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**STATE OF MINNESOTA  
IN SUPREME COURT**

**CASE NO. A09-607**

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OFFICE OF  
APPELLATE COURTS

MAR 27 2012

FILED

**UNITED PRAIRIE BANK – MOUNTAIN LAKE,**

**RESPONDENT,**

**vs.**

**HAUGEN NUTRITION & EQUIPMENT, LLC,  
LELAND HAUGEN AND ILENE HAUGEN,**

**APPELLANTS.**

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**RESPONDENT'S PETITION FOR REHEARING**

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**MACK & DABY, P.A.**  
John E. Mack (#65973)  
P.O. Box 302  
New London, MN 56273  
(320) 354-2045

**BRIGGS AND MORGAN, P.A.**  
Samuel L. Hanson (#41051)  
Charles B. Rogers (#130588)  
Jason R. Asmus (#319405)  
2200 IDS Center  
Minneapolis, MN 55402  
(612) 977-8400

**ATTORNEYS FOR APPELLANTS  
HAUGEN NUTRITION &  
EQUIPMENT, LLC, LELAND  
HAUGEN AND ILENE HAUGEN**

**ATTORNEYS FOR RESPONDENT  
UNITED PRAIRIE BANK – MOUNTAIN  
LAKE**

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## INTRODUCTION

Respondent United Prairie Bank – Mountain Lake ("UPB") respectfully petitions for rehearing pursuant to Minn. R. Civ. App. P. 140.01. In its March 14, 2012 opinion ("Opinion"), this Court framed the issue for review on appeal as follows: "The question in this case is whether the Minnesota Constitution provides a right to a jury trial for a claim to recover attorney fees based on a contract." Opinion at 5. Based on this articulation of the appellate issue, this Court "consider[ed] the substance of the claim, based on the pleadings and the underlying elements of the claim, and the 'nature of the relief sought'" (*id.* at 7 (quotation omitted)), and concluded that because "UPB's claim for the recovery of attorney fees is legal rather than equitable because it is an action seeking a monetary payment for contractual indemnity...appellants are entitled to a jury trial on attorneys fees under Article I, Section 4 of the Minnesota Constitution." *Id.* at 24.

But because Appellants Haugen Nutrition & Equipment, LLC, Leland Haugen and Ilene Haugen (collectively, "Haugens") admitted and conceded their contractual responsibility under the subject loan documents to pay UPB's attorneys' fees and their liability was determined on summary judgment, the issue for this Court's review on appeal was more narrow – namely, whether the Haugens had a constitutional right to a jury trial with respect to the determination of the reasonable amount of attorneys' fees to be included in UPB's damages award once the Haugens' liability was established. In this respect, the Opinion (i) overlooked and/or failed to consider material and undisputed facts, and (ii) ignored and misconceived established and controlling legal principles, including this Court's own prior case law precedent and procedural rules, regarding the

determination of the reasonableness and amount of attorneys' fees to be awarded under a contract.

UPB respectfully submits that, under the circumstances, rehearing would provide this Court and the parties with the opportunity to clarify and correct the proper scope of appellate review given the undisputed material facts of this case. And once the issue for appellate review is properly clarified and narrowed, rehearing would allow this Court to provide a clearer and more precise articulation of the governing rule in Minnesota regarding the constitutional right to a jury trial for the determination of the reasonable amount of attorneys' fees to be awarded pursuant to a contract so as not to render Minnesota an outlier standing in stark contrast to every other jurisdiction in the country.

## **SUMMARY OF ARGUMENTS IN SUPPORT OF THE PETITION**

As set forth in greater detail below, the three bases supporting UPB's rehearing petition are as follows:

(1) Because the Opinion overlooked and failed to appropriately consider the Haugens' admissions regarding their liability to UPB under the subject loan documents and their resulting undisputed liability for attorneys' fees, the scope of the issue for appellate review was unduly broad, which affected this Court's analysis of the constitutional right to a jury trial.

(2) The Opinion overlooks and ignores this Court's prior binding precedent, and it also misconceives and misconstrues significant legal precedent from other jurisdictions, all of which hold that once the legal issue of liability for attorneys' fees under a contract is determined, the equitable issue of the reasonable amount of attorneys' fees to be awarded is solely for the court to determine.

