

Case No. A08-1899

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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*Faegre & Benson, LLP and Eckland & Blando, LLP,*

*Interpleader Plaintiffs and Respondents,*

vs.

*R&R Investors, Curtis Hogenson, Diane Larson, Eileen M. Berger, Shirley J. Arvidson, David Klug, Mary King, Paul Strangis, the Estate of Norman K. Arvidson, and the Estate of Gerald Berger,*

*Interpleader Defendants,*

and

*R&R Investors I - UPA Partnership, Curtis Hogenson, individually and as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); Diane Larson, individually and as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); Eileen M. Berger, individually and as successor tenant-in-partnership in R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); and Shirley J. Arvidson, individually and as successor tenant-in-partnership in R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased),*

*Counterclaimants/Cross-Claimants and Appellants,*

vs.

*R&R Investors and Paul Strangis,*

*Interpleader Defendants/Cross-Claim Defendants and Respondents,*  
and

*Faegre & Benson, LLP and Eckland & Blando, LLP,*

*Defendants on Counterclaims and Respondents.*

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## TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
A.    The Tucker Act Litigation. ....	3
B.    The Maranatha Inn Apartments. ....	4
C.    The Hogenson Group Transferred Away Its Interests In The Partnership Without Any Reservation Of Rights. ....	5
1.    The Hogenson Group acquired the Partnership from the Janskis. ....	5
2.    The Hogenson Group transferred the Partnership to the Klugs without any reservation of rights. ....	6
3.    Strangis acquired the Partnership from the Klugs. ....	7
D.    The Hogenson Group Retained Faegre & Benson On Behalf Of The Partnership, And Faegre & Benson Remained Neutral When Ownership Issues Arose Regarding The Tucker Act Litigation.....	7
1.    The Hogenson Group attempted to “claw back” the rights to the Tucker Act litigation from the Klugs. ....	8
2.    Representation of the Partnership was transferred from Faegre & Benson to Eckland & Blando, and Paul Strangis began representing the Partnership as its key contact person with respect to the Tucker Act litigation. ....	10
E.    The Hogenson Group Authorized Faegre & Benson’s Continued Representation Of The Partnership In The Tucker Act Litigation And The Settlement On Behalf Of The Partnership. ....	11

F.	The Hogenson Group Opposed Faegre & Benson’s Request To Interplead The Settlement Proceeds. ....	13
G.	Faegre & Benson Provided The Partnership Legal File To The Hogenson Group.....	14
H.	The Hogenson Group Filed Its Amended Counterclaims And The District Court Properly Dismissed Them. ....	15
	SUMMARY OF THE ARGUMENT .....	20
	ARGUMENT.....	21
I.	STANDARD OF REVIEW.....	21
II.	THE DISTRICT COURT CORRECTLY HELD THE HOGENSON GROUP’S COUNTERCLAIMS AGAINST FAEGRE & BENSON FAILED TO STATE LEGALLY SUFFICIENT CLAIMS FOR RELIEF AS A MATTER OF LAW. ....	22
A.	Since The Funds Will Be Turned Over To The Rightful Owners As Determined By This Court, The Hogenson Group’s Counterclaims Fail Because There Can Be No Damages.....	23
B.	The District Court Correctly Held That The Hogenson Group’s Counterclaims For Malpractice Fail To State A Claim Upon Which Relief Can Be Granted. ....	26
C.	The District Court Correctly Ruled The Hogenson Group’s Fraud-Based Counterclaims Fail To State Legally Sufficient Claims For Relief.....	31
D.	The District Court Correctly Ruled The Hogenson Group’s Conversion-Based Counterclaims Fail To State A Claim Upon Which Relief Can Be Granted. ....	34
	CONCLUSION.....	37
	CERTIFICATE OF COMPLIANCE.....	39

**TABLE OF AUTHORITIES**

**Page No.**

**Cases**

Adams v. United States,  
42 Fed. Cl. 463 (1998) .....4

Baumgarten v. Milavetz, Gallop & Milavetz, P.A.,  
1999 WL 326164 (Minn. Ct. App. May 25, 1999).....28, 29

Chancellor Manor v. United States,  
331 F.3d 891 (Fed. Cir. 2003).....4

D.A.B. v. Brown,  
570 N.W.2d 168 (Minn. Ct. App. 1997).....37

Elzie v. Comm’n of Pub. Safety,  
298 N.W.2d 29 (Minn. 1980).....21

Franconia Assocs. v. United States,  
536 U.S. 129 (2002).....4

Frost-Benco Elec. Ass’n v. Minn. Pub. Utils. Comm’n,  
358 N.W.2d 639 (Minn. 1984).....22

Glenna v. Sullivan,  
245 N.W.2d 869 (Minn. 1976).....26, 28, 29

Hamilton v. Stageberg,  
2001 WL 267477 (Minn. Ct. App. Mar. 20, 2001).....28

Hennepin County 1986 Recycling Bond Litig.,  
540 N.W.2d 494 (Minn. 1995).....1, 21

Hildegarde, Inc. v. Wright,  
70 N.W.2d 257 (Minn. 1955).....35, 36

Larson v. Archer-Daniels-Midland Co.,  
32 N.W.2d 649 (Minn. 1948).....35

<u>Love v. Anderson,</u> 61 N.W.2d 419 (Minn. 1953).....	31-32, 33
<u>Markwood v. Olson Mfg. Co.,</u> 289 N.W. 830 (Minn. 1940).....	21
<u>Martens v. Minn. Mining &amp; Mfg. Co.,</u> 616 N.W.2d 732 (Minn. 2000).....	<i>passim</i>
<u>Meehl v. Berg,</u> 2005 WL 159601 (Minn. Ct. App. Jan. 19, 2005).....	28
<u>Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.,</u> 2003 WL 22388087 (Minn. Ct. App. Oct. 21, 2003) .....	37
<u>N. States Power Co. v. Franklin,</u> 122 N.W.2d 26 (Minn. 1963).....	<i>passim</i>
<u>Newman v. Brendel &amp; Zinn, Ltd.,</u> 691 N.W.2d 480 (Minn. Ct. App. 2005).....	36
<u>Rouse v. Dunkley &amp; Bennett, P.A.,</u> 520 N.W.2d 406 (Minn. 1994).....	23, 26, 28
<u>Royal Realty Co. v. Levin,</u> 69 N.W.2d 667 (Minn. 1955).....	1, 21-22
<u>Storage Tech. Corp. v. Cisco Sys., Inc.,</u> 395 F.3d 921 (8th Cir. 2005) .....	23
 <b><u>Other Authorities</u></b>	
Minn. Stat. §§ 481.07-071 .....	31
Minn. R Civ. P. 12.02(e).....	1, 32
Minn. R. Civ. P. 22. ....	24, 35, 36

## STATEMENT OF THE ISSUE

Whether the District Court correctly held that Appellants Curtis Hogenson, Diane Larson, Eileen Berger, and Shirley Arvidson, individually and as partners in R&R Investors (collectively, “Hogenson Group”), failed to state legally sufficient counterclaims against Respondent Faegre & Benson, LLP (“Faegre & Benson”), where the Hogenson Group failed to allege the essential elements of its counterclaims and, further, where there was no basis consistent with its pleadings upon which the Hogenson Group could allege that it had been damaged.

The District Court, by and through the Honorable Cara Lee Neville, correctly held as a matter of law based on the facts as plead by the Hogenson Group that all of the Hogenson Group’s counterclaims against Faegre & Benson failed to state legally sufficient claims for relief.

