No. A06-486

STATE OF MINNESOTA

IN SUPREME COURT

McIntosh County Bank, et al.,

Plaintiffs/Respondents,

vs.

Dorsey & Whitney LLP,

Defendant/Appellant.

BRIEF OF APPELLANT DORSEY & WHITNEY LLP

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

FEDERAL CASES

Page(s)

STATE CASES

Page(s)

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

(1) Did the Court of Appeals err in reversing summary judgment for Dorsey & Whitney LLP ("Dorsey") on Respondents' claim that they had an implied contractual attorney-client relationship with Dorsey where it is undisputed that: (a) Respondents' identities were unknown when Dorsey was retained and provided the legal services in question; (b) Dorsey was not told that it was retained to represent Respondents; (c) Respondents did not request that Dorsey represent them or pay any of Dorsey's fees; and (d) Respondents had no oral or written communications whatsoever with Dorsey?

Result Below: Notwithstanding the undisputed material facts in this case, including those identified in (a)-(d) above, the Court of Appeals held that fact disputes existed as to whether the "communications and circumstances" evidenced an implied contractual attorney-client relationship between Dorsey and Respondents, and remanded the case to the district court for further proceedings.

Most Apposite Authority:

- *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), *review denied* (Minn. Dec. 21, 1999)
- *TJD Dissolution Corp. v. Savoie Supply Co.*, 460 N.W.2d 59 (Minn. Ct. App. 1990)
- *Spannaus v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 368 N.W.2d 395 (Minn. Ct. App. 1985), *review denied* (Minn. Aug. 20, 1985)

(2) Did the Court of Appeals err in reversing summary judgment for Dorsey on Respondents' claim that they had standing as non-clients to sue Dorsey for legal malpractice under the intended third-party beneficiary theory, essentially overruling

Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981) and *Francis v. Piper*, 597 N.W.2d 922 (Minn. Ct. App. 1999), by concluding that the district court was required to apply the multi-factor test in *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) to determine whether Respondents were direct and intended third-party beneficiaries?

Result Below: The Court of Appeals rejected *Marker's* threshold determination in third-party beneficiary legal malpractice cases of whether the non-client was the direct and intended beneficiary of the attorney's services, and instead held that Minnesota courts are required to apply all six *Lucas* factors to determine whether the non-client has standing to sue for legal malpractice, and remanded the case to the district court for further proceedings.

Most Apposite Authority:

- *Marker v. Greenberg*, 313 N.W.2d 4 (Minn. 1981)
- *Francis v. Piper*, 597 N.W.2d 922 (Minn. Ct. App. 1999)
- *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734 (Minn. Ct. App. 1995), *review denied* (Minn. Sept. 28, 1995)
- *Holmes v. Winners Entm't, Inc.*, 531 N.W.2d 502 (Minn. Ct. App. 1995)

STATEMENT OF THE CASE

A. Court of Appeals' Decision

This appeal arises from a January 10, 2007 decision of the Minnesota Court of Appeals, which affirmed in part and reversed in part the January 17, 2006 order of the Hennepin County District Court (the Honorable Heidi S. Schellhas, presiding) granting summary judgment in Dorsey's favor. *See McIntosh County Bank v. Dorsey & Whitney LLP*, 726 N.W.2d 108 (Minn. Ct. App. 2007).

B. Nature of the Case

1. Factual Background

In 1998, Miller & Schroeder Financial, Inc. ("Miller & Schroeder") retained Dorsey to draft documents for 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"). Dorsey represented Miller & Schroeder in the loan transaction and advised Miller & Schroeder that one of the financing documents, called a Notice and Acknowledgement of Pledge (the "Pledge Agreement"), did not require National Indian Gaming Commission ("NIGC") approval to be enforceable against the Tribe.

After the loans were closed and funded, and after Dorsey's work was completed, Miller & Schroeder sold participation interests in the loans to 32 individual banks, 31 of which are Respondents in this appeal. Dorsey had no communications whatsoever with any of the Respondents prior to loan closing and, in fact, did not even know their identities.

The casino never generated a profit, the Tribe consequently never made any loan repayments to President, and President defaulted on its repayment obligations to Miller & Schroeder. Miller & Schroeder sued President for its default in October 2000, and obtained a $15 million judgment in 2002.

2. Respondents Sue Dorsey

On February 18, 2005, Respondents sued Dorsey in Hennepin County District Court for legal malpractice, breach of contract, and negligent misrepresentation, challenging Dorsey's advice to Miller & Schroeder regarding the Pledge Agreement. Dorsey sought summary judgment, on the ground, among others, that Respondents lacked standing to sue Dorsey. (App. 119-63.)

3. Bremer Sues Dorsey

The other participating bank, Bremer Business Finance Corporation ("Bremer"), sued Dorsey in Miller & Schroeder's bankruptcy case, asserting the same claims as Respondents. On the issue of Bremer's standing to sue Dorsey for legal malpractice in connection with the loan transaction, the Honorable Donovan W. Frank rejected a report and recommendation by the United States Bankruptcy Court, and held that Bremer lacked standing to sue Dorsey for legal malpractice under either the implied contract theory or the intended third-party beneficiary theory. (App. 789-882.)

C. <u>Disposition Below</u>

1. The District Court Grants Summary Judgment For Dorsey

On January 17, 2006, the district court granted summary judgment for Dorsey. (App. 237-51.) Based upon the undisputed material facts, the district court concluded that Respondents lacked standing to sue Dorsey for legal malpractice, breach of contract and negligent misrepresentation, as a matter of law. (*Id.*) Respondents appealed the district court's summary judgment order. (App. 253-55.)

2. The Court of Appeals' Decision

On January 10, 2007, the Court of Appeals affirmed in part and reversed in part the district court's summary judgment order. *See McIntosh*, 726 N.W.2d at 120-21. The Court of Appeals held that fact disputes existed whether the "communications and circumstances" evidenced an implied contractual attorney-client relationship between Dorsey and Respondents. *Id.* at 117-18. The Court of Appeals based its decision on a Miller & Schroeder representative's expectation that "'Dorsey's legal work would benefit both Miller & Schroeder and the [Respondents]'" and the fact that Dorsey was aware of Miller & Schroeder's business model and that Miller & Schroeder would be participating the loans. *Id.*

The Court of Appeals also reversed the district court's grant of summary judgment on Respondents' standing under the intended third-party beneficiary theory. *Id.* at 117. Essentially rejecting prior appellate decisions (including those from this Court), the Court of Appeals held that although it is undisputed that Respondents were not the "sole beneficiaries" of Dorsey's representation of Miller & Schroeder, the district court nonetheless was required to apply all six *Lucas* factors to determine whether Respondents had standing to sue Dorsey as direct and intended third-party beneficiaries. *Id.* at 115-16. The Court of Appeals held that fact disputes precluded application of the *Lucas* factors as a matter of law. *Id.* at 116-17.

