

No. A08-1899

State of Minnesota
 In Court of Appeals

Faegre & Benson LLP and Eckland and Blando LLP,
Interpleader Plaintiffs and Respondents,
 vs.

R&R Investors, Curtis Hogenson, Diane Larson, Eileen M. Berger,
 Shirley J. Arvidson, David Klug, Mary Klug, 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.

RESPONDENTS R&R INVESTORS' AND PAUL STRANGIS' BRIEF

(All Counsel Listed on Following Page)

MOHRMAN & KAARDAL, P.A.
Erick G. Kaardal
33 South Sixth Street
Suite 4100
Minneapolis, MN 55402
(612) 341-1074

Attorney for Appellants

LOMMEN, ABDO, COLE, KING &
STAGEBERG, P.A.
Phillip A. Cole
Diane M. Odeen
80 South Eighth Street
2000 IDS Center
Minneapolis, MN 55402
(612) 339-8131

*Attorneys for Respondent
Eckland & Blando LLP*

KELLY & BERENS, P.A.
Timothy D. Kelly (#54926)
Kelly A. Atherton (#0387409)
80 South Eighth Street
3720 IDS Center
Minneapolis, MN 55402
(612) 349-6171

*Attorneys for Respondents
R&R Investors and Paul Strangis*

WINTHROP & WEINSTINE, P.A.
Robert R. Weinstine
Brooks F. Poley
Thomas H. Boyd
Justice Erickson Lindell
225 South Sixth Street
Suite 3500
Minneapolis, MN 55402
(612) 604-6400

*Attorneys for Respondent
Faegre & Benson LLP*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES1

1. Whether the Tucker Act Claim (and hence the proceeds of that claim) remains the property of R&R Investors, which owned the claim when it originated, *or* did that claim become the property of the Hogenson Group either1

 a. Due to the "dissolution" of R&R Investors when the Hogenson Group sold their partnership interests to the Klugs in 2000, *or*1

 b. Because they buyers of R&R Investors from the Hogenson Group promised to deliver any proceeds of the claim to them?1

2. Whether, despite the record of sale of their partnership interests in R&R Investors in 2000 and their quitclaim deeds for the Maranatha Inn Property in 2003, the Hogenson Group has an actionable claim to an interest in the proceeds of the settlement of the Tucker Act Claim by R&R investors?1

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS5

 A. The Historical Facts6

 B. The Summary Judgment Ruling.....13

ARGUMENT19

Introduction.....19

 A. Standard Of Review20

 B. Any “Dissolution” of R&R Investors is Irrelevant to the Tucker Act Claim Because No Wind-Up of the Business of R&R Investors Ever Occurred.....21

 1. The Hogenson Group’s “Dissolution” Theory21

2.	The Personalty of R&R Investors Stayed With the Partnership in the Transfers of the Partnership from the Hogenson Group, and Later from the Klugs to Strangis	25
3.	The Legal Effect of Any Dissolution.....	28
4.	The Importance of the Failure to Wind-Up the Business of R&R Investors	34
C.	The New Issue of the Alleged Intent of the Klugs Not to Transfer the Tucker Act Claim When They Sold R&R Investors to Strangis	37
1.	The 2003 Quit Claim Deeds for the Hogenson Group to the Klugs	38
2.	The Hiring of Faegre by Berger in 2003 to Pursue the Tucker Act Claim	39
3.	The David Klug Affidavit	41
	CONCLUSION	43

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Cienega Gardens v. U.S.</u> , 67 Fed. Cl. 434 (2005).....	31, 32
<u>Cienega Gardens v. U.S.</u> , 503 F.3d 1266 (Fed. Cir. 2007).....	32
<u>Donoho v. U.S.</u> , 168 F.Supp. 679 (D. Minn. 1958), <u>affirmed</u> 275 F.2d 489 (8th Cir. 1960).....	22
<u>Franconia Associates v. U.S.</u> , 43 Fed. Cl. 702 (1999).....	7
<u>Franconia Associates v. U.S.</u> , 240 F.3d 1358 (Fed. Cir. 2001)	7
<u>Franconia Associates v. U.S.</u> , 536 U.S. 129 (2002).....	6, 7
<u>Goodman v. Niblack</u> , 102 U.S. 556 (1880)	17
<u>Matshushita Elec. Indus. Co. v. Zenith Radio Corp.</u> , 475 U.S. 574 (1986).....	20
<u>McCormack v. Theo. Hamm Brewing Co.</u> , 284 F. Supp. 158 (D. Minn. 1968)	35
<u>McKenzie v. Irving Trust Co.</u> , 323 U.S. 365 (1945)	17

STATE CASES

<u>Blatterman v. Cities Serv. Oil Co.</u> , 246 N.W. 532 (Minn. 1933)	41
<u>Caughie v. Brown</u> , 93 N.W. 656 (Minn. 1903)	38, 39
<u>Dairyland Ins. Co. v. Starkey</u> , 535 N.W.2d 363 (Minn. 1995).....	20
<u>DLH, Inc. v. Russ</u> , 566 N.W.2d 60 (Minn. 1997).....	20
<u>Egner v. States Realty Co.</u> , 26 N.W.2d 464 (Minn. 1947)	33
<u>Everest Investors 8 v. McNeil Partners</u> , 114 Cal.App. 4th 411 (2003)	32
<u>Fabio v. Bellomo</u> , 504 N.W.2d 758 (Minn. 1993).....	20

<u>Fenner & Beane v. Nelson</u> , 13 S.E.2d 694 (Ga. Ct. App. 1941)	29, 30, 31
<u>Fingerhut Products Co. v. Comm'r of Revenue</u> , 258 N.W.2d 606 (Minn. 1977)	42
<u>Fuller v. Nelson</u> , 28 N.W. 511 (Minn. 1886).....	21
<u>Gresser v. Hotzler</u> , 604 N.W.2d 379 (Minn. Ct. App. 2000).....	5, 20
<u>Hurwitz v. Padden</u> , 581 N.W.2d 359 (Minn. Ct. App. 1998).....	29, 35, 36
<u>Kangas v. Winquist</u> , 291 N.W. 292 (Minn. 1940).....	22
<u>Maras v. Stillinovich</u> , 268 N.W.2d 541 (Minn. 1978).....	29
<u>Spearman v. Spearman</u> , 408 N.W.2d 689 (Minn. Ct. App. 1987).....	21
<u>State by Cooper v. French</u> , 460 N.W.2d 2 (Minn. 1990).....	20
<u>Thiele v. Stich</u> , 425 N.W.2d 580 (Minn. 1988).....	42
<u>Thorpe v. Pennock Mercantile Co.</u> , 99 Minn. 22 (Minn. 1906)	21
<u>Trondson v. Janikula</u> , 458 N.W.2d 679 (Minn. 1990).....	21
<u>United Bank of Bismark v. Glatt</u> , 420 N.W.2d 743 (N.D. 1988)	15
<u>Windom Nat. Bank v. Klein</u> , 254 N.W. 602 (Minn. 1934)	21, 22
<u>Winkler v. Magnuson</u> , 539 N.W.2d 821 (Minn. Ct. App. 1995).....	20

FEDERAL STATUTES

Federal Assignment of Claims Act, 31 U.S.C. § 3727	16, 17, 32
----------------------------------------------------------	------------

STATE STATUTES

Minn. Stat. § 323.07	14
Minn. Stat. § 323.24	3, 14, 21, 22, 27
Minn. Stat. § 323.24(2)	28

Minn. Stat. § 323.24(3)	28
Minn. Stat. § 323.24(4)	28
Minn. Stat. § 323.28	15, 28
Minn. Stat. § 323.29	29, 36
Minn. Stat. § 323.32	15, 29
Minn. Stat. § 323.34	35
Minn. Stat. § 323.36	34
Minn. Stat. § 323.37	31, 34
Minn. Stat. § 323.39	34
Minn. Stat. § 323A.1202	14

MINNESOTA RULES OF COURT

Minn. R. Civ. App. P. 128.02	5
Minn. R. Civ. App. P. 143.01	4

SECONDARY AUTHORITIES

15 Dunnell Minnesota Digest § 1.05 (5th ed. 2005)	38
20 Minnesota Practice Series § 4.1 (2008)	14
Restatement (Second) of Agency §§ 82, 84(2), 85 (1958)	41

ISSUES

1. Whether the Tucker Act Claim (and hence the proceeds of that claim) remains the property of R&R Investors, which owned the claim when it originated, *or* did that claim become the property of the Hogenson Group either:
 - a. Due to the “dissolution” of R&R Investors when the Hogenson Group sold their partnership interests to the Klugs in 2000, *or*
 - b. Because the buyers of R&R Investors from the Hogenson Group promised to deliver any proceeds of the claim to them?
2. Whether, despite the record of sale of their partnership interests in R&R Investors in 2000 and their quitclaim deeds for the Maranatha Inn Property in 2003, the Hogenson Group has an actionable claim to an interest in the proceeds of the settlement of the Tucker Act Claim by R&R Investors?

STATEMENT OF THE CASE

This action arises out of Faegre & Benson’s (“Faegre”) and Eckland & Blando’s (“Eckland”) representation of a Minnesota partnership, R&R Investors, in an underlying lawsuit (the “Tucker Act Claim”).¹ On May 21, 2007, R&R Investors settled that claim² and the United States, the defendant in the Tucker Act Claim, agreed to make payments of as much as \$450,000 (collectively, the “Settlement Proceeds”) to R&R Investors.³

¹ See Respondents R&R Investors’ and Paul Strangis’ Appendix (“Resp. R&R App.”) 387-494 (Second Amended Complaint for Breach of Contract and Just Compensation).