### **Apposite Authority:**

Minn. R Civ. P. 12.02(e);

Hennepin County 1986 Recycling Bond Litig., 540 N.W.2d 494 (Minn. 1995)

N. States Power Co. v. Franklin, 122 N.W.2d 26 (Minn. 1963)

Royal Realty Co. v. Levin, 69 N.W.2d 667 (Minn. 1955)

## STATEMENT OF THE CASE

Respondents Faegre & Benson and Eckland & Blando, LLP (“Ecklund & Blando”) (collectively, “Attorneys”) are counsel for R&R Investors (“Partnership”), a partnership entity that was represented by the Attorneys in a lawsuit against the United States of America (“Government”). That lawsuit (“Tucker Act litigation”) arose out of the Partnership’s sole asset, the Maranatha Inn Apartments. The Partnership’s claims in the Tucker Act litigation were resolved through settlement in May 2007.

Following the settlement, the Hogenson Group and Respondent Paul Strangis asserted competing claims for the settlement proceeds from the Tucker Act litigation (“Funds”). Each faction claimed to represent the “real” Partnership and demanded the Attorneys pay over the Funds to them. In light of these competing claims to the Funds, the Attorneys commenced an interpleader action in Hennepin County District Court, the Honorable Cara Lee Neville presiding, seeking to deposit the Funds with the Court pending judicial determination of their ownership. Despite the fact that Faegre & Benson did not take sides in the partnership dispute between the Hogenson Group and Strangis regarding entitlement to the Funds, the Hogenson Group asserted various counterclaims against Faegre & Benson sounding in fraud, malpractice and conversion. Faegre & Benson subsequently brought a Motion to Dismiss the counterclaims.

By order and judgment filed on September 2, 2008, the District Court, *inter alia*, granted Faegre & Benson’s Motion to Dismiss the Hogenson Group’s counterclaims with prejudice. This appeal followed. Faegre & Benson respectfully requests the Court to affirm the dismissal of the Hogenson Group’s counterclaims in all respects.

## STATEMENT OF THE FACTS

### **A. The Tucker Act Litigation.**

The Tucker Act litigation constitutes a series of lawsuits commenced on behalf of more than 700 plaintiffs situated similarly to the Partnership. Like the other similarly situated plaintiffs, the Partnership's sole operative asset was an apartment building that was constructed pursuant to a variety of regulatory and contractual terms with the Government. Under the terms of the initial contract with the Government (and applicable federal regulations), plaintiffs like the Partnership would receive favorable mortgage terms in exchange for constructing and operating low- and moderate-income housing for a period of years. Under the original terms of the deal, plaintiffs like the Partnership were free to "prepay" their mortgage at a certain point in time and to convert their property to an unrestricted commercial use such as market-rent apartments, condominiums, and the like.

However, during the 1980's and early 1990's, the Government recognized that if plaintiffs such as the Partnership prepaid their mortgages and converted their low- and moderate-income housing to purely private commercial use, this would create a considerable need for replacement affordable housing. Rather than accept that challenge and meet the expected housing need through legitimate means, the Government sought to require plaintiffs like the Partnership to shoulder the burden without any additional consideration. In essence, the Government enacted certain laws and regulations that unilaterally rescinded the opportunity for plaintiffs like the Partnership to prepay their mortgages and forced them to continue to provide low- and moderate-income housing.

Faegre & Benson and Jeff Eckland instituted a number of lawsuits on behalf of these plaintiffs against the Government arising out of the enactment of these regulations and administration of these mortgages. The lawsuits have a long and tumultuous history through both the trial and appellate courts. See, e.g., Adams v. United States, 42 Fed. Cl. 463 (1998) (dismissing, in part, breach of contract claims brought by affordable housing owners); Chancellor Manor v. United States, 331 F.3d 891 (Fed. Cir. 2003) (rejecting federal government's attempts to avoid liability for Fifth Amendment takings of properties owned by affordable housing owners). For a significant period of time, many of these plaintiffs were without claims until Faegre & Benson successfully persuaded the United States Supreme Court that the Tucker Act litigation could and should proceed against the Government. See Franconia Assocs. v. United States, 536 U.S. 129 (2002) (unanimous decision reversing U.S. Court of Appeals and permitting affordable housing owners to pursue breach of contract and takings claims against the federal government). On remand, Faegre & Benson's victory for the plaintiffs in Franconia established the framework for a global settlement with the Government in the Tucker Act litigation.

**B. The Maranatha Inn Apartments.**

The Maranatha Inn Apartments ("Property") is an apartment building located in Morrison County, Minnesota, which was originally purchased by the Partnership in November 1978. (SA30, ¶ 79; SA101.) The Property is the subject of a mortgage, the terms of which were breached by the Government. (SA34-35, ¶ 101.) This breach of the mortgage terms gave rise to the Partnership's claims for damages in the Tucker Act litigation as described more fully below. (Id.)

**C. The Hogenson Group Transferred Away Its Interests In The Partnership Without Any Reservation Of Rights.**

**1. The Hogenson Group acquired the Partnership from the Janskis.**

The Partnership was formed by Robert and Ruth Ann Janski on or about January 1, 1975. (SA105, ¶ 1.) Pursuant to a Substitution of Partnership Agreement (“SPA”) and an Indemnity Agreement dated October 30 and December 1, 1984, respectively, the Janskis transferred all of their interests in the Partnership to the Hogenson Group and its predecessors in interest. (SA106, ¶ 5; APP394-395; SA240-241.) The SPA clearly expressed that the members of the Hogenson Group were not simply purchasing the assets of the Partnership. Instead, pursuant to Government approval, they were being *substituted* in place of the Janskis as partners in the Partnership:

Selling Partners have agreed to transfer their partnership interest in R&R Investors to Incoming Partners who have agreed to purchase Selling Partners interest. *Selling Partners and Incoming Partners have applied to the Farmers Home Administration for permission to substitute incoming partners for Selling Partners in R&R Investors and the Farmers Home Administration has given such approval.*

(APP394, ¶¶ 3-4) (emphasis supplied). The Government further approved the Hogenson Group members’ assumption, as partners in the Partnership, of the obligations imposed under the promissory notes executed by the Partnership in favor of the Government (“Promissory Notes”), and the related real estate mortgages (“Mortgages”). (APP403-404.)

**2. The Hogenson Group transferred the Partnership to the Klugs without any reservation of rights.**

On or about April 6, 2000, pursuant to a Purchase Agreement and additional documents executed by the Hogenson Group and David and Mary Klug, the members of the Hogenson Group transferred their interests in the Partnership to the Klugs. (APP412-418; SA242.) These documents confirmed that the Klugs were being substituted in place of the Hogenson Group members as partners in the Partnership, and that all parties intended the Partnership to continue as a going concern:

To facilitate the sale of this property, buying parties agree to *purchase an existing partnership*, known as R&R Investors. R&R Investors is presently the owner of [the Property].

\*\*\*

AN AGREEMENT OF PARTNERS OF R&R INVESTORS PARTNERSHIP CONSENTING TO ASSIGN THE PARTNERSHIP SHARES AND COMPLETE A SUBSTITUTION OF PARTNERS.

\*\*\*

[T]his transfer shall not interfere in any way with the ordinary business of the partnership and that said sale, assignment and transfer shall not affect any of the rights, duties and obligations or the powers contained in the amended partnership agreement and that *the partnership, R&R Investors, will continue* to retain, own, and operate [the Property].

(APP415-416 at Addendum C ¶ 4; APP417 at preamble and ¶ 3.) (emphasis added).<sup>1</sup>

These documents further provided the Klugs would assume the Partnership's obligations under the Promissory Notes and the Mortgages. (APP415 at ¶ 1.) In the Hogenson

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<sup>1</sup> Ninety-nine percent of the Hogenson Group's partnership interests were transferred to the Klugs under these agreements, with Berger retaining a one percent interest. (APP418, ¶ 2.) The Klugs assigned a security interest in the Partnership to the Hogenson Group to secure a 36-month promissory note executed by the Klugs. (SA242.)

Group's subsequent correspondence to the Government, the transfer to the Klugs was characterized as a "substitution of partners." (SA243-244.)

