . This court has held that, in order to sue a public official in his or her individual capacity, a plaintiff must *expressly and unambiguously state so in the pleadings*, otherwise, it will be assumed that the defendant is sued only in his or her official capacity. Because section 1983 liability exposes public servants to civil liability and damages, we have held that only an express statement that they are being sued in their individual capacity will suffice to give proper notice to the defendants. *Absent such an express statement, the suit is construed as being against the defendants in their official capacity*.

Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999) (emphases added)

(citations omitted); *accord, e.g., Baker v. Chisom*, 501 F.3d 920, 923-24 (8th Cir. 2007).

Plaintiff's only reference to the term "individual" is in the caption of the First Amended Complaint, and in introductory paragraphs indentifying these persons as "individual[s] residing in the state of Minnesota." First Amend. Compl., at caption and ¶¶ 9-14. Plaintiff does not expressly assert any individual conduct by or any claim against the individuals in their "individual capacities." Rather, while Count I is labeled as "Against All Defendants," it is actually only asserted against TiZA[1], its Board of Directors, Islamic Relief, and the Commissioner; nowhere are the individuals in their individual capacities mentioned. First Amend. Compl., ¶¶ 65-67. Count II is even more restrictive, with this claim asserted only as against TiZA, despite the label "Against All Defendants Other Than The Commissioner." *Id*., at ¶ 73.

For this reason alone, this Court should dismiss any purported claims against the individual TiZA Defendants in their individual capacities.

2. Plaintiff has failed to allege the individual TiZA Defendants acted under color of state law (or acted at all).

The first element of a Section 1983 claim requires Plaintiff to allege the individual TiZA Defendants in their individual capacities were *acting* under the color of law. *Hott*, 260 F.3d at 905. Plaintiff must include allegations that "the defendant's unconstitutional or unlawful action was the cause in fact of the plaintiff's injury. * * * Conduct is the cause in fact of a particular result if the result would not have occurred but for the conduct. Similarly, if the result would have occurred without the conduct complained of,

[1] TiZA is defined only as Tarek ibn Ziyad Academy. First Amend. Compl., ¶ 1.

such conduct cannot be a cause in fact of that particular result." *Forest Park II v. Hadley*, 408 F.3d 1052, 1058 (8th Cir. 2005) (quotations and brackets omitted) (emphasis added).

Not only has Plaintiff failed to allege facts sufficient to draw an inference these individual defendants were acting under the color of law, nowhere in the First Amended Complaint does Plaintiff assert any allegations of any actions at all. In other words, Plaintiff has failed to allege the individuals, in their individual capacity, were the cause in fact of any constitutional deprivation.

Instead, Plaintiff simply provides a conclusory and generalized statement that "TiZA, its Board of Directors, and its sponsor Islamic Relief" -- not the defendants in their individual capacities – "have set school policies that endorse and promote a single religion, Islam." (First Amend. Compl., ¶ 67). It is fundamental that individual participation is an essential element of a Section 1983 claim against a defendant in his or her individual capacity. *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir.1996) (quotation omitted). The First Amended Complaint contains no allegations that the individual TiZA Defendants, in their individual capacities, participated in, or caused in fact, any alleged unconstitutional conduct that forms the basis of Plaintiff's claims.

3. Plaintiff has failed to allege the individual TiZA Defendants caused a deprivation of a constitutional right.

The second element of pleading a Section 1983 claim requires Plaintiff to allege the actions of the individual TiZA Defendants individually deprived Plaintiff of a constitutional right. *Hott*, 260 F.3d at 905. Plaintiff must assert more the conclusory allegations – the First Amended Complaint must contain sufficient facts to state a claim

for relief that is plausible on its face. *See Ashcroft*, at 1949. The Plaintiff must allege facts sufficient to allow the Court to draw the inference these individuals' conduct deprived the Plaintiff of a constitutional right in order to survive a motion to dismiss. *Id*.

Plaintiff has failed to assert any factual allegations regarding the specific, individual conduct of the individual TiZA Defendants, let alone that such specific action, committed by a specific individual, deprived Plaintiff of a constitutional right. Plaintiff merely makes the conclusory allegation that "[t]he application of the Minnesota Charter School Act to provide for public funding and operation of TiZA, and TiZA's use of public funds, violate the Establishment Clause of the First Amendment to the U.S. Constitution because they have the primary purpose and effect of advancing religion. . . ." First Amend. Compl ¶ 66. The First Amended Complaint is absolutely devoid of any express actions or conduct of the individual TiZA Defendants whatsoever, *a fortiori* any conduct that allegedly deprived Plaintiff of a constitutional right. Plaintiff's generalized allegations, which are not directed toward the specific conduct of any individual TiZA Defendant, are insufficient to state a claim for relief. *See Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) (explaining that plaintiff "must include sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level").

Plaintiff failed to plead a prima facie Section 1983 claim against the individual TiZA Defendants in their individual capacities. Any purported "individual capacity" claims must therefore be dismissed.

B. Plaintiff has failed to plead a prima facie Minnesota Establishment Clause claim against the individual TiZA Defendants in their individual capacities.

The Minnesota constitutional provisions preventing the establishment of religion provide that no ". . . money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries," Minn. Const. Art. I, § 16, and that "[i]n no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." Minn. Const. Art. XIII, § 2. "The fundamental concept is that the state may neither advance nor inhibit religion, which defines permissible limits of legislation under state law." *Stark v Independent School District, No. 640,* 123 F.3d 1068, 1077, 121 Ed. Law Rep. 41 (8th Cir. 1997). The establishment clauses prohibit both benefits and support to schools teaching distinctive religious doctrines. *Id.* (*quoting Minnesota Fed'n of Teachers v. Mammenga*, 500 N.W.2d 136, 138 (Minn. Ct. App.1993)).

Again, Plaintiff has failed to assert any factual allegations regarding the conduct of the individual TiZA Defendants in their individual capacities which violate the Minnesota onstitution. Accordingly, Plaintiff has also failed to plead a prima facie Minnesota Establishment Clause claim against the individual TiZA Defendants in their individual capacities and such claim must be dismissed.