² App. 9 (September 2, 2008 District Court Order & Memorandum, p. 2) (“DC Memo” herein); App. 525-41 (Settlement Agreement).

³ App. 9, 23 (DC Memo, pp. 2, 16). The United States issued an initial lump sum payment of \$50,000, of which Faegre and Eckland deducted attorneys’ fees, leaving a balance of \$37,500. App. 9 (DC Memo, p. 2). On October 25, 2007, Faegre and Eckland moved to deposit the \$37,500 in to the court under Minn. R. Civ. P. 22, which the District Court granted. App. 10 (DC Memo, p. 3). The order under review here disposed of these proceeds and any future proceeds of the settlement.

On October 9, 2007, Faegre and Eckland commenced this interpleader action on the ground that both R&R Investors, under current ownership, and a group of former owners, had asserted competing claims to the Settlement Proceeds.⁴

On November 14, 2007, R&R Investors answered claiming entitlement to all the Settlement Proceeds.⁵ Strangis answered separately on November 1, 2007 taking the same position.⁶

On December 27, 2007, defendants Curtis Hogenson, Diane Larson, Shirley Arvidson, and Eileen Berger--whom we call "the Hogenson Group"⁷--claiming to be "R&R Investors I-UPA Partnership," served a blizzard of paperwork, including a 200+ page Verified Answer, Counterclaim, and Cross-Claims (including exhibits)⁸ and, shortly thereafter on December 31, 2007, filed a 200+ page First Amended Answer,

⁴ Appellants' Principal Brief ("APB" herein) states that "[t]he lower court interpleader action arose when two law firms, Faegre & Benson and Eckland & Blando, sought judicial resolution to a dispute between *different partnerships* regarding settlement proceeds from a federal action in the U.S. Court of Federal Claims." APB, pp. 1-2 (emphasis added). That is factually untrue. The Complaint states that there is only one partnership and that there has been a series of owners of the partnership. See App. 74-75 (Complaint, ¶¶ 10, 15, 18-20).

⁵ Resp. R&R App. 6 (Answer of R&R Investors, ¶ 18).

⁶ Resp. R&R App. 2 (Answer of Paul Strangis, ¶ 18).

⁷ The District Court, for simplicity of reference only, also called these defendants the "Hogenson Group." App. 8 (DC Memo, p. 1).

⁸ App. 79-316 (Verified Answer, Counterclaims and Cross-Claims).

Counterclaims and Cross-Claims (including exhibits).⁹ These pleadings claimed that the Hogenson Group had a right to all the Settlement Proceeds.¹⁰

The Hogenson Group brought the counterclaims and cross-claims in the names of:

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).¹¹

⁹ Resp. R&R App. 10-248 (First Amended Answer, Counterclaims and Cross-Claims). The cross-claims alleged that: (1) R&R Investors and Strangis tortiously interfered with "R&R Investors I-UPA Partnership's" attorney-client relationship with Faegre and Eckland, and (2) R&R Investors and Strangis conspired with Faegre and Eckland to substitute R&R Investors for "R&R Investors I-UPA Partnership" as the party-plaintiff and settling party in the Tucker Act Claim and as the beneficiary of the Settlement Proceeds. Resp. R&R App. 76-77 (First Amended Answer, Counterclaims and Cross-Claims, ¶¶ 207-216). The Hogenson Group also asserted malpractice and breach of contract claims against Faegre and Eckland. Resp. R&R App. 45-75 (First Amended Answer, Counterclaims and Cross-Claims, ¶¶ 119-206).

¹⁰ Resp. R&R App. 16-22, 24-26, 28 (First Amended Answer, Counterclaims and Cross-Claims, ¶¶ 15-19, 28-29, 33, 50, 53).

¹¹ App. 10 n.1 (DC Memo, p. 3); Resp. R&R App. 10-11 (First Amended Answer, Counterclaims and Cross-Claims). The Court need go no further than examining the style of this caption to see what nonsense the claims were in the District Court and are on this appeal. Please note the references to the individual members of the Hogenson Group as "tenant in partnership" which reflects the original theory the Hogenson Group presented to the District Court--that at all times they owned the Tucker Act Claim as individuals because of Minn. Stat. § 323.24. This theory has now been abandoned, which we explain later, but not before Judge Neville had to waste a great deal of time on it. The caption also refers to "R&R Investors I-UPA Partnership" which is a name not found in

The parties took no discovery and instead scheduled a series of motions all to be heard on March 6, 2008.¹² R&R Investors and Strangis moved for summary judgment on the interpleader claim seeking the Settlement Proceeds as a matter of law and overruling the counterclaims/cross-claims of the Hogenson Group.¹³ The Hogenson Group moved for partial summary judgment and for a declaratory judgment seeking the Settlement Proceeds as a matter of law.¹⁴ Faegre and Eckland moved to dismiss the malpractice and breach of contract claims and for Rule 11 sanctions with regard to those claims.¹⁵

On September 2, 2008, The Honorable Cara Lee Neville ordered a final judgment on all claims and counterclaims in the interpleader action. The Order granted summary judgment to R&R Investors and to Strangis for the Tucker Act Settlement Proceeds and denied the counter motion for summary judgment by the Hogenson Group,¹⁶ *and* granted

any historical document, and simply appears to be something made up by the Hogenson Group. Indeed, the Court should examine the caption of the APB which sets forth some of these names, which also violated Minn. R. Civ. App. P. 143.01 because it is not the caption of the District Court action, *compare* the caption of the DC Memo, App. 3.

¹² App. 10 (DC Memo, p. 3).

¹³ Id.

¹⁴ Id.

¹⁵ App. 10-11 (DC Memo, pp. 3-4).

¹⁶ App. 38 (DC Memo, p. 31).

the motions to dismiss by the Tucker Act litigation law firms on the malpractice and breach of contract claims.¹⁷

Final judgment was entered on September 2, 2008.¹⁸ The Hogenson Group timely appealed that judgment.¹⁹

STATEMENT OF FACTS

The 21 page Statement of Facts in Appellants' Principal Brief is a curiosity--it ignores the detailed 31 paragraph fact findings made by the District Court, violates Minn. R. Civ. App. P. 128.02, and instead writes on a clean slate citing information like the Hogenson Group's own complaints, letters, and random parts of the record. Appellants do not challenge a single one of these fact findings (although they do challenge certain legal conclusions)--they simply pretend that the fact findings do not exist.

The definitive statement of the facts, however, is the District Court findings.²⁰

¹⁷ App. 43, 47, 52-53, 55 (DC Memo, pp. 36, 40, 45-46, 48). The District Court also denied Faegre and Eckland's Motions for Rule 11 Sanctions against the Hogenson Group, finding that "[a]lthough the statutory fraud claims were attenuated, they were brought in conjunction with the Hogenson Group's general malpractice suit and their theory related to the interpleader action. Even if the conduct were in violation of Rule 11, monetary sanctions in this instance would do nothing to deter future actions like this one, because of the unique circumstances involved." App. 63-64 (DC Memo, pp. 56-57).

¹⁸ App. 7 (Order for Judgment).

¹⁹ App. 317-19 (Notice of Appeal to Court of Appeals).

²⁰ These findings are not numbered but are found at pages 5-17 of the DC Memo attached to the Court's September 2, 2008 Order for Judgment. App. 12-24. See Gresser v. Hotzler, 604 N.W.2d 379, 383 (Minn. Ct. App. 2000) (where the district court enters detailed findings on uncontroverted transaction documents, those findings are the facts for the appeal).

A. The Historical Facts.

In brief, the starting point is federal housing legislation which gave real estate developers an opportunity to borrow attractively priced long-term mortgage funding if they constructed apartment buildings and rented the units to low-income or no-income tenants at low rental rates for the long term.²¹ After twenty or thirty years the developer-owners, most of whom were partnerships, were free to raise the rents and enjoy a big payday by paying off the loan early and refinancing or selling the property. Many developers took this opportunity and built apartment buildings with Government financing.

In 1988, however, Congress extended the periods of compulsory low rentals for substantial additional periods of time (and barred early payoff of the mortgages) and some partnerships sued the Government in the Court of Federal Claims contending that the legislation extending the rental limitations was an uncompensated “taking” of their property by the Government in violation of the Fifth Amendment to the U. S. Constitution, or a repudiation of the terms of the mortgage contract that allowed the borrowers to raise rents or repay the mortgages after a fixed period of time. Both the

²¹ The Supreme Court described this financing program as follows: “[A] federal program to promote development of affordable rental housing in areas not traditionally served by conventional lenders. In exchange for low-interest mortgage loans issued by the Farmers Home Administration... [certain property owners] agreed to devote their properties to low- and middle-income housing and to abide by related restrictions during the life of the loans.” Resp. R&R App. 657 (Franconia Associates v. U.S., 536 U.S. 129, 132-33 (2002)).

Court of Federal Claims and the U.S. Court of Appeals rejected the claim,²² but in 2002 the U.S. Supreme Court sustained it and many apartment owning partnerships found themselves with viable large dollar claims against the United States.²³

One of those partnerships was R&R Investors, which had been formed by Robert and Ruth Janski in 1975.²⁴ R&R Investors is a Minnesota partnership and all parties agree the substantive law applicable to R&R Investors is the Uniform Partnership Act (“UPA”), Minn. Stat. § 323 et seq. R&R Investors then constructed the Maranatha Inn, a 25-unit apartment building, using \$518,130 borrowed under the federal program,²⁵ and rented out its units subject to the program’s rent restrictions (the “Maranatha Inn Property”). R&R Investors operated the property--subject to the rental and other restrictions--from the time it was built until today.