**3. Strangis acquired the Partnership from the Klugs.**

In 2004, the Klugs transferred their Partnership interests to Paul Strangis and a partnership he controls. (SA245-250; SA251, ¶ 2.) In consideration for the Government's approval for substituting Strangis in place of the Klugs as a general partner in the Partnership, Strangis agreed to assume the Partnership's obligations under the Promissory Notes and the Mortgages. (SA245.) The Government subsequently approved the substitution of Strangis into the Partnership as the majority partner, with David Klug retaining a one percent interest. (SA246-250.)

Thus, rather than a series of purchases of assets by different partnerships, each of these transfers—by the Janskis, to the Hogenson Group, to the Klugs, and then to Strangis—was characterized and reported in the documentation provided to the Government as a substitution of incoming partners in place of withdrawing partners in a continuation of the Partnership. None of this is surprising, as it was the Government's clear expectation for the incoming partners to assume the existing Partnership's obligations to the Government.

**D. The Hogenson Group Retained Faegre & Benson On Behalf Of The Partnership, And Faegre & Benson Remained Neutral When Ownership Issues Arose Regarding The Tucker Act Litigation.**

In November 2002, the Partnership's then-managing partner, Gerald Berger, contacted Faegre & Benson to engage as litigation counsel for the Partnership in the Tucker Act litigation. (SA255.) By letter dated January 24, 2003, Faegre & Benson

agreed to represent the Partnership in the Tucker Act litigation and provided a Contingent Fee Agreement (“CFA”) to Berger. (SA191.) In that letter, Berger was informed that he would be the “key contact” person for the Partnership and therefore would be “designated to receive all future mailings regarding the litigation and other developments.” (Id.) As the key contact person, it would be up to Berger to ensure that he distributed such materials to his general and limited partners (and all other relevant business associates) and apprise them of developments in the Tucker Act litigation. (See id.) Pursuant to the CFA, on or about February 28, 2003, Faegre & Benson was retained to represent the Partnership as a plaintiff in the Tucker Act litigation. (APP502-504; SA32, ¶ 87 and SA209-212).

**1. The Hogenson Group attempted to “claw back” the rights to the Tucker Act litigation from the Klugs.**

From the inception of the representation, Faegre & Benson had clearly informed the Hogenson Group that Faegre & Benson represented the Partnership, not the individuals who constituted the Partnership. Berger confirmed his understanding of this aspect of the representation in a March 21, 2003 letter sent to Faegre & Benson. (SA259-260.) In this letter, Berger refers to a telephone conversation he had with Faegre & Benson regarding the firm’s representation of the Partnership rather than individuals. (Id.) Berger explains how, in the sale of a separate partnership entity with claims in the Tucker Act litigation, he protected his interests in litigation proceeds by contracting with the buyers to carve out the claims from the sale, and states, “We plan to obtain the same agreement from [the Klugs] in favor of the R&R partners listed.” (Id.) Thus, Berger

acknowledged that he and the other members of the Hogenson Group had not retained ownership of the Tucker Act litigation rights when they transferred their interests in the Partnership, but that he had developed a plan to “claw back” ownership of those rights. (Id.)

In May 2003, Michael Vadnie, counsel for the Hogenson Group, provided Faegre & Benson with a draft “Saving Clause” intended to retroactively “accomplish the retaining of the existing partnership R&R Investors by the sellers Gerald Berger, Norman K. Arvidson, and Curtis O. Hogenson,” and sought guidance from Faegre & Benson regarding the effectiveness of the proposed agreement. (SA261-262.) Faegre & Benson was not the transactional attorney for the Klugs, the Hogenson Group, or the Partnership, and did not represent the Partnership or the partners in any capacity at the time of the 2000 transfer to the Klugs. (SA257-258, ¶ 4.) Because the ownership and preservation of, and entitlement to, the claims in the Tucker Act litigation was a matter to be settled among the various partners, Faegre & Benson declined to provide the guidance Vadnie sought. (Id.) Further, in letters sent to the Hogenson Group in July 2003, Faegre & Benson reminded the Hogenson Group members that “any damages recovered will be awarded to the partnership of R&R Investors. It will then be the partnership’s responsibility to divide and distribute the damages among the partners per your partnership agreement.” (SA265-267.)

In August 2003, Mr. Vadnie informed the Hogenson Group and Faegre & Benson that the Klugs had expressed concerns with the proposed Saving Clause, and that they were considering selling the Partnership to an investor. (SA268.) Vadnie again sought

advice on this matter in a letter to Faegre & Benson dated October 22, 2003. (SA263-264.) Consistent with their earlier communications, attorney Jeff Eckland, then associated with Faegre & Benson, responded via telephone to inform Vadnie that he and Berger would have to decide for themselves how best to deal with the issue. (SA258, ¶ 5.)

Although the Klugs refused to sign the Saving Clause proposed by the Hogenson Group, it may be that they reached some agreement with the Hogenson Group with respect to the handling of the Funds. In a letter apparently from Klug, dated January 9, 2004, Mr. Klug stated that he would turn the Funds over to the Hogenson Group:

In the event that R&R Investors, now owned by me, receives any funds through litigation started by past partner, Gerald Berger, I will assign any and all interest received to those checks and to any lawsuit proceeds to the original partners of R&R Investors. At the time any funds are received from me, I will direct the return of any funds to you, so that you may do disbursal [sic] according to your partnership agreement.

(APP544.) Despite this apparent agreement, the Hogenson Group sought to have the Klugs execute an assignment and amendment to the partnership agreement, apparently intended to bind any successor partners, which the Klugs refused to do. (APP551-552.) Throughout this period, Faegre & Benson continued to represent the Partnership in the Tucker Act litigation. (Id.)

2. **Representation of the Partnership was transferred from Faegre & Benson to Eckland & Blando, and Paul Strangis began representing the Partnership as its key contact person with respect to the Tucker Act litigation.**

By letter dated September 6, 2004, Berger, who was still acting as the key contact person for the Partnership in connection with the Tucker Act litigation, requested that

Faegre & Benson transfer the case to Eckland & Blando, a firm created by Jeff Eckland upon his departure from Faegre & Benson. (APP507.) Also in September 2004, Strangis, the controlling owner and majority partner in the Partnership, began working with Eckland as the key contact person for the Partnership in connection with the Tucker Act litigation. (SA251, ¶¶ 2-3.)

**E. The Hogenson Group Authorized Faegre & Benson's Continued Representation Of The Partnership In The Tucker Act Litigation And The Settlement On Behalf Of The Partnership.**

On December 31, 2005, Faegre & Benson renewed its appearance as counsel for the Partnership in the Tucker Act litigation, representing the Partnership jointly with Eckland & Blando. (APP514; APP508.) Both Strangis and the Hogenson Group approved Faegre & Benson's renewed representation of the Partnership in the Tucker Act litigation. (Id.)

In June 2006, the Hogenson Group and Strangis executed Settlement Consent Forms authorizing the Attorneys to settle the Tucker Act litigation on behalf of the Partnership. (APP518-523.) The Settlement Consent Forms expressly provide that each signor: (1) had a reasonable time to review and consider the Settlement Agreement in the Tucker Act litigation ("Settlement Agreement"); (2) carefully read and fully understood the Settlement Agreement; (3) understood that by signing the Settlement Agreement he or she released all claims raised in the Tucker Act litigation; and (4) authorized the Attorneys to execute the Settlement Agreement on the Partnership's behalf. (Id.)

In September and November 2006, members of the Hogenson Group and their independent counsel contacted the Attorneys regarding the status and ownership of the

Partnership's claims in the Tucker Act litigation. (SA269-272.) In their responses, the Attorneys consistently made information regarding the Tucker Act litigation available to the Hogenson Group and Strangis, and consistently remained neutral with respect to the entitlement to the Funds as between the Hogenson Group and Strangis. (Id.) At all times, the Hogenson Group was informed and aware the Attorneys believed that the Partnership was no longer owned by the Hogenson Group, the Attorneys were communicating with Strangis with regard to these issues, and the Attorneys continued to represent the Partnership in the Tucker Act litigation:

I understand that your office represents Curtis Hogenson, Diane Larson, Shirley Arvidson, and Eileen Berger, all of whom are either former partners of R&R Investors, a Minnesota partnership ("R&R") or spouses of the same. As I believe you understand, this office—in association with Faegre & Benson LLP—represents the R&R partnership, which currently is owned by partners different from the former partners and spouses named above.