III. IN THE ALTERNATIVE, THE INDIVIDUAL TIZA DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES ARE ENTITLED TO QUALIFIED IMMUNITY AS TO RETROSPECTIVE MONETARY RELIEF AND DISMISSAL AS TO INJUNCTIVE RELIEF.

A. Plaintiff's request for retrospective injunctive monetary relief against the individual TiZA Defendants in their individual capacities is barred by qualified immunity.

Alternatively, the Court should dismiss purported claims against the individual TiZA Defendants in their individual capacities based upon the doctrine of qualified immunity.[2] *See Wood v. Strickland*, 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) (applying qualified immunity to public school officials in Section 1983 cases). Qualified immunity is a powerful tool that shields individual officials from liability who are performing discretionary activities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v Fitzgerald*, 457 U.S. 800, 817 (1982). Qualified immunity is not only immunity from liability, but it is immunity from suit as well, and shields individual capacity defendants even where a constitutional violation may have occurred. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("One of the purposes of immunity, absolute or

[2] Immunity-based defenses may be brought under Rule 12(c). *See, e.g., Ansley v. Heinrich*, 925 F.2d 1339, 1346 (11th Cir.1991); *Prater v. Dahm*, 89 F.3d 538 (8th Cir. 1996) (considering qualified immunity on Rule 12(c) motion). Qualified immunity is *immunity from suit* rather than a mere defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806 (1985). The Courts have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation so that the expense of trial are avoided where the defense is dispositive. *Scott v. Harris*, 550 U.S. 372, 376, n.2, 127 S. Ct. 1769 (2007).

qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.").

Qualified immunity protects government officials from individual monetary liability in an effort to ensure they will not hesitate and react with indecision when confronting a difficult problem that calls for a decisive response. *Wood v. Strickland*, 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975).

> The imposition of monetary costs for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

Wood v. Strickland, at 319-320.

Qualified immunity limits the remedies available under Section 1983 against officials in their individual capacity to prospective injunctive or declaratory relief for ongoing violations of federal law. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (holding that a state official enjoys qualified immunity unless the official's conduct violated a clearly established constitutional or legal standard); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Officials may assert qualified immunity from retrospective relief when sued in their individual capacity. *McDuffie v. W.J. Estelle,* 935 F.2d 682, 684 (1991) (*citing Procunier v. Navarette,* 434 U.S. 555, 561, 98 S. Ct. 855, 859 (1978); *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir.1991)).

Here, Plaintiff seeks monetary relief in the form of an injunction requesting the individual TiZA Defendants to personally refund the state aid TiZA previously received. Such relief is retrospective and monetary in nature; thus, the individual TiZA Defendants in their individual capacities may assert the defense of qualified immunity against such relief.

The individual TiZA Defendants, "will merit qualified immunity unless their alleged conduct violated clearly established statutory or constitutional rights, that is, rights the contours of which were clear enough at the relevant time that a reasonable person would have been aware that his or her conduct violated them in the circumstances in which the conduct occurred." *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (citations omitted); *see also Waddell v. Forney*, 108 F.3d 889, 891 (8th Cir. 1997). In evaluating Plaintiff's Section 1983 claims against the defendants individually, the court must consider what specific constitutional rights the defendants allegedly violated, whether the rights were clearly established in law at the time of the alleged violation, and whether a reasonable person in the official's position would have known that his conduct would violate such rights. *Waddell*, 108 F.3d at 891. The inquiry whether the official would have known the alleged conduct violated the plaintiff's clearly established right must be undertaken in light of the case's specific context, not as a broad general proposition. *Anderson v. Creighton*, 483 U.S. 635, 639-640, 107 S. Ct. 3034, 3039 (1987).

Despite its 73 paragraph First Amended Complaint, Plaintiff failed to include any allegations that the conduct of any individual TiZA Defendant, in an individual capacity,

violated the Establishment Clause. Qualified immunity shields government actors from liability in civil lawsuits when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Because Plaintiff failed to describe any conduct of the individual TiZA Defendants, there can be no violation of any clearly established right, nor can there be any evaluation of whether a reasonable person in the official's position would have known that his or her conduct would violate such right. A plaintiff is required to plead facts that show a constitutional right had been clearly established under the particular circumstances and the defendant's actions deprived plaintiff of such right. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3042 n.6 (1987) ("Thus, on remand, it should first be determined whether the actions the [plaintiffs] allege [defendant] to have taken are actions that a reasonable officer could have believed lawful."). Here, Plaintiff has failed to do so.

The individual TiZA Defendants in their individual capacities are entitled to the protection of qualified immunity, and thus request this Court dismiss Plaintiff's claim for retrospective monetary relief requesting they personally refund the amount of state aid TiZA received.

B. Plaintiff's request for injunctive relief against the individual TiZA Defendants is without merit as such relief cannot be effectuated by these defendants individually.

Plaintiff seeks further injunctive relief requiring the individual TiZA Defendants in their *individual* capacities correct and eliminate the establishment of religion by TiZA, thus changing TiZA policies. First Amend. Compl., ¶ 21(b). Such relief, however, is

inappropriately sought against such defendants in their individual capacities as public officials acting in their individual capacities are powerless to carry out injunctive relief to change an entity's policies; rather, it is only in their *official* capacities that public officials may carry out equitable relief ordered by a court. *See Crawford v. Houston*, 386 F. Supp. 187 (D.C. Tex. 1974) (in Section 1983 action where injunctive relief was sought against defendants acting in both their official and individual capacities, the claim for such relief against the city officials in their individual capacities was dismissed on the ground that such officials could not individually be subjected to equitable remedies - public officials acting in their individual capacities, the court indicated, are powerless to carry out injunctive relief; thus, the court implied that it is only in their official capacities that public officials may carry out equitable strictures ordered by a court.); *see also Atcherson v Siebenmann*, 605 F.2d 1058, 1064 n.8 (8th Cir. 1979) (the court, although finding it unnecessary to reach the issue, noted that the public official in his individual capacity was not in a position to reinstate the improperly discharged employee; had the official not retained his immunity, the court indicated, it would have hesitated to assume that the reinstatement order applied to the official in his individual capacity).

