STATE OF MINNESOTA
IN COURT OF APPEALS

NO. A06-0486

McIntosh County Bank, et al.,

Appellants,

vs.

Dorsey & Whitney LLP,

Respondent.

RESPONDENT DORSEY & WHITNEY LLP'S BRIEF

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(1) Whether Appellants, as non-clients, had standing to sue Respondent Dorsey & Whitney LLP ("Dorsey") for legal malpractice under an intended third-party beneficiary theory where Dorsey was not retained for the sole purpose of directly benefiting Appellants in the subject loan transaction.

Result Below: The district court found no genuine issues of material fact existed and ruled that Dorsey was not retained for the sole purpose of directly benefiting Appellants in the loan transaction and, therefore, as a matter of law, Appellants lacked standing to sue Dorsey for legal malpractice.

- *Marker v. Greenberg*, 313 N.W.2d 4 (Minn. 1981)
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(2) Whether Appellants had standing to sue Dorsey for legal malpractice under the contract theory of representation where Appellants: (a) did not request that Dorsey represent them in the loan transaction; (b) had no oral or written representation agreement with Dorsey; (c) had no oral or written communications with Dorsey; and (d) paid no fees to Dorsey.

Result Below: The district court found no genuine issues of material fact existed and ruled that Appellants had no express or implied contractual attorney-client relationship with Dorsey and, therefore, as a matter of law, Appellants lacked standing to sue Dorsey for legal malpractice.

- *Sandum v. Doherty, Rumble & Butler, P.A.*, No. C7-94-801, 1994 WL 593925 (Minn. Ct. App. Nov. 1, 1994) (Resp. App. 420-23)
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(3) Whether Appellants had standing to sue Dorsey for legal malpractice under the tort theory of representation where Appellants: (a) did not request legal advice from Dorsey; (b) had no oral or written communications with Dorsey; and (c) paid no fees to Dorsey.

Result Below: The district court found no genuine issues of material fact existed and ruled that Appellants had no attorney-client relationship with Dorsey under the tort theory of representation and, therefore, as a matter of law, Appellants lacked standing to sue Dorsey for legal malpractice.

- *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26 (Minn. 1982)
- *Gramling v. Mem'l Blood Ctrs. of Minn.*, 601 N.W.2d 457 (Minn. Ct. App. 1999)
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- *TJD Dissolution Corp. v. Savoie Supply Co.*, 460 N.W.2d 59 (Minn. Ct. App. 1990)

(4) Whether Appellants had standing to assert a negligent misrepresentation claim against Dorsey where Appellants: (a) were not Dorsey's clients; (b) did not receive any representations from Dorsey; and (c) did not rely on any representations from Dorsey.

Result Below: The district court found no genuine issues of material fact existed and ruled, as a matter of law, that Appellants lacked standing to assert a negligent misrepresentation claim against Dorsey.

- *Schuler v. Meschke*, 435 N.W.2d 156 (Minn. Ct. App. 1989)
- *Colangelo v. Norwest Mortgage, Inc.*, 598 N.W.2d 14 (Minn. Ct. App. 1999)

STATEMENT OF THE CASE

A. Trial Court/Trial Judge Below

This appeal arises from an order of the Hennepin County District Court, the Honorable Heidi S. Schellhas presiding (the "District Court"), granting summary judgment in favor of Dorsey.

B. Nature of the Case

1. Factual Background

In February 1999, Miller & Schroeder Financial, Inc. ("Miller & Schroeder") made two loans totaling more than $12 million to President R.C. – St. Regis Management Company ("President") relating to the construction of a casino in upstate New York owned by the St. Regis Mohawk Tribe ("Tribe"). President used the loan proceeds to finance casino development and construction expenses. The governing agreement between the Tribe and President obligated the Tribe to repay development expenses to President only when casino revenues exceeded expenses.

Dorsey represented the lender, Miller & Schroeder, in the loan transaction (the "Loan Transaction") with the borrower, President. At Miller & Schroeder's direction, Dorsey drafted various documents for the Loan Transaction. One of the documents, a Notice and Acknowledgement of Pledge ("Pledge Agreement"), is the subject of this lawsuit. Under that document, the Tribe acknowledged that President pledged to Miller & Schroeder all payments received from the Tribe and the Tribe agreed to make such payments into an escrow account for Miller & Schroeder. Prior to the loan closing, Miller & Schroeder requested an opinion from Dorsey regarding whether the Pledge

Agreement required approval of the National Indian Gaming Commission ("NIGC") in order to be enforceable against the Tribe. Dorsey determined and advised Miller & Schroeder prior to closing that it did not.

Miller & Schroeder closed and funded the loans on February 24, 1999. Appellants are thirty-one banks that purchased participation interests in the loans <u>after</u> Dorsey's legal work on the Loan Transaction was completed and <u>after</u> the loans closed and funded. Miller & Schroeder did not request that Dorsey represent Appellants in the Loan Transaction, nor did Appellants request that Dorsey represent them. In fact, Appellants had no communications whatsoever with Dorsey, and Dorsey did not even know Appellants' identities prior to the loan closing. Appellants paid no legal fees in connection with the Loan Transaction and voluntarily chose not to retain their own counsel. Finally, neither Dorsey nor Miller & Schroeder communicated Dorsey's legal advice to Appellants and, as such, Appellants did not rely on such advice.

Shortly after casino operations began, President experienced repayment difficulties, which were caused by a lack of casino profits. There is no evidence in the record that casino revenues ever exceeded expenses to trigger the Tribe's repayment obligations to President. President defaulted on the loans in June 1999. Miller & Schroeder, on behalf of Appellants, thereafter sued President for its default and obtained a $15 million judgment. Appellants subsequently sold that judgment to the Tribe as part of a settlement with the Tribe in April 2005.

2. Bankruptcy Court Proceedings

Miller & Schroeder filed for Chapter 7 bankruptcy in January 2002. On October 3, 2003, Appellants sued Dorsey in an adversary proceeding in Miller & Schroeder's bankruptcy case, asserting the same claims as in this case. (AA 245.) On January 10, 2005, the Bankruptcy Court dismissed all but three Appellants for lack of subject matter jurisdiction on the grounds that since they did not file proofs of claim against Miller & Schroeder's estate, they could not maintain an action in Bankruptcy Court. (AA 433-441.) With respect to the remaining three participating banks (who had filed proofs of claim), the Bankruptcy Court issued a one-sentence decision denying Dorsey's summary judgment motion, simply noting that "genuine issues of material fact exist." (AA 440.) The Bankruptcy Court did not provide any legal analysis, nor did it identify any genuine issues of material fact that purportedly precluded summary judgment. (*Id.*) On May 11, 2005, the Bankruptcy Court issued an order abstaining from the three remaining Appellants' claims. (AA 442-51.)

On February 23, 2005, the remaining participating bank, Bremer Business Finance Corporation ("Bremer"), commenced a separate action against Dorsey in Bankruptcy Court, asserting the same claims against Dorsey as did Appellants. Dorsey moved to dismiss Bremer's claims for lack of jurisdiction or, alternatively, for abstention. While the Bankruptcy Court abstained from the claims asserted by Appellants, it chose not to abstain from Bremer's claims. (AA 442-51.)

Following the conclusion of discovery, Dorsey moved for summary judgment on a number of grounds, including Bremer's lack of standing, as a non-client, to sue Dorsey for legal malpractice. On November 9, 2005, the Bankruptcy Court denied Dorsey's motion. (AA 454.) With respect to Bremer's standing to assert a legal malpractice claim against Dorsey, the Bankruptcy Court issued a one-line conclusion: "Bremer Bank has raised a material issue of fact and law regarding the scope of the law firm's representation in connection with this transaction." (AA 454 ¶ 2.) Again, the Bankruptcy Court provided no legal analysis whatsoever on the standing issue and did not identify any disputed issues of material fact that purportedly precluded summary judgment. (*Id.*) There is nothing that can be drawn from the Bankruptcy Court's summary judgment denials because the court's orders contain absolutely no analysis whatsoever.

3. This Lawsuit

On February 18, 2005, Appellants commenced this lawsuit against Dorsey. Appellants leveled legal malpractice, breach of contract and negligent misrepresentation claims against Dorsey, alleging that Dorsey negligently advised Miller & Schroeder that the Pledge Agreement did not require NIGC approval to be enforceable. (AA 1-32.) Dorsey sought summary judgment on the grounds that: (1) Appellants lacked standing to sue Dorsey; (2) Dorsey's alleged negligence was not the proximate cause of Appellants' damages because it was undisputed that the casino never generated a profit; (3) Dorsey's actions satisfied the applicable standard of care because its advice was correct; (4) Appellants were required to conduct their own due diligence and disclaimed any reliance on Miller & Schroeder or its counsel; and (5) several Appellants approved the loan closing with full knowledge that the NIGC had not completed its review of the Pledge Agreement at the time of closing. (AA 119-63.)

C. Disposition Below – The District Court's Summary Judgment Order

On January 17, 2006, the District Court granted summary judgment in favor of Dorsey. (AA 237-51.) While Appellants claimed they were actually Dorsey's clients in the Loan Transaction, the District Court concluded that Appellants' allegation was baseless under the undisputed material facts and ruled that Appellants lacked standing to sue Dorsey as a matter of law. (*Id.*) Unlike the Bankruptcy Court's prior orders, the District Court conducted a thoughtful analysis and issued a reasoned decision with record support concerning Appellants' lack of standing to sue Dorsey.[1] (*Id.*)

Based on the undisputed material facts, the Court concluded that, as a matter of law, Appellants were not Dorsey's clients under the contract theory of representation:

> As a matter of law, a party's mere expectation that an attorney will represent him or her, is insufficient to create an attorney-client relationship . . . . Thus, the mere expectation by [Appellants] that Dorsey represented them is insufficient to create an attorney-client relationship between [Appellants] and Dorsey. Similarly, the mere belief by [Appellants] that Dorsey had been hired for their benefit or that they were Dorsey's clients is insufficient to create an attorney-client relationship between [Appellants] and Dorsey.
>
> Viewing the facts in a light most favorable to [Appellants], no genuine issue of material fact exists regarding the existence of an express or implied contract for legal services between [Appellants] and Dorsey.

(AA 247-48 ¶¶ 10-11 (citations omitted).)