...Jeff Eckland and this firm have consistently regarded the client as the partnership R&R Investors ... *We have and must remain neutral with respect to the issue of entitlement to settlement proceeds as between your clients and Mr. Strangis[.]* \*\*\* We will of course make the same information available to Mr. Strangis and/or his counsel upon request.

(Id.) (emphasis added).

On May 18, 2007, pursuant to the authorization provided in the Settlement Consent Forms, the Attorneys executed the Settlement Agreement on behalf of the Partnership in the Tucker Act litigation. (APP525-540.) The Settlement Agreement provides for the Funds to be disbursed to the Attorneys on behalf of the Partnership. (APP536 at Part III. 8.)

**F. The Hogenson Group Opposed Faegre & Benson's Request To Interplead The Settlement Proceeds.**

In June and August 2007, the Hogenson Group and Strangis each asserted that they were entitled to receive the Funds from the Attorneys on behalf of the Partnership. (SA164-165; SA273-274.) The Attorneys did not take a position regarding which faction was entitled to receive the Funds. (Id.) Instead, the Attorneys sought the agreement of all parties to place the Funds into an escrow account pending resolution of their dispute. (Id.)

In a letter to Curtis Hogenson dated July 31, 2007, Faegre & Benson reiterated its history of representing the Partnership solely as litigation counsel, and reminded Hogenson of the position regarding ownership of the Tucker Act claims that had been consistently expressed by Faegre & Benson since 2003:

...I stand by my prior statement that the claim against the U.S. Government asserted in the above lawsuit is a claim on behalf of R&R Investors, the partnership. \*\*\*

This was made clear to Gerald Berger, Diane Larson and you before the claim on Maranatha Inn was filed. In addition to conversations between Jeff Eckland, then of Faegre & Benson, and Gerald Berger, in 2002 and 2003, a letter dated July 14, 2003 was sent to all three of you ...[which] advised you: "Please be aware that any damages recovered will be awarded to the partnership of R&R Investors. It will then be the partnership's responsibility to divide and distribute the damages among the partners per your partnership agreement." \*\*\*

Thus, as we informed you in 2003, you simply must deal with the current owner of R&R Investors in order to solve the issue of entitlement to the lawsuit proceeds. \*\*\* Faegre & Benson remains neutral on the issue of entitlement to settlement proceeds as between you, Ms. Larson, and Mr. Strangis.

(SA275-277.)

On October 5, 2007, counsel for the Hogenson Group brought a motion for substitution of counsel in the Tucker Act litigation, seeking to replace the Attorneys as counsel of record for the Partnership. (SA182-183.) On October 9, 2007, in light of the competing claims to the Funds and the actions taken by counsel for the Hogenson Group, the Attorneys commenced this interpleader action, seeking to deposit the Funds with the District Court pending judicial determination of the competing claims between the Hogenson Group and Strangis. (SA278-285; SA286-287.) On January 5, 2008, the District Court granted the Attorneys' Motion to Deposit Funds. (SA288-292.)

On October 29, 2007, at the direction of Strangis on behalf of the Partnership, the Attorneys filed the Partnership's opposition to the Hogenson Group's motion to substitute counsel in the Tucker Act litigation. (SA137-146.) In their opposition papers, the Attorneys affirmatively stipulated that, if the Hogenson Group was successful in the interpleader action, the Attorneys would step down as counsel of record for the Partnership in the Tucker Act litigation. (SA141 at p. 5 n.4.)

**G. Faegre & Benson Provided The Partnership Legal File To The Hogenson Group.**

In October 2007, the Hogenson Group and its counsel, Erick Kaardal, contacted Faegre & Benson and requested that the Partnership "file" be transferred to Kaardal's offices. (APP350.) From October through December 2007, Faegre & Benson and Kaardal exchanged correspondence regarding the requested documents. (APP351; APP353; SA293-295; APP356-357; SA296; SA358-359; SA297; APP360-361; SA298-299.) Because the Tucker Act lawsuit involves hundreds of plaintiffs and years of

litigation, and because it was not clear that the Hogenson Group was entitled to demand documents on behalf of the Partnership, Faegre & Benson sought clarification regarding which documents were being requested and under what authority, and offered several times, unsuccessfully, to meet with Kaardal in order to discuss and resolve these issues. (Id.) Faegre & Benson also provided copies of file documents to Kaardal, and made additional file documents available for his review, on December 6 and 27, 2007. (Id.) On or about January 3, 2008, Faegre & Benson offered for Kaardal to review “the entire client file.” (SA300-304.) Moreover, in order to provide Kaardal with “a complete set of the documents that relate to R&R Investors’ claim,” Faegre & Benson sought and received authorization from Paul Strangis, the current managing partner of the Partnership, to provide copies of documents post-dating the Hogenson Group’s transfers of its interests in the Partnership. (SA305-306.) Thus, by February 7, 2008, the Hogenson Group had received a complete copy of the Partnership “file.” (Id.)

**H. The Hogenson Group Filed Its Amended Counterclaims And The District Court Properly Dismissed Them.**

On December 31, 2007, the Hogenson Group filed its First Amended Answer, Counterclaims and Cross-claims (“FAC”) asserting claims against Faegre & Benson sounding in fraud, malpractice, and conversion. (SA62-67, ¶¶ 167-206.) The gravamen of each of the counterclaims is that Faegre & Benson has prejudiced the Hogenson Group, either by allegedly attempting to substitute Strangis as the spokesperson for the Partnership in the Tucker Act litigation, or by “withholding” the Funds in the District Court interpleader action. (See generally SA1-75.) In any case, the Hogenson Group’s

alleged damages are measured by the Funds which the Hogenson Group claims it is allegedly entitled to receive. (SA20, ¶ 50.)

Counterclaims 1-3 of the FAC assert statutory and common law fraud claims for violation of Section 481.07, violation of Section 481.071, and “intentional fraud and misrepresentation,” respectively. (SA38-62, ¶¶ 120-165.) The Hogenson Group alleges that Faegre & Benson misrepresented to the District Court in the underlying interpleader action, and to the Court of Federal Claims in the Tucker Act litigation, that Strangis is now the key contact person for the Partnership in the Tucker Act litigation. (Id.) Nowhere in the FAC does the Hogenson Group assert that it took any action in reliance upon the alleged misrepresentations. (Id.) Further, all of the purported misrepresentations allegedly took place after the Hogenson Group had retained its current counsel to assert control over the Tucker Act litigation. (SA21-28, ¶¶ 59-66; SA39-46, ¶¶ 124-133; SA47-54, ¶¶ 140-149; SA55-62, ¶¶ 155-164.)

Counterclaims 4-7 of the FAC allege causes of action for breach of contract, negligence, breach of the fiduciary duty of loyalty, and legal malpractice, respectively. (SA62-65, ¶¶ 167-188.) Each of these claims sounds in malpractice, as the breach of contract claim arises out of the CFA between the Partnership and Faegre & Benson (SA63, ¶ 168), and the negligence and fiduciary duty claims are premised upon Faegre & Benson’s duties as attorneys for the Partnership. (SA63-64, ¶¶ 174, 180.) Despite acknowledging that each of its members authorized the settlement negotiated by the Attorneys in the Tucker Act litigation and despite asserting that it is entitled to the Funds (see SA20-21, ¶¶ 48-57; APP518-523), the Hogenson Group’s malpractice claims each

assert that, but for Faegre & Benson's alleged misconduct, the Partnership would have obtained a more favorable result in the Tucker Act litigation. (SA63-65, ¶¶ 170, 176, 182, 188.)