Here, the individual TiZA Defendants are not in a position to effectuate policy changes in their *individual* capacities. Plaintiff's claims against the individual TiZA Defendants in their individual capacities seeking injunctive relief must be dismissed.

IV. AS ALLEGED IN THE FIRST AMENDED COMPLAINT, THE COURT LACKS SUBJECT MATTER JURISDICTION OVER TIZA BECAUSE TIZA IS AN ARM OF THE STATE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

A. TiZA is an Arm of the State Entitled to Eleventh Amendment Immunity.

Based on the allegations of Plaintiff's First Amended Complaint, which the Court must accept as true for purposes of this motion, TiZA is an instrumentality of the state of Minnesota and entitled to the protection of Eleventh Amendment immunity. Accordingly, this court may not exercise jurisdiction over TiZA with respect to Plaintiff's Section 1983 claim and pendent state law claim, and such claims must be dismissed.

In *Howlett v. Rose*, the Supreme Court emphasized "the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." 496 U.S. 356, 365, 110 L. Ed. 2d 332, 346 (1990). Whether an entity constitutes an "arm of the state" turns on its relationship to the state under state law and requires consideration of the provisions of state law that define the agency's character. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430-31 & n. 5, 117 S. Ct. 900 (1997); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568 (1977). A federal court must dismiss an action barred by the Eleventh Amendment for lack of subject-matter jurisdiction. *Phillips v. Minnesota State University Mankato*, Slip Copy, No. 09-1659 (DSD/FLN) [Doc #12],

*4-5, 2009 WL 5103233 (D. Minn. Dec. 17, 2009) (unpublished opinion) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64-65 (1996)).[3]

In reviewing whether an entity is an arm of the state for purposes of the Eleventh Amendment, the Court applies a two-prong test: (1) whether the state treasury would be liable to pay a legal judgment against the entity; and (2) the degree of local control and autonomy exerted over the entity. *Phillips*, at *5-6 (citing *Hadley v. N. Ark. Cmty. Technical Coll.*, 76 F.3d 1437, 1439 (8th Cir. 1996)); *see Thomas v. St. Louis Bd of Police Com'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (same, and noting importance of "whether a money judgment against the agency will be paid with state funds.").

Neither the Eighth Circuit nor this District have addressed the issue of whether a Minnesota charter school is entitled to Eleventh Amendment immunity as an arm of the state. Other cases, however, provide guidance. *Compare Hadley*, 76 F.3d at 1442 (holding North Arkansas Community Technical College to be arm of the state as state calls NACTC a state agency, state controls it, "and - most importantly - funds the agency's general operations primarily from the state treasury); *Crosby v. Pulaski Technical College*, No. 4:06CV1003 (2007 WL 2750672) *4 (E.D. Ark. Sept. 18, 2007) (same); *Arkansas Rural Medical Practice v. Nelson*, No. 4:09-CV823 (2009 WL

[3] Further, dismissal of state entities pursuant to Eleventh Amendment immunity is the law of the case. *See* Memorandum Opinion and Order (July 21, 2009), p. 6 n.2 (dismissing the MDE based on sovereign immunity) [Doc # 60]); *Agostini v. Felton*, 521 U.S. 203, 236 (1997) ("Law of the case" is a policy of deference under which "a court should not reopen issues decided in earlier stages of the same litigation."); *see also Little Earth of the United Tribes v. United States Dep't of Hous. & Urban Dev.*, 807 F.2d 1433, 1438 (8th Cir. 1986) ("The law of the case doctrine applies to issues implicitly decided in earlier stages of the same case.").

5206717) (Dec. 30, 2009) (holding Arkansas Rural Medical Practice Loan and Scholarship Fund was arm of the state for diversity purposes as governing board was state agency, subject to state control, and funded by the state); *Phillips*, at *6 (concluding MnSCU and Minnesota State University at Mankato (MSUM) arms of the state because the state treasury funds these entities and thus exposed to a judgment and the state controls them through a board appointed by governor by statute); *Schneeweis v. Northwest Technical College*, No. 97-1742 (1998 WL 420564), *6 (D. Minn. Jun 1, 1998) (holding Northwest Technical College entitled to Eleventh Amendment immunity because "any award of damages . . . would derive from a budget supported primarily by the State."); *Stones v. L.A. Cmty. Coll.*, 572 F. Supp. 1072, 1076-78 (C.D.Cal.1983) (holding community college was an arm of the state where the legislature retained a large degree of control over college and substantially all of the college's funding was derived from state); *U.S. ex rel Diop v. Wayne County Community College.*, 242 F.Supp.2d 497 (E.D. Mich. 2003) (holding community college was an arm of the state, concluding Michigan community colleges are created by the state, subject to the comprehensive statutory scheme governing the operations of community colleges, and due to the state's funding of more than 1/3 of the college's revenues, any damage award would invade the state treasury, at least in part); and *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822, 824 (8th Cir. 1998) (stating University of Minnesota is an instrumentality of the state); *with Auer v. Robbins*, 519 U.S. 452, 456 n.1, 117 S. Ct. 905, 907 n.1, 137 L.Ed.2d 79 (1997) (holding City of St. Louis's Board of Police Commissioners was not an arm of the state because, while the Governor appoints the

majority of the board members, the city is responsible for the board's financial liabilities and it is not subject to the State of Missouri's direction or control); *Iowa Valley Community College Dist. v. Plastech Exterior Systems, Inc.*, 256 F.Supp.2d 959, 964 (S.D. Iowa 2003) (holding Iowa community colleges were not arms of the state, based on great deal of autonomy and control and ability to acquire operating funds from local sources implicating "Iowa would necessarily be liable for payment of a judgment rendered against [the community college]"); and *Griner v. Southeast Cmty. Coll.*, 95 F.Supp.2d 1054, 1057 (D.Neb.2000) (holding community college is not an arm of the state where college is controlled mostly by a locally elected board, which has the right to levy taxes, and state "may" appropriate funds to state's community colleges to provide property tax relief, indicating Nebraska would not be liable for judgment against college).