(3) The Opinion does not address and is directly contrary to this Court's prior precedent and its adopted standards in Rule 119 of the Minnesota Rules of General Practice, and thereby creates serious practical difficulties regarding the appropriate method to determine the reasonable amount of attorneys' fees to be awarded under a contract once liability is determined.

## ARGUMENT

### **I. THE OPINION OVERLOOKED THE HAUGENS' ADMITTED BREACH OF, AND RESULTING LIABILITY FOR ATTORNEYS' FEES UNDER, THE SUBJECT LOAN DOCUMENTS**

In the lawsuit below, UPB asserted, among others, claims against the Haugens for breach of the subject loan documents. As part of its breach of contract claims, UPB sought (1) a determination that the Haugens had breached their obligations under the subject loan documents, (2) a determination that UPB was "entitled to exercise all of its rights and remedies thereunder," and (3) an award of its resulting damages, which included unpaid principal "and accrued interest, charges and reasonable attorneys' fees and costs," as provided for in the loan documents. *See Amended Complaint.*

The Opinion does not address the Haugens' admissions before the trial court that they had breached their obligations under the subject loan documents and, as a result, UPB was contractually entitled to an award of attorneys' fees. Nor does the Opinion address the trial court's entry of summary judgment in UPB's favor, which the Haugens did not appeal, determining that the Haugens' breach of the loan documents and liability for attorneys' fees as a matter of law. *See Orders*, dated August 28 and September 2, 2008. And, most importantly, the Opinion does not address the Haugens' explicit admission in their supplemental brief to this Court that "[n]o one is disputing the right to the respondent [UPB] to reasonable attorneys' fees under the note and mortgage here." *App. Supp. Br.* at 9.

This Court took an expansive view of the issue for review on appeal to include both (i) the Haugen's liability for attorneys' fees under the loan documents and (ii) the

resulting determination of the reasonable amount of attorneys' fees. *See, e.g.*, Opinion at 24 n.9. But the Haugens' admissions and concessions and the trial court's unappealed summary judgment order remove any question regarding whether the Haugens were entitled to a jury trial regarding their liability for attorneys' fees under the subject loan documents – they clearly were not. *See State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 333, 191 N.W.2d 406, 413 (1971) ("No constitutional or statutory right to a jury trial exists where there is no issue of fact"). As a result, the appropriate scope of review for this Court on appeal should have been whether the Haugens had a constitutionally-protected right to a jury trial regarding the determination of the reasonable amount of attorneys' fees to be awarded to UPB as a component of damages resulting from the Haugens' undisputed breach of the loan documents. As set forth below, this Court, as well as every other court in the country to address the issue, have decided that question in the negative.

**II. THE OPINION IGNORES THIS COURT'S PRIOR BINDING PRECEDENT AND MISCONCEIVES AND MISCONSTRUES OTHER JURISDICTIONS' PRECEDENT WHICH HOLD THAT THE DETERMINATION OF THE REASONABLE AMOUNT OF ATTORNEYS' FEES IS WHOLLY EQUITABLE**

Rather than fully address the distinction between whether a party is liable for attorneys' fees and the determination of the reasonable amount of reasonable attorneys' fees to be awarded, this Court observed in a footnote that "[i]n reaching the conclusion that a jury trial is required for UPB's claim for the recovery of attorney fees, we do not distinguish between the predicate determination of appellant's liability for attorney fees and the amount of the fees awarded as damages." Opinion at 24 n.9. In so holding, this

Court failed to adequately address this Court's controlling precedent and the uniform holdings of all other courts that have addressed this issue.

**A. The Opinion ignores this Court's prior precedent**

In *Schutz v. Interstate Contracting Co.*, 196 Minn. 426, 426-27, 265 N.W. 296, 296 (1936), this Court determined that the plaintiff was not ultimately entitled to an award of attorneys' fees under the governing statute based on its reasoning that "[t]he attorney's fees are not a part of the cause of action, but something the **court** is authorized to award **after** it has been determined that plaintiff is entitled to recover on his cause of action." (Emphasis added). And, in *Campbell v. Worman*, 58 Minn. 561, 60 N.W. 668 (1894), this Court confirmed that the determination of the award of reasonable attorneys' fees under a contract was to be made by the court:

**[W]e hold that a recovery on such stipulations can only be had upon application to the court, and upon proof of the reasonableness and value of the attorneys' fees; and thereupon the court may fix the amount to be allowed at such sum, not exceeding the amount stipulated, as it shall deem reasonable and just, and the amount so fixed may be included in the judgment, the same as any other disbursement in the action.** We think that this rule is not only correct on principle, but is also the only one that will prevent injustice and unconscionable extortion.