The Court of Appeals affirmed the district court's determination that there was no attorney-client relationship under the tort theory because Respondents could not reasonably rely on Dorsey's advice to Miller & Schroeder. *Id.* at 119. Likewise, the Court of Appeals upheld the district court's dismissal of Respondents' negligent misrepresentation claim because Respondents' reliance on Dorsey's advice was not justifiable as a matter of law. *Id.* at 120.

D. **This Court Grants Review**

On March 20, 2007, this Court granted Dorsey's petition for review of the Court of Appeals' decision on two issues: (i) whether Respondents have standing to sue Dorsey for legal malpractice or breach of contract under the implied contract theory; and (ii) whether Respondents having standing to sue Dorsey for legal malpractice under the intended third-party beneficiary theory. (App. 276-77.) Requests by the Minnesota State Bar Association, the Minnesota Defense Lawyers Association, and Minnesota Lawyers Mutual Insurance Company to appear as amicus curiae in support of Dorsey's appeal were also granted. (*Id.*)

FACTS

A. Miller & Schroeder's Business

Miller & Schroeder was a commercial loan originator, lender, and servicer. (App. 278 ¶ 2.) Each of Miller & Schroeder's loans, including Indian gaming loans, had similar structures. (*Id.* ¶ 3.) Miller & Schroeder would first act as a loan originator and placement agent in negotiating loan terms with a prospective borrower. (*Id.* ¶ 3.) Miller & Schroeder then retained counsel to draft the necessary loan documents. (*Id.*) Miller & Schroeder funded the loan at closing and held a "lender's position" in the loan transaction with the financial risk of non-payment until it participated the full balance of the loan. (App. 279-80 ¶¶ 4-5.) If Miller & Schroeder was unable to sell participations for the entire loan amount, it retained an interest in the loan, which had happened in previous transactions. (App. 755.)

After closing Miller & Schroeder would attempt to sell participation interests for the entire loan balance, generally within one week of loan closing. (App. 279-80 ¶¶ 4-5.) Prior to purchasing a participation interest, banks were given a closing book, which contained the loan completed documentation and a participation agreement. (*Id.* ¶ 4.) The banks were not required to fund their participations until they received the closing book, had sufficient opportunity to review the documents, and executed a participation agreement. (*Id.*) Miller & Schroeder typically set the banks' funding date for one week after receipt of the closing book. (*Id.*) Miller & Schroeder retained loan-servicing rights following the participations, for which it received a fee. (App. 279 ¶ 2; 334-36 § 4.)

B. The St. Regis Loan Transaction

In 1998, Miller & Schroeder had discussions with President to finance a portion of the construction and development of the Akwesasne Mohawk Casino in Hogansburg, New York. (App. 281 ¶ 9.) Prior to these discussions, President and the Tribe had executed, and received NIGC[1] approval of, a management contract (the "Management Agreement") pursuant to which President would construct and manage the casino for the Tribe. (App. 38-75; 511-12.) Miller & Schroeder ultimately agreed to make two loans to President for $8,624,000 and $3,492,000, respectively (the "St. Regis Loans"). (App. 368-408.)

C. Miller & Schroeder Retains Dorsey

Steve Erickson, Miller & Schroeder's Senior Vice President and Gaming Finance Division Manager, testified without dispute that he retained Dorsey in November 1998 to represent Miller & Schroeder in documenting the St. Regis Loans on Miller & Schroeder's behalf. (App. 754-57.) Mary Jo Brenden, Miller & Schroeder's Associate General Counsel, concurred with Erickson that Miller & Schroeder was Dorsey's client and that Dorsey's representation involved the preparation of the documents necessary for Miller & Schroeder to close the St. Regis Loans, and "did not include within its scope any assistance or advice relating to Miller & Schroeder's sales of investments, or

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

participations, in the Loans. . . ." (App. 517-18 ¶¶ 4-5; 759-60.)

Erickson did not hire Dorsey to represent any of the Respondents. (App. 754-55.) Rather, Dorsey was "retained to represent Miller & Schroeder and I'll leave it at that." (App. 754.) Erickson testified that Dorsey owed its duty of loyalty to Miller & Schroeder, not Respondents. (App. 755.) Miller & Schroeder would not have allowed Dorsey to act adverse to Miller & Schroeder's interests. (*Id.*) Dorsey could not negotiate changes to the Participation Agreements that would have harmed Miller & Schroeder, even if doing so would have benefited Respondents. (App. 754-55.)

Mark Jarboe and Paula Rindels were the Dorsey attorneys primarily involved in drafting the necessary loan documents. (App. 727 ¶ 8; 732 ¶ 3.) Jarboe and Rindels understood that Miller & Schroeder was Dorsey's only client. (App. 725-29; 731-35.) Miller & Schroeder did not tell anyone at Dorsey that it was retained to represent the unknown banks that would purchase participation interests in the loans. (App. 726 ¶ 4; 733 ¶¶ 7-8; 754-55; 757.) Nor did Miller & Schroeder tell Dorsey that the prospective participating banks were the intended beneficiaries of Dorsey's services. (App. 515, 734 ¶ 5; 733 ¶ 8.)

D. <u>The Loan Documents, the Pledge Agreement, and the Amendment</u>

Dorsey drafted various documents for Miller & Schroeder, including loan agreements, promissory notes, and escrow agreements, for the St. Regis Loans. (App. 368-402.) Dorsey also drafted the Pledge Agreement, pursuant to which the Tribe acknowledged President's pledge to Miller & Schroeder of payments due from the Tribe under the Management Agreement as security for repayment of the loans, and agreed to make repayments (if casino revenues exceeded expenses) into a designated escrow account. (App. 76-78.)

President and the Tribe also drafted and executed an amendment to the Management Agreement (the "Amendment"), which increased the cap on expenses for which President could seek reimbursement from the Tribe from $20 million to $28.15 million. (App. 83.) In January 1999, Dorsey submitted a draft of the Pledge Agreement to the NIGC for its review (App. 298-99), and in February 1999, President and the Tribe submitted the Amendment to the NIGC for approval. (App. 13 ¶ 60.)

E. Miller & Schroeder Closes and Funds the St. Regis Loans

The Tribe had scheduled the casino's grand opening for April 1999. (App. 530-31; 747.) In February 1999, President requested that Miller & Schroeder close and fund the loans so the casino's opening could remain on schedule, notwithstanding that the NIGC had not yet completed its review of the Pledge Agreement or approved the Amendment. (App. 530-31; 747.)

Miller & Schroeder knew that the Amendment required NIGC approval to be enforceable, yet it was comfortable closing and funding the loans without NIGC approval of the Amendment because it would receive priority payments of the first $12,182,000 of the $20 million to be repaid by the Tribe under the NIGC-approved Management Agreement.[2] (App. 747.)

Before it agreed to close the loans, Miller & Schroeder requested an opinion from

[2] Dorsey was not asked to, and did not, provide any opinion regarding the Amendment. (App. 747.)