While the cited cases may be instructive, "[i]n determining the applicability of the eleventh amendment to the political subdivisions of the state, the court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state." *Greenwood v. Ross*, 778 F.2d 448, 458 (8th Cir. 1985); *see also Regents of the University of California v. Doe*, 519 U.S. 425, 430 n. 5, 117 S.Ct. 900, 904 n.5 (1997) (stating analysis of whether an entity is an arm of the state "can be answered only after considering the provisions of state law that define the agency's character.").

1. The state treasury is liable for a judgment against TiZA.

Under Minnesota law, a judgment against TiZA would expose the state treasury to liability. TiZA is a "public school and is part of the state's system of public education,"

but is "exempt from all statutes and rules applicable" to public schools unless such statutes and rules are made applicable by the MCSL. Minn. Stat. § 124D.10(7). For example, conventional school districts are granted the express authority to levy a tax for any amount necessary to pay judgments against the district. *See* Minn. Stat. § 126C.43(3). But because TiZA is exempt from all statutes, TiZA may not invoke any statutory authority permitting it to levy a tax for the payment of a judgment. In fact, TiZA is *expressly forbidden* from levying taxes or issuing bonds. *See* Minn. Stat. § 124D.10(25)(b).

As alleged by Plaintiff, "TiZA is supported by tax funds from both the state of Minnesota and the United States." First Amend. Compl., ¶ 6. Plaintiff further asserts that Minnesota law provides for TiZA's funding through a complex statutory scheme established by the state legislature in Minnesota Statutes, Sections 124D.10, 124D.11 and 126C. *Id.*, ¶¶ 21, 23-29. Millions of state dollars are distributed to TiZA every year. *Id.*, ¶ 29. During the 2008-2009 academic year, for example, Plaintiff alleged TiZA received approximately $3.8 million in funding from the state of Minnesota. *Id.* ¶ 21.

Thus, in the event TiZA is burdened with liability for a judgment, the *only* means available for TiZA to satisfy such an obligation is to utilize money received from the state (or possibly the federal government). Under these circumstances, the State fisc is exposed to liability for any judgment against TiZA.

The State's exposure to a judgment against TiZA is what makes this case very different from *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). There, the Supreme Court considered "whether [Ohio] Board of Education [was] to be

treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or [was] instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Id.* at 280. The Court noted that, "*the answer depends, at least in part, upon the nature of the entity created by state law*." *Id.* (emphasis supplied). The Court found significant that even though the local school boards received money and guidance from the State, they could also issue bonds and levy taxes, concluding local school boards in Ohio have "*extensive powers to issue bonds . . . and to levy taxes*" and, "[o]n balance," are more like a county or city than an arm of the state; therefore, Ohio school boards are "not entitled to assert any Eleventh Amendment immunity . . . " *Id.* at 280-81 (emphasis supplied).

Accordingly, *Mt. Healthy* does not mandate the perfunctory conclusion that all public schools may not invoke the Eleventh Amendment. Rather, *Mt. Healthy* teaches that each state is different, and each state's laws must be evaluated in the determination of the applicability of the Eleventh Amendment. Under Minnesota law, the analysis leads to only one conclusion: a judgment against TiZA is a tantamount to a judgment against the State.

Other courts have reached a similar conclusion. For example, courts in California, Maryland, Virginia and West Virginia have determined that public schools are entitled to the protections of the Eleventh Amendment. *See, e.g., Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir. 1992) (because a judgment against the school district would be satisfied out of state funds, and under California law school districts were state agencies that performed central governmental functions, they were protected by the

Eleventh Amendment); *Board of Educ. of Baltimore County v. Zimmer-Rubert*, 409 Md. 200, 973 A.2d 233 (Md. 2009) (Maryland has "long considered county school boards to be State agencies rather than independent, local bodies" and citing collection of cases stating Maryland county boards of education are state agencies); *De Levay v. Richmond County School Bd.*, 284 F.2d 340 (4th Cir.1960) (affirming dismissal because Virginia school districts, as agencies of the state, were not subject to suit by a citizen of the District of Columbia by reason of the Eleventh Amendment) *(relying on O'Neill v. Early*, 208 F.2d 286 (4th Cir. 1954)); *Workman v. Mingo County Schools*, --- F.Supp.2d ----, 2009 WL 3600357 (S.D. W. Va. Nov. 3, 2009) (holding West Virginia's assumption of control over county school district entitled district to Eleventh Amendment immunity).

Here, because a judgment against TiZA would be satisfied from state funds, the State treasury is exposed to liability. As such, the first *Hadley* factor favors application of the Eleventh Amendment to TiZA.

2. The State of Minnesota exercises substantial control over TiZA.

Review of the second *Hadley* factor demonstrates the state's sweeping control over TiZA, from funding to approval over school buildings to its very existence as a school.

Plaintiff acknowledges the state's broad control over TiZA:

> The Commissioner and the Department of Education [] are charged with approving and overseeing charter schools. The Commissioner administers the legislature's public school funding program, including the Minnesota Charter School Law, Minn. Stat. § 124D.10, and has approved statutory distribution of funds to TiZA despite the school's constitutional violations. The Department is also responsible for reviewing and processing TiZA's charter school lease aid applications

> and reviewing Islamic Relief's audits and student performance reviews.

First Amend. Compl., ¶ 8[4]; *see also id.*, ¶ 60 (noting the "state's approval of" TiZA's sponsorship contract). Plaintiff also contends that TiZA's alleged entanglement "imposes excessive monitoring burdens upon the [Minnesota] Department [of Education]." *Id.*, ¶ 55. Plaintiff alleges the Commissioner may terminate TiZA's sponsorship arrangement for violations of law. *Id.*, ¶ 58.

The state's pervasive control over TiZA also finds expression in the strictures of the Minnesota Charter School Law:

- An entity is mandated to seek approval from the commissioner before acting as an authorizer. Minn. Stat. §§ 124D.3(c).
- Authorizers are mandated to participate in training approved by the Minnesota Department of Education. Minn. Stat. § 124D.10(3)(e).
- Certain authorizers mandated to re-apply for approval to act as authorizers by a certain date. Minn. Stat. § 124D.10(3)(f).
- The establishment of a charter school is dependent upon approval by the commissioner. Minn. Stat. § 124D.10(4)(b).
- Charter school must submit to commissioner a written report explaining how material weaknesses identified in audit reports are to be resolved. Minn. Stat. § 124D.10(6a).
- Expressly providing that charter schools are exempt from all statutes and rules applicable public schools except as provided in section 124D.10. Minn. Stat. § 124D.10(7).