Three transactions occurred where the partners sold their partnership interests in R&R Investors to buyers who substituted as owners of R&R Investors:

(1) December 1984: The Hogenson Group purchased the Janskis’ interests in R&R Investors.²⁶ The legal mechanism was a substitution of partners.²⁷

²² Resp. R&R App. 628-43 (Franconia Associates v. U.S., 43 Fed. Cl. 702 (1999)); Resp. R&R App. 644-52 (Franconia Associates v. U.S., 240 F.3d 1358 (Fed. Cir. 2001)).

²³ Resp. R&R App. 657 (Franconia, 536 U.S. at 133).

²⁴ App. 12 (DC Memo, p. 5).

²⁵ App. 12 (DC Memo, p. 5); App. 367-75 (Loan Agreement); App. 376-83 (Loan Agreement).

²⁶ App. 13 (DC Memo, p. 6).

(2) April 2000: David and Mary Klug purchased the Hogenson Group's interests in R&R Investors.²⁸ This sale too was by a substitution of partners.²⁹

In conjunction with this sale, an April 10, 2000 Indemnity Agreement was executed by both of the "Klugs [who] signed as a 'New or Substitute Partner.'"³⁰ The "Sellers" were identified as Gerald A. Berger, Norman K. Arvidson, Diane L. Larson, and Curtis O. Hogenson and the "Buyers" were the Klugs; "R&R Investors, a Minnesota partnership" was also a party.³¹

The two Whereas clauses state:

WHEREAS, the Sellers have formed the partnership known as R&R Investors, a Minnesota Partnership, for the purpose of constructing, financing, operating and managing a residential apartment building or buildings in Royalton, Minnesota; and

²⁷ The Janskis and the Hogenson Group executed a Substitution of Partnership Agreement which states "[t]he undersigned Selling Partners and Incoming Partners agree that the following individuals shall be substituted as partners in the partnership of R&R Investors...." App. 394 (Substitution of Partnership Agreement). The "Selling Partners" are identified as Robert R. Janski and Ruth Ann Janski and the "Incoming Partners" are identified as Gerald Berger, Robert C. Abel, Norman K. Arvidson, Diane Lee Larson, and Curtis O. Hogenson. App. 395 (Substitution of Partnership Agreement).

²⁸ App. 15 (DC Memo, p. 8).

²⁹ App. 15-16, 32 (DC Memo, pp. 8-9, 25). The Hogenson Group and the Klugs executed an Amendment to Amended Partnership Agreement which states it is "An Agreement of Partners of R&R Investors Partnership Consenting to Assign the Partnership Shares and Complete a Substitution of Partners. R&R Investors is a Minnesota Partnership." App. 417 (Amendment to Amended Partnership Agreement).

³⁰ App. 16 (DC Memo, p. 9); App. 421 (Indemnity Agreement).

³¹ App. 30 (DC Memo, p. 25); App. 421 (Indemnity Agreement).

WHEREAS, the Sellers are desirous of selling the partnership known as R&R Investors and the Buyers are desirous of buying said partnership.³²

(3) **March 2004:** Strangis and a limited liability company he controls purchased the Klugs' interests in R&R Investors³³ through the following instruments:

- a. September 30, 2003 R&R Investors Amended and Restated Partnership Agreement;³⁴
- b. December 22, 2003 quitclaim deed from the Klugs to "R&R Investors a Minnesota General Partnership,"³⁵
- c. March 31, 2004 Purchase and Sale Agreement for Partnership Interests between Strangis (and the limited liability company he owns) as "Purchasers" and David P. Klug and Mary V. Klug as "Sellers,"³⁶ and
- d. September 1, 2004 Assignment of Partnership Interests from the Klugs to Strangis and the limited liability company he owns.³⁷

This transaction also was a substitution of partners.³⁸

³² App. 30 (DC Memo, p. 23); App. 421 (Indemnity Agreement).

³³ App. 21, 36 (DC Memo, pp. 14, 29). On May 3, 2004 the Klugs also quit claimed to "R&R Investors, a Minnesota general partnership" any interest in the Maranatha Inn Property. App. 20 (DC Memo, p. 13); App. 475 (Quit Claim Deed dated May 3, 2004).

³⁴ App. 19 (DC Memo, p. 12); Resp. R&R App. 505-14 (R&R Investors Amended and Restated Partnership Agreement).

³⁵ App. 19 (DC Memo, p. 12); App. 435 (Quit Claim Deed dated December 22, 2003).

³⁶ App. 20 (DC Memo, p. 13); App. 436-74 (Purchase and Sale Agreement for Partnership Interests).

³⁷ App. 36 (DC Memo, p. 29); App. 495-96 (Assignment of Partnership Interests).

In 2003 Faegre added R&R Investors as one of the many claimants it represented asserting Tucker Act Claims. Faegre's client (and later Eckland's client) at all times has been R&R Investors.³⁹

On May 18, 2007, R&R Investors, along with the many other borrower-owners, entered into a Settlement Agreement with the United States of the Tucker Act Claim.⁴⁰

The Settlement Agreement named "R&R Investors LP" as the "Plaintiff name[d] per

³⁸ App. 37 (DC Memo, p. 30). The Klugs and Strangis (and the limited liability company he owns) executed a Purchase and Sale Agreement for Partnership Interests which states "Sellers shall sell, convey and assign the Partnership Interests to Purchasers, and Purchasers shall purchase and accept the Partnership Interests for the Purchase Price...." App. 437 (Purchase and Sale Agreement for Partnership Interests, ¶ 1). The "Sellers" are identified as David and Mary Klug; the "Purchasers" are identified as Strangis and the limited liability company he owns; and the "Partnership Interests" are identified as the "Sellers' partnership interests in the Partnership [R&R Investors, a Minnesota general partnership], together with any and all rights associated with such partnership interests...." App. 436 (Purchase and Sale Agreement for Partnership Interests).

The Klugs and Strangis (and the limited liability company he owns) also executed an Assignment of Partnership Interests which assigned all of "Assignor's partnership interests in R&R investors, a Minnesota general partnership ('R&R investors') together with any and all rights and interests associated with such partnership interests (the 'Partnership Interests') free and clear of any liens, claims or encumbrances created or suffered by Assignor." App. 36 (DC Memo, p. 29); App. 495-96 (Assignment of Partnership Interests).

³⁹ App. 18, 52 (DC Memo, pp. 11, 45); Resp. R&R App. 268-326 (Complaint for Breach of Contract and Just Compensation, ¶ 91); Resp. R&R App. 262-64 (Contingent Fee Agreement, dated February 15, 2003); Resp. R&R App. 265-67 (Contingent Fee Agreement, dated February 28, 2003); App. 511-13 (Contingent Fee Agreement, dated November 3, 2004).

⁴⁰ App. 23 (DC Memo, p. 16); App. 525-41 (Settlement Agreement).

complaint”; “Maranatha Inn” as the “Project name[d] per complaint”; and “R&R Investors” as the “Borrower name[d] per agency records.”⁴¹

No individual present or former partner of R&R Investors was a plaintiff in the Tucker Act Claim.⁴²

The Settlement Agreement further provided that:

[R&R Investors] warrants and represents that it is the sole owner of the claims at issue, and that no assignment or transfer of these claims or any portion of them has been made. [R&R Investors] further warrants and represents that no other action with respect to these claims is pending or will be filed by [R&R Investors] in any other court....⁴³ and that “[t]his Agreement is entered into in compromise of all claims that [R&R Investors] ha[s] against the Government relating in any way to any right to prepay the loans referenced above....⁴⁴

After R&R Investors receives final payment from the Government pursuant to the Settlement Agreement, R&R Investors’ “claims shall be dismissed with prejudice.”⁴⁵

All the parties before this Court entered into written consents of the Settlement Agreement.⁴⁶

⁴¹ App. 18 (DC Memo, p. 11); App. 541 (Settlement Agreement). All parties agree that the “LP” on the identification of R&R Investors is a mistake. Id.

⁴² See Resp. R&R App. 387-494 (Second Amended Complaint for Breach of Contract and Just Compensation).

⁴³ App. 527 (Settlement Agreement, ¶ H).

⁴⁴ App. 527 (Settlement Agreement, ¶ K).

⁴⁵ App. 537 (Settlement Agreement, Part III(C)(1)).

⁴⁶ App. 9, 22-23 (DC Memo, pp. 2, 15-16); App. 518-23 (Settlement Agreement Consent Forms).

Three other facts are important.

First, at no point did anyone take any steps to wind-up or terminate the affairs of R&R Investors.⁴⁷

Second, at no point did anyone purport to convey from R&R Investors to any partner (or to any other person) any property of the partnership--no one completed any action, for example, to convey any Tucker Act Claim rights that the partnership owned to a partner as his or her personal property.⁴⁸ In 2004, however, a lawyer for the Hogenson Group, purporting to convey a recommendation from Attorney Eckland, had told the Hogenson Group that “the possible best way” to get “the proceeds from [the] Federal lawsuit . . . into the hands” of the Hogenson Group “is by an assignment but also an amendment of any partnership agreement that would travel to and be binding upon the purchasers and any successor purchasers or owners.”⁴⁹ This was never done.

Third, when Faegre and Eckland brought this interpleader action seeking a court determination as to whom the law firm should deliver the proceeds of the Settlement Agreement, those law firms served the members of the Hogenson Group, the Klugs, and

⁴⁷ App. 31-32 (DC Memo, pp. 24-25).

⁴⁸ App. 32-33, 37-38 (DC Memo, pp. 25-26, 30-31).

⁴⁹ App. 20 (DC Memo, p. 13). The lawyer also noted that the “Klug side... prefers not to seek legal counsel . . . [and] appears to be rather balky.” App. 552 (July 6, 2004 Letter from Michael Vadnie to Hogenson Group).