Finally, Counterclaims 8-9 of the FAC assert claims for conversion and conspiracy to convert, respectively. (SA65-67, ¶¶ 190-206.) To support these claims, the Hogenson Group asserts that Faegre & Benson's opposition to its motion to substitute counsel in the Tucker Act litigation, and Faegre & Benson's deposit of the Funds in trust with the District Court in the interpleader action, constitute acts of conversion and conspiracy to convert. (Id.)

On February 7, 2008, Faegre & Benson filed a Motion to Dismiss the Hogenson Group's counterclaims, based solely upon the allegations of the FAC and the exhibits attached thereto and referenced therein, pointing out that (1) the Hogenson Group failed to allege that it had acted in reliance upon, and could not have acted in reliance upon, any alleged misrepresentation by Faegre & Benson; (2) the Hogenson Group consented to the Settlement Agreement after reviewing its terms, thereby ratifying and approving Faegre & Benson's work on the Partnership's behalf; and (3) Faegre & Benson deposited the Funds in trust with the District Court for distribution to the Hogenson Group, if indeed it is the correct party in interest. Thus, all of the counterclaims alleged by the Hogenson Group failed to state any claim upon which relief could be granted. (See generally Mem. of Law in Supp. of Mot. to Dismiss.) Faegre & Benson also demonstrated that, because the Funds are being held by the Court in trust for the Partnership, the Hogenson Group cannot allege that it has been damaged. Absent the

essential element of damages, as Faegre & Benson pointed out, there is no amendment that can possibly rectify the Hogenson Group's deficient counterclaims. (Id.)

In response, instead of attempting to support the adequacy of its claims as pleaded, the Hogenson Group opposed Faegre & Benson's Motion to Dismiss by departing entirely from the allegations of the FAC to assert a new theory: that Faegre & Benson "sided" with Strangis, and against the Hogenson Group, by commencing the interpleader action and placing the Funds in trust with the District Court. (See Mem. of Law in Opp'n to Mot. to Dismiss.) The Hogenson Group thus attempted to create a new "conflicts" theory of malpractice by asserting that Faegre & Benson is representing Strangis and the individual members of the Hogenson Group in matters in which they have competing interests. (Id. at 19-26.) Finally, the Hogenson Group asserted that, in addition to the damages from "withholding" the Funds, they incurred emotional distress damages and incurred attorneys' fees in pursuing their claims. (Id. at 27-34.)

Faegre & Benson demonstrated to the District Court in its reply brief that the Hogenson Group had not addressed, or refuted, the facts and arguments demonstrating that its counterclaims are deficient on their face. (See Reply Mem. of Law in Supp. of Mot. to Dismiss at 3-5.) As Faegre & Benson pointed out, the Hogenson Group cannot pursue fraud without reliance, malpractice where there was informed consent to settlement, or conversion caused by an interpleader action. (Id.) Further, Faegre & Benson demonstrated that the Hogenson Group's new theories were expressly contrary to the allegations and exhibits of the FAC. (Id. at 5-6.) Faegre & Benson had always represented the Partnership, not the individual partners. (Id.) Finally, as Faegre &

Benson pointed out, the Hogenson Group's having incurred attorneys' fees in pursuing its claims does not satisfy the prerequisite that a claimant must have suffered actual damages. (Id. at 7-8.)

The District Court heard oral argument on the Motion to Dismiss on March 6, 2008. On September 2, 2008, the District Court filed an Order and Memorandum in which it properly held that the Hogenson Group's counterclaims against Faegre & Benson failed to state legally sufficient claims for relief. (APP39-55.) Since the Hogenson Group had failed to allege counterclaims upon which relief could be granted, the District Court granted Faegre & Benson's Motion to Dismiss and ordered the entry of judgment in favor of Faegre & Benson on the Hogenson Group's counterclaims. (APP6.)

## SUMMARY OF THE ARGUMENT

The District Court correctly held as a matter of law that all of the Hogenson Group's counterclaims fail to state claims upon which relief could be granted.

As a threshold matter, all of the Hogenson Group's counterclaims are fundamentally flawed because the Funds to which the Hogenson Group asserts entitlement are being held by the District Court in trust for the Partnership. Thus, even if the Hogenson Group is correct in alleging that it is the "real" Partnership, it will receive the Funds from the District Court and therefore cannot allege that it has been damaged.

The Hogenson Group is simply wrong in claiming that the District Court's dismissal of the Hogenson Group's counterclaims against Faegre & Benson was premised on the District Court's determination that Strangis and the partnership he owns are entitled to the Funds. Further, the Hogenson Group is wrong in claiming that the District Court's dismissal of its counterclaims was predicated upon the Hogenson Group's failure to allege the specific dollar amount of its claimed damages. To the contrary, the District Court's dismissal of the Hogenson Group's counterclaims was expressly predicated upon the District Court's determination that the Hogenson Group failed to allege the essential elements of its counterclaims and could not allege any facts consistent with its pleadings to support granting the relief requested.

Accordingly, judgment was properly entered against the Hogenson Group and in favor of Faegre & Benson with regard to the Hogenson Group's counterclaims, and that judgment should be affirmed in all respects.

## ARGUMENT

### I. STANDARD OF REVIEW.

Rule 12.02(e) of the Minnesota Rules of Civil Procedure provides for the dismissal of actions which fail to state a claim upon which relief can be granted. The only question for the District Court on a motion under Rule 12.02(e) “is whether the complaint contains a legally sufficient claim for relief.” Elzie v. Comm’n of Pub. Safety, 298 N.W.2d 29, 32 (Minn. 1980) (internal citation omitted). A complaint which fails to allege one or more of the essential elements of a cause of action is deficient as a matter of law. Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 748 (Minn. 2000). Pleadings will be dismissed when “it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” N. States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963).

In deciding a motion to dismiss on the pleadings, the District Court may consider contracts and other documents incorporated by reference therein. Hennepin County 1986 Recycling Bond Litig., 540 N.W.2d 494, 497 (Minn. 1995). See also Martens, 616 N.W.2d at 739 n.7. Thus, the sufficiency of a complaint to establish a cause of action “may be determined by the terms of the exhibits” which supplement its allegations. Markwood v. Olson Mfg. Co., 289 N.W. 830, 831-32 (Minn. 1940). The terms of plain and unambiguous exhibits “prevail over inconsistent allegations in the complaint[.]” Id.

Upon review of the District Court’s grant of a motion to dismiss under Rule 12.02(e), the sole question presented is “whether the complaint sets forth a legally sufficient claim for relief.” Royal Realty Co. v. Levin, 69 N.W.2d 667, 670 (Minn.

1955). As such, the District Court's ruling is subject to *de novo* review. Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984) (deference to District Court's decision not required when deciding purely legal issue). The District Court's dismissal under Rule 12.02(e) will be affirmed when "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." N. States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963).

**II. THE DISTRICT COURT CORRECTLY HELD THE HOGENSON GROUP'S COUNTERCLAIMS AGAINST FAEGRE & BENSON FAILED TO STATE LEGALLY SUFFICIENT CLAIMS FOR RELIEF AS A MATTER OF LAW.**

The greatest of the deficiencies of the Hogenson Group's counterclaims is that fact that the Hogenson Group does not and cannot establish *any* grounds consistent with its pleadings upon which it may allege actual damages. The proceedings in the Tucker Act litigation are on hold pending the determination of the Hogenson Group's claims against Strangis in this action, and the Funds are being held in trust with the District Court pending that determination. Thus, even if the Hogenson Group prevails in asserting that it is the proper party in interest in the Tucker Act litigation, then it still cannot establish damages because it will recover ownership and control over the Funds. In the alternative, if it is determined that the Hogenson Group does not own the Tucker Act claims, then the Hogenson Group will not be damaged if the Funds are released to Strangis because the Hogenson Group would have no right to the Funds.