Likewise, the District Court held that no attorney-client relationship existed between Appellants and Dorsey under the tort theory of representation:

[1] Because the District Court ruled that Appellants lacked standing to sue Dorsey, it did not address Dorsey's remaining summary judgment arguments. (AA 237-51.)

> Even if the facts asserted by [Appellants] reflected some direct contact between [Appellants] and Dorsey, the Participation Agreements specifically disclaimed any responsibility for warranties or representations made in connection with the loan. Minnesota recognizes the validity of specific disclaimers . . . .
>
> Viewing the facts in a light most favorable to [Appellants], as a matter of law, [Appellants'] reliance upon information received from Miller & Schroeder is insufficient to create an attorney-client relationship between [Appellants] and Dorsey.

(AA 249 ¶¶ 15-16 (citations omitted).)

The District Court ruled that Appellants lacked standing to sue Dorsey for legal malpractice under the intended third-party beneficiary theory:

> Any intended benefit to [Appellants] of the attorney-client relationship between Miller & Schroeder and Dorsey was incidental; [Appellants] were not the sole intended beneficiaries or the intended direct beneficiaries, as required by *Marker*. . . .
>
> Viewing the facts in a light most favorable to the plaintiffs, no genuine issue of material fact exists about whether [Appellants] were the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder; therefore the Court does not reach the multi-factor analysis required by *Marker*.

(AA 250 ¶¶ 20-21 (citations omitted).)

Finally, the District Court dismissed Appellants' negligent misrepresentation claim:

> "Minnesota courts have not extended the theory of negligent misrepresentation to claims by non-clients against an attorney." . . . The current Minnesota rule is that "an attorney will not be liable to a non-client third party for negligence. Liability arises only if that attorney acted with fraud, malice, or has otherwise committed an intentional tort." . . . .
>
> Viewing the facts in a light most favorable to [Appellants], no genuine issue of material fact exists about whether Dorsey acted with malice or committed fraud or another intentional tort.

(AA 250 ¶¶ 23-24 (citations omitted).)

Appellants appeal from this decision.

STATEMENT OF FACTS

A. The Management Agreement

On November 7, 1997, President and the Tribe executed a Fourth Amended and Restated Management Agreement ("Management Agreement"), pursuant to which President agreed to construct and manage the Akwesasne Mohawk Casino on the Tribe's reservation land near Hogansburg, New York. (AA 38-75.) The NIGC approved the Management Agreement on December 26, 1997.[2] (Resp. App. 89-90.) The Management Agreement obligated President to furnish the capital for the development and construction of the casino (the "Development Expenses"). (AA 49-50 § 6.1(B).) The Development Expenses that could be incurred by President and repaid by the Tribe were capped at $20 million. (*Id.*) The Tribe was required to repay the Development Expenses only when the casino's revenues exceeded operating expenses. (*Id.* and AA 65 § 8.10(C).) The Tribe's repayment obligations were absolute, however, and survived the termination of the Management Agreement. (AA 72 § 10.7.)

B. Miller & Schroeder Makes Two Loans to President

In late 1998, Miller & Schroeder agreed to make two loans to President – a Senior Lien Construction Loan in the amount of $8,624,000 ("St. Regis I Loan") and a Senior Lien Furniture, Fixtures & Equipment Loan in the amount of $3,492,000 ("St. Regis II

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[2] The NIGC is a federal administrative agency established pursuant to Indian Gaming Regulatory Act. The NIGC was established to oversee various aspects of the Indian gaming industry. 25 U.S.C. § 2704. The NIGC reviews and approves contracts that provide for the management of Indian gaming facilities and all modifications thereto. 25 U.S.C. §§ 2705(a)(4) and 2711(b). Agreements that require NIGC approval that are not approved are void. 25 C.F.R. §§ 533.7 and 535.1(f).

Loan") (collectively, the "Loans"). (AA 7-8 ¶¶ 38-40.) Neither the Tribe nor Appellants were parties to the Loan Transaction.

C. <u>Miller & Schroeder Retains Dorsey For the Loan Transaction</u>

Steve Erickson, Miller & Schroeder's Senior Vice President and Manager of the Gaming Finance Division, retained Dorsey to represent Miller & Schroeder in documenting the Loan Transaction on Miller & Schroeder's behalf. (Resp. App. 372.) Dorsey drafted the Loan Agreements and corresponding Promissory Notes, which obligated President to repay Miller & Schroeder principal, plus interest, in equal monthly installments until May 2002. (AA 379 § 2.02(b) and Resp. App. 93 § 7.)

Dorsey also drafted the Pledge Agreement, which was executed by the Tribe, President and Miller & Schroeder as of February 12, 1999. (AA 76-78.) Under the Pledge Agreement, the Tribe acknowledged President's pledge to Miller & Schroeder of all payments due from the Tribe under the Management Agreement, as security for repayment of the Loans. The Tribe also recognized its existing obligation under the Management Agreement to repay President for Development Expenses advanced for the casino project and that its repayment obligations survived any termination of the Management Agreement. (AA 76-78 ¶ A.) The Tribe agreed to make any payments that were required under the Management Agreement (if casino revenues exceeded expenses) into an escrow account for Miller & Schroeder. (*Id.* ¶ 2.)

D. <u>The Amendment to the Management Agreement</u>

During the latter part of January and early February 1999, President and the Tribe wanted to amend the Management Agreement to increase the cap on reimbursable

Development Expenses related to the casino from $20 million to $28.15 million. (AA 83.) Because the Amendment constituted a modification to the Management Agreement that required NIGC approval, on February 16, 1999, President submitted the Amendment to the NIGC for such approval. (AA 83.) The NIGC subsequently notified the parties that it would take 30-60 days to complete its review of the Loan Documents[3] and the Amendment. (AA 85-87.)

E. <u>Miller & Schroeder Closes and Funds the Loans Prior to the Completion of NIGC Review</u>

The Tribe had scheduled the casino's grand opening for April 1999. (AA 412; Resp. App. 365.) Because the NIGC review process was not yet complete, President requested that Miller & Schroeder close and fund the Loans without receiving a determination from the NIGC so that the casino's opening could stay on schedule. (AA 412-13; Resp. App. 365.)

Miller & Schroeder was comfortable closing and funding the Loans without NIGC approval of the Amendment. (Resp. App. 365.) Under the terms of the Loan Documents, repayment of the Loans had a first and priority security interest in the proceeds received by President under the Management Agreement until the Loans were fully repaid. (AA 380 § 3; Resp. App. 93 § 7.) As such, Miller & Schroeder would receive the first $12.182 million, plus interest, of the $20 million in Development Expenses repaid by the

[3] On January 22, 1999, Dorsey submitted drafts of the Loan Documents to the NIGC as part of its review process. (AA 276-77.)

Tribe. (*Id.*) Accordingly, the increased cap was immaterial to Miller & Schroeder's loan position. (Resp. App. 365.)

Miller & Schroeder did, however, seek an opinion from Dorsey whether the Pledge Agreement required NIGC approval in order to be valid and enforceable against the Tribe.[4] (Resp. App. 365.) Dorsey advised Miller & Schroeder that the Pledge Agreement was not a document that required NIGC approval.[5] (Resp. App. 359-60, 365 and 384.) There is absolutely no evidence, contrary to Appellants' bald assertions (App. Br. at 20), that Dorsey's advice was ever communicated by Dorsey or by Miller & Schroeder to Appellants. (AA 8.)

On February 22, 1999, Miller & Schroeder prepared and sent a memorandum to prospective participating banks to advise them that the NIGC had not yet approved the Amendment or reviewed the Pledge Agreement and that the NIGC's review of the documents "may take as long as 60 days." (AA 412-13.) Miller & Schroeder requested

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[4] Dorsey was not asked to, and did not, provide any opinion regarding the Amendment. (Resp. App. 365.) Nor did Miller & Schroeder ask Dorsey to provide an opinion regarding all of the risks that may exist in closing and funding the Loans without NIGC approval of the Amendment and/or the Notice and Acknowledgement of Pledge. (Resp. App. 366.) Nor, contrary to Appellants' unsupported assertions (App. Br. at 4), did Dorsey advise Miller & Schroeder to close and fund the loans.

[5] Appellants raise an issue regarding the propriety of Dorsey's legal advice, which was not addressed by the District Court. While Appellants reference the affidavit testimony of Michael Cox, Mr. Cox conspicuously does not opine that Dorsey's legal advice was incorrect. More importantly, Kevin Washburn, former general counsel of the NIGC and a Professor of Law at the University of Minnesota, has confirmed that Dorsey's advice was legally correct and that Dorsey did not deviate from the applicable standard of care. (Resp. App. 407-19.)

that the banks authorize the closing of the Loans notwithstanding the lack of NIGC approval of the Amendment:

> The Borrower [President] is confident that the NIGC will approve the cap increase, however, the Borrower would like to keep the Casino on schedule for its grand opening on April 10, 1999. Therefore, in light of the time frame required by the NIGC to complete the review [up to 60 days], the Borrower has requested that Miller & Schroeder close and fund the Loans without the NIGC approval of the cap increase as the Casino is near completion. As the Loans are first to be repaid from the revenues as described above, Miller & Schroeder is recommending the participants close and fund as scheduled.

(*Id.* ¶ 4.) In requesting authorization to close the Loans, Miller & Schroeder also advised the banks about the Notice and Acknowledgment of Pledge:

> The Tribe and [President] have executed a Notice and Acknowledgement of Pledge ("Notice"), in which the Tribe acknowledges the pledge by the Borrower of the security as described above, to Miller & Schroeder. A draft of the Notice has been submitted to the NIGC for review and the final executed Notice will be submitted by the Tribe after closing. A positive response from NIGC is expected to be received in due course.

(*Id.* ¶ 6.) This memorandum did not reference Dorsey or its advice to Miller & Schroeder. (*Id.*)

A number of Appellants approved the closing and funding of the Loans with knowledge that the NIGC had not completed its review of the Notice and Acknowledgment of Pledge[6] or approved the Amendment. (Resp. App. 114-45.) Appellants would not have been allowed to purchase a participation interest in the Loans without providing the approval requested by Miller & Schroeder in the memorandum.

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[6] The NIGC never communicated any position regarding the Notice and Acknowledgment of Pledge. Nor was such a communication expected or necessary, as NIGC approval was not legally required. (Resp. App. 407-19.)