Strangis (who then owned R&R Investors), and while the others all responded, the Klugs defaulted and never appeared.⁵⁰

B. The Summary Judgment Ruling.

On September 2, 2008, resolving eight motions in a detailed 64 page ruling, Judge Neville ordered a final judgment on all claims, cross-claims and counterclaims in the interpleader action. The District Court ordered the interpled funds to be paid to R&R Investors and the check delivered to R&R Investors' current owner Strangis (as well as all further Settlement Proceeds), except \$1,250 was to be paid to the Estate of Gerald Berger to reimburse that estate for a retainer Berger had paid to Faegre in 2003.⁵¹

The written ruling--which we call the "DC Memo"--is divided into three parts: a procedural and factual background;⁵² an analysis of the cross motions for summary judgment;⁵³ and an analysis of the motions to dismiss the malpractice and breach of contract claims (and related Rule 11 motions) against the Tucker Act litigation attorneys.⁵⁴

This brief addresses only the summary judgment issues between the Hogenson Group and R&R Investors/Strangis.

⁵⁰ App. 33, 36-37 (DC Memo, pp. 26, 29-30).

⁵¹ App. 6 (Order for Judgment, ¶¶ 3, 4).

⁵² App. 8-24 (DC Memo, pp. 1-17).

⁵³ App. 24-38 (DC Memo, pp. 17-31).

⁵⁴ App. 38-64 (DC Memo, pp. 31-57).

On pages 5-17 of the ruling, Judge Neville sets forth her fact findings in 31 unnumbered paragraphs.⁵⁵ The conclusions of law on the issue of who has a right to the Settlement Proceeds are found in 28 unnumbered paragraphs on pages 17-31.⁵⁶

Judge Neville first addressed the rights partners have to partnership property “as a tenant in partnership” under the UPA,⁵⁷ which applied to R&R Investors because it was formed before January 1, 1999,⁵⁸ but concluded that “property acquired with partnership funds is partnership property,”⁵⁹ not property of individual partners.⁶⁰ What the partners own and may sell or otherwise convey to others is their “interest in the partnership [which] is distinguishable from partnership property.”⁶¹

⁵⁵ App. 12-24 (DC Memo, pp. 5-17).

⁵⁶ App. 24-38 (DC Memo, pp. 17-31).

⁵⁷ App. 25-27 (DC Memo, pp. 18-20); Minn. Stat. § 323.24.

⁵⁸ Common law controlled Minnesota partnerships until 1921 when Minnesota adopted the Uniform Partnership Act of 1914, generally called the “UPA.” See Minn. Stat. § 323 et seq. In February 1997, Minnesota adopted the new Revised Uniform Partnership Act of 1994 under Chapter 323A of the Minnesota Statutes, which repealed a major portion of the Uniform Partnership Act of 1914 as of January 1, 2002. The new law is generally called the “RUPA.” Chapter 323A of the Minnesota Statutes, formally titled the “Uniform Partnership Act of 1994,” took effect January 1, 1999 and now governs all partnerships in Minnesota. Minn. Stat. § 323A.1202. See 20 Minnesota Practice Series § 4.1 (2008).

⁵⁹ App. 26 (DC Memo, p. 19) (citing Minn. Stat. § 323.07).

⁶⁰ App. 27 (DC Memo, p. 20).

⁶¹ Id.

A “chose in action,” she also concluded, “is not the ‘partner’s interest in the partnership,’ but is ‘specific partnership property,’” citing United Bank of Bismark v. Glatt, 420 N.W.2d 743, 746-47 (N.D. 1988) and three other cases.⁶² The “Tucker Act Claim is specific partnership property under the UPA.”⁶³

Judge Neville then turned to the question of what happened to this “specific partnership property” as a result of the transfers of interests in R&R Investors to the Klugs and then to Strangis. The Hogenson Group had argued that R&R Investors had “dissolved” when they themselves ceased being partners, but the District Court pointed out that dissolution is different than the winding up of the business of the partnership, i.e., ceasing business, paying all the bills, and distributing any remaining property to the partners.⁶⁴ Here, the District Court stated, the “business [of the Maranatha Apartments] has been continued--and the apartments have not been sold, nor have the debts been paid off.”⁶⁵

Since R&R Investors had not been wound-up, none of the property--including the Tucker Act Claim--ever transferred to any partner of the partnership. When the Hogenson Group sold their partnership interests to the Klugs, partnership debts “were

⁶² Id.

⁶³ Id.

⁶⁴ App. 28-29 (DC Memo, pp. 21-22) (citing case law for Minn. Stat. §§ 323.28 (repealed) and 323.32 (repealed)).

⁶⁵ App. 31 (DC Memo, pp. 24).

assumed by the Klugs in the assumption agreement.”⁶⁶ What actually happened was a “substitution of partners,” as the transaction documents clearly show.⁶⁷

The District Court also pointed out that, regardless of any dissolution, there never was a conveyance of the Tucker Act Claim from R&R Investors to any person, not during the ownership period by the Hogenson Group, or later. Thus, she concluded that the Tucker Act Claim was owned by R&R Investors when the Klugs purchased the partnership interests of the Hogenson Group.⁶⁸

The District Court next turned to the 2004 transfer to Strangis by the Klugs of their partnership interests. Judge Neville noted the Klugs had been served as interpleader defendants but “have not appeared... nor have they contested that they transferred the partnership and Maranatha Apartments to Mr. Strangis....”⁶⁹ The Hogenson Group had argued that Strangis could not own the Tucker Act Claim because of the Minnesota Statute of Frauds (which does apply to choses in action) and the Federal Anti-Assignment Act, and Strangis has no writing conveying the Tucker Act Claim to him⁷⁰--but Judge Neville held that R&R Investors itself now owns and always has owned the claim, so as a practical matter Strangis, who currently controls R&R Investors, controls the claim even

⁶⁶ Id.

⁶⁷ App. 32 (DC Memo, p. 25).

⁶⁸ App. 32-33 (DC Memo, pp. 25-26).

⁶⁹ App. 33 (DC Memo, p. 26).

⁷⁰ App. 33-34 (DC Memo, pp. 33-35). See infra note 72 for an explanation of the Federal Anti-Assignment Act.

though he does not own it personally.⁷¹ The Statute of Frauds and Anti-Assignment Act Agreements are not applicable to the facts here.⁷²

The District Court had harsh words for the absent Klugs and for the Hogenson Group. As to the Klugs, they sold their R&R Investors' partnership interests to Strangis "free and clear of any and all liens and encumbrances,"⁷³ but then David Klug submitted an affidavit stating that he had not *intended* to convey the Tucker Act Claim to Strangis

⁷¹ App. 33-34 (DC Memo, pp. 26-27).

⁷² The District Court held that "Section 1-206 of the Uniform Commercial Code sets forth the Statute of Frauds for 'Kinds of Personal Property Not Otherwise Covered.' The Comments indicate that a 'chase in action' is subject to the written requirements. However, this argument propounded by the Hogenson Group assumes that there was no substitution of partners of R&R Investors. The claim has belonged to R&R Investors all along. The statute of frauds argument actually supports Strangis' current position, namely that nowhere has the Hogenson Group provided a writing showing that R&R Investors conveyed that claim to any other individual or entity. Therefore the claim remains with the partnership that owns it, as it is partnership property." App. 33 (DC Memo, p. 26).

Further, the Hogenson Group does not have standing to invoke the Federal Anti-Assignment Act. The sole purpose of the Federal Assignment of Claims Act, 31 U.S.C. § 3727, is to protect the Government, and not to protect parties to a putative assignment. Goodman v. Niblack, 102 U.S. 556 (1880) (predecessor statute); McKenzie v. Irving Trust Co., 323 U.S. 365, 369 (1945) ("provisions of the statute governing assignments of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves."). These cases deny standing to any party other than the Government to invoke the Anti-Assignment Act.

⁷³ The Court held that "[o]n September 1, 2004 both of the Klugs assigned all of their partnership interests to Kass Properties and Paul Strangis. Assigned were 'all of Assignor's partnership interests in R&R Investors, a Minnesota general partnership ('R&R Investors')... together with all rights and interests associated with such partnership interests (the 'Partnership Interests') free and clear of any liens, claims or and encumbrances created or suffered by Assignor." App. 36 (DC Memo, p. 29); App. 495-96 (Assignment of Partnership Interests).

in 2004⁷⁴--if the affidavit is truthful, why did Klug not tell Strangis that he intended not to convey out the Tucker Act Claim when he sold the partnership to Strangis?⁷⁵

As to the Hogenson Group, the Court questioned how they could simultaneously and inconsistently insist that (i) the Tucker Act Claim was their personal property at all times (the “tenant in partnership” theory), but also that (ii) the claim became their personal property after a “dissolution” of R&R Investors, and (iii) the Klugs had somehow purchased the claim and then promised to deliver proceeds from the claim back to the Hogenson Group?⁷⁶

And the Court gave weight to facts revealed by Faegre (but not disclosed in the Hogenson Group’s 400+ pages of answers, counterclaims and cross-claims), that in 2003 the Hogenson Group had hired a lawyer to help them try to regain the Tucker Act Claim--which had suddenly become valuable after the Supreme Court held in 2002 that the Government had repudiated the prepayment rights in the mortgage agreements with the plaintiff partnerships--and that he recommended they obtain something in the nature of an

⁷⁴ App. 35 (DC Memo, p. 28). “It was never intended as part of the sale that Mary or I would acquire any claims that the R&R Investors general partnership from which Mary and I purchased the Marantha [sic] Inn, or as general partners, owned prior to the sale of the Marantha [sic] Inn. I am quite confident of this since the purchase agreement and underlying sales documents do not mention the transfer of any claims held by R&R Investors’ general partnership from which Mary and I purchased the Marantha [sic] Inn.” App. 326-27 (Aff. of David Klug, ¶ 4).