[4] The State has wielded its power against TiZA. Recently, the MDE withheld nearly $1.4 million in state funding, $139,801.66 of which was based on Commissioner Seagren's Order, dated November 18, 2009, relating to alleged teacher licensure issues pursuant to Section 127A.42.

- Mandating that a charter school shall meet all federal, state and local health and safety requirements applicable to school districts. Minn. Stat. § 124D.10(8).

- Commissioner must approve any deviations from statutory audit procedures. Minn. Stat. § 124D.10(8)(j).

- Permitting commissioner to reduce charter school's state aid for failure to correct violations under MCSL. Minn. Stat. § 124D.10(8a)-8(b).

- Department of Education must review and "approve or disapprove" school facility leases. Minn. Stat. § 124D.10(17).

- Before formation of an affiliated nonprofit building corporation, charter school must request approval from the commissioner. Minn. Stat. § 124D.10(17a).

- Requiring commissioner approval for a change in sponsors. Minn. Stat. § 124D.10(23)(c).

- Authorizing commissioner to terminate contract between authorizer and charter school under certain circumstances. Minn. Stat. § 124D.10(23)(d).

The list goes on. The state also controls board composition (Minn. Stat. § 124D.10(4)(d)), admissions' requirements (Minn. Stat. § 124D.10(9)), pupil performance standards (Minn. Stat. § 124D.10(10)), employment and other operating matters, including teacher and administration qualification requirements (Minn. Stat. § 124D.10(11)), education of pupils with disabilities (Minn. Stat. § 124D.10(12)); the school year length (Minn. Stat. § 124D.10(13)); transportation services (Minn. Stat. § 124D.10(16)); and teacher and other employee retirement requirements (Minn. Stat. § 124D.10(22)), among others.

In sum, TiZA will rise or fall at the discretion of the state.

3. Minnesota case law holds public school districts are arms of the state.

The Minnesota courts have long held that public school districts are arms of the state. In *Village of Blaine v. Independent School District No. 12*, the court stated:

> While school districts are not technically municipal corporations, they are at least public corporations. But they are not within [the protections of] Minn. Const., art. 1, nor are they within U.S. Const. Amend. XIV, s 1. They are quasi-public corporations, governmental agencies with limited powers. They *are arms of the state* and are given corporate powers solely for the exercise of public functions for educational purposes.

272 Minn. 343, 351, 138 N.W.2d 32, 38 (1965) (emphasis added). Similarly, in *Independent School Dist. No. 581 v. Mattheis*, a declaratory judgment proceeding to establish school district's right to an agency hearing before the education commissioner, the court stated:

> We are unable to find any authority, and none is called to our attention, granting one arm of government [school district] a constitutional right to adjudicate in any manner, except that specified by the legislature, its differences with another branch of government. . . . As we read [Minnesota Statutes Section] 15.0411, the constitutional right to an agency hearing referred to in subd. 4 applies to individuals but not to subdivisions of government. . . . It has long been settled that school districts are quasi-municipal corporations and the creatures of statute, having only the rights expressly conferred on them by the legislature. They have no standing to challenge the constitutionality of a law which withholds from them other powers.

275 Minn. 383, 386-87, 147 N.W.2d 374, 377 (1966).

In *GME Consultants v. Oak Grove Dev.*, when deciding whether a school district's property was exempt from Minnesota's mechanics' lien statute as public property, the court stated:

> Minnesota case law exempting public property from mechanics' liens, albeit dated, however, remains solidly rooted in public policy. First, public

> property is owned by municipal corporations, school districts, and other quasi-municipal corporations which are expressly created to administer the local affairs of the state government. They are public entities created for public purposes. *School districts in particular 'are arms of the state* and are given corporate powers solely for the exercise of public functions for educational purposes.'

515 N.W.2d 74, 76 (Minn. Ct. App. 1994) (citations omitted) (emphasis added). In *Allen v. ISD. No. 17*, in holding a school district is not liable for injuries to a pupil from its negligent operation of a bus, the court stated:

> The common-law rule of nonliability for negligence rests upon the fact that its functional duty is public. [The school district] is charged with the control and management of its public school. It is an agency for the public good. Its function is to administer public education, and is a quasi governmental agency. It is an *arm of the state*, and its functions are governmental.

173 Minn. 5, 6, 216 N.W. 533, 543 (1927) (emphasis added). Also, in *Board of Education of City of Minneapolis v. Houghton*, when determining whether the Minnesota board of education must seek approval from the city of Minneapolis's planning commission as to the location and design of a school building before erecting it, the court stated:

> Chapter 13 of the home rule charter of the city of Minneapolis conferring certain powers upon the city planning commission [that no public improvements shall be authorized to be constructed in the city until the location and design of the same have been approved by the City Planning Commission] does not make it necessary that the approval of the commission be had as to the location and design of school buildings before they are erected by the board of education of said city. *The maintenance of public schools is not a matter of local, but of state, concern*. The portions of home rule charters having to do with school matters must be in harmony with, and not contrary to, the Constitution of this state and statutory provisions relative thereto.

181 Minn. 576, 233 N.W. 834 (Minn. 1930) (emphasis added).

Importantly, as noted above, TiZA does not have the statutory power to tax or levy for the payment of judgments. As such, TiZA is an arm of the state. *Compare Mt Healthy*, 429 U.S. 280-81 (board of education found to be local political subdivision and not arm of the state due in part to having "extensive power to issues bonds . . . and to levy taxes") *with Winberg v. University of Minnesota*, 499 N.W.2d 799, 802 (Minn. 1993) (University of Minnesota held not a local political subdivision, due in part to lack of power to levy taxes) and *Humenansky*, 152 F.3d at 824 (stating University of Minnesota is an instrumentality of the state);

The Minnesota Constitution confirms the treatment of public schools as arms of the state by the courts. Article XIII, Section 1 of the Minnesota Constitution states that "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature to establish a general and uniform system of public schools." Section 3 thereof provides in part: "The Legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the state."