*Id.* at 565, 60 N.W. at 669 (emphasis added).

Thus, in *Schutz* and *Campbell*, this Court confirmed that (i) the determination of a party's contractual liability for attorneys' fees is separate and distinct from the determination of the amount of reasonable attorneys' fees to be awarded and (ii) the latter determination is solely a matter in equity for the court, not a jury. That the Opinion ignores these two prior precedential decisions justifies rehearing.

**B. The Opinion also misconstrues and misapplies precedent from all other jurisdictions to address the issue**

**1. This Court must recognize the distinction between liability for attorneys' fees and a reasonableness determination**

Every other court that has addressed this issue has recognized the distinction between (1) whether a party is liable for attorneys' fees pursuant to a contract on the one hand and (2) the reasonable amount of attorneys' fees on the other. *See, e.g., McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1314 (2d Cir. 1993) ("we hold that an action to recover attorneys' fees pursuant to a contract presents traditional common-law contract issues which should be submitted to a jury...but that the subsequent determination of the amount of attorneys' fees owed presents equitable issues of accounting which do not engage a Seventh Amendment right to jury trial"); *United States v. Bd. of Cnty. Com'rs of the Cnty. of Dona Ana, N.M.*, 730 F. Supp. 2d 1327, 1339 (D. N.M. 2010) ("The Tenth Circuit agreed with the distinction made by the Second, Fifth and Seventh Circuits, which have all held that liability for attorneys' fees sought under a contract provision for indemnification is a legal issue covered by the Seventh Amendment, however, the amount of attorneys' fees due under such a provision is an equitable issue which the judge should decide"); *Ideal Elec. Sec. Co., Inc. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 146 (D.C. Cir. 1997) ("once a party's contractual entitlement to attorney's fees has been ascertained, it is within the trial court's sound discretion to determine a reasonable fee award"); *Quint v. A.E. Staley Mfg. Co.*, 245 F. Supp. 2d 162, 171 (D. Me. 2003) (while underlying contract dispute is triable to jury, "post-adjudication reasonableness determinations [relating to attorneys' fees] sound in equity and lie beyond the scope of the Seventh

Amendment"); *Ginberg v. Tauber*, 678 A.2d 543, 549 (D.C. 1996) (where there is no dispute that attorneys' fees are owed and "all that remained to be determined at trial was the amount of the fee..., that determination is one which sounds in equity rather than law"); *Guess v. Parrott*, 585 S.E.2d 464, 470 (N.C. Ct. App. 2003) ("appellant had no right to have the reasonable value of appellee's services determined by a jury, as this issue is committed to the sound discretion of the trial court"); *Paramount Commc'ns Inc. v. Horsehead Ind., Inc.*, 287 A.D.2d 345 (N.Y. App. Div. 2001) ("when a contract provides for an award of attorneys' fees, there is no right to a jury trial on the issue of reasonable value of such fees"). And as recognized by the Second Circuit in *McGuire*, these decisions comport with the United States Supreme Court's holding that "a judgment is 'final' even though the court has yet to determine attorneys' fees, and even if those fees are sought pursuant to a contract." *McGuire*, 1 F.3d at 1315 (citing *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202-03 (1988)).