⁷⁵ App. 35-36 (DC Memo, pp. 28-29).

⁷⁶ App. 37-38 (DC Memo, pp. 30-31).

assignment of the claim from the Klugs, which they were never able to do.⁷⁷ All they received was a vague January 2004 letter that states *if* R&R Investors received any funds through the Tucker Act litigation “I *will assign* any and all . . . law suit proceeds to the original partners of R&R Investors.”⁷⁸ (Judge Neville’s emphasis). This letter is dated about eight months *before* the Klugs sold R&R Investors to Strangis, and Judge Neville was obviously troubled as to why the Klugs had not come forward and explained how they could make such a promise to the Hogenson Group and then turn around and sell their partnership interests to Strangis a few months later “free and clear of all liens.”⁷⁹

ARGUMENT

Introduction

This brief responds to points A-G of Appellants’ Principal Brief (herein “APB”), pp. 27-51, and generally follows the presentation order set forth there. At the outset, however, this Court needs to know that the counterclaims and cross-claims of the Hogenson Group are now and were in the District Court disingenuous. The Court also needs to know that all parties agreed that the relevant transaction documents for the three sales of the partnership interests were genuine and that the issue before the District Court was the application of law to those documents.

⁷⁷ App. 17-18, 20-21 (DC Memo, pp. 10-11, 13-14).

⁷⁸ App. 19-20, 35, 38 (DC Memo, pp. 12-13, 28, 31); App. 544 (January 9, 2004 letter from David Klug to Diane Larson).

⁷⁹ See App. 35-37 (DC Memo, pp. 28-30).

A. Standard Of Review.

On appeal from summary judgment, the reviewing court must examine the record to determine (1) whether there are any genuine issues of material fact, and (2) whether the District Court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). But when “the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,” summary judgment is proper. DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

A genuine issue of material fact exists when the nonmoving party presents evidence that creates a doubt as to a factual issue that is “probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” DLH, 566 N.W.2d at 71. The court reviews the evidence in the light most favorable to the party against whom judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

On appeal from summary judgment where no material facts are in dispute and the only question is one of law, this Court reviews *de novo*. Dairyland Ins. Co. v. Starkey, 535 N.W.2d 363, 364 (Minn. 1995). An award of summary judgment should be affirmed if it can be sustained on any ground. Winkler v. Magnuson, 539 N.W.2d 821, 828 (Minn. Ct. App. 1995).

Where the district court enters detailed findings on uncontroverted transaction documents, those findings are the facts for the appeal. See Gresser v. Hotzler, 604 N.W.2d 379, 383 (Minn. Ct. App. 2000).

B. Any “Dissolution” of R&R Investors is Irrelevant to the Tucker Act Claim Because No Wind-Up of the Business of R&R Investors Ever Occurred.

1. The Hogenson Group’s “Dissolution” Theory.⁸⁰

The core issues in this case are what is and is not partnership property under the now repealed Minnesota UPA and what happens to partnership property when there is a dissolution (due to the departure of partners), but the partnership continues operating and is not wound up. In the District Court the Hogenson Group asserted inconsistent theories as to ownership of the Tucker Act Claim of R&R Investors--first, they contended that the members of the group had always owned that claim since it arose in 1988 (or 1997), during the time the Hogenson Group owned R&R Investors, because partners of UPA partnerships themselves own partnership property as “tenants in partnership” under Minn. Stat. § 323.24. This contention has been abandoned on appeal after Judge Neville explained to the Hogenson Group how the “tenant in partnership” law actually worked.⁸¹

⁸⁰ This section is in response to APB, pp. 31-36.

⁸¹ App. 25-27 (DC Memo, pp. 18-20). Property owned by a partnership is property of the partnership, not property of the partners. Spearman v. Spearman, 408 N.W.2d 689, 691 (Minn. Ct. App. 1987) (applying the UPA); Windom Nat. Bank v. Klein, 254 N.W. 602, 603 (Minn. 1934). A chose in action owned by a partnership is also the property of the partnership. Fuller v. Nelson, 28 N.W. 511, 512 (Minn. 1886) (cause of action is a partnership asset and partnership can assign cause of action); Trondson v. Janikula, 458 N.W.2d 679, 683 (Minn. 1990) (“[T]he assignment of the vendor’s interest in Chicago Partnership to the Sjostrands vested in them whatever rights Chicago Partnership had in the property as vendors, including recourse against the property for the purchase price. . . .”); Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 31 (Minn. 1906) (in a case to determine the respective rights of creditors following the transfer of partnership assets [stock of merchandise] to a corporation, the court stated, “if before the interposition of the court is asked the property has ceased to be the property of the partnership by a transfer to a third person the equities of the partners are extinguished and the derivative equities of the creditors are at an end . . . ‘It is, therefore, always essential to any

By abandoning this argument the Hogenson Group has acknowledged the validity of Judge Neville's first conclusion of law--that when the Tucker Act Claim arose, that claim was the property of R&R Investors.⁸² Thus, the sole issue properly before this Court as to the summary judgment ruling is whether the claim or its proceeds still are partnership property, or did the Tucker Act Claim or proceeds somehow get transferred away from R&R Investors?

Second, the Hogenson Group argued that there had been a "dissolution" of R&R Investors when they sold their interests to the Klugs and that event meant that the Tucker Act Claim somehow never traveled with their partnership interests to the Klugs, and that claim is still owned by the "dissolved" partnership, which itself is still owned by the Hogenson Group. On a related note, they contend that Strangis has no right to the Settlement Proceeds because he has no separate conveyance of the claim or proceeds to him from R&R Investors and, apparently, that the Klugs somehow own the claim/proceeds and they have promised to deliver those proceeds to the Hogenson Group.

preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced.'") (citation omitted).

What Minn. Stat. § 323.24, which states that a "partner is a co owner with the other partners of specific partnership property *holding as a tenant in partnership*," means is set forth in the many Minnesota cases which have interpreted this language meaning that, when a partnership owns property, the partners can use (or possess) the property, but that does not mean they own it--the partnership still owns it. See e.g., Donoho v. U.S., 168 F. Supp. 679, 682-83 (D. Minn. 1958), affirmed 275 F.2d 489 (8th Cir. 1960); Kangas v. Winquist, 291 N.W. 292, 293-94 (Minn. 1940); Windom Nat. Bank v. Klein, 254 N.W. 602, 604-05 (Minn. 1934).

⁸² App. 27, 38 (DC Memo, pp. 20, 31).

These are the sole legal theories on which this appeal of the summary judgment is based.

So the starting point is a clear understanding of the details of the Hogenson Group's "dissolution" claim--something that is a bit of a challenge with the blizzard of names the group applies to the evolution of R&R Investors over its 30 plus year life.⁸³ In a nutshell, the Hogenson Group argues that it owned R&R Investors in 1988 when Congress passed a law that barred prepayment rights granted in the mortgages and left the borrowers with the obligation to charge reduced rents for the life of the loans; the Hogenson Group also owned R&R Investors in 1997 when R&R Investors asked permission to pay off the debt early and the Government rejected the request because of the 1988 Act of Congress. At this point, R&R Investors had a "takings" claim or a contract repudiation claim against the Government; in 2000 the Hogenson Group sold their interests in R&R Investors to the Klugs *but did not separately convey the Tucker Act Claim*; this sale caused a "dissolution" of R&R Investors and the effect of that dissolution is that the not yet brought Tucker Act Claim stayed with the Hogenson Group.⁸⁴

We will examine this theory and demonstrate that the District Court was dead right in rejecting it, but at the outset the Court needs to focus on how the theory

⁸³ The Court must understand that none of these names are historical or found in any of the transaction documents. These names are just labels the Hogenson Group or its lawyers have created to further their arguments (disguised as historical facts).

⁸⁴ In a slight of hand they did not argue in the District Court, the Hogenson Group now claims that when Berger, a member of the group, hired Faegre & Benson in 2003 to pursue the Tucker Act Claim on behalf of R&R Investors, that was part of the "winding up [of] partnership affairs."

illogically separates rights from responsibilities of a business organization and puts a valuable asset of a partnership in the pocket of departing equity owners, while leaving the enterprise still responsible to its creditors, one of whom is owed a huge long term mortgage debt. This is one of the reasons the counterclaims and cross-claims are disingenuous.

If the Hogenson Group theory is correct, on the day *before* they sold their partnership interests to the Klugs, R&R Investors owned a functioning apartment building and a large potential claim against the Government, but also owed a large mortgage debt to its lender; on the day *after* the sale, R&R Investors still owned the apartment building (was still subject to the onerous rental restraints), still owed the big mortgage debt, but now by operation of the Minnesota UPA, some other “partnership in dissolution”--meaning the Hogenson Group--owned the valuable legal claim. Even a school child can see this is not how the law can function or how people can do business.

We ask the Court to step back from the fray for a moment and consider how the position of the Hogenson Group violates the basic proposition that rights and responsibilities go hand in hand. The *rights* at issue--what the parties are fighting over--are rights to cash from the Government in settlement of the Tucker Act Claim; but the attendant *responsibilities* are to honor the rent restrictions and other restraints and to pay the note on the Maranatha Inn Property to avoid foreclosure. The Hogenson Group has washed its hands of those responsibilities--they lie with R&R Investors and, as a practical matter, with Strangis. He is the one who over the next twenty years has to find qualified low-income tenants to pay rent, to pay the note and mortgages, and thereafter to pay the

large balloon due on the property. The law simply does not countenance such a disconnect.

