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No. A06-486

STATE OF MINNESOTA

IN SUPREME COURT

McIntosh County Bank, et al.,

Plaintiffs/Respondents,

vs.

Dorsey & Whitney LLP,

Defendant/Appellant.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLANT DORSEY & WHITNEY LLP

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INTRODUCTION

Besides unsupported speculation, or statements that lack record support, Respondents do not identify any genuine issue of material fact that precludes summary judgment. Instead, Respondents ask this Court to ignore long-standing Minnesota law and adopt new legal standards never before adopted in Minnesota. Respondents' arguments must be rejected.

The undisputed material facts establish that Respondents were not the direct and intended third-party beneficiaries of Dorsey's representation of Miller & Schroeder. *See infra* Section I. Nor were Respondents Dorsey's clients under an implied contract theory. *See infra* Section II. The Court of Appeals' decision should be reversed, and judgment entered in Dorsey's favor.

FACTS[1]

A. Many of Respondents' Factual Allegations Lack Evidentiary Support

Respondents attempt to create fact issues where none exist by making numerous assertions without record support.

1. Dorsey Was Not Retained For Respondents' Benefit

Despite Steve Erickson's testimony that Dorsey was retained to represent Miller & Schroeder, (App. 754-55), Respondents incorrectly assert that Dorsey represented the "lenders" in the loan transaction. (Resp. Br. at 3.) Respondents' reference to themselves

[1] Respondents erroneously assert that no discovery was conducted in the trial court. (Resp. Br. at 8 and n.3.) Dorsey conducted significant written discovery in this case. (App. 423-510 and 521-30.)

as "lenders" is wrong. At closing Miller & Schroeder was the sole lender. (App. 279-80.) Miller & Schroeder's funds, not Respondents', were disbursed to President at closing. (*Id.*) Respondents did not even fund their participation interests until days or weeks after closing.[2] (*Id.*) All relevant documents – the Loan Agreement, Promissory Note, Escrow Agreement, and Participation Agreement – identify Miller & Schroeder as "lender." (App. 328-415.)

Without citing any record evidence, Respondents erroneously allege that Dorsey "knew that one of the primary objectives of its work was to benefit the Respondents." (Resp. Br. at 9; *see also id.* at 13, 15 and 17.) Dorsey represented Miller & Schroeder, and drafted the loan documents for Miller & Schroeder's benefit, to protect its interests. (App. 754-57.) Miller & Schroeder did not tell Dorsey that it was retained to benefit Respondents. (App. 726 ¶ 4; 727 ¶ 9; 733 ¶¶ 7-8; 754-55; 757.) Respondents had no communications whatsoever with Dorsey, much less any communications to advise Dorsey that they were beneficiaries of Dorsey's work. (App. 242-44; 521-29.)

Respondents also allege that they were beneficiaries of Dorsey's work because retaining their own counsel would have been too expensive. (Resp. Br. at 11-12.) There is no record evidence to support this assertion, and Judge Frank rejected a similar contention. "[T]he Court disagrees with the notion that each [participant] need to get its

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[2] Respondents assert that they committed to purchase participations prior to closing. (Resp. Br. at 3, 16.) While irrelevant, no record evidence supports this assertion. Moreover, Respondents could have elected not to purchase participations after review of closing books received post-closing. (App. 279-80.)

own specialized lawyer. Both the expert and the bankruptcy court overlooked the possibility of having one or two lawyers represent the [participants] as a group." (App. 857 n.54.)

2. Dorsey's Advice Was Not Conveyed to Respondents

Respondents incorrectly assert that Dorsey "advis[ed] the lenders to proceed with closing without first obtaining NIGC approval." (Resp. Br. at 4.) Dorsey provided legal advice only to its client, Miller & Schroeder; Dorsey provided no advice whatsoever to Respondents. (App. 521-29.) And Erickson confirmed that Dorsey did not advise Miller & Schroeder to close the loans; the decision to close was Miller & Schroeder's alone. (App. 747.)