Dorsey on whether the Pledge Agreement required NIGC approval. (App. 747.) Jarboe, the Chair of Dorsey's Indian and Gaming Law practice group, was responsible for determining whether the Pledge Agreement needed NIGC approval. (App. 741-43.) Based on his vast experience with IGRA, the NIGC, and its regulations, Jarboe determined that no approval was required. (*Id.*) Jarboe communicated his conclusion to Rindels, who, in turn, advised Miller & Schroeder that the Pledge Agreement did not require NIGC approval. (App. 741-43; 747; 758; 766-69.)

On February 22, 1999, Miller & Schroeder sent a memorandum to prospective participants to advise them that the NIGC had not yet approved the Amendment or reviewed the Pledge Agreement and that review of the documents "may take as long as 60 days." (App. 530-31.) Miller & Schroeder advised prospective participants:

> 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.) Miller & Schroeder also advised the participants about the Pledge Agreement:

> 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 <u>not</u> reference Dorsey or its advice to Miller &

Schroeder. (*Id.*) Most Respondents signed the February 22 memorandum (App. 530-61), and Miller & Schroeder confirmed that Respondents would not have been allowed to purchase a participation interest without agreeing to the closing as requested by Miller & Schroeder. (App. 747.) Miller & Schroeder closed and funded the loans on February 24, 1999. (App. 10-11 ¶ 15.)

F. <u>Respondents Purchase Participation Interests</u>

After Miller & Schroeder closed and funded the loans, and after Dorsey had completed its work on the loan transactions, Miller & Schroeder sold participations to Respondents. (App. 282.) Dorsey had no communications with any of the Respondents prior to closing. (App. 521-29; 727 ¶ 11; 733 ¶ 10.) In fact, Dorsey did not even know the identity of a single Respondent before closing. (App. 727 ¶ 10; 733 ¶ 9.) None of the Respondents ever requested that Dorsey represent them in the loan transaction, nor did they advise Dorsey that they considered themselves to be clients. (App. 521-29; 728 ¶¶ 13 and 18; 734 ¶¶ 14 and 19.) Dorsey did not send any documents to Respondents. (App. 728 ¶ 15; 734 ¶ 16.) Dorsey did not sign any retainer agreement or engagement letter with any of Respondents. (App. 521-29; 728 ¶ 17; 734 ¶ 18.) Dorsey did not send any bills to Respondents; bills were sent to Miller & Schroeder and paid by President. (App. 514; 728 ¶ 19; 734 ¶ 20.) Dorsey provided no legal advice to Respondents. (App. 521-29.)

G. <u>The Participation Agreement</u>

The relationship between Miller & Schroeder and Respondents was governed by a Participation Agreement which was prepared internally by Miller & Schroeder. (App.

328-67.) Respondents were required to be "institutional investors," meaning they were entities with total assets exceeding $5 million. (App. 332-33 § 3.1.) The Participation Agreement makes clear that the relationship between Miller & Schroeder and Respondents was that of a buyer and seller. (App. 332 § 2.2.)

By executing a Participation Agreement, each Respondent 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 has received and made a complete examination of copies of all Loan Documents[3] 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,[4] Borrower and Obligor and their credit and the desirability of purchasing an undivided interest in the Loan.
>
> * * *
>
> Participant is participating with Lender 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.

(App. 332-33 § 3.1 (emphasis added).)

Respondents also accepted the risk of non-payment of the loans:

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[3] "Loan Documents" is defined as "all of the documents evidencing and securing the loan," including the loan agreement, promissory note, escrow agreement and the Pledge Agreement. (App. 331 § 1.)

[4] "Collateral" is defined as "the Loan Documents, the Property and interests in the Property now or hereafter securing the Loan. . . ." (App. 329 § 1.) This includes the Pledge Agreement.

> 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.

(App. 336 § 5.1.)

Most importantly, Respondents acknowledged that they did not rely on the validity or enforceability of the Pledge Agreement, which was part of the Collateral securing the loans:

> 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, Respondents 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.

(App. 336-37 § 5.3.) Despite these terms, Respondents voluntarily chose not to retain their own counsel.

H. <u>President Defaults</u>

The Casino opened on April 11, 1999. (App. 22 ¶ 80.) Almost immediately, President began experiencing financial difficulties due to the casino's lack of profit.

(App. 751-52.) The Tribe never made any payments to President because the casino's revenues never exceeded expenses. (App. 562-637.) Following President's default, Miller & Schroeder retained Dorsey to pursue collection of the loans. (App. 750.) On October 3, 2000, Miller & Schroeder sued President in the United States District Court for the District of Minnesota. (App. 638-47.) Miller & Schroeder obtained summary judgment on February 21, 2002, and a $15,681,528.16 judgment was entered on April 16, 2002 (the "President Judgment"). (App. 648-60; 677-83.)

I. Respondents Settle With the Tribe

Respondents never attempted to collect any of the President Judgment. Instead, Respondents settled with the Tribe on April 11, 2005. (App. 661-724.) The Tribe agreed to pay Respondents $3,453,588 in exchange for an assignment to the Tribe of the President Judgment and a release of all claims against the Tribe. (*Id.*)

Two months earlier, Respondents commenced this action against Dorsey and Bremer sued Dorsey in bankruptcy court.

SUMMARY OF ARGUMENT

The Court of Appeals' reversal of the district court's summary judgment order regarding Respondents' standing to sue Dorsey under an implied contract theory is erroneous. The two purportedly disputed facts relied upon by the Court of Appeals in reversing summary judgment are neither disputed nor material to the standing determination. No Minnesota appellate decision has ever found an implied contractual attorney-client relationship to exist, particularly under factual circumstances like those in this case. To the contrary, on undisputed material facts like those here, Minnesota courts have uniformly dismissed claims of implied contractual attorney-client relationship. There is no legal or factual basis for this Court to conclude otherwise here.

The Court of Appeals' reversal of summary judgment regarding Respondents' alleged standing to sue Dorsey as intended third-party beneficiaries is also erroneous. Intended third-party beneficiary legal malpractice claims have been regularly rejected in Minnesota because the doctrine is a "very limited" exception to the strict privity requirement that only clients can sue attorneys for legal malpractice. Minnesota appellate courts, starting with this Court's decision in *Marker*, have long held that where, as here, the undisputed material facts establish that the plaintiff is not the direct and intended third-party beneficiary of the attorney's services, the plaintiff lacks standing to sue as a matter of law. In those cases, the multi-factor *Lucas* test need not be applied. Because the undisputed material facts establish that Respondents were not the direct and intended third-party beneficiaries of Dorsey's representation of Miller & Schroeder, Respondents lack standing to sue Dorsey as a matter of law.