2. **The Personalty of R&R Investors Stayed With the Partnership in the Transfers of the Partnership from the Hogenson Group, and Later from the Klugs to Strangis.**⁸⁵

The Hogenson Group argues that when the Hogenson Group sold their interests in R&R Investors to the Klugs in 2000, this sale caused a “dissolution” of R&R Investors and the effect of that dissolution is that the Tucker Act Claim stayed with the Hogenson Group.

In support of this argument, the Hogenson Group argues that there is no document revealing the intent of the Hogenson Group to transfer any unknown asset of the partnership when the partnership itself was transferred.⁸⁶ This is untrue. The transaction documents for the transfers of partnership interests also transferred the known (and unknown) personalty owned by the partnership.

On January 12, 2000, David and Mary Klug entered into a Purchase Agreement with the Hogenson Group for the Maranatha Inn Apartments.⁸⁷ The Klugs and the Hogenson Group executed three addenda attached to the Purchase Agreement. Addendum ‘B,’ which is subtitled Personal Property List Value Allocation, transferred “All other personal property on premises now belonging to owner and used in the

⁸⁵ This section is in response to APB, pp. 37-38, 48-50.

⁸⁶ APB, p. 38.

⁸⁷ App. 15 (DC Memo, p. 8); App. 412-16 (Purchase Agreement).

operation of Maranatha Inn Apartments. Not limited to the following: shovels, lawn mower, lawn care items....”⁸⁸

Addendum ‘C’ also provided that: “To facilitate the sale of this property, buying parties agree to purchase an existing partnership, known as R&R Investors.”⁸⁹

On March 31, 2004, the Klugs as sellers and Paul Strangis and Kass Properties IV, LLC (the limited liability company Strangis controls) as buyers entered into a Purchase and Sale Agreement for Partnership Interests.⁹⁰ This Agreement also transferred the known (and unknown) personalty owned by R&R Investors: “WHEREAS, the Partnership owns:... (b) any and all personal property used in connection with the operation of the Real Property, including but not limited to cash, cash equivalents and the personal property described on Exhibit C attached hereto (the ‘Personal Property’)...”⁹¹ Exhibit C, which is executed by David Klug, consists of a list of the partnership personal property: 26 stoves, 26 refrigerators, 25 sleeve installed air conditioners, and 1 Toro lawn mower.⁹²

The Purchase and Sale Agreement for Partnership Interests also provided that Strangis and Kass Properties IV, LLC succeeded “to any and all rights, privileges,

⁸⁸ App. 414 (Purchase Agreement, Addendum ‘B’).

⁸⁹ App. 415 (Purchase Agreement, Addendum ‘C’, ¶ 4).

⁹⁰ App. 36 (DC Memo, p. 29); App. 436-74 (Purchase and Sale Agreement for Partnership Interests).

⁹¹ App. 436 (Purchase and Sale Agreement for Partnership Interests).

⁹² App. 460 (Purchase and Sale Agreement for Partnership Interests, Exhibit C).

benefits, obligations and duties of Sellers arising under the Partnership Interests from and after the date thereof and Seller shall have no further rights, privileges, benefits, obligations or duties with respect to the Partnership Interests except such as arise as a result of the [1%] Retained Interest.”⁹³

As Judge Neville commented, if the Klugs intended to convey to Strangis less than everything they owned in regard to R&R Investors, they should have disclosed that fact to him instead of promising that they were selling him the partnership “free and clear of all liens [and] claims” except as disclosed.⁹⁴ In short, the Klugs bought R&R Investors from the Hogenson Group and Strangis bought R&R Investors from the Klugs, and in both sales the parties conveyed all partnership assets to the buyer.

A related argument advanced by the Hogenson Group is that Minn. Stat. § 323.24 bars the conveyance of specific partnership property by a partner.⁹⁵ That statute simply provides that the “tenant in partnership” right of a partner to use, possess or enjoy

⁹³ App. 439 (Purchase and Sale Agreement for Partnership Interests, ¶ 5(c)). Paragraph 1 of the “Purchase and Sale Agreement for Partnership Interests” defines the Retained Interest as follows: “Purchase and Sale. Sellers shall sell, convey and assign the Partnership Interests to Purchasers, and Purchasers shall purchase and accept the Partnership Interests for the Purchase Price (as hereinafter defined) and on and subject to the terms and conditions herein set forth; provided however, David [Klug] shall retain a one percent (1%) Partnership Interest in the Partnership (the ‘Retained Interest’) which shall be subject to an option to purchase in favor of Strangis which may be exercised, by written notice from Strangis to David [Klug], given at any time after the Closing. Notwithstanding anything contained herein or in the Partnership Amendment, as herein defined, to the contrary, neither David [Klug] nor any other holder of the Retained Interest shall be entitled to any distributions of any kind from the Partnership.” App. 437 (Purchase and Sale Agreement for Partnership Interests, ¶ 1).

⁹⁴ See App. 35-36 (DC Memo, pp. 28-29).

⁹⁵ APB, pp. 48-50.

partnership property does not carry with it certain other incidents of ownership like the right to assign it,⁹⁶ have it attached,⁹⁷ or bequeath it,⁹⁸ unless all the other partners “consent” to such a transfer. It simply has no application here because the Tucker Act Claim was never assigned, attached, or bequeathed. It was always owned by the partnership. If a partnership owned a room full of exercise equipment, the partners would all have a statutory right to “possess” the machines--and exercise on them--but could not sell them, bequeath them, or suffer attachment of them unless the other partners consented. If all the partners sold their partnership to Strangis, they would no longer have a right to use the machines; he could use them and, if the partnership then sold the machines--like R&R Investors sold its Tucker Act Claim--the proceeds would become partnership property under the control of Strangis.

3. **The Legal Effect of Any Dissolution.**⁹⁹

Judge Neville explained that a Minnesota UPA partnership may “continue to exist even in dissolution,”¹⁰⁰ and dissolution is not the same as winding-up of the

⁹⁶ Minn. Stat. § 323.24(2).

⁹⁷ Minn. Stat. § 323.24(3).

⁹⁸ Minn. Stat. § 323.24(4).

⁹⁹ This section is in response to APB, pp. 31-33, 39-40.

¹⁰⁰ App. 28-29 (DC Memo, pp. 21-22) (citing Minn. Stat. § 323.28 (repealed)).

partnership.¹⁰¹ So the end of the partnership relationship between the parties “does not end the partnership itself.”¹⁰²

Sometimes, she noted, partners withdraw their share of partnership profits “and no liquidation need occur.”¹⁰³ The key point is that when a dissolution occurs, the partnership “does not necessarily cease to exist as a legal entity, but rather it ceases to have the power to contract for new liabilities for the departing partners, as set forth in Section 323.32.”¹⁰⁴

The argument the Hogenson Group presents here blurs the distinction between dissolution and wind-up and creates something in the nature of a series of partnerships where owners of a partnership have come and gone, which happens all the time, especially as to real estate owning partnerships which have tax advantages for the partners. But no one--other than the Hogenson Group to our knowledge--has ever made this “series of partnerships” argument, which, by the way, is why they attach the fanciful names to R&R Investors as that partnership has passed from owner to owner.

The case law presented by the Hogenson Group in support of this theory is sparse, but they argue that a “case on all fours” to the present facts is Fenner & Beane v. Nelson,

¹⁰¹ App. 29 (DC Memo, p. 22) (citing Minn. Stat. § 323.29 (repealed)).

¹⁰² App. 29 (DC Memo, p. 22) (citing Hurwitz v. Padden, 581 N.W.2d 359, 361 (Minn. 1998)).

¹⁰³ App. 29 (DC Memo, p. 22) (citing Maras v. Stillinovich, 268 N.W.2d 541, 544 (Minn. 1978)).

¹⁰⁴ App. 29 (DC Memo, p. 22).

13 S.E.2d 694 (Ga. Ct. App. 1941).¹⁰⁵ Here is what happened: in March 1933 customer Nelson directed the stock brokerage partnership of Fenner, Beane and Ungerleider to purchase \$99,525.16 in stock on margin; in July 1933 he directed the stocks be sold leaving a net loss of \$18,757.76, which Nelson refused to pay. Id. at 695. In April 1937, Fenner & Beane, then the name of the brokerage partnership after some partners had left the business and others had joined, sued Nelson for the net loss. Id. at 695-96. Nelson's defense--contrary to what the Hogenson Group tells the Court--was that "the account sued on was an illegal gambling transaction," and that Nelson himself had been injured because the "partnership gave him incorrect and inaccurate information as to the status of his account...." Id. at 696.

At trial, Nelson made the illegal gambling argument but, at the conclusion of all evidence, moved for a directed verdict on the ground that he dealt with Fenner, Beane and Ungerleider and not with Fenner & Beane and "there was no evidence that the assets of that partnership or its right of action against Nelson had ever passed to Fenner & Beane." Id. The trial court granted the motion and denied a series of "exceptions" asserted by the plaintiff brokerage firm. Id.

The Court of Appeals affirmed. It stated that the partnership that contracted with Nelson was a New York limited partnership, but declined to give that fact weight because it had not been pled. Id. at 697. The Court of Appeals also declined to consider the fact that New York had adopted the UPA "under section 20 of which a change in a partnership without an intention to dissolve it does not result in a dissolution." Id.

¹⁰⁵ APB, pp. 39-40.

Instead, the court turned to the common law of Georgia, including the Code of 1863, which provided that upon a dissolution of a partnership due to a change in personnel the title “to personal property [of the partnership] shall vest in the surviving partners, who have the right to dispose thereof for paying the debts and making distribution.” *Id.* at 698. In short, they have to pay the partnership bills (which the Hogenson Group never did) and then enjoy any surplus as their return on equity.