4. Summary

As were the entities in *Hadley*, *Crosby*, *Arkansas Rural*, *Phillips*, *Scheeweis*, *Stones*, *Diop*, *Humenansky* and *Belanger*, TiZA, too, is an arm of the state. Most importantly, any judgment against TiZA would necessarily be satisfied out of state funds. And while TiZA may enjoy some local autonomy, the state in effect controls all aspects of TiZA's existence: establishment, termination, sponsorship, state aid funding, audits,

board composition, school year, transportation, pupil, even what buildings it may lease for school operations. As an arm of the state, TiZA is entitled to Eleventh Amendment immunity, and this court should dismiss all claims as against TiZA for lack of subject matter jurisdiction.

Additionally, because the Eleventh Amendment also bars state law claims against a state in federal court, *Cooper v. St. Cloud State Univ.*, 226 F.3d 964, 968 (8th Cir. 2000), and this Court only has pendent jurisdiction over the state constitutional claim, Plaintiff's state constitutional law claim must also be dismissed.

B. <u>The individual TiZA Defendants in their official capacities are also entitled to Eleventh Amendment immunity For Claims Seeking Retrospective Relief and Equitable Restitution.</u>

1. The Eleventh Amendment bars claims seeking retrospective relief and equitable restitution against state officials in their official capacities.

Eleventh Amendment immunity extends to the individual TiZA Defendants in their official capacities. Plaintiff's claims seeking retrospective relief in the form of a refund to the state of Minnesota must be dismissed.

The Eleventh Amendment prohibits federal-court lawsuits seeking retrospective relief. *See Miener v. Missouri*, 673 F.2d 969, 982 (8th Cir. 1982) (finding compensatory services are retrospective and barred by the Eleventh Amendment); *Edelman v. Jordan*, 415 U.S. 651, 664, 668, 94 S. Ct. 1347, 1358, 1357-58, 39 L. Ed. 2d. 662 (1974) (holding the Eleventh Amendment of the Constitution bars that portion of the District Court's decree that ordered retroactive payment of benefits). Only prospective, equitable relief has been recognized as an exception to Eleventh Amendment immunity. *See Ex Parte*

Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (holding that a state official who acted unconstitutionally could be sued in his official capacities for prospective relief only); *Edelman v. Jordan*, 415 U.S. at 664, 667-68, 94 S. Ct. at 1356, 1357-58.

Further, it is well settled that any money judgment against a state official in his or her official capacity "payable by the state" is barred by the Eleventh Amendment, including an award of restitution even though it is an equitable remedy rather than damages.[5] *Nevels v. Hanlon*, 656 F.2d 372, 377(8th Cir. 1981); *Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 1355-56, 39 L. Ed. 2d 662 (1974); *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 309 (8th Cir. 1978), cert. denied, 439 U.S. 1070, 99 S. Ct. 839, 59 L.Ed.2d 35 (1979); *Downing v. Williams*, 624 F.2d 612, 625-26 (5th Cir. 1980), vacated on other grounds, 645 F.2d 1226 (5th Cir. 1981); *Arthur v. Nyquist*, 573 F.2d 134, 138-39 (2d Cir.), cert. denied sub nom. *Manch v. Arthur*, 439 U.S. 860, 99 S. Ct. 179, 58 L.Ed.2d 169 (1978); *see also Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981).

Here, Plaintiff's claims against the individual TiZA Defendants in their official capacities, seeking a refund of the state aid TiZA has received would be payable by TiZA, an arm of the state. Such relief is retrospective, equitable restitution, which is barred by the Eleventh Amendment. Accordingly, such claims must be dismissed.

[5] The Eleventh Amendment further prohibits federal-court lawsuits seeking monetary damages from individual state officers in their official capacities because such lawsuits are essentially "for the recovery of money from the state." *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 464, 65 S. Ct. 347, 350, 89 L. Ed. 389 (1945). An action for damages against a state official in his or her official capacity is not against the person but is against the office and is no different from a suit against the State itself. *See Hafer v. Melo*, 502 U.S. 21, 25-26, 112 S.Ct. 358, 361-62 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989).

2. The Eleventh Amendment bars prospective relief sought against state officials to enforce conformity with state law.

The Eleventh Amendment bars prospective relief sought against state officials in their official capacities, where supplemental jurisdiction is asserted to enforce conformity with provisions of state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Here, the Court has pendent jurisdiction over Plaintiff's state constitutional claims and thus the Eleventh Amendment bars such claims regardless of the relief sought.

Based on the foregoing, if TiZA is found to be an arm of the state entitled to Eleventh Amendment immunity, the Eleventh Amendment would also bar suit against the individual TiZA Defendants in their official capacities, whether for monetary damages or prospective relief, on the basis of Plaintiff's state constitutional claim. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. at 97-124 (holding the Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law).

This Court should dismiss the pendent state law claim against the individual TiZA Defendants in their official capacities.

V. IRUSA AND SEAGREN'S CROSSCLAIMS MUST BE DISMISSED BECAUSE TIZA DID NOT AGREE TO INDEMNIFY THEM FOR THEIR OWN CONDUCT AND BECAUSE THEY CANNOT SEEK INDEMNITY FOR VIOLATING THEIR OWN STATUTORY OBLIGATIONS.

The crossclaims asserted by IRUSA and Seagren must be dismissed because such claims seek indemnification against TiZA for liability, damages and injury resulting from IRUSA and Seagren's own conduct, which is not permitted under Minnesota law because TiZA did not explicitly agree in the sponsorship contracts to indemnify IRUSA and

Seagren for their own conduct. The crossclaims must further be dismissed as against public policy because IRUSA and Seagren impermissibly seek to absolve themselves from their statutory responsibilities under the MCSL.