Moreover, the Hogenson Group's counterclaims against Faegre & Benson are deficient on their face in several other respects, as well. The Hogenson Group cannot pursue claims for fraud without reliance, or malpractice given its informed consent to the settlement, or conversion based on the interpleader action. Thus, the District Court's dismissal of the Hogenson Group's counterclaims against Faegre & Benson should be affirmed in all respects.

**A. Since The Funds Will Be Turned Over To The Rightful Owners As Determined By This Court, The Hogenson Group's Counterclaims Fail Because There Can Be No Damages.**

The well-established requirement that a plaintiff must have been damaged in order to support *prima facie* claims for relief is a dispositive legal principle in this appeal. Damages are an essential element of the Hogenson Group's counterclaims sounding in fraud (Counterclaims 1-3), malpractice (Counterclaims 4-7), and conversion (Counterclaims 1-8). See Martens, 616 N.W.2d at 747 (damages are an essential element of fraud claims); Rouse v. Dunkley & Bennett, P.A., 520 N.W.2d 406, 408 (Minn. 1994) (damages are an essential element of malpractice claims); Storage Tech. Corp. v. Cisco Sys., Inc., 395 F.3d 921, 929 (8th Cir. 2005) (damages are an essential element of conversion claims). The Hogenson Group has not been able to allege any damages that it has suffered or could have suffered consistent with its pleadings.

The Hogenson Group does not dispute that it must have incurred damages in order to proceed with its counterclaims against Faegre & Benson. (Appellant's Br. at 70, 74.) However, the sole category or theory of damages identified by the Hogenson Group is that it has allegedly been damaged because it is entitled to the Funds, but has not received

them. (See id. at 74) (stating alleged damages do not flow from any deficiency with the settlement of the Tucker Act litigation, but rather because “Faegre and Eckland ... sought to give the [Funds] to the 2004 Strangis partnership[.]”) The Hogenson Group’s damages theory fails because it has not been damaged, i.e., the Funds have not been distributed to any party but rather are being held in trust for the Partnership pending the determination of the Hogenson Group’s and Strangis’ competing claims.

Specifically, in the underlying interpleader action, the District Court permitted the Funds to be deposited in trust with the District Court pending resolution of the partnership dispute between Strangis and the Hogenson Group. (See SA288-292.) Thus, if the Hogenson Group prevails in demonstrating that it is entitled to the Funds, then the Hogenson Group will suffer no damages because the District Court will distribute the Funds to the Hogenson Group in accordance with interpleader procedure under the Minnesota Rules of Civil Procedure. (Id.) See also Minn. R. Civ. P. 22. In the alternative, if it is determined that the Hogenson Group is *not* entitled to the Funds, then the Hogenson Group cannot be damaged by the release of the Funds to the correct party in interest. The District Court therefore properly held that the Hogenson Group failed to allege a colorable damages theory. (APP46; APP50-55.)

Rather than identifying any category of lawfully recoverable damages that could proximately result from Faegre & Benson’s alleged conduct, the Hogenson Group instead attempts to mischaracterize the District Court’s decision by claiming its holding was that the Hogenson Group’s damages theory is deficient because the Hogenson Group failed “to allege an actual dollar amount as damages resulting from the claims asserted.”

(Appellant's Br., 69-70) (citing APP49, APP50, APP53.) The Hogenson Group is simply wrong. Nowhere in its Order and Memorandum did the District Court make any such holding. (See generally, Order and Mem.) The District Court dismissed the Hogenson Group's counterclaims because, based on its allegations, the Hogenson Group failed to establish that it would suffer any damages.

Moreover, upholding the District Court's dismissal of the Hogenson Group's counterclaims against Faegre & Benson is in no way dependent or contingent upon this Court's determination of whether the Hogenson Group is ultimately entitled to the Funds. Because the Funds are being held in trust pending that determination, the Hogenson Group has not been damaged, and cannot be damaged, regardless of the ultimate resolution of Strangis' and the Hogenson Group's competing claims.

Because the Hogenson Group is guaranteed to receive the amounts, if any, to which it is entitled, there is no legally cognizable basis for it to allege that damages may result from Faegre & Benson's alleged conduct. The absence of any colorable allegation of damages is dispositive of all of the Hogenson Group's counterclaims. The District Court's dismissal of the counterclaims therefore should be upheld in its entirety. See N. States Power, 122 N.W.2d at 29 (pleadings will be dismissed when "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.").

**B. The District Court Correctly Held That The Hogenson Group's Counterclaims For Malpractice Fail To State A Claim Upon Which Relief Can Be Granted.**

In Counterclaims 4-7 of the FAC, the Hogenson Group alleges causes of action for breach of contract, negligence, breach of the fiduciary duty of loyalty, and legal malpractice. (SA62-65, ¶¶ 167-188.) Each of these counterclaims sounds in malpractice, i.e., the breach of contract counterclaim arises out of the CFA between the Partnership and Faegre & Benson (SA63, ¶ 168), and the negligence and fiduciary duty counterclaims are premised upon Faegre & Benson's duties as attorneys for the Partnership. (SA63-64, ¶¶ 174, 180.) See also Glenna v. Sullivan, 245 N.W.2d 869, 871 (Minn. 1976) (defining negligence and breach of contract actions arising out of attorney engagement as malpractice claims). Further, each of these counterclaims asserts the essential element of malpractice that *but for* Faegre & Benson's alleged misconduct the Partnership would have obtained a more favorable result in the Tucker Act litigation. (SA63-65, ¶¶ 170, 176, 182, 188.) See also Rouse, 520 N.W.2d at 408 (setting forth the elements of malpractice).

Each of the Hogenson Group's malpractice-based counterclaims as pleaded assert that the Hogenson Group could have obtained a more favorable result in the Tucker Act litigation. Rouse, 520 N.W.2d at 408. This is an essential element of these malpractice-based counterclaims. However, on appeal, the Hogenson Group has now affirmatively disclaimed its allegation that it could have obtained a more favorable result in the Tucker Act litigation. Specifically, and contrary to the express allegations of the FAC, the Hogenson Group now states that "the basis of the [malpractice] claim is *not the amount*

*of the settlement*” but rather that “Faegre and Eckland ... sought to give the settlement to the 2004 Strangis partnership[.]” (Appellant’s Br. at 74) (emphasis original). Having abandoned this allegation, the Hogenson Group’s FAC clearly fails to state legally sufficient claims for malpractice as a matter of law. Martens, 616 N.W.2d at 748 (pleading which fails to allege one or more of essential elements of cause of action is deficient as matter of law).

The Hogenson Group’s attempt at replacing this necessary allegation by asserting that “Faegre and Eckland ... sought to give the settlement to the 2004 Strangis partnership” also fails. (Appellant’s Br. at 74.) As noted by the District Court, Faegre & Benson has consistently maintained its neutrality as to which faction is the proper party in interest with respect to the Tucker Act litigation. (APP50-51.) Faegre & Benson deposited the Funds with the District Court pending the resolution of Strangis’ and the Hogenson Group’s competing claims, and has agreed to step down as counsel in the Tucker Act litigation should the Hogenson Group be determined to be the proper party in interest. (Id.) The District Court correctly held that Faegre & Benson has left the determination of the Partnership dispute in the hands of the Court, and has not taken sides. (Id.) This holding was inevitable, and cannot be undermined by any allegations made by the Hogenson Group. The fact that Faegre & Benson commenced this interpleader action and deposited the Funds with the District Court is an inherently neutral action that ensures the Funds will be distributed to the proper party in interest.