(Resp. App. 369.) Miller & Schroeder closed and funded the Loans on February 24, 1999. (AA 10.)

F. Miller & Schroeder Sells Participation Interests to Appellants

1. Miller & Schroeder Business Model

The St. Regis Loans had the same general structure as other Miller & Schroeder gaming loans. (AA 257.) Miller & Schroeder engaged in different functions and had various interests and risks throughout the course of a gaming loan transaction. Miller & Schroeder would first act as a loan originator and placement agent in negotiating loan terms with a prospective borrower. (*Id.*) Once loan terms were agreed to, Miller & Schroeder, as the lender, hired counsel to draft the necessary loan documents. (*Id.*) Upon closing, as the originating lender, Miller & Schroeder disbursed the loan proceeds to the borrower. (*Id.*) Following disbursement of the loan proceeds (which was sometimes weeks after closing), Miller & Schroeder would sell participation interests in the loans in varying amounts to various banks. (*Id.*) Miller & Schroeder retained servicing rights to the loans. (AA 332 § 4.)

Although it is legally irrelevant to the issue of Appellants' standing to assert a legal malpractice claim against Dorsey, Appellants appear to insinuate that Miller & Schroeder had no financial interest or risk in its gaming loan transactions because its general business model was to participate out 100% of its gaming loans. (App. Br. at 10-12.) This insinuation is wrong.

It is undisputed that Miller & Schroeder had several different financial interests in the Loan Transaction. The Loan Placement Agreement provided Miller & Schroeder with a 4% placement fee. (AA 364.) Miller & Schroeder's Loan Agreement also provided for the payment of a servicing fee by the borrower. (AA 380.) This servicing fee was confirmed in the Participation Agreement. (AA 313.)

Moreover, Miller & Schroeder held the lender's position in the St. Regis Loans and bore the financial risk of non-payment until it was able to sell participation interests in the entire balance of the Loans. If Miller & Schroeder was unable to participate the entire loan, it retained an interest in the loan, which had happened previously. (Resp. App. 373.) Moreover, it is undisputed that the entire balance of the St. Regis Loans were not fully participated out until May 1999 – weeks after closing. (AA 241 ¶ 7.)

2. The Participation Agreement

The relationship between Miller & Schroeder and Appellants was governed by a Participation Agreement. (AA 306-345.) Dorsey did not draft the Participation Agreement. (Resp. App. 347 ¶ 21; 353 ¶ 22.) It was prepared internally by Miller & Schroeder. (Resp. App. 376; 347 ¶ 21; 353 ¶ 22.)

As a condition of sale, Appellants were required to accept all of the terms of the Participation Agreement. (Resp. App. 363 and 366.) Appellants were also required to be "institutional investors," meaning they were entities with total assets exceeding $5 million. (AA 330-31 § 3.1.) The Participation Agreement makes clear that the relationship between Miller & Schroeder and Appellants was adversarial – that of a buyer and seller. (AA 330 § 2.2.)

By executing a Participation Agreement, each Appellant acknowledged that it had made a complete and independent examination of all loan documents and had reached its own independent and informed judgment about all aspects of the Loans:

> Participant[7] has received and made a complete examination of copies of all Loan Documents it requires to be examined and approves of the form and content of the same. Participant acknowledges that Participant has been provided with or granted access to all of the financial and other information that Participant has requested or believes to be necessary to enable Participant to make an independent and informed judgment with respect to the Collateral,[8] Borrower and Obligor and their credit and the desirability of purchasing an undivided interest in the Loan.
>
> * * *
>
> Participant is participating with Lender[9] based upon Participant's own independent examination and evaluation of the Loan transaction and the information furnished with respect to Borrower and without any representations or warranties from Lender as to the Borrower's financial suitability, the appropriateness of the investment and the value and security of the Collateral.

(AA 330-31 § 3.1 (emphasis added).)

Appellants also accepted the risk of non-payment of the Loans:

> Participant accepts the full risk of nonpayment by Borrower and any other Obligor of the Loan and of Participant's interest in the Loan and agrees that Lender shall not be responsible for nor warrants or represents the payment, performance or observance by Borrower or any other Obligor of any of the terms, covenants or conditions of the Loan Documents.

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[7] "Participant" is defined as "the party identified in the preamble to this [Participation] Agreement as 'Participant'." (AA 329 § 1.) This includes Appellants.

[8] "Collateral" is defined as "the Loan Documents, the Property and interests in the Property now or hereafter securing the Loan . . ." (AA 327 § 1.) This includes the Notice and Acknowledgement of Pledge.

[9] "Lender" is defined as Miller & Schroeder. (AA 329 § 1.)

(AA 334 § 5.1 (emphasis added).)

Appellants further acknowledged that they did not rely on any representations or warranties made by Miller & Schroeder:

> Participant specifically acknowledges that Lender has made no warranty or representation, express or implied, to Participant with respect to the solvency, condition (financial or other) or future condition (financial or other) of Borrower, any Obligor, Lender or the Collateral. <u>Participant also acknowledges that Lender makes no warranty or representation as to and shall not be responsible for the due execution, legality, validity, enforceability, genuineness, sufficiency or collectibility of the Collateral or any document relative thereto</u>.

(*Id.* § 5.2 (emphasis added).)

Finally, Appellants waived their right to sue Miller & Schroeder for any reliance on the advice of its counsel:

> The Lender [Miller & Schroeder] shall not be responsible for any negligence or misconduct on the part of any accountant, attorney, appraiser, evaluator, surveyor, engineer, architect or other expert or be bound to supervise the proceedings of any such appointee provided that Lender shall use reasonable care in the selection of such person or firm.

(AA 334-35 § 5.3.)

Based on these provisions in the Participation Agreement, it is undisputed that Appellants had no right to rely on any representations made concerning the Loan Transaction, were obligated to conduct their own due diligence with respect to the Loan Transaction (including loan documents like the Pledge Agreement), accepted the risk of non-payment of the Loans and received no guarantees regarding the enforceability of the Loan Documents. Despite the fact that Appellants knew that they were signing an adversarial, one-sided agreement that was very favorable to Miller & Schroeder, they voluntarily chose not to retain their own counsel.

G. Miller & Schroeder Never Told Dorsey That It Was Retained to Represent Appellants

Miller & Schroeder did not tell Dorsey that it was retained to represent the unknown banks that might purchase participation interests in the Loans. (Resp. App. 372-73; 375; 344 ¶ 4; 351 ¶¶ 7-8.) Nor did Miller & Schroeder tell Dorsey that the prospective participating banks were the sole and direct intended beneficiaries of Dorsey's services. (Resp. App. 99; 345 ¶ 5; 351 ¶ 8.) Mr. Erickson, an attorney, confirmed that he did not hire Dorsey to represent any of the participating banks in the Loan Transaction. (Resp. App. 372-73.) Rather, Dorsey was "retained to represent Miller & Schroeder and I'll leave it at that." (Resp. App. 372.)

The primary scope of Dorsey's representation involved the preparation of the Loan Documents. (Resp. App. 373.) Mary Jo Brenden, Miller & Schroeder's in-house counsel, confirmed that Dorsey's representation "did not include within its scope any assistance or advice relating to Miller & Schroeder's sales of investments, or participations, in the Loans. . . ."[10] (Resp. App. 101-02 ¶¶ 4-5; *see also* Resp. App. 377-78.)

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[10] At Miller & Schroeder's request, Dorsey provided advice to Miller & Schroeder concerning the insertion of certain language into the Participation Agreement pertaining to the obligation of the banks to comply with licensing requirements of the New York Racing and Wagering Board. (AA 331 § 3.1 and 340 § 7.7.) This revision allowed Miller & Schroeder to sell participation interests to the prospective banks after the Loans closed.

Mr. Erickson confirmed his understanding that Dorsey owed its duty of loyalty to Miller & Schroeder, not Appellants. (Resp. App. 373.) Miller & Schroeder would not have allowed Dorsey to act adverse to Miller & Schroeder's interests. (*Id.*) For instance, Dorsey could not have attempted to negotiate changes to the Participation Agreements that would have been harmful to Miller & Schroeder's interests, even if doing so would have benefited Appellants. (Resp. App. 372-73.)

H. <u>Dorsey Had No Contact With Appellants Prior to the Closing of the Loans</u>

Appellants did not produce evidence of <u>any</u> direct communications by them with Dorsey prior to the closing and funding of the Loans. And for good reason – there were none. The undisputed material facts were as follows:

- Dorsey had no oral or written communications with Appellants prior to the closing and funding of the Loans. (Resp. App. 105-13; 345 ¶ 11; 351 ¶ 10.)
- Prior to the closing and funding of the Loans, Dorsey did not even know the identity of a single Appellant. (Resp. App. 345 ¶ 10; 351 ¶ 9.)
- Appellants never directly communicated to or advised Dorsey, either orally or in writing, that they considered themselves to be Dorsey's clients. (Resp. App. 105-13; 346 ¶ 13; 352 ¶ 14.)
- Appellants did not expressly request, either orally or in writing, that Dorsey represent them in connection with the Loan Transaction. (Resp. App. 105-13; 346 ¶ 18; 352 ¶ 19.)
- Dorsey did not send any documents to Appellants. (Resp. App. 346 ¶ 15; 352 ¶ 16.)
- Dorsey did not sign any written retainer agreement or engagement letter with any of Appellants. (Resp. App. 105-13; 346 ¶ 17; 352 ¶ 18.)
- Dorsey did not send any bills for legal services to Appellants; bills were sent to Miller & Schroeder and were paid by President. (Resp. App. 98; 346 ¶ 19; 352 ¶ 20.)

- Dorsey provided no legal advice to Appellants. (Resp. App. 103-15.)

These undisputed material facts presented to the District Court established that Appellants did not retain any Dorsey attorney, exchange written correspondence with any Dorsey attorney, meet with or talk to any Dorsey attorney, communicate directly via email with any Dorsey attorney, exchange facsimiles with any Dorsey attorney, seek legal advice from Dorsey, or advise any Dorsey attorney regarding Dorsey's alleged representation of Appellants in the Loan Transaction. (AA 242.)