## **2. The "reasonableness" determination sounds in equity**

In the Opinion, this Court treated UPB's claim for attorneys' fees as a traditional legal claim seeking damages for breach of contract. *See* Opinion at 11 ("UPB seeks the recovery of attorney fees, which is essentially a form of money damages for the appellants' breach of the Loan Documents"). The Court failed to fully appreciate, however, that the calculation of attorneys' fees sounds in equity, not law, because the requirement of "reasonableness" is an equitable doctrine that courts impose upon what would otherwise be a legal claim governed by contract principles. Indeed, in concluding

that "the reasonableness of attorney's fees is a question of law to be determined by the court and not by a jury," the Missouri Court of Appeals explained as follows:

[A]n attorney is only entitled to fees which are fair and just and which adequately compensate him for his services. [] This is true no matter what fee is specified in the contract, because an attorney, as a fiduciary, cannot bind his client to pay a greater compensation for his services than the attorney would have the right to demand if no contract had been made.<sup>1</sup> [] Therefore, as a matter of public policy, reasonableness is an implied term in every contract for attorney's fees...Once liability on a contract has been determined, damages in the form of attorney's fees permitted under the contract follow as a matter of law, and the trial court may calculate these amounts and enter judgment accordingly. [] The trial court, as an expert on attorney's fees, may award reasonable amounts as a matter of law...A jury trial on the issue is neither required nor appropriate.

*State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 835 (Mo. Ct. App. 1996)

(internal citations omitted).<sup>2</sup>

This Court observed in its Opinion that "an award of attorney fees would...compensate UPB for the loss it incurred—*i.e.*, the attorney fees expended as a result of appellants' breach of the Loan Documents." Opinion at 15. Were the question of attorneys' fees a legal claim governed by traditional contract law relating to damages, that would be the case. But the actual fees incurred is not the appropriate standard.

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<sup>1</sup> Minnesota, like Missouri, provides that attorneys owe clients a fiduciary duty. See *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 548 (Minn. 2008) (recognizing "the fiduciary and ethical duties attorneys owe their clients.").

<sup>2</sup> Although the Missouri appellate court based the equitable imposition of reasonableness upon contracts governing attorney fees on the fiduciary duty owed by attorneys to clients, the court addressed the issue in the context of the contractual indemnity obligations of an insurer who demanded a jury trial as to the amount of reasonable attorneys' fees for which it was liable. *Id.* at 834. Thus, the reasoning extends beyond fee disputes between attorneys and clients to situations where, as here, a party is entitled to recover attorneys' fees from the opposing party pursuant to contract.

Rather, Minnesota, like other jurisdictions, imposes an equitable restriction on a party's ability to recover attorneys' fees by only permitting an award of those fees that are "fair," "reasonable," and "just." *Agri Credit Corp. v. Liedman*, 337 N.W.2d 384, 386 (Minn. 1983); *Campbell*, 58 Minn. at 565, 60 N.W. at 669. This equitable limitation of the reasonableness of attorneys' fees to be awarded demonstrates the equitable nature of UPB's request for an award of attorneys' fees under the subject loan documents.

Moreover, the Opinion does not address or even mention this Court's previous holding that determinations of "reasonableness" generally are an issue for a court and not a jury. In *Alton M. Johnson Co. v. MAI*, 463 N.W.2d 277 (Minn. 1990), this Court held that an insurer was not entitled to a jury trial to determine the reasonableness of the settlement, which the insured entered into with a third party. This Court held that "reasonableness is an issue for the court." *Id.* at 279. This Court further noted that the "nature of the evidence does not lend itself well to appraisal by a jury." *Id.* Rather, the evaluation of the type of evidence presented "is best understood and weighed by a trial judge," because "[t]he decisionmaker is being asked to apply its sense of fairness to evaluate a compromise of conflicting interest, a characteristic role for equity." *Id.* The determination of a reasonable award of attorneys' fees likewise requires the decisionmaker to apply its sense of fairness, a characteristic of equity. *See Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 620–21 (Minn. 2008) (Minnesota courts use loadstar method to determine fair award of attorneys' fees).

### 3. The "reasonableness" determination is akin to an equitable accounting

Rejecting numerous cases finding that the determination of reasonable attorneys' fees by the court is essentially an equitable accounting, this Court stated that those cases "fail to explain or support" why "awards of attorney fees are equivalent to an equitable accounting." Opinion at 12 n.3. The issue before this Court, however, is not whether a jury must determine if an award of attorneys' fees is appropriate, but rather whether a jury should determine the reasonable amount of attorneys' fees to be awarded. The determination of the reasonable amount of attorneys' fees is akin to equitable accounting for at least three reasons.