This Court should reverse the Court of Appeals' decision and enter judgment for Dorsey on all claims.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). On a motion for summary judgment, while the district court must view the evidence in the light most favorable to the non-moving party, it 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.'" *DLH, Inc.*, 566 N.W.2d at 69 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

On appeal from an order of summary judgment, the reviewing court must review the record for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined; and (2) whether the district court erred in its application of the law. *See Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). If the material facts are not in dispute the reviewing court reviews the application of law *de novo*. *See Medica, Inc. v. Atlantic Mut. Ins. Co.*, 566 N.W.2d 74, 76 (Minn. 1997). Under this standard, since no material facts are in dispute, this Court should reverse the Court of Appeals' legal conclusions regarding the implied contract and intended third-party beneficiary legal malpractice theories, and hold that

Respondents lack standing to sue Dorsey for legal malpractice as a matter of law.

II. RESPONDENTS HAD NO IMPLIED CONTRACTUAL RELATIONSHIP WITH DORSEY

For decades Minnesota courts have uniformly dismissed legal malpractice claims based upon an implied contractual attorney-client relationship. In fact, Dorsey is unaware that any Minnesota appellate court has ever found an implied contractual attorney-client relationship to exist. The undisputed material facts in this case provide no basis for the Court of Appeals or this Court to determine otherwise.

A. While Minnesota Appellate Courts Have Noted That An Attorney-Client Relationship Can Be Created By Implied Contract, None Have Actually Found One to Exist

The elements of an express contract are: (i) an offer; (ii) communicated to the offeree; (iii) acceptance of the offer; and (iv) consideration. *See Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626-27 (Minn. 1983). A contract requires a meeting of the minds concerning all essential terms of the agreement. *See Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980). Although Minnesota recognizes the implied contract concept, a party alleging an implied contract is not relieved of the burden of establishing all essential contractual elements. *See High v. Supreme Lodge of World, Loyal Order of Moose,* 210 Minn. 471, 473, 298 N.W. 723, 725 (1941).

For an implied contract to exist, the circumstances must "clearly and unequivocally" indicate the intention of the parties to enter into a contract. *See Webb Bus. Promotions, Inc. v. Am Elec. & Entm't Corp.*, 617 N.W.2d 67, 75 (Minn. 2000).

There must be some evidence that the parties, by their conduct, intended to enter into a contract. *Id.* The intention to contract must be present at the time the services are performed. *See In re Hirt's Estate,* 213 Minn. 209, 213, 6 N.W.2d 98, 100 (1942). An implied contract requires a meeting of the minds. *See Roberge v. Cambridge Coop. Creamery Co.,* 248 Minn. 184, 188, 79 N.W.2d 142, 145 (1956). "[T]he simple fact of benefit without more does not impose contractual liability." *See High,* 210 Minn. at 474-75, 298 N.W. at 725.

A plaintiff has standing to sue an attorney under the implied contract theory only if the attorney and client contract for legal services. *See Gramling v. Mem'l Blood Ctrs. of Minn.*, 601 N.W.2d 457, 459-60 (Minn. Ct. App. 1999). To prove the intent to contract necessary for such a claim, the plaintiff must present some evidence of a request for legal representation and an agreement by the attorney to provide such representation. *Id.* A party's mere expectation that an attorney will represent it is insufficient as a matter of law to create a contractual 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).

Minnesota appellate courts have dismissed legal malpractice claims premised on an alleged implied contractual attorney-client relationship in cases with far stronger facts than those present here. Courts have dismissed implied contract claims where the attorney and putative client had communications. *See Gerdin v. Princeton State Bank,* 371 N.W.2d 5, 7 (Minn. Ct. App. 1985), *aff'd*, 384 N.W.2d 868 (Minn. 1986). Implied contract claims have also been dismissed even though the attorney sent documents to the plaintiff. *See Spannaus*, 368 N.W.2d at 398. Likewise, implied contract claims have failed even where the attorney met with and sent letters to the alleged client. *See Precision Diversified Indus. v. Colgate*, No. A03-2060, 2004 WL 2093532, at * 6-7 (Minn. Ct. App. Sept. 21, 2004), *review denied* (Minn. Dec. 14, 2004) (App. 891-901). Courts have even dismissed implied contract claims where the attorney provided legal advice to the plaintiff and the plaintiff relied on that advice. *See TJD Dissolution Corp. v. Savoie Supply Co.*, 460 N.W.2d 59, 62 (Minn. Ct. App. 1990). Finally, courts have dismissed implied contract claims where the attorney knows the identity of the putative client and that his actions may adversely impact the putative client's rights. *See Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 30 (Minn. 1982).

In rejecting implied contractual attorney-client relationship claims, Minnesota courts frequently note the absence of traditional indicia of an express contract between the attorney and client, including: a request by the client to the attorney to provide legal services, an agreement by the attorney to provide representation, oral communications between the attorney and client, the exchange of documents between the attorney and client, the provision of legal advice to the client, and the payment of fees by the client. None of these facts exist here.

B. <u>Because There Are No Genuine Issues of Material Fact, Whether an Implied Contract Existed Should Be Determined as a Matter of Law</u>

The following material facts, which supported the district court's summary judgment order, are undisputed:

(1) Respondents identities' were unknown at the time Dorsey was retained and provided legal services to Miller & Schroeder;

(2) Respondents did not ask Dorsey for legal representation, and Dorsey never promised it;

(3) There were no direct oral or written communications between Dorsey and Respondents;

(4) Dorsey did not bill Respondents, and Respondents did not pay fees to Dorsey;

(5) Dorsey was not told that it was retained to represent Respondents in the loan transaction or that the sole purpose of Dorsey's retention was to directly benefit Respondents;

(6) Respondents did not inform Dorsey, either orally or in writing, that they considered themselves to be Dorsey's clients in the loan transaction;

(7) Dorsey did not sign any written retainer agreement or engagement letter with Respondents;

(8) Respondents were contractually obligated to conduct their own due diligence and evaluate the loan, and disclaimed reliance on any statements made by Miller & Schroeder or its counsel; and

(9) Respondents voluntarily chose not to retain counsel to represent them in the loan transaction.

See App. 242-44 ¶¶ 12-18. The Court of Appeals took no issue with these undisputed material facts.

Nevertheless, the Court of Appeals reversed the district court's summary judgment order on the grounds that the following "communications and circumstances" required further analysis by the district court: (i) Dorsey represented Miller & Schroeder in 36 prior transactions and was aware that Miller & Schroeder would participate the loans; and (ii) Erickson's testimony that he expected that "Dorsey's work would benefit both Miller & Schroeder and [Respondents]." *Id.* at 117-18. But these facts, like those identified above, are not disputed.[5] Moreover, they are not material to whether an implied contractual attorney-client relationship existed between Dorsey and Respondents. *See infra* pp. 25-26.