I. <u>President Defaults</u>

The Casino opened on April 11, 1999. (AA 22 ¶ 80.) Almost immediately, President began experiencing financial difficulties due to the casino's lack of profit. (Resp. App. 369-70.) The undisputed material facts demonstrated that the Tribe never made any payments under the Management Agreement because the casino's revenues never exceeded expenses. (Resp. App. 146-221.)

In June 1999, President requested an extension of the interest-only period until August 1999. (Resp. App. 146-49.) President's request was granted. (Resp. App. 392-406.) When the casino continued to falter, in November 1999, President requested an additional extension of the interest-only period through July 2000 and a reamortization of the principal. (Resp. App. 151-53.) President's request was again granted. (Resp. App. 221.) In January 2000, President informed Miller & Schroeder that it would not make the scheduled February 2000 interest payment. (Resp. App. 155-66.)

On April 17, 2000, the Tribe terminated all gaming licenses of individuals employed by President. (AA 22 ¶ 82.) The Tribe also prohibited President access to the

Casino and removed President as the Casino's manager. (*Id.*) It was not until at least October 2000 – more than 20 months after the Pledge Agreement was executed – that anyone with the Tribe mentioned any alleged infirmity with the document.

Miller & Schroeder retained Dorsey to pursue collection of the amounts due and owing on the Loans. (Resp. App. 368.) On October 3, 2000, Miller & Schroeder sued President in United States District Court for the District of Minnesota. (Resp. App. 222-31.) Miller & Schroeder obtained summary judgment on February 21, 2002, and a judgment in the amount of $15,681,528.16, plus interest, was entered on April 16, 2002 (the "President Judgment"). (Resp. App. 232-44; AA 278-82.)

J. <u>Appellants Pursue Claims Against the Tribe in New York</u>

On December 8, 2003, Appellants sued the Tribe in the New York Supreme Court for Nassau County for breach of the Notice and Acknowledgment of Pledge. (AA 245 (citing Asmus Aff. Ex. AA).) In response, on December 31, 2003, the Tribe commenced a *qui tam* action against the Appellants and President in the United States District Court for the Northern District of New York to have the Notice and Acknowledgment of Pledge declared void for lack of NIGC approval. (AA 283-301.) In the *qui tam* action, Appellants argued that the Notice and Acknowledgment of Pledge did not require NIGC approval and, consequently, was valid and enforceable against the Tribe. (Resp. App. 245-78.) These arguments are directly contrary to the position taken by Appellants against Dorsey here.

K. <u>Appellants Settle With the Tribe</u>

Appellants settled with the Tribe on April 11, 2005. (Resp. App. 279-342.) The Tribe agreed to pay Appellants $3,453,588 in exchange for an assignment to the Tribe of the President Judgment and a dismissal of the New York lawsuits. (*Id.*)

SUMMARY OF ARGUMENT

Other than unsupported speculation and conjecture, or bold statements that lack any record support, Appellants do not present any genuine issue of material fact that should preclude summary judgment. *See infra* Section II. Instead, Appellants try to persuade this Court to ignore long-standing Minnesota law and adopt new legal positions that have never been taken before by Minnesota courts. This is not the appropriate role of this Court. *See infra* Section IV.B.1.

The District Court correctly ruled that Appellants lacked standing to sue Dorsey for legal malpractice. Appellants were not the direct and intended third-party beneficiaries of Dorsey's services in the Loan Transaction because Dorsey was not retained for the sole purpose of directly benefiting Appellants. *See infra* Section III. Nor were Appellants Dorsey's clients in the Loan Transaction under either the contract or tort theory because they had no communications whatsoever with Dorsey, made no request that Dorsey represent them, paid no fees to Dorsey and did not rely on any advice given by Dorsey to Miller & Schroeder. *See infra* Sections IV and V. Finally, since Appellants were not Dorsey's clients, they cannot maintain a negligent misrepresentation claim. *See infra* Section VI.

Appellants argue throughout their brief that the District Court's Order deprives them of their "day in court" and absolves Dorsey of liability. This is simply not true. Appellants had their day in court. They were given every opportunity to present facts to support their claimed right to sue Dorsey. They failed to do so – a failure they do not contest on appeal.

Moreover, the District Court's Order does not absolve Dorsey from liability. Dorsey stands behind its legal advice. If, however, Dorsey's advice was incorrect, then it could be liable to Miller & Schroeder for any resulting harm. That harm could include a claim by Appellants against Miller & Schroeder for actions taken by Miller & Schroeder on the advice of Dorsey. In that situation, Miller & Schroeder could potentially seek contribution and indemnification from Dorsey, which is precisely what has happened in the Bankruptcy Court. Dorsey does not claim that it is accountable to no one. Dorsey maintains only that it owes no duties to non-clients like Appellants, a position overwhelmingly supported by Minnesota law.

The District Court correctly ruled the undisputed material facts unequivocally demonstrate that Appellants were not Dorsey's clients or the direct intended third-party beneficiaries of Dorsey's services. As such, Appellants have no standing to pursue legal malpractice, breach of contract or negligent misrepresentation claims as a matter of law. Summary judgment was properly granted.[11] The District Court's decision should be affirmed.

[11] Appellants attempt to introduce material from Bremer's case. *See* App. Br. at 7; AA 457-70. Not only are these materials irrelevant to the issues before this Court, they were not part of the record below. Appellants' attempt to include them as part of the appellate record is improper. *See* Minn. R. Civ. App. P. 110.01. The offending materials should be stricken.

ARGUMENT

I. STANDARD OF REVIEW

On appeal from summary judgment, the role of this Court is to review the record for the purpose of determining whether there are any genuine issues of material fact for trial and whether the district court erred in its application of the law. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988).

A motion for summary judgment is decided on the pleadings, depositions, answers to interrogatories, admissions, affidavits, and documentary evidence. Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). On a motion for summary judgment, the district court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). While the district court must view the evidence in the light most favorable to the non-moving party, it must ultimately evaluate whether there is sufficient evidence to warrant submitting the case to a jury. *Id.* at 243.

Under this standard, as no material facts were in dispute and the District Court correctly applied the law, summary judgment should be affirmed in all respects.

II. APPELLANTS DO NOT CHALLENGE THE DISPOSITIVE UNDISPUTED MATERIAL FACTS PRESENTED TO THE DISTRICT COURT

While Appellants attack the District Court's order as improperly resolving factual disputes, *see* App. Br. at 22-24, they fail to identify a single issue of disputed material fact that should preclude summary judgment. Significantly, Appellants do not challenge the following undisputed material facts, which were fully supported by the record and were relevant to the District Court's Order:

(1) Miller & Schroeder did not tell Dorsey that it was retained to represent Appellants in connection with the Loan Transaction (AA 242 ¶ 12);

(2) Miller & Schroeder did not tell Dorsey that the sole purpose of Dorsey's retention was to directly benefit Appellants in connection with the Loan Transaction (AA 242 ¶ 12);

(3) Appellants had no contact or communication whatsoever with Dorsey prior to the Loan closing (AA 242 ¶ 13);

(4) Dorsey did not know the identities of Appellants prior to the Loan closing (AA 242 ¶ 13);

(5) Appellants did not inform Dorsey, either orally or in writing, that they considered themselves to be Dorsey's clients in connection with the Loan Transaction (AA 242 ¶ 13);

(6) Appellants did not request, either orally or in writing, that Dorsey represent them in connection with the Loan Transaction (AA 242 ¶ 13);

(7) Dorsey did not send any documents to Appellants prior to the Loan closing (AA 242 ¶ 13);

(8) Dorsey did not sign any written retainer agreement or engagement letter with Appellants (AA 242 ¶ 13);

(9) Dorsey's bills for legal fees and expenses were sent to Miller & Schroeder and paid by President out of the Loan proceeds (AA 242 ¶ 13);

(10) Appellants were contractually obligated to conduct their own due diligence and evaluate the Loan Transaction without reliance on any statements of the lender, Miller & Schroeder, or its counsel, Dorsey (AA 243 ¶ 17 and n.9);

(11) Appellants disclaimed reliance on any statements made by Miller & Schroeder or its counsel (AA 243-44 ¶¶ 17-18);

(12) Appellants voluntarily chose not to retain counsel to represent them in connection with the Loan Transaction (AA 244 ¶ 18);

(13) Dorsey's advice was never communicated to Appellants by Dorsey or Miller & Schroeder (AA 245 ¶ 21); and

(14) Dorsey was retained to structure, document and close the Loans for Miller & Schroeder (AA 244 ¶ 18).[12]

Based on these undisputed material facts, the Court properly applied Minnesota law and concluded that: (1) Appellants lacked standing, as non-clients, to sue Dorsey for legal malpractice under the intended third-party beneficiary theory; (2) Appellants lacked standing to sue Dorsey for legal malpractice and breach of contract because they had no contractual attorney-client relationship with Dorsey; (3) Appellants lacked standing to sue Dorsey for legal malpractice because they had no attorney-client relationship with Dorsey under the tort theory; and (4) Appellants, as non-clients, could not sue Dorsey for negligent misrepresentation. *See* AA 237-51. The District Court's decision was correct and should be affirmed.

III. APPELLANTS LACKED STANDING TO SUE DORSEY UNDER THE INTENDED THIRD-PARTY BENEFICIARY THEORY

Appellants' primary argument on appeal is that they were the direct and intended third-party beneficiaries of Dorsey's legal services to Miller & Schroeder in the Loan Transaction. *See* App. Br. at 25-33. Appellants' argument implicitly concedes that they were not Dorsey's clients in the Loan Transaction; rather, Appellants contend they have

[12] Appellants insinuate that Dorsey's discovery actions in this case were somehow improper. Appellants state that "[n]o discovery was conducted" in this case. *See* App. Br. at 8. This statement is wrong. Dorsey conducted significant written discovery in this case, much of which was relied upon by the District Court in determining that no genuine issues of material fact existed. *See* Res. App. 423-25; AA 1-88 and 105-13. Appellants also note that "Dorsey relied on the depositions and discovery obtained in the Bremer case." *See* App. Br. at 8 n.2. This statement is true but meaningless; Appellants themselves relied on discovery obtained in the bankruptcy cases.

standing to sue Dorsey under a very limited exception to Minnesota's strict privity requirement for legal malpractice claims.