First, the reasonableness standard applicable to a determination of attorneys' fees is the same "reasonableness" standard that historically applies to accounting claims. *See, e.g., In re Rosenberg*, 128 F.2d 924, 926 (7th Cir. 1942) ("The agent in possession was required to make an accounting and to justify the reasonableness and propriety of his disbursement"); *Fleming v. Fleming*, 230 N.W. 359, 370 (Iowa 1930) (applying reasonableness standard in accounting action by deceased partner's widow to determine amount of unreasonable compensation surviving partners must return); *Knight v. Hamakar*, 67 P. 107, 110 (Or. 1901) (on final accounting, administrator of estate must establish reasonableness of his charges); *Porter v. Ayer*, 29 A. 1027, 1027 (N.H. 1891) (applying reasonable compensation standard in equitable accounting action to recover rent from co-tenants); *In re Archer's Estate*, 23 N.Y.S. 1041, 1048 (N.Y. Sup. Ct. 1892) ("requiring proof from the accounting party of the necessity and reasonableness of the

expenditure" in connection with administration of estate). And pursuant to Minnesota law, this "reasonableness" determination is one for the court, not the jury. *See Alton*, 463 N.W.2d at 279.

Second, this Court observed that an equitable accounting is available where "a fiduciary owes an equitable duty to account." Opinion at 12 n.3. As the *Chase Resorts* court observed, the equitable limitation of reasonableness on contractual agreements to pay another party's attorneys' fees arises specifically out of the fiduciary relationship between attorney and client. *See Chase Roberts*, 913 S.W.2d at 834; *see also McIntosh*, 745 N.W.2d at 548 (recognizing fiduciary duty owed by attorneys to clients under Minnesota law).

Third, this Court observed that "[t]he remedy of equitable accounting is available...when the accounts at issue are exceedingly complicated." Opinion at 12 n.3. In order to properly determine the reasonableness of attorneys' fees, the jury must have a thorough and detailed understanding of the entire process of litigation, including (i) the pleading process, (ii) discovery, including related rules, motions, and disputes, (iii) pre-trial motion practice such as Rule 12 motions, motions for summary judgment, motions *in limine*, and the research and briefing involved in the same, (iv) post-trial motion practice, (v) the appellate process, and (vi) and the bases for an attorneys' rates and fees. This determination is better made by the Court, an expert in all of these matters. Moreover, attorneys will likely be forced to reveal substantial privileged work product to explain to a layperson why certain litigation strategies were pursued. The Court can better consider such privileged matters by allowing the submission of related materials *in*

*camera*. See Minn. Gen. R. Prac. 119.03 (permitting the submission of "any fee agreement relevant to the fee application, bills actually rendered to the client, work in progress reports, time sheets, invoices or statements for disbursements, or other relevant records...for *in camera* review by the court"); see also *infra* Section III.

### III. THE OPINION FAILS TO ADDRESS THIS COURT'S PRIOR PRECEDENT AND PREVIOUSLY-ENACTED MINN. R. GEN. PRAC. 119 AND CREATES EXTREME PRACTICAL DIFFICULTIES

Rejecting any notion that considerations of practical difficulties are relevant to whether the constitutional right to a jury trial exists, the Opinion states that "[t]he availability of a constitutionally-guaranteed right to a trial by jury does not and should not turn on the practical difficulties of its implementation." Opinion at 19. But this Court held directly to the contrary in *Schmidt v. Schmidt*, 47 Minn. 451, 50 N.W. 598 (1891).

In *Schmidt*, appellants contested the validity of a proposed will and asserted a constitutional right to a jury trial on such claim. *Id.* at 452, 50 N.W.2d at 598. As part of its analysis, this Court noted the historical practice derived from English common law of treating wills affecting real estate, which carried a constitutional right to a jury trial, differently than wills affecting personal property, which did not. *Id.* at 454-56, 50 N.W.2d 599-600. The Court rejected the notion that the availability of a jury trial was dependent upon whether the challenged will affected real property based, in part, on the "practical difficulties" that would result from such a determination:

**If, as counsel for appellants claims, we are bound by the old common-law rule, it would lead to the result that, when the will affects real property, a party is entitled to a jury trial, but not if it affects only**

personalty, -a distinction which is out of harmony with the general policy of our laws, to say nothing of the very apparent practical difficulties that would arise in attempting to apply it. It must be admitted that it has been the usual practice in this state to submit the issue of will or no will to a jury. This is perhaps to be accounted for in part by the characteristic conservative tendency of the bench and bar to adhere to old precedents, even after they have ceased to be obligatory. It is also true that, in theory at least, such an issue is one eminently fitted to be submitted to a jury, although in practice it must be admitted that the result is not always satisfactory, for the question with the jury in such cases is very apt to be, not whether the instrument is the will of the testator, but whether it is such a will as they think he ought to have made.