"The construction and effect of an unambiguous contract are questions of law for the court." *Lake Cable Partners v. Interstate Power Co.*, 563 N.W.2d 81, 85 (Minn. Ct. App. 1997) (citing *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979)). The general rule is that a person must accept responsibility for damages resulting from their own actions; they are not entitled to indemnity for damages caused by their own conduct. *Fossum v. Kraus-Anderson Const.*, 372 N.W.2d 415, 417 (Minn. Ct. App. 1985). "Agreements seeking to indemnify the indemnitee for losses occasioned by its own negligence are not favored by the law and are not construed in favor of indemnification **unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it**." *National Hydro Systems v. M.A. Mortenson Co.*, 529 N.W.2d 690, 694 (Minn. 1995) (emphasis in original; quotations omitted); *see also Yang v. Voyagaire Houseboats*, 701 N.W.2d 783, 791 (Minn. 2007) (same). Such an obligation will not be found by implication. *See Farmington Plumbing v. Fischer Sand and Aggragate, Inc.*, 280 N.W.2d 838, 242 (Minn. 1979), *superseded on other grounds by statute as recognized in Katzner v. Kelleher Const.*, 545 N.W.2d 378, 381 (Minn. 1996).

TiZA must have a sponsor to legally operate as a charter school. Minn. Stat. § 124D.10(4). In compliance therewith, IRUSA agreed to act as TiZA's sponsor. The sponsorship relationship began pursuant to a written contract dated February 10, 2003.

See Doc # 74-1 (Exhibit A to IRUSA's Answer and Crossclaim [Doc # 74]). TiZA and IRUSA entered into a renewed sponsorship contract on June 16, 2006.[6] *See* Doc # 74-2 (Exhibit B to IRUSA's Answer and Crossclaim [Doc # 74]).

Plaintiff sued IRUSA and Seagren not pursuant to a theory of vicarious liability for TiZA's conduct, but for their own independent liability arising from their own statutory obligations pursuant to the MCSL.

For example, Plaintiff alleges IRUSA improperly permitted TiZA's entanglement with religion with government by "disregarding requirements of Minnesota law aimed at avoiding such entanglement" in a number of ways. First Amend. Compl., at ¶ 56 [Doc # 66]. Specifically, Plaintiff alleges IRUSA violated Section 124D.10, subds. 3, 6 and 8 by authorizing a charter school – TiZA – "that is affiliated with religious institutions" and by failing "to ensure that [TiZA] did not promote a particular religion." *Id.*, ¶ 56(a). Plaintiff then alleges IRUSA violated section 124D.10, subd. 17 because IRUSA permitted TiZA to lease a facility owned by a sectarian organization that was not constructed as a school facility, failed to ensure that TiZA made reasonable efforts to locate public or nonsectarian facilities, and failed to follow the approval and documentation requirements establishing that TiZA's lease rates were reasonable. *Id.*, ¶ 56(d). Plaintiff alleges IRUSA failed to terminate its sponsorship with TiZA per section 124D.10, subd. 23(b)(3) due to TiZA's violations of the law, including section 124D.10, subds. 3, 6, 8 and 17. *Id.*, ¶¶ 56, 58, 61, and 62.

[6] Sponsorship contracts are generally renewed every three years. Minn. Stat. § 124D.10, subd. 6(9).

Plaintiff further alleged that IRUSA "set school policies that endorse and promote a single religion, Islam. [IRUSA has] used tax funds to sponsor . . . a school that is pervasively religious and sectarian, and that regularly promotes and advances Islamic beliefs and doctrine." *Id.*, at 67. Lastly, Plaintiff contends IRUSA improperly authorized, on repeated occasions, a charter school [TiZA] that promotes a particular religion in violation of the Establishment Clause of the First Amendment to the U.S. Constitution and similar provisions of the Constitution of the State of Minnesota. *See generally id*., ¶¶65-68, 71-73.

Plaintiff asserts similar allegations against Seagren. Plaintiff contends Seagren is charged with approving and overseeing charter schools and administering the State's public school funding program, including the "Minnesota Charter School Law, Minn. Stat. § 124D.10, and has approved *statutory* distribution of funds to TiZA despite the school's constitutional violations." *Id*., ¶8 (emphasis added). Plaintiff asserts the MDE (of which Seagren is Commissioner) failed to follow the approval and documentation requirements of section 124D.10, subd. 17 relating to TiZA's lease rates. *Id*., ¶ 56(d). Plaintiff alleges that Seagren failed to terminate IRUSA's sponsorship of TiZA per section 124D.10 due to TiZA's violations of the law, including section 124D.10, subds. 3, 6, 8 and 17, and the Federal Establishment Clause. *Id*., ¶¶ 8, 56(a)-(d), 58, 68.

It is this independent conduct of IRUSA and Seagren that forms the basis for Plaintiff's claims against these defendants, and, consequently, it is this independent conduct that must be considered in the context of IRUSA and Seagren's claims for indemnification under the indemnification provisions of the 2003 and 2006 sponsorship

contracts. *See* IRUSA Answer and Cross-Claim, at p. 12, ¶¶ 1-5 [DOC # 74]; Seagren Answer and Crossclaim, at pp. 20-21, ¶¶ 1-7 [DOC # 96].

As written, the 2003 and 2006 indemnification provisions, however, do not obligate TiZA to indemnify IRUSA and Seagren for liability arising from their own conduct:

> The Charter School shall assume full liability for its activities and shall indemnify and hold harmless the Commissioner and the Sponsor, its officers, and their agents and employees from any suits, claims, or liability arising under this Contract. The parties recognize and agree that the Commissioner and the Sponsor are immune from liability under this Contract under Minnesota Statutes Section 124D.10, Subdivision 25 (1994), as amended, and this paragraph is not intended to modify or otherwise affect that provision or any other law.

See 2003 [Doc. # 74-1] and 2006 Contracts [Doc. #74-2] , at ¶ 5.4. Nothing in this provision expresses any clear and unequivocal intent by TiZA to indemnify IRUSA or Seagren for their own conduct, nor does any language permit an inference of such an obligation. To the contrary, this provision mandates that TiZA "shall assume full liability for <u>its</u> activities" - not the activities of others, and in only this context TiZA agreed to "indemnify and hold harmless the Commissioner and the Sponsor . . ."