No Minnesota court has ever permitted a non-client to sue an attorney for legal malpractice under circumstances like those in this case. Indeed, of the twelve known Minnesota appellate decisions that have addressed the intended third-party beneficiary legal malpractice theory, eleven affirmed summary judgment and/or a dismissal of the non-client's legal malpractice claim. *See Marker v. Greenberg*, 313 N.W.2d 4, 5-6 (Minn. 1981) (en banc); *Kuntz v. Jensen & Gordon*, No. A04-1310, 2005 WL 949119, at *4 (Minn. Ct. App. Apr. 26, 2005) (Resp. App. 424-27); *Precision Diversified Indus. v. Colgate*, No. A03-2060, 2004 WL 2093532, at *7 (Minn. Ct. App. Sept. 21, 2004), *review denied* (Minn. Dec. 14, 2004) (Resp. App. 428-38); *Francis v. Piper*, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999), *review denied* (Minn. Oct. 26, 1999); *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995), *review denied* (Minn. Sept. 28, 1995); *Holmes v. Winners Entm't, Inc.*, 531 N.W.2d 502, 505 (Minn. Ct. App. 1995); *CPJ Enters., Inc. v. Gernander*, 521 N.W.2d 622, 624 (Minn. Ct. App. 1994); *Sandum v. Doherty, Rumble & Butler, P.A.*, No. C7-94-801, 1994 WL 593925, at *4 (Minn. Ct. App. Nov. 1, 1994), *review denied* (Minn. Jan. 10, 1995) (Resp. App. 420-23); *Great Am. Ins. Co. v. Perry*, No. C6-93-1573, 1994 WL 101991, at *2 (Minn. Ct. App. Mar. 29, 1994), *review denied* (Minn. May 17, 1994) (Resp. App. 439-41); *Schuler v. Meschke*, 435 N.W.2d 156, 163 (Minn. Ct. App. 1989); *Anderson v.*

Orlins, No. C3-88-897, 1988 WL 113764, at *2 (Minn. Ct. App. Nov. 1, 1988), *review denied* (Minn. Jan. 13, 1989) (Resp. App. 442-45).[13]

Appellants ask this Court to stray from this long jurisprudential history of dismissing non-client legal malpractice claims and confer upon them standing to sue Dorsey. Minnesota law does not permit such a leap. The District Court correctly applied Minnesota law to the undisputed material facts of the case in ruling that Appellants, as non-clients, lacked standing to pursue a legal malpractice claim against Dorsey.

A. **The District Court Correctly Determined That the "Sole Purpose" Test Applies**

"The lawyer-client relationship is jealously guarded and restricted to only those two parties because it is a fiduciary relationship of the highest character." *CPJ Enters.*, 521 N.W.2d at 624. In Minnesota, the doctrine of intended third-party beneficiary legal malpractice is a "very limited" exception to the strict privity requirement for legal malpractice claims. *Marker*, 313 N.W.2d at 5. Under this theory, "[a]n attorney may be held liable to a nonclient when 'the client's sole purpose in retaining an attorney is to benefit directly [that] third party.'" *Holmes*, 531 N.W.2d at 505 (quoting *Marker*, 313 N.W.2d at 5) (emphasis added). In order to assert a legal malpractice claim against a lawyer, the third party must be the "direct and intended beneficiary of the lawyer's services." *Id.* (emphasis added) (same).

[13] The Minnesota Supreme Court's decision in *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261 (Minn. 1992), *reh'g denied* (Feb. 11, 1993), is the lone exception, wherein the court held that fact issues precluded summary judgment. The *Admiral Merchants* case is easily factually distinguishable. *See infra* Section III.B.

Rather than challenge the undisputed material facts in the record supporting summary judgment, Appellants argue that the District Court erroneously applied the "sole purpose" test to determine their standing to pursue a legal malpractice claim against Dorsey. *See* App. Br. at 27-30. Appellants assert that the District Court should have instead applied a nebulous "primary purpose" test that has never been adopted or applied in Minnesota. *Id.*

Minnesota has applied the sole purpose test to legal malpractice claims asserted by non-clients for more than 25 years. The Minnesota Supreme Court first enunciated the sole purpose test in *Marker* in 1981.

> The cases extending the attorney's duty to non-clients are limited to a narrow range of factual situations in which the client's sole purpose in retaining an attorney is to benefit directly some third party.

Marker, 313 N.W.2d at 5 (emphasis added). In 1992, the Minnesota Supreme Court affirmed the propriety of the sole purpose test:

> [A]n intended third-party beneficiary may bring an action for legal malpractice in those situations when the client's sole purpose is to benefit the third-party directly, and the attorney's negligent act caused the beneficiary to suffer a loss.

Admiral Merchants, 494 N.W.2d at 266 (emphasis added) (citing *Marker*, 313 N.W.2d at 5). As recently as 2002, the Minnesota Supreme Court again reaffirmed the sole purpose test. *See Pine Island Farmers Coop. v. Erstad & Reimer, P.A.*, 649 N.W.2d 444, 448 n.4 (Minn. 2002) (third-party beneficiary exception not implicated by the facts of the case).

While Appellants allege that "there has been continuing development in this area of the law," *see* App. Br. at 27, every Minnesota intended third-party beneficiary legal malpractice case decided since *Marker* and *Admiral Merchants* has reaffirmed and applied the sole purpose test. *See Kuntz,* 2005 WL 949119, at *4; *Colgate,* 2004 WL 2093532, at *7; *Francis*, 597 N.W.2d at 924; *Goldberger*, 534 N.W.2d at 738; *Holmes*, 531 N.W.2d at 505; *CPJ Enters.*, 521 N.W.2d at 624; *Sandum*, 1994 WL 593925, at *4; *Perry*, 1994 WL 101991, at *2; *Schuler*, 435 N.W.2d at 163; *Anderson*, 1988 WL 113764, at *2. In every one of these cases, the appellate court affirmed summary judgment or a dismissal of the non-client's legal malpractice claim for lack of standing. In light of this long and undisputed Minnesota jurisprudential history, the District Court correctly utilized the sole purpose test in its determination that Appellants lacked standing to pursue a legal malpractice claim against Dorsey.

B. **The District Court Correctly Ruled that the Undisputed Material Facts Demonstrated that Dorsey Was Not Retained for the Sole Purpose of Directly Benefiting Appellants**

The District Court properly found that Appellants failed to present any genuine issue of material fact regarding whether Dorsey was retained for the sole purpose of directly benefiting Appellants in the Loan Transaction. *See* AA 249-50. The undisputed material facts unequivocally support the District Court's decision.

First, Miller & Schroeder confirmed that the scope of Dorsey's representation did not include any issues relating to participation interests.[14] *See* Resp. App. 101-02 ¶¶ 4-5. Steve Erickson retained Dorsey to draft the Loan Documents for Miller & Schroeder only. *See* Resp. App. 373. Mr. Erickson further confirmed that Dorsey owed its duty of

[14] *See supra* n.10.

loyalty to Miller & Schroeder and could not seek to change any prejudicial terms for the benefit of Appellants. *See* Resp. App. 372-73. Second, Dorsey had no idea who Appellants were prior to the closing and funding of the Loans. As such, Dorsey did not intend to represent them. *See Goldberger*, 534 N.W.2d at 739 (estate beneficiaries only "incidental" beneficiaries). Third, Appellants were not parties to the Loan Documents drafted by Dorsey. Rather, the documents were drafted at Miller & Schroeder's request and expressly benefited Miller & Schroeder. The documents do not evidence an intent to directly benefit Appellants. *See Holmes*, 531 N.W.2d at 505. Fourth, the Participation Agreements illustrate the adversarial buyer-seller relationship between Appellants and Miller & Schroeder and also contain language that is prejudicial to Appellants. This is yet more evidence of a lack of intent to directly benefit Appellants. *Id.* Fifth, the fact that Appellants played no role in Dorsey's retention further evidences the lack of intent to directly benefit Appellants in the Loan Transaction. *Id.*

Appellants' apparent reliance on *Admiral Merchants* to support their standing argument is misplaced. In *Admiral Merchants*, the client and the third-party were commonly owned or managed. *Admiral Merchants*, 494 N.W.2d at 263. The evidence revealed that counsel actually exchanged communications with the third-party regarding the underlying issues and that counsel actually received payment of fees from the third party for rendering such services. *Id.* at 265. Based on these unique facts, the court denied summary judgment. *Id.*

This case differs in at least two dispositive ways. First, there is no evidence in the record that even remotely suggests that Appellants and Dorsey directly communicated prior to the Loan Transaction or that Appellants paid any fees to Dorsey. Rather, undisputed material facts presented to the District Court demonstrate that there were no communications whatsoever between Appellants and Dorsey. Second, unlike the client and the third-party relationship in *Admiral Merchants*, Appellants and Miller & Schroeder are not commonly owned or managed, are not related entities and are not within the same organizational structure.

It is undisputed that Miller & Schroeder did not retain Dorsey for the sole purpose of directly benefiting Appellants in the Loan Transaction. Dorsey was retained to document the Loan Transaction and provide advice for Miller & Schroeder's benefit. Because Dorsey represented Miller & Schroeder's interests in the Loan Transaction, Appellants could not be the sole and direct beneficiaries of Dorsey's representation. *See Marker*, 313 N.W.2d at 5; *Holmes*, 531 N.W.2d at 505.

At best, as noted by the District Court, Appellants were "incidental" beneficiaries of Dorsey's services to Miller & Schroeder. *See* AA 250 ¶ 20. As this Court has previously held, however, incidental beneficiaries lack standing to sue as a matter of law. *See Goldberger*, 534 N.W.2d at 739; *Holmes* 531 N.W.2d at 505. Thus, the District Court was correct in ruling that Appellants lacked standing to sue Dorsey for legal malpractice.

C. The District Court Correctly Determined That Whether Appellants Were Direct and Intended Third-Party Beneficiaries is a Threshold Question

The District Court determined that the threshold question was whether Appellants were the direct and intended third-party beneficiaries (AA 249 ¶ 17), and because the undisputed material facts demonstrated that they were not, no further analysis need be conducted. *See* AA 250 ¶¶ 20-21. Appellants contend that the District Court's threshold analysis was improper and it should have applied a multi-factor test to determine whether Appellants had standing to sue Dorsey. *See* App. Br. at 27. But, this Court has already determined that "[t]he requirement that the third party be an intended beneficiary is a threshold requirement for an attorney to have a duty to a third party." *Francis*, 597 N.W.2d at 924. Once it is determined that the sole purpose of the attorney's retention was not to directly benefit the non-client, no further analysis is required. *Id.* at 925.