Respondents also erroneously claim that Dorsey's advice concerning the Pledge Agreement was conveyed to Respondents. (Resp. Br. at 16.) Since Dorsey had no communications with Respondents, Dorsey did not provide any advice to them. There is no record evidence that Miller & Schroeder conveyed Dorsey's advice to Respondents. The February 22, 1999 memorandum relied upon by Respondents references neither Dorsey nor its advice. (App. 530-31.)

3. Respondents Could Not Rely on Dorsey's Advice

Respondents assert that the Participation Agreement permits them to rely solely on counsel hired by Miller & Schroeder. (Resp. Br. at 18.) The Court of Appeals rejected this argument, concluding that the Participation Agreement made it unreasonable and unjustifiable as a matter of law for Respondents to rely on Dorsey's legal advice to Miller & Schroeder. *See McIntosh County Bank v. Dorsey & Whitney LLP*, 726 N.W.2d 108, 119-20 (Minn. Ct. App. 2007). Respondents did not appeal this conclusion. Judge Frank also rejected this assertion. "[T]he Court questions why any bank would think it would be reasonable to rely on a lender's attorney's work, when the lender is in such a position as Miller & Schroeder was, being an agent for the borrower during the loan transaction period." (App. 857 n.54.)

B. Respondents Fail to Identify a Disputed Issue of Material Fact

While Respondents repeatedly allege that genuine issues of material fact exist, they conspicuously fail to identify any such disputed facts. Moreover, Respondents do not contest any of the undisputed material facts identified in Dorsey's opening brief, which supported the district court's summary judgment decision. (Dorsey Op. Br. at 20-21.) Respondents instead argue that Dorsey could have ascertained Respondents' identities if it had tried to do so. (Resp. Br. at 26-27.) This kind of "metaphysical doubt" is insufficient to oppose summary judgment. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Additionally, Respondents argue that Dorsey should have prepared a retainer agreement to confirm that it did not represent them. (Resp. Br. at 27.) This argument is non-sensical. Dorsey could not send any retainer agreement to Respondents because Dorsey did not know who they were. Finally, the two purportedly disputed facts cited by the Court of Appeals – (i) that Dorsey previously represented Miller & Schroeder and was aware of its business model; and (ii) Erickson's testimony that he expected Dorsey's work would benefit both Miller & Schroeder and Respondents – are neither disputed nor material. (Dorsey Op. Br. at 21-22.)

C. Respondents' Malpractice Allegations Are Irrelevant

While Respondents contend Dorsey committed malpractice, the issue is irrelevant to this appeal. Dorsey's alleged malpractice was not addressed by the district court or the Court of Appeals. In any event, Dorsey did not commit malpractice. Appellants rely upon the affidavit testimony of Michael Cox, who did not opine that Dorsey's legal advice was incorrect.[3] Kevin Washburn, former NIGC general counsel and a University of Minnesota Professor of Law, opined that Dorsey's advice was legally correct and that Dorsey satisfied the applicable standard of care. (Supp. App. 912-24.)

ARGUMENT

I. RESPONDENTS LACK STANDING TO SUE DORSEY AS NON-CLIENTS UNDER THE INTENDED THIRD-PARTY BENEFICIARY THEORY

The fundamental issue for this Court's resolution is the proper legal standard to determine whether a non-client has standing to sue an attorney for legal malpractice. In *Marker v. Greenberg*, 313 N.W.2d 4 (Minn. 1981), this Court first recognized that in limited circumstances non-clients may assert legal malpractice claims against attorneys:

> 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.