*Id.* at 456, 50 N.W. at 600 (emphasis added). Thus, this Court has previously confirmed that it is appropriate to consider "practical difficulties" when determining whether a constitutional right to a jury trial exists.

There is no question that the Opinion creates a number of very serious "practical difficulties" by requiring lay juries to make determinations regarding the award of reasonable attorneys' fees. The following are just a few examples:

- First, as a result of the Opinion, in every civil case in which a litigant seeks an award of attorneys' fees under a contract, the litigants will be forced to submit lay and perhaps even expert testimony regarding the work performed and fees charged by the attorneys handling the case so the jury can determine the amount of attorneys' fees to be awarded. This will confuse and complicate the determination of the underlying claim.
- Second, following the conclusion of trial, parties may submit a number of post-trial motions and supporting papers. As a result of the Opinion, the litigants will be forced to re-empanel the jury (or empanel a new jury) after the conclusion of trial to determine the amount of attorneys' fees to be awarded for such post-trial activities.
- Third, an appeal will follow post-trial submissions. As a result of the Opinion, after the conclusion of the appeal, the litigants must re-empanel the jury (or empanel a new jury) to obtain an award of attorneys' fees incurred with respect to the appeal.

- Fourth, any determination by the re-empaneled (or newly-empaneled) jury regarding the amount of attorneys' fees to be awarded for the appeal, would be subject to a new and separate appeal process. The Opinion creates the possibility of such a never-ending cycle of attorneys' fee jury trials, making it extraordinarily difficult, if not impossible, to achieve finality in civil lawsuits.

And, it is beyond any serious debate that courts are "better equipped to make computations based on details about billing practices, including rates and hours charged on a particular case." *McGuire*, 1 F.3d at 1316; *see also Kudon*, 547 A.2d at 979. The Opinion does not dispute this ineluctable conclusion.

Finally, the Opinion is silent regarding this Court's 1996 promulgation of Rule 119 of the Minnesota General Rules of Practice. Presumably in recognition of these very "practical difficulties," Rule 119.01 specifically provides that an "application for award or approval of fees **shall be made by motion**," which could only be made to a court not a jury. (Emphasis added). The Advisory Committee Note confirms that "[t]his rule is intended to provide a standard set of documentation that allows the majority of fee applications to be considered by **the court** without requiring further information." (Emphasis added). If the determination of a reasonable attorneys' fee award under a contract did, in fact, implicate the right to a jury trial, then Rule 119 could not have been enacted.

**CONCLUSION**

UPB respectfully submits that rehearing is appropriate and necessary in order for this Court to clarify that, while the question of whether a party is liable for attorneys' fees under a contract is legal in nature, once that legal determination of liability is made, then the determination of the reasonable amount of attorneys' fees to be awarded is equitable in nature and must be made by the court without a jury.

DATED: March 26, 2012

**BRIGGS AND MORGAN, P.A.**

By 

Samuel L. Hanson (#41051)  
Charles B. Rogers (#130588)  
Jason R. Asmus (#319405)

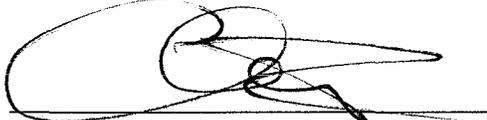
2200 IDS Center  
Minneapolis, MN 55402-2157  
(612) 977-8400

**ATTORNEYS FOR RESPONDENT  
UNITED PRAIRIE BANK – MOUNTAIN  
LAKE**

**CERTIFICATE OF COMPLIANCE**

The undersigned counsel for Respondent certifies that this Petition for Rehearing complies with the requirements of Minn. R. App. P. 132.01 and 140.02 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2007 and contains 4,299 words, excluding the Table of Contents, Table of Authorities, and Appendix.

DATED: March 26, 2012



Charles B. Rogers (#130588)

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