No fewer than five Minnesota appellate court decisions have taken precisely the same approach as the District Court in dismissing legal malpractice actions asserted by non-clients for failure to satisfy the threshold direct and intended third-party beneficiary requirement. *See Francis*, 597 N.W.2d at 924-25 ("Because Francis has not shown she was an intended third-party beneficiary of Heine's attorney-client relationship with Piper, we do not reach the multi-factor analysis."); *Goldberger*, 534 N.W.2d at 738 (determining third party was not an intended beneficiary before considering two of the *Lucas* factors); *Holmes*, 531 N.W.2d at 505 (determining third party was not an intended beneficiary and not reaching multi-factor analysis); *Marker*, 313 N.W.2d at 5-6 (determining third party was not an intended beneficiary and not reaching multi-factor analysis); *see also Witzman v. Gross*, 148 F.3d 988, 990 (8th Cir. 1998). In addition, in *Admiral Merchants*, the Minnesota Supreme Court did not reach the *Lucas* multi-factor analysis after determining that a fact issue existed regarding whether the third party was a direct and intended third-party beneficiary.[15] *Admiral Merchants*, 494 N.W.2d at 266.

Despite these clear judicial pronouncements, Appellants ask the Court to skip this threshold question and move directly to a multi-factor balancing test from *Lucas v. Hamm*, 364 P.2d 685, 687-88 (Cal. 1961) to determine whether they have standing to assert a legal malpractice claim. *See* App. Br. at 29-31. Appellants' argument fails in at least two material respects. First, the two cases Appellants cite to support their argument – *Goldberger* and *Francis* – actually confirm that the direct and intended third-party beneficiary analysis is a threshold determination. Second, this Court has already established that the *Lucas* factors do not determine whether a non-client is an intended third-party beneficiary. Instead, the factors are used to determine the scope of the duty owed after the non-client's intended third-party beneficiary status is established.

1. *Goldberger* and *Francis* Support the District Court's Decision

Contrary to Appellants' argument, this Court's decision in *Goldberger* actually supports the District Court's decision. In that case, beneficiaries of an estate asserted a legal malpractice claim against the attorney hired by the personal representative.

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[15] Appellants cite *Anoka Orthopaedic Assocs., P.A. v. Mutschler*, 773 F. Supp. 158, 166-67 (D. Minn. 1991) to support their argument. In that case, Judge Doty erroneously ignored *Marker's* sole purpose threshold requirement and instead improperly considered a multi-factor test to analyze the non-client third-party's standing to sue. Judge Doty's decision not only ignored established Minnesota law at the time, but three subsequent decisions by this Court – *Francis*, *Goldberger* and *Holmes* – confirmed Minnesota's strict adherence to the threshold analysis. *See supra* Section III.A. Notably, in *Holmes*, this Court properly applied the threshold direct and intended third-party beneficiary requirement to facts analogous to *Anoka* and affirmed summary judgment for the lawyer.

Goldberger, 534 N.W.2d at 736. The court began its analysis of the beneficiaries' standing to sue by reiterating the threshold determination from *Marker* and *Admiral Merchants* that the attorney be retained for the sole purpose of directly benefiting the non-client. *Id.* at 738 (citing *Marker*, 313 N.W.2d at 5; *Admiral Merchants*, 494 N.W.2d at 266). The court did <u>not</u> mandate application of the *Lucas* factors to make that determination. Instead, the *Lucas* factors could be used simply as an "aid" in the determination. *Id.* at 738.

The court left the threshold direct and intended third-party beneficiary requirement intact. *Id.* Before any analysis of the *Lucas* factors, the court first determined that "appellants are not the direct, intended beneficiaries of the personal representative's attorneys' services." *Id.* The court held that "at best, individual beneficiaries of the estate are only 'incidental beneficiaries' of the attorneys' services." *Id.* at 739. It was only <u>after</u> reaching this conclusion that the court briefly mentioned just two of the six *Lucas* factors, neither of which favored the beneficiaries' claim. *Id.* at 739-40.

To the extent *Goldberger's* "aid" language created any confusion concerning the threshold requirement, it was resolved in *Francis*. In that case, a purported beneficiary under a will sued the testator's attorney for legal malpractice. *Francis*, 597 N.W.2d at 923. The court first confirmed that the *Marker* and *Admiral Merchants* decisions "indicate[] the intended third-party beneficiary requirement is a <u>threshold requirement</u> for a non-client to bring a legal malpractice action against an attorney." *Id.* at 924 (emphasis added). Next, the court identified cases from other jurisdictions that also supported the view that, as a threshold matter, a non-client must prove that it was a direct and intended third-party beneficiary of the attorney's services. *Id.* (citing *Needham v. Hamilton*, 459 A.2d 1060, 1062-63 (D.C. 1983); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987); *Guy v. Liederbach*, 459 A.2d 744, 751-52 (Pa. 1983); *Auric v. Cont'l Cas. Co.*, 331 N.W.2d 325, 328-29 (Wis. 1983)). Finally, the court held that imposition of the threshold requirement was consistent with the Restatement of the Law Governing Lawyers.[16] *Id.* at 925. The court affirmed summary judgment because the beneficiary could not satisfy his burden of proving that the testator's sole purpose in retaining the attorney was to directly benefit the non-client third-party. *Id.* at 925. Critically, because the threshold requirement was not met, the court's opinion is completely devoid of any mention of the *Lucas* factors.

Thus, *Goldberger* and *Francis* confirm that the District Court correctly applied the threshold direct and intended third-party beneficiary analysis to Appellants' legal malpractice claim.

2. The *Lucas* Factors Do Not Determine Whether a Non-Client is a Direct and Intended Third-Party Beneficiary

Appellants assert that the District Court erred by failing to apply the *Lucas* factors to determine whether Appellants were the direct and intended third-party beneficiaries of Dorsey's legal services. *See* App. Br. at 27. This Court has repeatedly held, however, that the *Lucas* factors are <u>not</u> used to determine whether a non-client is a direct and intended third-party beneficiary. Rather, the factors merely "determine 'the extent of an

[16] Contrary to Appellants' argument (App. Br. at 32), the *Francis* court cited the Restatement to support its continued adherence to the threshold intended third-party beneficiary requirement, not to indicate some divergence therefrom.

attorney's duty to a non-client.'" *Francis*, 597 N.W.2d at 924 (quoting *Marker*, 313 N.W.2d at 5); *see also Goldberger*, 534 N.W.2d at 738 ("The cases then state that the Lucas factors must be considered in determining the attorney's duty to the nonclient."); *Sandum*, 1994 WL 593925, at *4 ("In determining the extent of the attorney's duty to a nonclient, the court should consider" the *Lucas* factors.). Because the undisputed material facts conclusively establish that Appellants were <u>not</u> the direct and intended third-party beneficiaries of Dorsey's services, the District Court properly determined that the *Lucas* factors were irrelevant and need not be analyzed. *See* AA 250 ¶ 21.

D. <u>Even if The *Lucas* Factors Were Relevant, They Do Not Support Appellants' Claims</u>

Even assuming that Appellants can satisfy the threshold requirement, the *Lucas* factors support the District Court's dismissal of Appellants' malpractice claim. The first and second *Lucas* factors – the intent to benefit the plaintiff and the foreseeability of harm – demonstrate the lack of any duty owed by Dorsey to Appellants. It is undisputed that Dorsey was retained only to represent Miller & Schroeder in the Loan Transaction. Dorsey was hired to draft necessary Loan documents that would protect Miller & Schroeder's rights and allow Miller & Schroeder to market a loan package for sale to participating banks. Any benefit that may have been received by Appellants was, at best, incidental. Moreover, since it was never intended that Dorsey represent Appellants' interests, any harm to Appellants was not foreseeable.

With regard to the third *Lucas* factor — the degree of certainty that the plaintiff suffered injury — Appellants ignore that Miller & Schroeder secured a $15 million judgment, plus interest, against President. Appellants had the opportunity to pursue collection of the judgment, but chose not to do so. And, notwithstanding that the Tribe's and President's repayment obligations remained intact, Appellants assigned their interest in the President Judgment to the Tribe for a payment in excess of $3 million and voluntarily waived any claims to collect the Loans.

The fourth *Lucas* factor – causation – likewise supports the dismissal. Even assuming Appellants' malpractice allegations are true and the Notice and Acknowledgment of Pledge is unenforceable against the Tribe, all repayment obligations remain intact. The Tribe was to repay President once casino revenues exceeded expenses. *See* AA 65 § 8.10(C). President was then obligated to pay the monies received from the Tribe to Miller & Schroeder. *See* AA 379 § 2.02(b) and Resp. App. 93 § 7. Miller & Schroeder was to remit payments received from President to Appellants. *See* AA 326-45.

Moreover, it is undisputed that the Tribe's repayment obligations – with or without an enforceable Pledge Agreement – were never triggered. Appellants knew that because the Tribe was obligated to repay President only if casino revenues exceeded expenses, there was a risk that if the casino was not profitable, the Loans may not be repaid. *See* Resp. App. 364-65. There is no evidence in the record to demonstrate that the casino's revenues ever exceeded operating expenses. *See* Resp. App. 370. Thus, Appellants' failure to receive Loan repayments was caused by the casino's poor performance, not Dorsey's actions.

This Court's decision in *Goldberger* resolves the question regarding the fifth *Lucas* factor – prevention of future harm – in Dorsey's favor. The estate beneficiaries in *Goldberger* argued that they had standing to sue the personal representative's attorney because the personal representative had no incentive to maintain the lawsuit since he suffered no harm. *Goldberger*, 534 N.W.2d at 739. Likewise, Appellants argue that they have standing to sue Dorsey because Miller & Schroeder was merely a nominal lender with no financial interest in the Loan Transaction. *See* App. Br. at 31. The *Goldberger* court rejected that argument out of hand. "If a personal representative breaches his fiduciary duty of acting in the estate's best interests, the beneficiaries may hold the personal representative responsible." *Id.* And, "if the personal representative's liability was caused by following an attorney's advice, the attorney is not 'shielded' from a malpractice suit." *Id.*; *see also Witzman*, 148 F.3d at 990. Similarly, in this case, if Miller & Schroeder breached any duty to Appellants, then Appellants could sue Miller & Schroeder for damages suffered as a result. And, if Miller & Schroeder acted upon Dorsey's advice, and that advice was negligent, then Dorsey would be responsible to Miller & Schroeder.[17] Just like the attorney in *Goldberger*, Dorsey would not be "shielded" from liability if Appellants are not given standing to pursue a legal malpractice claim against Dorsey.