Id. at 5 (emphasis added). In other words, "'the third party . . . must be a direct and intended beneficiary of the lawyer's services.'" *Id.* (emphasis added) (quoting *Brody v. Ruby*, 267 N.W.2d 902, 906 (Iowa 1978)). If the attorney is found to owe a duty to the

[3] Respondents also rely on Judge Frank's conclusion that Dorsey committed malpractice, even though he did not determine whether Dorsey's advice was correct. (Resp. Br. at 20.) Dorsey will contest this unprecedented legal conclusion on appeal to the Eighth Circuit.

non-client, then the scope of that duty must be determined. "In determining the extent of an attorney's duty to a non-client, courts frequently consider the factors expressed by the *Lucas* court." *Id.* (emphasis added).

Marker thus established a two-part analysis. First, courts must determine, as a threshold matter, whether the attorney owes a duty to the non-client.[4] Second, if a duty is owed because the attorney was retained for the sole purpose of directly benefiting the non-client – *i.e.*, the non-client is the direct and intended beneficiary – then the *Lucas* factors determine the extent of the duty owed.

A. Whether a Duty is Owed is a Threshold Determination

Respondents argue (and the Court of Appeals concluded) that *Marker* did not establish a two-part test. Rather than making a threshold determination of whether a duty is owed to the non-client, Respondents posit that the *Lucas* factors determine both the existence of a duty and the scope of that duty. *See* Resp. Br. at 29-34. To support their proposed evisceration of *Marker's* two-part test, Respondents argue that *Marker's* "sole purpose" language "could never be satisfied" because "[t]he client always has some purpose in establishing, and gets some benefit from, the representation." Resp. Br. at 33. Respondents' argument, and the Court of Appeals' decision, are contrary to long-standing Minnesota law and should be rejected.

First, the "sole purpose" language, first enunciated in *Marker* and repeated in subsequent Minnesota appellate decisions, *see* Dorsey Op. Br. at 29, is not "unworkable."

[4] The existence of a legal duty presents a question of law. *See Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985).

Indeed, the will drafting cases cited by the *Marker* court rebut Respondents' argument. In those cases, the sole purpose of the attorney's retention was to confer a direct benefit on a third party by effectuating the client's intended bequest through a properly drafted will. Unlike an ordinary business transaction, the testator client does not retain an attorney for the purpose of personal financial benefit. Instead, the client's sole purpose is to have a non-client financially benefit from the bequest. Thus, the successfully drafted will achieves the client's "sole purpose to . . . benefit directly" another. The fact that the client's wishes are implemented by a properly drafted will, and thus the client "benefits" from the representation, is immaterial.[5]

Second, this Court has already explained that the "sole purpose" language means that the non-client must be the "direct and intended beneficiary" of the attorney's services.[6] *See Marker*, 313 N.W.2d at 5. The approach taken by the Court of Appeals, and advocated by Respondents, would eliminate the threshold test, rendering *Marker's* "direct and intended beneficiary" language meaningless. Instead, this Court should apply the "direct and intended beneficiary" language from *Marker* as the threshold test to

[5] If the "sole purpose" language is strictly applied here, Respondents lack standing as a matter of law because the Court of Appeals concluded that Respondents were not the "'sole beneficiaries' of Dorsey's representation because it was also in Miller [& Schroeder's] interest for the loan documents to be enforceable." *See McIntosh*, 726 N.W.2d at 115.

[6] Difficulty in satisfying the "sole purpose" language is to be expected given that "the relaxation of the strict privity requirement is very limited . . . to prevent a myriad of causes of action." *Marker*, 313 N.W.2d at 5. Thus, it is not surprising that no Minnesota appellate court has ever extended an attorney's duty to a non-client to provide standing to sue for malpractice.

determine whether a duty is owed to a non-client.