But this case--as the Hogenson Group has pleaded from day one--is not under Georgia common law (or under its Code of 1863), the case is under the UPA,¹⁰⁶ which has no provision that says upon dissolution of a partnership title to personal property of the partnership “shall vest in the surviving partners.” To the contrary, upon dissolution, under Minn. Stat. § 323.37, “each partner... may have the partnership property applied to discharge its liabilities”--pay its debts--and then “the surplus applied to pay in cash the net amount owing to the respective partners.”¹⁰⁷

Ironically, the leading UPA case comparable to what happened here is a Tucker Act case where real estate partnerships challenged the 1988 Act of Congress that changed the rules as to low-moderate income housing financed by the Government. Sound familiar? In Cienega Gardens v. United States, 67 Fed. Cl. 434 (2005), the Government argued that because partnership interests in some of the plaintiff partnerships had been

¹⁰⁶ App. 26 (DC Memo, p. 19). See Resp. R&R App. 561 (Counterclaim Plaintiffs’ Memorandum of Law in Support of their Motion for Partial Summary Judgment Against Counterclaim Defendants and Cross Claim Defendants, p. 31); APB, pp. 29-30.

¹⁰⁷ Minn. Stat. § 323.37.

sold and transferred, the Anti-Assignment Act¹⁰⁸ barred the partnerships from asserting Tucker Act claims. Id. at 464-65.

The Court held:

The plaintiffs in these cases are not the partners but the partnerships. Under California law, a partnership is viewed as an entity, not as an aggregation of individuals, regarding its ownership of property. *See Everest Investors 8 v. McNeil Partners*, 114 Cal.App. 4th 411, 424, 8 Cal.Rptr.3d 31, 40 (2003). The entities who entered into the Regulatory Agreements with HUD were Blossom Hill Apartments, a limited partnership, and Skyline View Gardens, a limited partnership.... Those are the same entities that have filed the present suit. Accordingly, because no transfer of a claim took place, Blossom Hill and Skyline View did not violate the Anti-Assignment Act.¹⁰⁹

Id. at 464. And the Court concluded:

Furthermore, there is no fear of multiple claimants here; just as the court would not allow the former limited partners of [two of the plaintiff partnerships] to bring a takings suit in this court, it will allow the partnerships to litigate their claims.

Id. at 465.¹¹⁰ Thus the Court of Federal Claims has already ruled that former owners of claimant partnerships are not proper Tucker Act plaintiffs; the partnerships themselves are because they borrowed the mortgage money and they suffer the harm in no longer being able to prepay their mortgages.

¹⁰⁸ See supra note 72 for an explanation of the Federal Anti-Assignment Act.

¹⁰⁹ The California case cited in this quotation involved a UPA partnership. In the quoted text, there is also a footnote, which we have omitted. That footnote cites two earlier California cases, one in 1952 and one in 1989, which are UPA or pre-UPA cases.

¹¹⁰ While the Government appealed and did obtain a vacation of some of the rulings, Cienega Gardens v. U.S., 503 F.3d 1266 (Fed. Cir. 2007), the Government apparently did not appeal the Anti-Assignment ruling and it was not vacated.

In fairness to the Hogenson Group, they have tried to distinguish Cienega Gardens through an argument that, while California is a UPA-“entity” state, Minnesota is a UPA-“aggregate” state, but the Hogenson Group has never really presented a case that so held.¹¹¹ The closest case they cite is Egner v. States Realty Co., 26 N.W.2d 464 (Minn. 1947).¹¹² But Egner makes no reference to either the “aggregate theory” or “single entity theory” of UPA partnership law.

Egner was a simple agency case--an owner of cemetery lots had hired a partnership to sell the lots and, when a partner withdrew, the principal-owner conveniently used the withdrawal to terminate what had become a lucrative contract for the partnership-agent. The Supreme Court affirmed a ruling in favor of the principal-owner stating that, at common law, “an agency conferred upon a partnership is terminated by operation of law by [the dissolution of the partnership]” and the “uniform partnership act has effected no change in this rule.” Id. at 469. Of course, we are not dealing with any question of the continuation of an agency relationship here. Egner is no authority for the earth shattering change in partnership law that the Hogenson Group seeks.

¹¹¹ Resp. R&R App. 605 (Counterclaim Plaintiffs’ Memorandum of Law in Opposition to Cross-Claim Defendant Paul Strangis’ Motion for Summary Judgment, p. 29).

¹¹² APB, p. 32.

4. **The Importance of the Failure to Wind-Up the Business of R&R Investors.**¹¹³

Judge Neville put great weight--and properly so--on the fact that while R&R Investors may have undergone a “dissolution” when partners sold their interests to other partners, there never was a “winding up” of the operations of R&R Investors.¹¹⁴ So now, for the first time on appeal, the Hogenson Group argues that when member Berger hired Faegre in 2003, that was part of the “winding up” of partnership affairs.¹¹⁵

But the Hogenson Group exquisitely misunderstands the wind-up process. In that process, which is statutory,¹¹⁶ the creditors are paid first and the owners split anything left over, which Minn. Stat. § 323.37 calls the “surplus.” Moreover, the wind-up process is not automatic--some partnerships continue business as usual after a dissolution, others decide to wind-up the partnership’s affairs.

The process the Hogenson Group proposes here is that the owners--the Hogenson Group themselves--strip away a six figure asset of the partnership and then pass on the other assets and the huge mortgage liability to, as a practical matter, subsequent owners like Strangis, by *not* undergoing a wind-up process.

Perhaps more importantly, in a wind-up the business operations of the partnership cease. Here the business of R&R Investors and the Maranatha Inn has not missed a beat

¹¹³ This section is in response to APB, pp. 35, 41-43, 47-50.

¹¹⁴ App. 31-32 (DC Memo, pp. 24-25).

¹¹⁵ APB, p. 47.

¹¹⁶ Minn. Stat. § 323.36 (Right to Wind-Up); § 323.37 (Allocation of Partnership Property on Dissolution); and § 323.39 (Distribution on Dissolution).

since 2000, or for that matter since its formation. A glance of the sale of assets from the Hogenson Group to the Klugs, and then to Strangis, show that each deal was the sale of an operating, functioning apartment rental business. Judge Neville found “[t]hat business has been continued--and the apartments have not been sold, nor have the debts been paid off.”¹¹⁷

We ask the Court to glance back at the confusing names of Appellants in the caption, e.g., “R&R Investors I-UPA Partnership.” The reason Appellants made up these names is the “series of R&R Investors partnerships” argument--not just the one that borrowed the mortgage money, built the Maranatha Inn, and has operated it for 30 years. Appellants contend that this partnership went into dissolution when they sold their interests to the Klugs and they continue to own it (“The Hogenson partnership did continue as a partnership [after they sold to the Klugs] because it had remaining partnership business to do....”).¹¹⁸ Once again, this is the theory that the Hogenson

¹¹⁷ App. 31 (DC Memo, p. 24). That crucial fact distinguishes McCormack v. Theo. Hamm Brewing Co., 284 F. Supp. 158 (D. Minn. 1968), a case the Hogenson Group cites for the proposition that a partnership still retains the legal power to sue after it is in dissolution. APB, pp. 46-47. In McCormack, a beer distributor went out of business when its brewer terminated a regional distribution agreement, and the partnership then sued the brewer for wrongful termination. Id. at 161. Citing Minn. Stat. § 323.34, the court declined to dismiss and held the partnership was the proper real party in interest even though its business was no longer operating. Id. at 161-62. The issue in the present case, moreover, is not whether R&R Investors can sue the Government, either in dissolution or in some future wind-up, the issue here is whether there is more than one R&R Investors partnership.

Finally, McCormack was not cited in the District Court.

¹¹⁸ APB, p. 35 (citing Hurwitz v. Padden, 581 N.W.2d 359, 361 (Minn. Ct. App. 1998)).

Group somehow can sell the building and real estate, along with the mortgage debt, to the new partnership formed by the Klugs, but keep the Tucker Act Claim through transaction documents that say nothing of the sort.

As to Hurwitz, the Hogenson Group's quote is incomplete.¹¹⁹ This Court did state that when "the partnership's business is completely resolved, only then are the entity and the partnership relationship finally terminated," but this Court then cited to Minn. Stat. § 323.29 (stating partnership continues until winding up of partnership affairs is completed) (Id.)--something that has never happened here.

The Hogenson Group does argue that two transaction documents (pretending we can ignore the others) support its "series of partnerships" theory.¹²⁰ First, in the sale from the Hogenson Group to the Klugs an April 10, 2000 Indemnity Agreement¹²¹ was executed between "selling partners" and "buying partners" and that leads to the inference that a second partnership was created at that time. But, as we noted earlier, the Klugs signed this document as "New or Substitute Partner," making clear there was only one partnership.¹²² The second Whereas clause, moreover, states the "Sellers are desirous of

¹¹⁹ Id.

¹²⁰ APB, pp. 41-43.

¹²¹ App. 421-22 (Indemnity Agreement).

¹²² See supra note 30.

selling the partnership known as R&R Investors and the Buyers are desirous of buying said partnership.”¹²³ This document shows there is only one R&R Investors.

Second, there are two contingency fee agreements--one signed in 2003 by Hogenson Group member Berger and another signed by Strangis in 2004. We ask the Court to examine the documents--both refer to R&R Investors as the client and identify the Maranatha Inn as the subject property.¹²⁴ Why a second agreement? Because by 2004, R&R Investors was under new ownership, and lawyer Eckland had left Faegre and formed his own firm. It was probably good business for the lawyers to seek a retainer agreement signed by the new owner of the client partnership. In sum, neither of these documents purports to create a second partnership or detracts from Judge Neville’s core conclusion--that R&R Investors owned the Tucker Act Claim when it came into existence and still owns the claim.