Because the material facts are undisputed, a remand to the district court is not warranted here. As the Court of Appeals itself recognized, when no material facts are in dispute, the existence of a contractual relationship should be determined as a matter of law. *See McIntosh*, 726 N.W.2d at 116 (citing *Estate of Peterson*, 579 N.W.2d 488, 490 (Minn. Ct. App. 1998)). Accordingly, this Court should decide the implied contract issue as a matter of law, and reverse the Court of Appeals' decision

C. **The Undisputed Material Facts In This Case Demonstrate The Lack of An Implied Contractual Relationship As a Matter of Law**

The undisputed material facts in this case demonstrate the lack of any intent between Dorsey and Respondents to enter into an implied contractual attorney-client relationship.

First, Respondents did not ask Dorsey to represent them in the loan transaction, and Dorsey never promised any representation. In the absence of a request for representation by the putative client and an agreement by the attorney, Minnesota courts consistently find no contractual attorney-client relationship to exist. *See Gramling*, 601 N.W.2d at 459-60 (no attorney-client relationship because no request for representation

[5] In contrast, in *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261 (Minn. 1992), the case cited by the Court of Appeals below, material "communications and circumstances" were disputed. *Admiral Merchants* is distinguishable from this case. *See infra* Section III.B.2.

and no promise to represent); *TJD Dissolution Corp.*, 460 N.W.2d at 62 (same); *Spannaus*, 368 N.W.2d at 398 (same); *Sandum v. Doherty, Rumble & Butler, P.A.*, No. C7-94-801, 1994 WL 593925, at *2 (Minn. Ct. App. Nov. 1, 1994) (App. 883-86) (same). Moreover, Respondents' unilateral expectation that Dorsey would protect their interests in the loan transaction is insufficient as a matter of law to create an attorney-client relationship. *See Spannaus*, 368 N.W.2d at 398-99.

Second, not only was there no request for legal representation and no agreement, no one was identified who could make a request or enter into an agreement at the time Dorsey was retained and rendered the services in question. Indeed, at the time Dorsey was retained by Miller & Schroeder, neither Miller & Schroeder nor Dorsey knew the identities of any of the Respondents. *See supra* pp. 8-9. It is inconceivable, and no Minnesota court has ever held, that an attorney could have a contractual attorney-client relationship with an unknown client. Attorneys would be unable to determine whether conflicts of interest exist, or prevent conflicts from arising, if they do not know their alleged clients' identities.

Third, all parties who were involved in forming and performing the contract for Dorsey's services – Erickson and Brenden from Miller & Schroeder, and Rindels and Jarboe from Dorsey – testified that Miller & Schroeder was Dorsey's only client in the loan transaction. [6] *See supra* pp. 8-9. Dorsey was not told that it was retained to

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[6] While the Court of Appeals cited Erickson's belief that Dorsey's work would benefit both Miller & Schroeder and Respondents, *see McIntosh*, 726 N.W.2d at 117, any benefit received by Respondents is legally irrelevant to whether they had an implied contractual

represent Respondents. *Id.*

Fourth, the fact that Respondents did not have any direct, oral or written communications with Dorsey prior to the loan closing further demonstrates the absence of any contractual relationship. *See Sandum*, 1994 WL 593925, at *2 (no attorney-client relationship because alleged client did not have contact with law firm); *Schuler v. Meschke*, 435 N.W.2d 156, 162 (Minn. Ct. App. 1989) (no attorney-client relationship because alleged clients never received correspondence from attorney); *Langeland*, 319 N.W.2d at 30 (same).

Fifth, the fact that Respondents were not billed and did not pay Dorsey's fees evidences the lack of any contractual relationship. *See Hill v. Schaffner*, No. C5-94-960, 1994 WL 615049, at *1 (Minn. Ct. App. Nov. 8, 1994) (App. 909-11) (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).

Sixth, because Dorsey represented the seller of the loans (Miller & Schroeder), it could not have represented the buyers (Respondents) in the same transaction. *See* App. 754-55. The buyers and seller could well disagree on terms of the loan transaction or Participation Agreement, and Dorsey could not represent both sides in such an adverse situation.

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attorney-client relationship with Dorsey. *See High,* 210 Minn. at 474-75, 298 N.W. at 725. *See also infra* p. 26.

On virtually identical facts, Judge Frank concluded that Bremer, the only other participant in the loan transaction besides Respondents, had no implied contractual attorney-client relationship with Dorsey.[7] *See* App. 834-35. In particular, Judge Frank determined that Erickson's and Brenden's testimony was the "best evidence" of Miller & Schroeder's intent to retain Dorsey to represent Miller & Schroeder, and not Bremer, in the loan transaction. *Id.* The lack of any communications whatsoever among Dorsey, Miller & Schroeder, and Bremer further supported the lack of an implied contractual attorney-client relationship. *Id.*

The facts[8] relied upon by the Court of Appeals, even if viewed in the light most favorable to Respondents, are immaterial and do not change the legal conclusion that no implied contract existed.

No Minnesota court has held that an attorney's mere awareness that a client's business model anticipates post-closing participation sales confers upon the ultimate purchaser an attorney-client relationship. Indeed, other jurisdictions have confirmed that counsel for a lender in a loan participation transaction does not have an attorney-client relationship with any participants. *See, e.g., In re Colonial Cheshire I, Ltd. P'ship*, 130

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[7] Judge Frank held that: "(1) Miller & Schroeder did not advise Dorsey that it was retained to represent the bank lender/participants; (2) Dorsey did not communicate with the bank lender/participants; and (3) neither the bank lender/participants nor potential bank lender/participants contacted Dorsey, told Dorsey that they considered Dorsey their attorney, or asked Dorsey to represent them in connection with the loan transaction or closing." *See* App. 835.

[8] As noted *supra* Section II.B, these facts are not disputed, and thus the Court of Appeals erred in remanding the issue to the district court.

B.R. 122, 125-26 (Bankr. D. Conn. 1991) (denying motion to disqualify counsel because no attorney-client relationship existed between counsel for lender and participants); *In re Colocotronis Tanker Sec. Litig.*, 449 F. Supp. 828, 831-34 (S.D.N.Y. 1978) (denying motion to compel discovery brought by participants because no attorney-client relationship existed between counsel for lender and participants). Consistent with this authority, Judge Frank held that the Participation Agreement highlighted the adversarial buyer-seller relationship between Miller & Schroeder and Bremer because it was one-sided in Miller & Schroeder's favor. *See* App. 836. This, too, supported his conclusion that no implied contractual relationship existed between Dorsey and Bremer. *Id.*

Likewise, no Minnesota court has held that receiving incidental benefit from an attorneys' representation of another party creates an implied contractual attorney-client relationship. This Court previously rejected such contentions. *See Langeland*, 319 N.W.2d at 31 (rejecting plaintiff's argument that receipt of "secondary" benefit was sufficient to establish implied contractual attorney-client relationship); *see also High*, 210 Minn. at 474-75, 298 N.W. at 725 ("[T]he simple fact of benefit without more does not impose contractual liability"). Judge Frank likewise rejected a similar contention by Bremer, holding that the mere "fact that Bremer would benefit from Dorsey's work while Dorsey represented Miller & Schroeder does not, by itself, establish that Bremer was Dorsey's client."[9] *See* App. 835.