Third, contrary to Respondents' argument, there has been no "struggle" regarding the application of *Marker's* threshold test or the *Lucas* factors.[7] Minnesota appellate courts have consistently and repeatedly dismissed non-client legal malpractice claims as a matter of law for failure to satisfy *Marker's* threshold test, without reaching the *Lucas* factors. *See, e.g., Precision Diversified Indus. v. Colgate*, No. A03-2060, 2004 WL 2093532, at *7 (Minn. Ct. App. Sept. 21, 2004) (App. 891-901) ("appellants were merely incidental beneficiaries and therefore lack standing to sue the trustee's attorney" and not reaching *Lucas* factors); *Francis v. Piper*, 597 N.W.2d 922, 925 (Minn. Ct. App. 1999) ("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"); *Sandum v. Doherty, Rumble & Butler, P.A.*, No. C7-94-801, 1994 WL 593925, at *4 (Minn. Ct. App. Nov. 1, 1994) (App. 883-86) (client "did not retain [attorney] to benefit" third party, and not reaching multi-factor analysis); *Holmes v. Winners Entm't, Inc.*, 531 N.W.2d 502, 505 (Minn. Ct. App. 1995) (same).

Moreover, the malpractice treatise repeatedly cited by Respondents endorses this

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[7] Respondents' reliance on *Admiral Merchants* and *Goldberger* to support their application of the *Lucas* factors is misplaced. Both cases actually support *Marker's* threshold test. *See* Dorsey Op. Br. at 34-37. Moreover, Respondents' assertion that *Anderson v. Orlins*, 1988 WL 113764 (Minn. Ct. App. Nov. 1, 1988) "endorsed application of the multi-factor analysis," Resp. Br. at 34, is incorrect. The *Anderson* court reiterated the threshold test from *Marker* that the non-client "must be 'a direct and intended beneficiary of the lawyer's services.'" 1988 WL 113764, at *2. The majority opinion does not even cite *Lucas*, much less apply the multi-factor test. *Id.*

approach. "No matter the legal theory, the predominant inquiry usually has focused on one criterion: was the principal purpose of the attorney's retention to provide legal services for the benefit of the plaintiff? If the answer is 'no,' other factors usually need not be considered." 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 7.8, at 842 (2007) (emphasis added). If, as a threshold matter, no duty is owed because the non-client is not the direct and intended beneficiary, the *Lucas* factors are irrelevant.[8]

B. The *Lucas* Factors Determine the Extent of the Attorney's Duty to a Non-Client

Because an attorney does not owe the same duties to a non-client as those owed to a client, if a court concludes that a duty is owed to the non-client under the threshold test, the second step is to determine the extent of the attorney's duty. This Court held that the *Lucas* factors are used to make that determination. *See Marker*, 313 N.W.2d at 5 (holding that the *Lucas* factors "determin[e] the extent of an attorney's duty to a non-client") (emphasis added); *see also Francis*, 597 N.W.2d at 924 (same); *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995) (same); *Sandum*, 1994 WL 593925, at *4 (same). Contrary to Respondents' argument and the Court of Appeals' decision, the *Lucas* factors determine the extent of the duty, not whether a duty is owed in the first place.

C. Respondents Cannot Satisfy *Marker's* Threshold Test

Three considerations are relevant to whether the sole purpose of Dorsey's retention

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[8] Judge Frank also concluded that the *Lucas* factors need not be analyzed because Bremer was not the direct and intended beneficiary of Dorsey's retention. *See* App. 849-50.

was to directly benefit Respondents, and thus determining whether a duty was owed to Respondents. First, Miller & Schroeder and Dorsey must mutually intend that the retention directly benefit Respondents. *See* 1 R. Mallen & J. Smith, supra § 7.8, at 843-44; *see also, e.g., Great Am. Ins. Co. v. Perry*, No. C6-93-1573, 1994 WL 101991, at *2 (Minn. Ct. App. Mar. 29, 1994) (App. 902-04) (intent to provide direct benefit required)l *Zenith Ins. Co. v. O'Connor*, 148 Cal. App. 4th 998, 1008 (Ct. App. 2007) (mutual intent). Second, the benefit received by Respondents must be direct, not merely incidental or secondary. *See Holmes*, 531 N.W.2d at 505. Finally, Miller & Schroeder and Respondents cannot be adverse, nor can there be even a potential for conflict between them. *See Goldberger*, 534 N.W.2d at 739. Applying these considerations to the undisputed material facts here, Dorsey owed no duty to Respondents as a matter of law.