Moreover, the Hogenson Group’s malpractice counterclaims as initially plead were properly dismissed by the District Court because, as a matter of law, they fail to

state a claim upon which relief can be granted given that the Hogenson Group had expressly consented to the settlement. Minnesota courts “disapprove of allowing a client who has become dissatisfied with a settlement to recover against an attorney” solely on the ground that a more favorable result might have been obtained. Rouse, 520 N.W.2d at 410 n.6. “To allow a client who becomes dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented.” Glenna, 245 N.W.2d at 873. Thus, when the client consents to resolving litigation through settlement, and affirms that he or she understands the terms and scope of the settlement agreement, the allegation that a more favorable result could have been obtained fails to state a colorable malpractice claim as a matter of law. Baumgarten v. Milavetz, Gallop & Milavetz, P.A., 1999 WL 326164, \*5-6 (Minn. Ct. App. May 25, 1999) (SA307-311). See also Meehl v. Berg, 2005 WL 159601, \*2 (Minn. Ct. App. Jan. 19, 2005) (affirming summary judgment on legal malpractice claim alleging result more favorable than settlement could have been obtained) (SA312-313); Hamilton v. Stageberg, 2001 WL 267477, \*1 (Minn. Ct. App. Mar. 20, 2001) (summary judgment affirmed, dismissal was “consistent with the supreme court’s rejection of legal malpractice cases that call into question the amount of a settlement.”) (SA314-315).

In this case, each member of the Hogenson Group authorized Faegre & Benson to represent the Partnership in the Tucker Act litigation, and authorized the specific terms of the Settlement Agreement which resolved the Tucker Act litigation. (APP508; APP518-523). The Settlement Consent Forms executed by each of the members of the Hogenson Group confirmed that each member: (1) had a reasonable amount of time to review and

consider the Settlement Agreement; (2) carefully read and fully understood the Settlement Agreement; (3) understood that by signing the Settlement Agreement he or she released all claims raised in the Tucker Act litigation; and (4) authorized the Attorneys to execute the Settlement Agreement on the Partnership's behalf. (Id.)

In addition, in September and November 2006, the Attorneys specifically explained to the Hogenson Group that: (1) the Attorneys represented the Partnership in the Tucker Act litigation; and (2) the Partnership was now owned by partners *other than* the Hogenson Group. (SA269-272.) Armed with this knowledge, the Hogenson Group could have attempted to withdraw its consent to the Settlement Agreement, or immediately sought judicial determination of its rights *vis-à-vis* those of Strangis, but the Hogenson Group did neither. Thus, when the Attorneys executed the Settlement Agreement in May 2007, they did so with the express informed consent of the Hogenson Group. (APP518-523; APP525-540.)

Despite each of its members' express informed consent to the Settlement Agreement, the Hogenson Group premised its malpractice-based counterclaims on the allegation that *but for* Faegre & Benson's alleged misconduct a more favorable result could have been obtained in the Tucker Act litigation. (SA63-65, ¶¶ 170, 176, 182, 188.) Under Glenna and its progeny, these "sour grapes" allegations fail, as a matter of law, to state claims for malpractice upon which relief can be granted. Glenna, 245 N.W.2d at 873; Baumgarten, 1999 WL 326164, at \*5-6. The District Court therefore properly dismissed the Hogenson Group's counterclaims because they necessarily failed to state legally sufficient claims for malpractice. (APP53.)

As it did before the District Court, rather than defend the validity of its malpractice claims as pleaded, the Hogenson Group's appellate brief departs entirely from the allegations and exhibits of the FAC and argues that its malpractice claims are premised on Faegre & Benson's simultaneous agreements to represent the members of the Hogenson Group, and Strangis, as individuals with conflicting interests in the Funds. (Appellant's Br., 71.) This attempt to reinvent its malpractice claims was rejected by the District Court and should be rejected by this Court. The Hogenson Group cannot now salvage its deficient claims with a theory that is different from and contrary to the facts as pleaded in the FAC.

As noted by the District Court, the Hogenson Group's "conflicts" theory of malpractice fails because it is expressly contrary to its claims as expressed in the FAC. (APP52.) Specifically, in the FAC, the malpractice-based claims are asserted *in the name of the Partnership*, not the individual members of the Hogenson Group, and the gravamen of the claims is that, *but for* Faegre & Benson's alleged misconduct, the Partnership would have achieved a better result in the Tucker Act litigation. (APP51-52; SA32, ¶¶ 87-88; SA62-65, ¶¶ 166-188). There is no allegation in the FAC that Faegre & Benson represented the individual members of the Hogenson Group or Strangis as an individual. (*Id.*) Indeed, there can be no such allegation. As also noted by the District Court, the CFA executed by the members of the Hogenson Group clearly reflects that Faegre & Benson was retained solely on behalf of the Partnership, never the individual partners. (APP51-52; SA32, ¶¶ 87-88; SA62-65, ¶¶ 166-188; SA194-197). The

Hogenson Group's improvised "conflicts" theory therefore was properly rejected by the District Court. This Court should do the same.

Finally, the Hogenson Group's argument that it has been prevented from discovering facts to support its malpractice theory—even if it was sufficiently pleaded, which it is not—is equally unavailing. The Hogenson Group claims that it was stymied in its investigation by Faegre & Benson's refusal to produce the Partnership's litigation file. (Appellant's Br., 70-71.) However, the Hogenson Group received a complete copy of the Partnership's legal file almost a full year ago—by February 7, 2008. (SA305-306.) If any facts existed to support the Hogenson Group's malpractice-based counterclaims, it would have discovered them in those files. The District Court's dismissal of the Hogenson Group's malpractice claims therefore should be affirmed in all respects. See N. States Power, 122 N.W.2d at 29 (pleadings will be dismissed when "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.").

**C. The District Court Correctly Ruled The Hogenson Group's Fraud-Based Counterclaims Fail To State Legally Sufficient Claims For Relief.**

Counterclaims 1-3 of the FAC assert claims against Faegre & Benson for violation of Minnesota Statutes Sections 481.07 and 481.071, and "intentional fraud and misrepresentation," respectively. (SA38-62, ¶¶ 120-165.) Sections 481.07 and 481.071 codify the penalties for an attorney's deceit or collusion in a judicial proceeding. See Minn. Stat. §§ 481.07-071. These statutory causes of action share the same essential elements as common law fraud claims. See Love v. Anderson, 61 N.W.2d 419, 422

(Minn. 1953) (dismissing Minn. Stat. § 481 claim for failure to allege reliance, and holding “[t]he common law gives the right of action and the statute the penalty.”). Thus, all of the Hogenson Group’s fraud-based counterclaims are governed by the pleading requirements applicable to fraud. Id.

Among other fraud pleading requirements, a complainant must specifically allege each of the essential elements including: (1) a misrepresentation; (2) actual reliance on the misrepresentation; and (3) damages. Martens, 616 N.W.2d at 747. Failure to plead any of the essential elements is a fatal defect which will result in dismissal of the fraud claim under Rule 12.02(e). Id. at 747-748. See also Love, 61 N.W.2d at 422 (failure to plead essential fraud elements resulted in dismissal of statutory claim for attorney deceit).

Faegre & Benson argued, and the District Court correctly held, that the Hogenson Group’s fraud-based counterclaims fail to state legally sufficient claims for relief because the Hogenson Group does not allege a single act taken in reliance upon Faegre & Benson’s alleged misrepresentations. (APP42; APP44-47.) Specifically, while the Hogenson Group alleges in the FAC that Faegre & Benson misrepresented to the District Court in the interpleader action, and to the Court of Federal Claims in the Tucker Act litigation, that Strangis is now the key contact person for the Partnership in the Tucker Act litigation, the Hogenson Group does not assert that it took any action in reliance upon the alleged misrepresentation. (SA38-62, ¶¶ 120-165.) Because the Hogenson Group fails to allege any acts taken in reliance upon the alleged misrepresentations, the District Court correctly determined as a matter of law that the Hogenson Group’s fraud-based

counterclaims fail to allege legally sufficient claims for relief. (APP42; APP47.) See Martens, 616 N.W.2d at 747-48.