Only in cases where there is a clearly expressed intent by one party to indemnify another party for the other party's own negligence will courts enforce such a provision. *See, e.g., Lake Cable Partners*, at 86 (enforcing provision where indemnitor agreed to indemnify indemnitee, "including negligence on the part of [the indemnitee] or claimed on the part of [the indemnitee]"; *Oster v. Medtronic, Inc.*, 428 N.W.2d 116, 118-19 (Minn. Ct. App. 1988) (finding indemnification language "regardless of whether or not it is caused in part by a party indemnified hereunder" was sufficiently explicit to enforce

indemnification of another's own negligence); *Johnson v. McGough Const. Co., Inc.*, 294 N.W.2d 286, (1980) (holding that language stating party will "assume entire responsibility and liability for all damages" and will "indemnify and save harmless the Contractor * * * from all such claims including, without limiting the generality of the foregoing, claims for which the Contractor may be, or may be claimed to be, liable" was sufficiently clear that the "indemnitor is liable to the indemnitee for its negligence.") *superseded by statute.* While present in the cited cases, Section 5.4 of the sponsorship contracts do not express a similar intent by TiZA to indemnify IRUSA and Seagren for their own conduct. Their crossclaims, therefore, fail as a matter of law.

A further compelling reason exists favoring dismissal of the crossclaims against TiZA: in defiance of the public policy of this state, IRUSA and Seagren improperly seek indemnification for liability arising from a violation of their own statutory obligations.

Minnesota law does not permit the enforcement of an indemnity clause that is contrary to public policy. *Yang*, 701 N.W.2d at 791. "[A]n indemnity agreement that seeks to relieve a party of the consequences of a public duty imposed by statute is void," and against public policy. *Id*. (citing *Zerby v. Warren*, 297 Minn. 134, 144, 210 N.W.2d 58, 64 (1973)). In *Zerby*, shortly after a retailer sold glue to a minor, the minor's friend, also a minor, died after sniffing the glue. 297 Minn. at 161, 210 N.W.2d at 61. At the time of the sale, selling glue to minors was forbidden by statute. *Id*. The retailer sought enforcement of an indemnification clause in its contract with the manufacturer of the glue. 297 Minn. at 143-44, 210 N.W.2d at 64. The court rejected the retailer's attempt to enforce the provision:

> Any agreement which relieves the defendants of the consequences of the violation of the public duty imposed by [statute] is against public policy. For this reason, we hold that the trial court properly disallowed defendants' claim for indemnity based on the contract provision.

Id.; *see also U.S. v. J&D Enterprises*, 955 F.Supp. 1153 (D.Minn. 1997) (denying motion to file third party claim by contractor against owner in action commenced by United States under Clean Air Act, in part, as against public policy as contractor sought contractual indemnity for liability resulting from contractor's violation of statute); *see also National Union Fire Ins. v. Gates*, 530 N.W.2d 223, 228 (Minn. Ct. App. 1995) (refusing to allow indemnification based upon "the public policy against indemnifying intentional . . . acts."); *compare N.P. Ry. Co. v. Thornton Bros.*, 206 Minn. 193, 288 N.W. 226 (1939) (permitting enforcement of indemnity clause against Railroad by contractor for damages arising from installation of sewer under tracks as contract did not purport to relieve railroad of any statutory obligation).

In the First Amended Complaint, Plaintiff's allegations against IRUSA and Seagren are expressed only as violations of the MCSL and the Federal Establishment Clause and related provisions of the Minnesota Constitution. Specifically, Plaintiff alleges IRUSA violated Section 124D.10, subds. 3, 6, 8 and 17 by authorizing a charter school – TiZA – affiliated with a religious institution, by failing to ensure TiZA did not promote a particular religion, by permitting TiZA to lease a facility owned by a sectarian organization that was not constructed as a school facility, by failing to ensure that TiZA made reasonable efforts to locate public or nonsectarian facilities, and by failing to follow the approval and documentation requirements establishing that TiZA's lease rates were

reasonable. First Amended Complaint, ¶ 56(a)-(d) [Doc # 66]. Plaintiff further alleges that IRUSA failed to terminate its sponsorship with TiZA per section 124D.10, subd. 23(b)(3) due to TiZA's violations of the law, including section 124D.10, subds. 3, 6, 8 and 17. *Id*., ¶¶ 56, 58, 61, and 62. Plaintiff also contends that IRUSA improperly authorized TiZA thereby allowing the promotion of religion in violation of the Establishment Clause and similar provisions of the Minnesota Constitution. *See generally id*., ¶¶65-68, 71-73.

Plaintiff asserts similar statutory allegations against Seagren. Plaintiff contends Seagren is charged with approving and overseeing charter schools and administering the MCSL. *Id*., ¶8 (italics added). Plaintiff asserts that the MDE (of which Seagren is Commissioner) failed to follow the approval and documentation requirements of section 124D.10, subd. 17 relating to TiZA's lease rates and that Seagren failed to terminate IRUSA's sponsorship of TiZA per section 124D.10 due to TiZA's violations of the law, including section 124D.10, subds. 3, 6, 8 and 17, and the Establishment Clause. *Id*., ¶¶ 8, 56(a)-(d), 58, 68.

IRUSA and Seagren seek indemnity for their respective liability arising from their own statutory and constitutional violations, which is against public policy and contrary to Minnesota law. The crossclaims against TiZA should be dismissed.

CONCLUSION

The TiZA Defendants respectfully request this Court dismiss the individual TiZA Defendants in their individual capacities for Plaintiff's failure to plead prima facie claims against them. Alternatively, the individual TiZA Defendants request this Court dismiss

Plaintiff's claim for retrospective monetary relief pursuant to the doctrine of qualified immunity, as well as Plaintiff's claim for injunctive relief as such claims are improperly asserted against the individual TiZA Defendants in their individual capacity.

TiZA requests dismissal of Plaintiff's claims against TiZA for lack of subject matter jurisdiction as TiZA is an arm of the state and entitled to Eleventh Amendment immunity. Similarly, the TiZA Defendants request an order dismissing Plaintiff's claims for retrospective monetary relief against the individual TiZA Defendants in their official capacities as such relief is prohibited by the Eleventh Amendment.

Lastly, TiZA requests dismissal of IRUSA and Seagren's crossclaim as impermissibly seeking indemnification for their own conduct and for liability resulting from a violation of their own statutory obligations.

Respectfully submitted,

JOHNSON & CONDON, P.A.

Dated: February 12, 2010.

By: /s/ Shamus P. O'Meara .

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