1. Miller & Schroeder and Dorsey Did Not Mutually Intend to Directly Benefit Respondents

Both the client and attorney must mutually intend to directly benefit the non-client:

> Often, the attorney's retention will benefit another. The inquiry, however, usually is whether the plaintiff was *the* person *intended* to be benefited by the legal services. In other words, the inquiry is whether the expressed intent of the client to benefit the plaintiff was the direct and agreed purpose of the transaction or relationship. Thus, the inquiry is whether *both* the attorney and the client intend the plaintiff to be the beneficiary of legal services?

R. Mallen & J. Smith, *supra* § 7.8, at 843 (italics in original).

The undisputed material facts do not evidence any mutual intent for Dorsey's retention to directly benefit Respondents. While Erickson testified that Dorsey was retained to represent Miller & Schroeder and "to the extent consistent, to also look out for the interests of [Respondents]" *see* App. 755, the purpose of Dorsey's retention – drafting loan documents – was carried out:

> Miller & Schroeder is not claiming that its intent was not carried out. And there is no evidence suggesting that Miller & Schroeder instructed Dorsey that it wanted the benefits from Dorsey's work to go to Bremer (i.e., that it intended for "X" to go to Bremer).

App. 849. Dorsey was retained to draft the loan documents to protect Miller & Schroeder's interest. Moreover, that Respondents played no role in Dorsey's retention indicates a lack of mutual intent to benefit Respondents. *See Holmes*, 531 N.W.2d at 505.

Regardless, it is undisputed that Dorsey did not intend to directly benefit Respondents. Dorsey had no communications with Respondents and took no actions to benefit them. Even if Dorsey was aware that Respondents were affected by its services, that alone is insufficient to establish Dorsey's intent or create any duty of care. *See Zenith*, 148 Cal. App. 4th at 1008.

2. Respondents Received No Direct Benefit From Dorsey's Retention

The loan documents, which name Miller & Schroeder as the sole "lender," directly benefited Miller & Schroeder by creating a marketable loan product that Miller & Schroeder could originate, sell to Respondents, and thereafter service. Respondents were not parties to the loan documents, which demonstrates that Respondents received no direct benefit from Dorsey's representation of Miller & Schroeder. *See Holmes*, 531

N.W.2d at 505 (no direct benefit where non-client was not a party to the documents drafted by attorney).

Any benefit Respondents received flowed through the loan transaction and occurred as a result of Respondents' purchase of participation interests. Judge Frank addressed this very issue in the Bremer case:

> [N]or is there evidence that the purpose of the loan agreement was to benefit primarily Bremer as opposed to secure the loan and close the deal. In fact, Miller & Schroeder was, at least up until the Participation Agreement was signed, solely a placement agent for President. <u>Any benefit to Bremer flowed through the loan transaction, and therefore was incidental, not direct as required by *Marker*</u>.

App. 849 (emphasis added). *See also Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 30-31 (Minn. 1982) (landowners lacked standing to sue bank's attorneys because attorney was retained to protect bank's interests; protection of landowners' interest was "secondary").[9] Respondents' benefit from Dorsey's retention was secondary or incidental, at best.