The Hogenson Group does not dispute that its statutory and common law fraud claims are governed by the rules of pleading for fraud and does not, because it cannot, identify any allegation of reliance in the FAC. (Appellant's Br., 72-74.) Instead, the Hogenson Group merely restates its argument to the District Court that it did rely on the alleged misrepresentations—*again without identifying a single alleged act of reliance*:

The “how” is the Hogenson partners’ reliance on Faegre and Eckland representing the Hogenson partners’ interests in the litigation from the time of the signing of the retainer agreements in 2003 until the discovery in 2007 that Faegre and Eckland were actually representing the Strangis partnership since 2004.

(Id. at 73.) The District Court correctly rejected the Hogenson Group’s argument because the Hogenson Group failed to “allege what action they took or did not take because of this purported misrepresentation.” (APP44.) This Court should do likewise. As a matter of law, the Hogenson Group cannot proceed with its fraud-based counterclaims in the absence of any allegations of reliance. Martens, 616 N.W.2d at 747-48; Love, 61 N.W.2d at 422.

The District Court further correctly rejected the Hogenson Group’s argument because it is clear that there are no facts consistent with the FAC which could conceivably allow the Hogenson Group to assert that it had been taken in by Faegre & Benson’s alleged “fraud.” (APP45.) Specifically, the gravamen of the alleged “fraud” is that Faegre & Benson attempted to “substitute” Strangis for the Hogenson Group as the spokesperson for the Partnership in the Tucker Act litigation. (SA38-62, ¶¶ 120-165.)

However, as acknowledged in the FAC, the Hogenson Group knew of the position allegedly being taken by Faegre & Benson and disagreed with it, and the Hogenson Group appeared in both the interpleader action and the Tucker Act litigation to assert and litigate its alleged entitlement to control the Partnership's Tucker Act litigation. (See generally SA1-75.) As a result, there is no plausible pleading that could establish reliance and resurrect the Hogenson Group's deficient fraud claims. See N. States Power, 122 N.W.2d at 29 (dismissal is appropriate when no facts exist, consistent with the claimant's theory of the case, to support granting the relief requested). The District Court's dismissal of the Hogenson Group's fraud-based counterclaims therefore should be affirmed in all respects.

**D. The District Court Correctly Ruled The Hogenson Group's Conversion-Based Counterclaims Fail To State A Claim Upon Which Relief Can Be Granted.**

For its final allegations against Faegre & Benson, the Hogenson Group asserts counterclaims for conversion and conspiracy to convert. (SA65-67, ¶¶ 190-206.) Specifically, the Hogenson Group alleges that Faegre & Benson's decision to deposit the Funds with the Court, rather than release them to the Hogenson Group, constituted an act of conversion. (Id.) Further, the Hogenson Group asserts that Faegre & Benson's alleged attempt to substitute Strangis as the spokesperson for the Partnership in the Tucker Act litigation was also an act of conversion and conspiracy to convert. (Id.) These counterclaims fail to state legally sufficient claims for relief as a matter of law.

Conversion is defined as an "act of willful interference with a chattel, *done without lawful justification*, by which any person thereto is deprived of use and

possession.” Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649, 650 (Minn. 1948) (emphasis supplied). A refusal to deliver chattel is lawfully justified when such refusal is qualified by a demand that the putative owner “first prove his title or right to possession.” Hildegarde, Inc. v. Wright, 70 N.W.2d 257, 260 (Minn. 1955).

Without this power to require the demandant to prove his right to possession, the bailee would indeed be placed in a difficult position, for it is a well-recognized rule that delivery in good faith to a person not entitled to the goods also constitutes a conversion for which the owner can recover against the bailee.

Id. This rationale is embedded in the Minnesota Rules of Civil Procedure, under which a party in possession of monies subject to conflicting and opposing claims is not required to choose between the claimants, but rather may place the monies in trust with the Court pending determination of ownership. See Minn. R. Civ. P. 22.

As the District Court correctly held as a matter of law, Faegre & Benson did not unjustifiably interfere with any of the Hogenson Group’s rights by depositing the Funds into the District Court for safekeeping pending proof of the Hogenson Group’s “title or right to possession”:

Here, the Tucker Act Counsel have a lawful justification for withholding the funds: the Interpleader Action. It would be absurd for the Tucker Act Counsel to be found liable for converting funds this Court has ordered to be deposited for safe keeping until the determination of rights to the funds under law.

(APP54) (citing Hildegarde, 70 N.W.2d at 260). Faegre & Benson was absolutely justified “in following the dictates of Rule 22.” (Id.) The Minnesota Rules of Civil Procedure expressly afford this remedy to parties, like Faegre & Benson, in possession of disputed funds, and it is well-settled law that a demand for proof of ownership, such as is

required in an interpleader proceeding, does not constitute conversion. Minn. R. Civ. P. 22. Hildegarde, 70 N.W.2d at 260. It would be grossly contrary to law, and negate the entire foundation of the interpleader remedy, if the deposit of the Funds with the District Court would constitute conversion. The District Court therefore properly dismissed the Hogenson Group's conversion counterclaim. See, e.g., Newman v. Brendel & Zinn, Ltd., 691 N.W.2d 480, 484 (Minn. Ct. App. 2005) (complaint arising out of action taken in compliance with procedural rules was dismissed on Rule 12.02(e) motion).

Moreover, contrary to the arguments of the Hogenson Group, Faegre & Benson's interpleader action was not based on a "make-believe dispute" between Strangis and the Hogenson Group. (Appellant's Br. at 74-75.) Rather, the interpleader action was premised upon the competing claims by the Hogenson Group and Strangis, each of whom have asserted that they are entitled to receive the Funds from the Attorneys on behalf of the Partnership. (SA164-165; SA273-274.) As demonstrated by the hard-fought battle between Strangis and the Hogenson Group, the dispute over entitlement to the Funds is not "make believe," but is indisputably real.

Also, as acknowledged in the FAC and as noted by the District Court, Faegre & Benson has not wrongfully withheld control of the Tucker Act litigation from the Hogenson Group. (SA141, n.4; APP54). Instead, Faegre & Benson has agreed to step down as counsel for the Partnership if the Hogenson Group is successful in demonstrating that it is the proper party in interest. (Id.) Thus, the Hogenson Group's counterclaim for conversion was properly dismissed as a matter of law. (APP54-55.)

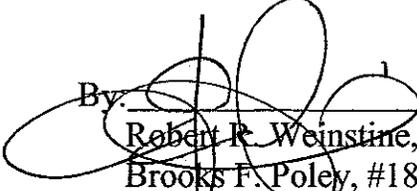
Finally, it is well-settled that in the absence of an underlying tort (in this case, the tort of alleged conversion), a claim for civil conspiracy cannot stand and is properly dismissed. D.A.B. v. Brown, 570 N.W.2d 168, 172 (Minn. Ct. App. 1997); Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 2003 WL 22388087, \*3 (Minn. Ct. App. Oct. 21, 2003) (SA316-319). Because the Hogenson Group's counterclaim for conversion was properly dismissed as a matter of law, there is no underlying tort on which the conspiracy counterclaim may be premised. The District Court therefore properly dismissed the Hogenson Group's conspiracy counterclaim for failure to state a legally sufficient claim for relief. (APP55.)

#### CONCLUSION

Faegre & Benson respectfully requests that this Court affirm the Order and Judgment of the District Court in their entirety with respect to the dismissal of the Hogenson Group's counterclaims against Faegre & Benson.

Dated: January 26, 2009

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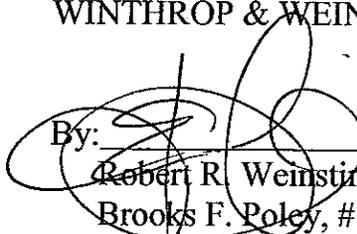
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Minnesota Rule of Civil Appellate Procedure 132.01, subd. 3, the undersigned hereby certifies, as counsel for Respondent, that this brief complies with the type-volume limitation as there are 9,751 words of proportional space type in this brief. This brief was prepared using Microsoft Word 2003.

Dated: January 26, 2009

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