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[17] This is precisely what happened in the Bankruptcy Court. The Trustee for Miller & Schroeder asserted a contribution and indemnity claim against Dorsey to recover any money the estate would be required to pay to Bremer if Bremer successfully prosecuted its proof of claim.

The sixth *Lucas* factor – imposition of an undue burden on the legal profession – also weighs strongly in favor of Dorsey. If Miller & Schroeder had wanted to hire Dorsey to represent Appellants in the Loan Transaction, Dorsey would have had an impermissible conflict of interest in representing both Miller & Schroeder, as seller, and Appellants, as buyers, in the same Loan Transaction. This Court has recognized this conflict problem as a policy reason for refusing to recognize intended beneficiary malpractice claims. *See, e.g., Goldberger*, 534 N.W.2d at 739; *Hill v. Schaffner*, No. C5-94-960, 1994 WL 615049, at *2 (Minn. Ct. App. Nov. 8, 1994) (Resp. App. 446-48); *see also Witzman*, 198 F.3d at 990-91. Other jurisdictions are in accord. *See, e.g., Needham*, 459 A.2d at 1062; *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1269 (1990); *Hopkins v. Akins*, 637 A.2d 424, 428 (D.C. 1993); *Spinner v. Nutt*, 631 N.E.2d 542, 544-45 (Mass. 1994); *Trask v. Butler*, 872 P.2d 1080, 1085 (Wash. 1994); *Logotheti v. Gordon*, 607 N.E.2d 1015, 1018 (Mass. 1993); *Hale v. Groce*, 744 P.2d 1289, 1292 (Or. 1987). If this Court accepted Appellants' standing argument, the burden placed on the legal profession would be enormous. Attorneys representing lenders in transactions like this one could potentially have exposure to malpractice claims asserted by an unlimited number of unknown non-clients who do not surface until months or even years after the transaction is complete. Extending an attorney's duties and obligations to these unknown and unknowable non-clients is inequitable and contrary to long-standing Minnesota law.

E. <u>The Restatement and Foreign Cases Do Not Apply</u>

Appellants alternatively argue that a test articulated in § 51 of the Restatement (Third) of the Law Governing Lawyers somehow broadens the scope of liability of an attorney to a non-client third-party, and that the court should not focus on the "sole purpose" of the representation. *See* App. Br. at 32-34. Appellants' position is flawed in several respects. First, no Minnesota court has expressly adopted the Restatement test.[18] Minnesota courts have consistently acknowledged that an attorney may be liable to a third-party only if the client's "sole purpose" in retaining counsel is to provide a direct benefit to the third party. *See, e.g., Francis*, 597 N.W.2d at 924 (referencing Restatement).

Second, even if Minnesota courts had adopted the Restatement, application of the § 51 factors supports the result reached by the District Court. The Restatement imposes liability only if: (a) counsel knows that the client intends that "one of the primary objectives of the representation" is to provide benefit to the non-client third-party; <u>and</u> (b) if such representation does not impair counsel's obligations to the client; <u>and</u> (c) the absence of a duty would make enforcement of obligations to the client unlikely. *See* Restatement (Third) of the Law Governing Lawyers § 51(3) (2000). Appellants presented no evidence to the District Court to satisfy any of these requirements.

Appellants cannot satisfy subpart (a) because the undisputed material facts clearly demonstrate that Miller & Schroeder's primary intent and objective in retaining Dorsey was to benefit itself and not any of the participating banks. Appellants cannot satisfy

[18] Appellants suggest that the *Francis* court adopted the Restatement § 51 test. *See* App. Br. at 32. The court did no such thing. As set forth above (*supra* Section III.C.1), the *Francis* court merely cited the Restatement in reaffirming that the sole purpose analysis is a "threshold" requirement. *Francis*, 597 N.W.2d at 925.

subpart (b), either, because Dorsey could not represent both the seller (Miller & Schroeder) and buyers (Appellants) in the same transaction. "No court can impose a duty of divided loyalty upon a lawyer." *See Hill*, 1994 WL 615049, at *2. "It is the potential for conflict that makes direct suit by the beneficiary unacceptable; the fact that the interests of the personal representative and the beneficiary may be aligned in a particular case does not render the suit acceptable." *Goldberger*, 534 N.W.2d at 739 (emphasis added). Finally, subpart (c) is also absent because, as set forth above, Dorsey's obligations to Miller & Schroeder can be enforced without conferring upon Appellants standing to sue Dorsey for legal malpractice. The District Court correctly found that the record simply did not support Appellants' persistent but empty assertion that they were the direct and intended third-party beneficiaries of Dorsey's representation.

Finally, Appellants rely on foreign cases for the proposition that it may be appropriate to permit third-party malpractice claims even if possible adversity exists. These cases are readily distinguishable on their facts. In *Collins v. Binkley*, 750 S.W.2d 737 (Tenn. 1988), counsel was retained by his client, after his client and the third-party negotiated an agreement, to draft documents that specifically pertained to the existing agreement between his client and the third-party. Conversely, Dorsey was retained to provide services solely to Miller & Schroeder and those services were complete <u>before</u> Appellants even became involved in the Loan Transaction. *Friske v. Hogan*, 698 N.W.2d 526 (S.D. 2005), and *Estate of Leonard v. Swift*, 656 N.W.2d 132 (Iowa 2003) are factually distinct too, as both cases evidenced that the third-party was the direct and intended beneficiary of the representation, the imposition of such duty did not impair counsel's obligations to the client, and the identity of the third-party was known at the time of the representation. As set forth above, none of these facts are present here.

Given the undisputed material facts and law discussed above, the District Court properly followed Minnesota law and determined that Dorsey was not retained for the sole purpose of directly benefiting Appellants in the Loan Transaction. As such, the District Court correctly ruled, as a matter of law, that Appellants lacked standing as non-clients to pursue a legal malpractice claim against Dorsey.

IV. THE DISTRICT COURT CORRECTLY RULED THAT APPELLANTS AND DORSEY HAD NO CONTRACTUAL ATTORNEY-CLIENT RELATIONSHIP

A. No Implicit Contractual Relationship Existed As a Matter of Law[19]

While Appellants claim to have expected Dorsey to protect their interests in the Loan Transaction, as a matter of law, a party's mere expectation that an attorney will represent it is insufficient to create an attorney-client relationship. *See Spannaus v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 368 N.W.2d 395, 398-99 (Minn. Ct. App. 1985), *review denied* (Minn. Aug. 20, 1985), *review denied* (Sept. 26, 1985) (cited by District Court at AA 247 ¶ 10). Ignoring the hallmarks of a contractual attorney-client relationship – a request by the client to the attorney to provide legal services, an agreement by the attorney to provide legal services, communications between the attorney and alleged client, and payment of legal fees by the client – Appellants ask this

[19] Appellants do not dispute that no explicit contractual relationship existed between themselves and Dorsey. Nor could they, given their admissions in written discovery that no express oral or written agreement existed. *See* Resp. App. 1-88 and 105-13.

Court to impose an attorney-client relationship here simply because Dorsey was familiar with Miller & Schroeder's business model. *See* App. Br. at 34-35. Not surprisingly, Appellants cite no authority for this proposition.

Moreover, Appellants do not challenge the undisputed material facts that support the lack of a contractual attorney-client relationship. First, Appellants did not ask Dorsey to represent their interests in the Loan Transaction and Dorsey never promised to provide them with representation. *See TJD Dissolution*, 460 N.W.2d at 62 (no attorney-client relationship because no request for representation and no promise to represent); *Spannaus*, 368 N.W.2d at 398 (same); *Sandum*, 1994 WL 593925, at *2 (same).

Second, Appellants did not have any direct communications with Dorsey prior to the closing and funding of the Loans. *See Sandum*, 1994 WL 593925, at *2 (no attorney-client relationship because alleged client did not have contact with law firm); *see also Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 30 (Minn. 1982) (same).

Third, Dorsey never sent any written correspondence or other documents to Appellants. *See Schuler*, 435 N.W.2d at 162 (no attorney-client relationship because alleged clients never received correspondence from attorney).

Fourth, because Dorsey represented the seller of the Loans (Miller & Schroeder), it could not have represented the buyer (Appellants) in an adverse situation. *See* Resp. App. 372-73. Indeed, it is undisputed that Dorsey was not retained to represent Appellants as clients. As stated by Mr. Erickson, Dorsey was "retained to represent Miller & Schroeder and I'll leave it at that." *Id.* As sophisticated institutional investors, Appellants either knew or should have known that Dorsey represented Miller &

Schroeder's interests and not their own. *See Gerdin v. Princeton State Bank*, 371 N.W.2d 5, 7 (Minn. Ct. App. 1985) (no attorney-client relationship because neither party intended attorney-client relationship and individual knew that attorney represented other parties), *aff'd*, 384 N.W.2d 868 (Minn. 1986). This is confirmed in the Participation Agreements executed by Appellants. *See* AA 326-45.

Finally, Dorsey did not bill, and Appellants did not pay, Dorsey's fees. *See Hill*, 1994 WL 615049, at *1 (no attorney-client relationship because legal services were billed to corporation and not alleged client); *Sandum*, 1994 WL 593925, at *2 (no attorney-client relationship because law firm never billed plaintiff for legal services).

Based on these undisputed material facts, the District Court correctly held that Appellants had no contractual attorney-client relationship with Dorsey. *See* AA 247-48 ¶¶ 8-11.

B. Appellants' Assignment Argument Is Contrary to Minnesota Law

Appellants ask this Court to ignore the long-standing Minnesota law prohibiting the assignment of legal malpractice claims in any context and adopt a new position that, in certain limited circumstances, legal malpractice claims can be assigned. *See* App. Br. at 35-38. Such a request is improper and should be rejected.