3. Respondents Were Adverse to Miller & Schroeder Or, At A Minimum, A Potential For Conflict Existed

The adversarial buyer-seller relationship between Miller & Schroeder and Respondents also demonstrates that Respondents were not the direct and intended

[9] *See also Goldberger*, 534 N.W.2d at 738-39 (estate beneficiaries lacked standing to sue personal representative's attorneys because they were "incidental beneficiaries"); *Holmes*, 531 N.W.2d at 505 (shareholder lacked standing to sue corporation's attorney because "[t]he benefit flowed through the corporation" and was not "'direct,' as required by *Marker*"); *Sandum*, 1994 WL 593925, at *4 (non-client shareholder lacked standing to sue corporation's attorney because the attorney's retention was intended to benefit the corporation and "[a]ny benefit to the corporation's existing shareholders is secondary").

beneficiaries of Dorsey's retention. *See Hill v. Schaffner*, No. C5-94-960, 1994 WL 615049, at *2 (Minn. Ct. App. Nov. 8, 1994) (App. 909-11) (no duty owed to adversary). Respondents try to avoid this fact by asserting that "[t]here was no adversity between [Miller & Schroeder] and Respondents regarding the loan transactions—the parties were perfectly aligned and moving towards a common goal." Resp. Br. at 48. The record belies this assertion.

When Dorsey was retained, and while it was drafting the loan documents, Respondents were not moving towards any common goal with Miller & Schroeder because they had no legal interest in the loans. Contrary to Respondents' unsupported assertion, there is no record evidence that Respondents had committed to purchase participation interests prior to closing. *See supra* p. 2 n.2. During the relevant time frame, Respondents were not even involved in the loan transaction, much less working towards a common goal with Miller & Schroeder. Respondents purchased participation interests after closing and after Dorsey's services were complete. *See* App. 282.

Respondents make much of Dorsey's awareness of Miller & Schroeder's business model to participate the loans under a Participation Agreement. *See* Resp. Br. at 27-28. But the Participation Agreement that governs Respondents' purchases contains terms that are adverse to Respondents. *See* App. 332-37 §§ 2.2, 3.1, 5.1, 5.2 and 5.3; *see also* Dorsey Op. Br. at 12-14. Dorsey's knowledge of the Participation Agreement, and its adverse terms, actually demonstrates that Dorsey could not have been aware that Respondents were intended beneficiaries of Dorsey's services. Judge Frank relied on the adverse terms in the Participation Agreement to conclude that the relationship between

Miller & Schroeder and Bremer was adversarial and, thus, it was not reasonable for Bremer to believe that Dorsey represented the participants. *See* App. 836.

Regardless, even if Respondents' interests were "aligned" with Miller & Schroeder's, it would be inappropriate to foist upon Dorsey any obligation to protect Respondent's interests because of the potential for conflict between the interests of Dorsey's client, Miller & Schroeder, and Respondents. This conflict problem is precisely the reason Minnesota appellate courts have declined to provide non-clients with standing to sue attorneys. *See Goldberger*, 534 N.W.2d at 739 ("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") (emphasis in original); *CPJ Enters., Inc. v. Gernander*, 521 N.W.2d 622, 624-25 (Minn. Ct. App. 1994) (attorneys may be discouraged from following a client's instructions because doing so would adversely affect a third party). Other jurisdictions are in accord. *See, e.g., Zenith*, 148 Cal. App. 4th at 1008 (reinsurer lacked standing to sue ceding insurer's attorney because of potential conflict); *Hedges v. Durrance*, 834 A.2d 1, 4-5 (Vt. 2003) (wife lacked standing to sue husband's divorce attorney because of adversarial relationship); *MacMillan v. Scheffy*, 787 A.2d 867, 869-70 (N.H. 2001) (refusing to provide non-client buyer standing to sue seller's attorney because buyer-seller relationship is adversarial).

In sum, the undisputed material facts establish that: (i) there was no mutual intent to benefit Respondents; (ii) Respondents received no direct benefit from Dorsey's retention; and (iii) Respondents and Miller & Schroeder were adverse. Thus, Respondents cannot satisfy *Marker's* threshold test, as they are not direct and intended beneficiaries, and therefore lack standing to sue Dorsey as a matter of law.