C. The New Issue of the Alleged Intent of the Klugs Not to Transfer the Tucker Act Claim When They Sold R&R Investors to Strangis.

The Hogenson Group cobbles together three things--the 2003 quit claim deeds from themselves to the Klugs, the 2003 retainer agreement between R&R Investors executed by Gerald Berger on behalf of R&R Investors, and the David Klug Affidavit--and uses these documents to contend that there is a fact question as to whether the Tucker Act Claim is still owned by R&R Investors.

¹²³ App. 421-22 (Indemnity Agreement).

¹²⁴ Resp. R&R App. 262-64 (Contingent Fee Agreement, dated February 15, 2003); Resp. R&R App. 265-67 (Contingent Fee Agreement, dated February 28, 2003); App. 511-13(Contingent Fee Agreement, dated November 3, 2004).

Judge Neville addressed all three points. Neither independently, nor collectively, however, do these things somehow strip R&R Investors of the Tucker Act Claim.

1. **The 2003 Quit Claim Deeds for the Hogenson Group to the Klugs.**¹²⁵

In the District Court, we pointed out that the Hogenson Group made only a passing reference to the 2003 quit claim deeds for the Maranatha Inn Property--each of them belatedly delivered to the Klugs. Our point was that if there could be any argument after the Hogenson Group sold R&R Investors to the Klugs in 2000 that property of the partnership somehow remained with the sellers, that argument could not survive the 2003 delivery of those quit claim deeds. In this Court the Hogenson Group turns that argument around on us and contends that the quit claim deeds are the conveyances whereby the Klugs come to own the Maranatha Inn Property--having received it from the individual members of the Hogenson Group--and there is no comparable “quit claim deed” of the Tucker Act Claim to the Klugs (or to Strangis for that matter).

But the premise of this argument is a mis-depiction of the quit claim deeds--they were not conveyances of interests, they were in the nature of releases of claims, just as quit claim deeds always are. Such deeds do not constitute a representation that the quit claiming party owns an interest in the subject party--all they do is convey what the quit claimer owns, *if anything*.¹²⁶ In truth, there has never been a conveyance of the

¹²⁵ This section is in response to APB, pp. 36-38, 44.

¹²⁶ “A quitclaim deed passes such rights and interests as the grantor possesses at the time, but the grantor does not affirm that the grantor is possessed of any title whatsoever.” 15 Dunnell Minnesota Digest § 1.05 (5th ed. 2005)(citing Caughie v. Brown, 93 N.W. 656, 657 (Minn. 1903)(“ [A] quitclaim deed passes all of the estate which the grantor can

Maranatha Inn Property since the mortgage to the Government was put on the property. R&R Investors owned that property then and owns it now.

The Hogenson Group further compounds the situation by repeatedly pointing out that Strangis has no conveyance of the Tucker Act Claim from anyone *to him*. But as Judge Neville made clear, Strangis does not own and has never owned the Tucker Act Claim--R&R Investors owns it and has always owned it.¹²⁷ Strangis, of course, has always pleaded that R&R Investors itself--not Strangis personally--owned the Tucker Act Claim.¹²⁸

2. **The Hiring of Faegre by Berger in 2003 to Pursue the Tucker Act Claim.**¹²⁹

The Hogenson Group tries to change the legal effect of the binding agreements that constitute the transfers of ownership of the R&R Investors partnership interests from them to the Klugs and from the Klugs to Strangis by pointing out that neither the Klugs nor Strangis hired Faegre in February 2003, it was the Hogenson Group member Gerald Berger who did that (and paid a retainer). The way that argument was presented in the

convey by deed of bargain and sale. It is the mode adopted for the conveyance of land where the grantor does not propose to be held responsible for the condition of the title, and, when he thus conveys, it is immaterial to him whether he has title or not. It passes such rights and interests as the grantor possesses at the time, but by its execution and delivery a grantor does not affirm that he is possessed of any title whatsoever.”)).

¹²⁷ App. 38 (DC Memo, p. 31).

¹²⁸ Resp. R&R App. 6 (Answer of R&R Investors, ¶ 18); Resp. R&R App. 2 (Answer of Paul Strangis, ¶ 18).

¹²⁹ This section is in response to APB, pp. 40-41.

District Court was that Berger was a *departed partner* in 2003, and could no longer bind R&R Investors to a legal representation contract.¹³⁰

But Judge Neville pointed out that in February 2003, Berger was still a 1% owner of R&R Investors.¹³¹ And even if Berger did not have legal authority to hire Faegre, that would not somehow mean that R&R Investors could not benefit from Faegre's and Eckland's work. The Government was satisfied that the proper R&R Investors was before the Court of Federal Claims and sought and obtained a release from R&R Investors, not some other partnership.

The point here is that R&R Investors has always owned the Tucker Act Claim and R&R Investors has asserted that claim successfully in court--regardless of what Berger believed he was doing when he hired Faegre in 2003. When the Government paid the Settlement Proceeds here, it was not concerned with who hired Faegre--it was concerned with getting a release from the partnership that borrowed the mortgage money from the United States and that would feel the pain of the change in repayment terms of the mortgage due to the 1988 Act of Congress. That "party" is neither the Hogenson Group nor Berger.

¹³⁰ Resp. R&R App. 546-49, 570 (Counterclaim Plaintiffs' Memorandum of Law in Support of their Motion for Partial Summary Judgment Against Counterclaim Defendants and Cross Claim Defendants, pp. 16-19, 40).

¹³¹ App. 22 n.10, 35 (DC Memo, pp. 15, 28).

At worst, any defect in the retention of Faegre was cured when Strangis signed a retainer agreement on behalf of R&R Investors.¹³²

Finally, the Hogenson Group argues that it lost money on the sale of its interests to the Klugs in 2000--about \$125,000. But that sale took place at a time when a Tucker Act Claim by others had been dismissed in the Court of Federal Claims and thus had no value. There is nothing in the record to suggest that the Hogenson Group was even aware that the claim existed until early 2003.

3. The David Klug Affidavit.¹³³

Judge Neville stated: “The Klugs although named in this action have not appeared; however, Mr. Klug submits by affidavit that it was *never* his intention to assume the Tucker Act Claim.”¹³⁴ (Judge Neville’s emphasis) After examining the documents transferring R&R Investors to the Klugs and later from them to Strangis, Judge Neville had this comment on the affidavit and a January 2004 letter from David Klug to Berger:

Somewhat puzzling and contradictory is Mr. Klug’s more recent Affidavit, in which he indicates that it was not his intent that he and Mary Klug acquire the claims of R&R Investors, and that he understood that the sale of the assets of R&R Investors created a new and separate general partnership. However, in his letter of January 2004 he indicated that he would assign

¹³² One partner can bring an action on behalf of a partnership where there is no risk that the defendant will be exposed to a second claim brought by another partner. Blatterman v. Cities Service Oil Co., 246 N.W. 532, 532-33 (Minn. 1933). More importantly, the second retainer agreement ratifies the hiring of the law firm. Restatement (Second) of Agency §§ 82, 84(2) (ratification relates back), 85 (1958).

¹³³ This section is in response to APB, pp. 50-51.

¹³⁴ App. 28 (DC Memo, p. 21).

any claim to the Hogenson Group. Based on the transactional documents before the Court, when the Klugs sold the partnership to the Strangis Group in 2004, all of the R&R Investors property remained with R & R Investors, of which Strangis is a new partner. The Hogenson Group has failed to introduce any evidence of a valid assignment. The Affidavit of Michael Cockson, supporting Faegre & Benson's Motions provides evidence to the contrary: the Hogenson Group had been working on a method to try to retain the claim from the Klugs, but it was ultimately never carved out in any of the transactional documents. The question of an assignment was raised by Mr. Vadnie. The Hogenson Group has not made any good faith argument that further discovery would reveal some sort of an assignment and no one has claimed one exists. This also would [sic] be contrary to their argument that the Hogenson Group never gave up the claim to the Klugs. It would also be contrary to their argument that the Federal Anti-Assignment Act prohibits such an assignment.¹³⁵

The Hogenson Group argues for the first time on appeal that questions of ownership of a partnership asset, i.e., a chose in action, depend on the intent of the partners and, therefore, that a genuine material issue of fact exists defeating the underlying granted summary judgment.¹³⁶ However, it is well settled law that issues not raised or litigated in the trial court will not be considered for the first time on appeal. Thiele v. Stich, 425 N.W.2d 580, 582-83 (Minn. 1988); Fingerhut Products Co. v. Comm'r of Revenue, 258 N.W.2d 606, 608 n.4 (Minn. 1977).

¹³⁵ App. 35-36 (DC Memo, pp. 28-29).

¹³⁶ APB, pp. 47-51.

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed.

Dated: January 23, 2009

KELLY & BERENS, P.A.

By: Kelly A. Atherton

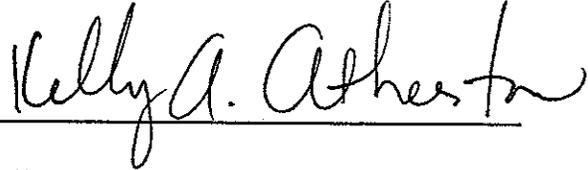
Timothy D. Kelly (#54926)
Kelly A. Atherton (#0387409)
3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171

*Attorneys for Respondents
R&R Investors and Paul Strangis*

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 11,929 words, exclusive of the Table of Contents and Table of Authorities. This brief was prepared using Word 2007.

Dated: January 23, 2009.



Kelly A. Atherton

Subscribed and sworn to before
me this 23rd day of January, 2009.



Notary Public