1. This Court Cannot Create New Law

Minnesota law clearly prohibits the assignment of legal malpractice claims in all circumstances. *See Wagener v. McDonald*, 509 N.W.2d 188, 191-92 (Minn. Ct. App. 1993), *cited in Professional Fiduciary, Inc. v. Silverman*, --- N.W.2d ----, 2006 WL 1148100, at *5 (Minn. Ct. App. May 2, 2006) (Resp. App. 449-53). In Minnesota, parties may not receive assignments of claims against attorneys under <u>any</u> circumstances. Purported assignments are void as against public policy. *Wagener*, 509 N.W.2d at 191-92. Appellants are, in essence, asking this Court to make new law. Such a request is not appropriate:

> The Court of Appeals is an intermediate appellate court. It is primarily decisional and error correcting rather than a legislative or doctrinal court. Its primary function is the correction of error by application of legal principles. Its task is to find the law, to state it and to apply it to the facts. Only when there are no statutory or judicial precedents to follow will the Court of Appeals make new law.

St. Aubin v. Burke, 434 N.W.2d 282, 284 (Minn. Ct. App. 1989); *see also Miller v. Mercy Med. Ctr.*, 380 N.W.2d 827, 831 (Minn. Ct. App. 1986). "Because this court is limited in its function to correcting errors it cannot create public policy." *Roquemore v. State Farm Mut. Auto. Ins. Co.*, 610 N.W.2d 694, 696 (Minn. Ct. App. 2000). As such, this Court should reject Appellants' request to adopt a new position that would permit assignment of legal malpractice claims.

2. Appellants' Assignment Theory Fails As a Matter of Fact, Law and Policy

Even if this Court entertained Appellants' assignment argument, it should not take the drastic step of permitting Appellants to receive an assignment of a legal malpractice claim from Miller & Schroeder. Although Appellants contend that the reasoning of *Cerebrus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999) supports their position, it clearly does not.

As set forth above, *Cerebrus* directly contradicts the *Wagener* mandate. The *Wagener* court explicitly held that attempted malpractice assignments are void because:

(1) the assignment of legal malpractice claims is incompatible with an attorney's duty of loyalty to the client; (2) assignment is incompatible with the attorney's duty to maintain confidentiality; (3) the nature of legal services are unique and the attorney-client relationship is jealously guarded; and (4) the risk of parties colluding against attorneys. *Wagener*, 509 N.W.2d. at 191. Each of these public policy considerations weighs in favor of denying Appellants' request here.

Cerebrus is factually inapposite as well. In *Cerebrus*, "the specific factual circumstances" of that case allowed an assignee of a commercial loan agreement to sue the attorneys of the original lender. *Cerebrus*, 728 A.2d at 1059. However, the court carefully and narrowly held that the assignment of the commercial loan agreement permitted assignment of the legal malpractice claim, and such assignment was valid under Rhode Island law. *Id.* at 1058-59 (third-parties purchased "all" rights and obligations including legal malpractice claims). In contrast, it is undisputed that the Participation Agreement does not assign to Appellants all of Miller & Schroeder's rights and obligations under the Loan Agreements. In fact, Miller & Schroeder retains several critical rights, including the right to service the Loans and to retain counsel to pursue collection of outstanding amounts. *See* AA 326-45. As such, this Court should affirm Minnesota's strict adherence to the *Wagener* standard and reject Appellants' assignment theory.

V. <u>THE DISTRICT COURT CORRECTLY RULED THAT APPELLANTS AND DORSEY HAD NO ATTORNEY-CLIENT RELATIONSHIP UNDER THE TORT THEORY</u>

The tort theory of attorney-client relationship is intended to "protect[] lay persons where it would be reasonably foreseeable to the lawyer that the person might be injured if the advice is given negligently." *TJD Dissolution*, 460 N.W.2d at 62. As such, an attorney-client relationship arises under the tort theory <u>only</u> if "a person seeks and receives legal advice from a lawyer under circumstances in which a reasonable person would rely on the advice." *Schuler*, 435 N.W.2d at 161-62 (citation omitted); *Langeland*, 319 N.W.2d at 30.

A. <u>Appellants Had No Communications Whatsoever With Dorsey</u>

It is undisputed that Appellants did not request or receive legal advice directly from Dorsey. *See* Resp. App. 105-13. This fact alone precludes a malpractice claim premised on the tort theory. *See Gramling v. Mem'l Blood Ctrs. of Minn.*, 601 N.W.2d 457, 460 (Minn. Ct. App. 1999) ("Absent a request for legal advice, [a court] cannot conclude an attorney-client relationship exist[s] under the tort theory of representation"), *review denied* (Minn. Dec. 21, 1999). Appellants' argument that this Court's decision in *Sandum* eliminates the need for direct communication between the attorney and putative client for the tort theory to apply, *see* App. Br. at 38, is flawed in several respects.

First, in *Sandum*, this Court specifically noted that "courts have focused on whether some sort of contact existed between the plaintiff and the attorney." *Sandum*, 1994 WL 593925, at *3 (citing *Langeland*, 319 N.W.2d at 31 (no attorney-client relationship found where plaintiff had no direct contact with the attorney)); *see also*

Schuler, 435 N.W.2d at 162 (tort theory rejected because plaintiffs did not seek advice from attorney). Second, Appellants' position ignores this Court's more recent *Gramling* decision, which mandated a request for legal advice before the tort theory can be applied. "Absent a request for legal advice, [a court] cannot conclude an attorney-client relationship exist[s] under the tort theory of representation." *Gramling*, 601 N.W.2d at 460. Finally, this Court has held that a lack of direct communications between an attorney and putative client can render reliance on the attorney's advice unreasonable as a matter of law. *See Colgate*, 2004 WL 2093532, at *6; *Sandum*, 1994 WL 593925, at *3. Accordingly, the undisputed lack of any communications between Dorsey and Appellants is fatal to Appellants' tort-theory claim.

B. Appellants Have Not Shown Any Genuine Issue of Material Fact

Appellants argue that Dorsey's knowledge of Miller & Schroeder's general business model is sufficient for application of the tort theory in this case. *See* App. Br. at 38-39. Appellants do not cite any case law to support this novel theory, nor do they identify a single genuine issue of material fact that should preclude summary judgment.

First, in addition to the complete lack of communications between the parties, Dorsey did not know the identity of any of the Bank Participants prior to the closing and funding of the Loans. *See Gerdin*, 371 N.W.2d at 8 (no attorney-client relationship under the tort theory because attorney had never met plaintiff). Second, Dorsey had no pre-existing relationship with Appellants. *See Schuler*, 435 N.W.2d at 162 (no attorney-client relationship under tort theory because "respondents did not seek advice and [the lawyer] had never represented any of the respondents"); *Colgate*, 2004 WL 2093532, at *6.

Third, there is no evidence that Dorsey acted gratuitously on Appellants' behalf in the Loan Transaction. *See Sandum*, 1994 WL 593925, at *3 (no attorney-client relationship under tort theory because attorney was hired by corporation, dealt directly with corporation and did not act gratuitously on plaintiff shareholders' behalf). Fourth, because Miller & Schroeder's interests in the sale of the Loans were potentially adverse to the Appellants' interests, Appellants knew, or should have known, that Dorsey was not their lawyer. *See TJD Dissolution*, 460 N.W.2d at 62 (tort theory of representation not "extended to apply to a situation where the lawyer represented a client known by the plaintiff to have interests adverse to the plaintiff"); *Hill*, 1994 WL 615049, at *2 (same). Finally, the fact that Appellants did not pay for the legal services Dorsey provided reinforces that no attorney-client relationship existed. *Colgate*, 2004 WL 2093532, at *6.

No genuine issue of material fact supports the inference of an attorney-client relationship under the tort theory. Accordingly, the District Court correctly ruled that Appellants lack standing to sue Dorsey for legal malpractice. *See* AA 248-49 ¶¶ 12-16.

VI. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' NEGLIGENT MISREPRESENTATION CLAIM

Appellants do not contest that Minnesota courts have expressly refused to extend the theory of negligent misrepresentation to claims by non-clients against an attorney. *Schuler*, 435 N.W.2d at 162 (quoting *Eustis v. David Agency, Inc.*, 417 N.W.2d 295, 298 (Minn. Ct. App. 1987)). Appellants' sole allegation of error is that the District Court erroneously ruled that no attorney-client relationship existed and, therefore, dismissal was not appropriate. *See* App. Br. at 39. As detailed above, however, the District Court was correct in ruling that no attorney-client relationship existed between Dorsey and Appellants as a matter of law. *See supra* Sections IV and V. Thus, the District Court's dismissal of Appellants' negligent misrepresentation claim was likewise correct.

Moreover, Minnesota law is clear that liability can arise from an attorney's misrepresentations to a non-client only if the attorney acted with "fraud, malice or has otherwise committed an intentional tort." *Schuler*, 435 N.W.2d at 162. Mere negligence is not enough. Since Appellants do not allege an intentional tort or any malice on Dorsey's part, *see* AA 1-32, Appellants lack standing to assert a negligent misrepresentation claim.

Regardless, it is undisputed that Dorsey made no representations to Appellants. Instead, Appellants claim that the representations came from Miller & Schroeder. *See* AA 21-22, ¶¶ 78-79. But, it is undisputed that Miller & Schroeder never disclosed Dorsey's advice to Appellants prior to the Loan closing. *See* AA 244-45 ¶ 21. Since Dorsey could not have made any representations – much less misrepresentations – to Appellants, their negligent misrepresentation claim fails. *See Colangelo v. Norwest Mortgage, Inc.*, 598 N.W.2d 14, 19 (Minn. Ct. App. 1999) (summary judgment granted when plaintiffs could not establish defendant "supplied false or misleading information to them"). Based on the undisputed material facts, the District Court correctly dismissed Appellants' negligent misrepresentation claim as a matter of law. *See* AA 250-51 ¶¶ 23-25.

CONCLUSION

The District Court correctly granted summary judgment in Dorsey's favor. Dorsey respectfully requests that this Court affirm the District Court's summary judgment order in all respects.

DATED: May 10, 2006

BRIGGS AND MORGAN, P.A.

By ______________________________

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent Dorsey & Whitney LLP certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word XP and contains 13,921 words, excluding the Table of Contents, Table of Authorities, and Appendix.

Dated: May 10, 2006

Richard G. Mark (#67581)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).