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[9] Respondents' incidental benefit from Dorsey's representation of Miller & Schroeder is relevant, if at all, only to Respondents' purported standing as direct and intended third-party beneficiaries; it is immaterial to whether a contractual relationship exists.

Applying controlling Minnesota law to the undisputed material facts of this case, there is only one conclusion – Respondents were not Dorsey's clients under an implied contract theory. The Court of Appeals' decision should be reversed.

D. An Implied Contractual Attorney-Client Relationship Here Would Contravene Public Policy and Impose Undue Burdens on Attorneys

The Court of Appeals' decision purports to establish a new standard for Minnesota attorneys in determining the identity of the parties who are deemed to be their actual clients. Attorneys owe clients the duty of loyalty, trust, confidentiality, zealous advocacy, and the avoidance of conflicts, among others. In addition to enjoying these duties, clients also have rights, such as the attorney-client privilege. The ability to determine who is, and is not, a client is essential for any attorney who wishes to fulfill fiduciary duties and comply with ethics rules, not to mention protect against liability.

By expanding the attorney-client relationship by implied contract, the Court of Appeals' decision impairs and makes uncertain attorneys' fiduciary and ethical duties, and clients' rights and privileges. Minnesota courts have been very hesitant to expand the ways in which an attorney-client relationship is created – for good reason. If the decision stands, the attorney-client relationship, carefully defined by decades of consistent Minnesota law, would become uncertain for such unprecedented reasons as awareness that an attorney's work may incidentally benefit some person with whom the client may later have some dealings.

Moreover, incidental benefit is insufficient to establish standing under the intended third-party beneficiary theory. *See infra* Section III.

The Court of Appeals' decision means that Dorsey may have represented 31 banks whose identities were unknown when it was retained and performed its legal services. If Dorsey did not know the identities of its purported clients, which it did not, it would have no way of avoiding conflicts, maintaining loyalty and trust, protecting confidences, providing zealous advocacy, or fulfilling its other fiduciary and ethical duties. Moreover, clients' expectations of loyalty, confidentiality, zealous advocacy, and the avoidance of conflicts would be infringed by uncertainty regarding what types of "communications and circumstances" might be found retrospectively to imply a contractual attorney-client relationship. The Court of Appeals' decision may allow strangers to the attorney-client relationship to retrospectively claim to be part of that intimate relationship.

The facts here do not provide any reason to depart from long-standing Minnesota law. Under the undisputed material facts of this case, including those facts relied upon by the Court of Appeals, there is no factual or legal basis to conclude that an implied contractual attorney-client relationship existed between Dorsey and Respondents. The Court of Appeals' decision should be reversed, and this Court should order the dismissal of Respondents' claims based on an implied contract theory.

III. <u>RESPONDENTS LACK STANDING TO SUE DORSEY UNDER THE INTENDED THIRD-PARTY BENEFICIARY THEORY</u>

Minnesota courts have long held that where, as here, the undisputed material facts establish that the non-client plaintiff is not the direct and intended third-party beneficiary of the attorney's services, the non-client plaintiff lacks standing to bring a malpractice claim as a matter of law. The *Lucas* factors need not be analyzed or applied.

A. The Intended Third-Party Beneficiary Theory is "Very Limited"

"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., Inc. v. Gernander*, 521 N.W.2d 622, 624 (Minn. Ct. App. 1994). As a general rule, an attorney can be sued for legal malpractice only by a plaintiff with whom the attorney has an attorney-client relationship. *See Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981). In *Marker*, this Court first recognized a "very limited" exception to the strict privity requirement for legal malpractice claims – the intended third-party beneficiary theory. *Id.* at 5. Under the intended third-party beneficiary theory, an attorney may be sued by a non-client only when "the client's sole purpose in retaining an attorney is to benefit directly some third party."[10] *Id.* (emphasis added). "'[I]n order to proceed successfully in a legal malpractice action, [the non-client] must be the direct and intended beneficiary of the lawyer's services.'" *Id.* (emphasis added) (quoting *Brady v. Ruby*, 267 N.W.2d 902, 906 (Iowa 1978)).

The "very limited" nature of the intended third-party beneficiary theory is evidenced by Minnesota appellate decisions on the issue. No Minnesota appellate court has ever permitted a non-client third party to sue an attorney for legal malpractice under circumstances like those in this case. Of the fourteen Minnesota appellate decisions that have considered legal malpractice suits brought by non-clients, thirteen affirmed

[10] In 2002, this Court reaffirmed the *Marker* standard. *See Pine Island Farmers Coop. v. Erstad & Reimer, P.A.*, 649 N.W.2d 444, 448 n.4 (Minn. 2002) (noting, however, that intended third-party beneficiary exception not implicated by the facts of the case).

summary judgment and/or a dismissal of the non-client's legal malpractice claim. *See Marker*, 313 N.W.2d at 5-6; *Kuntz v. Jensen & Gordon*, No. A04-1310, 2005 WL 949119, at *4 (Minn. Ct. App. Apr. 26, 2005) (App. 887-90); *Precision Diversified Indus.*, 2004 WL 2093532, at *7; *Francis v. Piper*, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999); *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995); *Holmes*, 531 N.W.2d at 505; *CPJ Enters.*, 521 N.W.2d at 624; *Sandum*, 1994 WL 593925, at *4; *Hill*, 1994 WL 615049, at *2; *Great Am. Ins. Co. v. Perry*, No. C6-93-1573, 1994 WL 101991, at *2 (Minn. Ct. App. Mar. 29, 1994) (App. 902-04); *TJD Dissolution Corp.*, 460 N.W.2d at 62-63; *Schuler*, 435 N.W.2d at 163; *Anderson v. Orlins*, No. C3-88-897, 1988 WL 113764, at *2 (Minn. Ct. App. Nov. 1, 1988) (App. 905-08).[11] There is no reason to stray from this jurisprudential history here.

B. <u>Direct and Intended Beneficiary Status is a Threshold Requirement</u>

This Court held in *Marker* that whether a non-client is a direct and intended beneficiary is a threshold determination. In order to sue for malpractice, the "sole purpose in retaining [the] attorney is to benefit directly some third party[,]" and the third party "'must be a direct and intended beneficiary of the lawyer's services.'" *Marker*, 313 N.W.2d at 5 (quoting *Brody*, 267 N.W.2d at 906). If the evidence establishes that the third party was the direct and intended beneficiary of the attorney's services, satisfying the threshold requirement, then the *Lucas* factors are applied "in determining the extent

[11] This Court's decision in *Admiral Merchants* is the lone exception, wherein the Court held that fact issues precluded summary judgment. *Admiral Merchants* and this case are markedly different. *See infra* Section III.B.2.

of an attorney's duty to a non-client. . . ." *Id.* Thus, if the non-client is not the direct and intended beneficiary, the *Lucas* factors are inapplicable.

While the Court of Appeals agreed it was undisputed that Respondents were not the "sole beneficiaries" of Dorsey's services in the loan transaction,[12] it nonetheless held that summary judgment was inappropriate because courts have not "strictly applied" *Marker's* threshold test and "have been inconsistent in defining the proper role of the *Lucas* factors" in determining intended third-party beneficiary standing.[13] *See McIntosh,* 726 N.W.2d at 115-16. The Court of Appeals held that all six *Lucas* factors must be applied to determine whether the non-client is the direct and intended third-party beneficiary with standing to sue. *Id.* at 116.

The Court of Appeals' decision is erroneous in several respects. No Minnesota appellate court has ever rejected application of *Marker's* direct and intended beneficiary test as a threshold requirement. Likewise, no Minnesota appellate court has ever applied all six *Lucas* factors, and several have refused to apply the *Lucas* factors after determining that the non-client plaintiff was not the direct and intended beneficiary of the

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[12] Judge Frank likewise determined that Bremer was not the direct and intended beneficiary of Dorsey's services. *See* App. 847 ("[T]he Court finds that the primary purpose in retaining Dorsey was to benefit Miller & Schroeder . . . .") and 849 ("Bremer was not an 'intended' third-party beneficiary of Miller & Schroeder's attorney-client relationship with Dorsey. . . .").

[13] While the Court of Appeals held that fact issues precluded summary judgment on Respondents' intended third-party beneficiary claim, it did not identify any purportedly disputed facts. Moreover, as set forth above, the two facts identified by the Court of Appeals in its implied contract analysis are neither disputed nor material. *See supra* Section II.B.

attorney's services. Moreover, the cases relied upon by the Court of Appeals – *Admiral Merchants* and *Goldberger* – actually support application of *Marker's* threshold test, particularly under the facts of this case.

1. *Marker's* Threshold Test Applies

No Minnesota appellate court has ever analyzed all six *Lucas* factors in determining whether a non-client is a direct and intended third-party beneficiary. Contrary to the Court of Appeals' decision, *Marker's* direct and intended beneficiary mandate has been consistently applied as a threshold determination on the standing issue since this Court first announced the principle. Subsequent Court of Appeals' decisions have followed *Marker's* mandate and applied the direct and intended beneficiary determination as a threshold requirement.

In *Francis*, the Court of Appeals analyzed the intended third-party beneficiary standard enunciated in *Marker* and subsequent appellate decisions, and determined that the 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." *Francis*, 597 N.W.2d at 924 (emphasis added). The court identified cases from other jurisdictions supporting this threshold determination, and noted its consistency with the Restatement of the Law Governing Lawyers. *Id.* at 924-25 (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)). Thus, the court held that "[t]he requirement that the third party be an intended beneficiary is a <u>threshold requirement</u> for an attorney to have a duty to a third party." *Francis*, 597 N.W.2d at 924 (emphasis added). If the non-client is not the direct and intended beneficiary of the attorney's retention, the malpractice claim fails as a matter of law and no further analysis is required. *Id.* at 925.

Minnesota appellate courts have repeatedly dismissed non-client legal malpractice as a matter of law for failure to satisfy the threshold test, without reaching the *Lucas* factors. *See Precision Diversified Indus.*, 2004 WL 2093532, at *7 (determining that "appellants were merely incidental beneficiaries and therefore lack standing to sue the trustee's attorney" and not reaching *Lucas* factors); *Francis*, 597 N.W.2d at 925 ("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"); *Holmes*, 531 N.W.2d at 505 (determining third party was not an intended beneficiary and not reaching multi-factor analysis).

Judge Frank likewise concluded that Bremer failed to establish that it had standing to sue Dorsey under the intended third-party beneficiary theory. *See* App. 847-49. Judge Frank noted that the trial record on the standing issue in the Bremer case, which is nearly identical to the undisputed material facts here, did not support a finding that Miller & Schroeder intended Dorsey's work to directly benefit Bremer because any benefit to Bremer flowed through the loan transaction and was merely incidental. *See* App. 849. Because Bremer was not a direct and intended third-party beneficiary of Dorsey's services, Judge Frank did not analyze the *Lucas* factors. *Id.*

2. *Admiral Merchants* and *Goldberger* Support Continued Application of *Marker's* Threshold Test

The Court of Appeals relies exclusively on *Admiral Merchants* and *Goldberger* to justify its departure from established Minnesota law. Both cases, however, actually support continued application of *Marker's* direct and intended third-party beneficiary test as a threshold determination.

In *Admiral Merchants*, Admiral Merchants Motor Freight, Inc. ("Admiral Merchants") and Leamington Co. ("Leamington") were owned and operated by Robert Short ("Short") until his death in November 1982. *See Admiral Merchants*, 494 N.W.2d at 263. In 1980, Admiral Merchants ceased making pension payments to Central States Fund ("CSF"), and in January 1984, Admiral Merchants received a withdrawal assessment from CSF. *Id.* at 264. Under a federal statute, Admiral Merchants had the right to demand arbitration to resolve any dispute regarding any assessment, but that right would be lost by failing to timely request arbitration. *Id.*

In November 1983, O'Connor & Hannan ("O'Connor") investigated the possible liability of Admiral Merchants and other Short control group employers, including Leamington, to CSF for any unfunded pension liability. *Id.* O'Connor was specifically advised that Leamington and other control group employers were concerned about their potential liability. *Id.* In October 1985, CSF sent a final demand letter to Admiral Merchants and then filed a lawsuit to recover the unpaid amounts. *Id.* Admiral Merchants retained Kirkland & Ellis ("Kirkland") to defend the lawsuit. *Id.* Kirkland answered the complaint, but did not demand arbitration. *Id.* CSF subsequently received a default judgment because of Admiral Merchants' failure to timely demand arbitration. *Id.* After settling with CSF, Admiral Merchants and Leamington sued O'Connor and Kirkland for legal malpractice. *Id.*

During their representation, O'Connor and Kirkland knew that Admiral Merchants and Leamington had the same owners and same representative. *Id.* at 265. The law firms repeatedly met face-to-face with the parties through their mutual representative. *Id.* The representative directly sought and received the firms' advice expressly on behalf of Leamington. *Id.* at 265-66. Leamington also paid part of O'Connor's and Kirkland's legal fees, and the firms knew that Leamington would likely be liable for most, if not all, of any judgment against Admiral Merchants. *Id.* at 265. Nonetheless, the district court dismissed Leamington's claims on summary judgment for lack of standing. *Id.*

With respect to Leamington's intended third-party beneficiary argument, this Court did not analyze the *Lucas* factors. Instead, this Court held that the facts presented, if believed, could indicate that Leamington "was the <u>intended beneficiary</u> when Admiral Merchants retained legal counsel to defend against the withdrawal liability assessment, because Admiral Merchants itself was nearly judgment-proof." *Id.* at 266 (emphasis added). Further fact-finding was necessary based on *Marker's* threshold test — Leamington may have been the direct and intended third-party beneficiary of Admiral Merchants' retention of O'Connor and Kirkland — not the *Lucas* factors.

Goldberger likewise supports *Marker's* threshold test. In that case, beneficiaries of an estate asserted a legal malpractice claim against the attorney hired by the personal representative. *See Goldberger*, 534 N.W.2d at 736. The court began its standing analysis by reiterating the threshold direct and intended beneficiary test pronounced in *Marker*. *Id.* at 738 (citing *Marker*, 313 N.W.2d at 5). The court did not mandate application of the *Lucas* factors to make that determination. Instead, the court stated that the *Lucas* factors could be used as an "aid" in the determination. *Id.* at 738.

The *Goldberger* court did not alter *Marker's* threshold requirement. *Id.* Before discussing 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. The court then briefly addressed the beneficiaries' argument that the policy stated in *Lucas* was important, and concluded that public policy did not favor the beneficiaries' claim. *Id.* at 739-40. Importantly, the court held that burdensome conflicts would arise if the estate's attorney directly owed duties to the beneficiaries.[14] *Id.*

Admiral Merchants, *Goldberger*, and subsequent cases like *Francis* confirm that *Marker's* direct and intended third-party beneficiary mandate remains a threshold determination under Minnesota law. If this threshold test is not satisfied, the non-client's malpractice claim must be dismissed as a matter of law, and application of all *Lucas*

[14] In *Francis*, the Court of Appeals resolved any confusion created by its statement in *Goldberger* that the *Lucas* factors may "aid" the intended third-party beneficiary determination. The court confirmed that the *Marker*, *Admiral Merchants* and *Goldberger* decisions "indicate[] the intended third-party beneficiary requirement is a threshold requirement for a non-client to bring a legal malpractice action against an attorney." *Francis*, 597 N.W.2d at 924 (emphasis added).

factors is not mandated. Accordingly, the Court of Appeals' contrary decision should be reversed.

C. The Court of Appeals' Decision is Contrary to Public Policy

Attorneys owe demanding fiduciary and ethical duties to their clients, such as the duties of confidentiality, undivided loyalty, zealous representation, and the avoidance of conflicts. Clients also have important rights and privileges, such as the attorney-client privilege. Non-clients do not enjoy the same rights and privileges as clients. Nor do attorneys owe the same exacting duties to non-clients as they do to clients — for good reason. A requirement that attorneys owe the same client-centered fiduciary and ethical duties to non-clients would create serious ethical conflicts for the attorney.

If Miller & Schroeder wanted to hire Dorsey to represent Respondents, Dorsey would have had an impermissible conflict of interest in representing both Miller & Schroeder, as seller, and Respondents, as buyers, in the same loan transaction. Because Respondents were unknown when Dorsey was retained, Dorsey could not have even run a necessary conflict check and could have already been adverse to one or more of Respondents. This is precisely why Minnesota courts have recognized conflict problems as a policy reason for refusing to recognize intended third-party beneficiary malpractice claims. *See, e.g., Goldberger*, 534 N.W.2d at 739; *Hill*, 1994 WL 615049, at *2; *see also Witzman v. Gross*, 148 F.3d 988, 990-91 (8th Cir. 1998). 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 the Court of Appeals' decision stands, attorneys representing lenders in loan transactions could have potential exposure to malpractice claims asserted by unknown non-clients who do not become known, if at all, until months or even years later. For example, mortgages are routinely sold shortly after closing, and sometimes are sold numerous times. Clearly the attorney who drafts the initial mortgage documents is not liable to anyone who purchases an interest in the mortgage at any time after closing. *See, e.g., One Nat'l Bank v. Antonellis*, 80 F.3d 606, 608-09 (1st Cir. 1996) (mortgagee's attorney owed no duty to subsequent purchaser under contract or tort theory); *Page v. Frazier*, 445 N.E.2d 148, 152-53 (Mass. 1983) (no attorney-client relationship between bank's attorney and mortgagors).

Extending Dorsey's duties and obligations to unknown non-clients like Respondents is inequitable and contrary to long-standing Minnesota law. There is a wide spectrum of similar transactions – from the relatively simple to the extremely complex – in American financial markets that are characterized by the packaging, assignment, re-packaging, and reassignment of financial instruments, from mortgages to derivatives to participations. If the originator's or assignor's attorney's knowledge of the likelihood of sale or assignment turns those downstream purchasers or assignees into direct and intended third-party beneficiaries with standing to sue attorneys for legal malpractice, attorneys' responsibilities and exposures will multiply enormously.[15]

It is because of these ethical and fiduciary issues that Minnesota courts use the *Lucas* factors to determine the scope of the duty owed to a non-client intended third-party beneficiary. This Court has never held that the *Lucas* factors determine whether a plaintiff is a direct and intended third-party beneficiary with standing to sue for legal malpractice. Rather, once it is determined that the non-client is a direct and intended third-party beneficiary, the factors "determine[e] the extent of an attorney's duty to a non-client." *Marker*, 313 N.W.2d at 5. Subsequent Court of Appeals' decisions have reiterated this principle. *See, e.g., Francis*, 597 N.W.2d at 924 (quoting *Marker*, 313 N.W.2d at 5); *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.).

This approach makes sense because, as set forth above, attorneys do not owe non-clients the same duties as they owe to clients. As such, in evaluating a malpractice claim asserted by a non-client, courts must first determine the duties attorneys owe to the non-clients before determining whether the attorney breached those duties and is therefore

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[15] The Court of Appeals ruled as a matter of law that Respondents could not sue Dorsey for malpractice on the theory that any malpractice claim held by Miller & Schroeder was assigned to Respondents as part of the assignment of rights Respondents received from Miller & Schroeder in the participation transaction. *See McIntosh*, 726 N.W.2d at 118. Permitting Respondents to sue Miller & Schroeder's attorneys on an alternative intended third-party beneficiary theory would produce an inconsistent and perverse result.

potentially liable for malpractice.

Since it is undisputed that Respondents were not the direct and intended beneficiaries of Dorsey's representation of Miller & Schroeder in the loan transaction, Respondents lack standing to sue Dorsey as a matter of law. The *Lucas* factors need not be analyzed. The Court of Appeals' contrary decision should be reversed.

CONCLUSION

Dorsey respectfully requests that this Court reverse the Court of Appeals' decision and enter judgment for Dorsey as a matter of law on all claims.

Dated: April 19, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant Dorsey & Whitney LLP certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 10,194 words, excluding the Table of Contents, Table of Authorities, and Appendix.

Dated: April 19, 2007

Richard G. Mark (#67681)

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