D. Even Under the *Lucas* Factors, Respondents' Claims Fail

Even if this Court, like the Court of Appeals, concludes that the *Lucas* factors must be analyzed in the first instance to resolve whether a duty is owed, there is no need for a remand to the district court. Because the material facts in this case are undisputed, the *Lucas* factors can be analyzed as a matter of law. None of the *Lucas* factors support Respondents' alleged standing to sue Dorsey.

1. Because The Material Facts are Undisputed, the *Lucas* Factors Should Be Analyzed as a Matter of Law

Although Respondents genuine issues of material fact preclude application of the *Lucas* factors as a matter of law, no allegedly disputed facts are identified. Moreover, neither of the allegedly disputed facts cited by the Court of Appeals, *see McIntosh*, 726 N.W.2d at 117-18, are disputed. *See also* Dorsey Op. Br. at 21-22. Accordingly, there is no basis for a remand.

2. The *Lucas* Factors Do Not Support Respondents' Alleged Intended Third-Party Beneficiary Standing

The first *Lucas* factor – the extent to which the transaction was intended to <u>affect</u> Respondents[10] — is not particularly noteworthy or dispositive. Dorsey was retained to

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[10] Respondents mischaracterize this intent to "affect" factor as the intent to "benefit" factor. *See* Resp. Br. at 38-39. Clearly intent to "affect" is something far different than intent to "benefit." Indeed, an intent to "affect" could be exactly the opposite from an intent to "benefit" because a transaction could negatively affect a non-client, and thus not benefit the non-client. Contrary to Respondents' argument, the intent to "affect" factor is

draft documents to protect Miller & Schroeder's rights and interests as the lender, which facilitated the loan closing and allowed Miller & Schroeder to earn the placement fee, market and sell participations to Respondents, and earn loan-servicing fees. Any intent to affect Respondents was, at best, incidental and not intentional. Moreover, it is difficult to conceive of a transaction in which an attorney's services do not affect another party to the transaction. For example, if a borrower drafts loan documents for a real estate transaction, the lender is affected by the preparation of those documents. Even if the lender is positively affected (benefited), the lender is not permitted to sue the borrower's attorney. *See Poferl v. Nat'l Title Co.*, No. C2-00-1512, 2001 WL 267464, at *3 (Minn. Ct. App. Mar. 20, 2001) (Supp. App. 925-27); *see also Zenith*, 148 Cal. App. 4th at 1088 (without more, an attorney's knowledge that third parties will be affected by the representation of the client is insufficient to create a duty of care). Likewise, shareholders of a corporation unquestionably are affected by an attorney's representation of a corporation in a lawsuit. Nonetheless, Minnesota appellate courts have been clear that the attorney represents the corporation; the corporation's shareholders are not direct and intended third-party beneficiaries of the attorney's services. *See Holmes*, 531 N.W.2d at 505; *Sandum*, 1994 WL 593925, at *4.

With respect to the second *Lucas* factor — foreseeability of harm — this case is factually dissimilar from the will drafting cases cited in *Marker*. In those cases, there is little or no foreseeable harm to the attorney's client, the decedent, who likely has passed

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not duplicative of *Marker's* threshold test.

away by the time the attorney's negligence surfaces. In contrast, the foreseeability of harm to the decedent's beneficiaries is more evident. If the will is negligently drafted, the beneficiary may lose a bequest which he or she was intended to receive. *See Marker*, 313 N.W.2d at 5; *see also* App. 848. Here, Dorsey represented Miller & Schroeder in the loan transaction, and Miller & Schroeder had significant financial risks and interests therein. Immediately foreseeable risks of harm to Miller & Schroeder may be its inability to originate the loan, earn a placement fee, sell participations, and collect servicing fees. In contrast, any harm that may result to the Respondents is secondary and attenuated at best. As Judge Frank determined, because the Participation Agreement required Respondents to conduct their own due diligence without reliance on Miller & Schroeder, any harm to Respondents was not foreseeable.[11] *See* App. 850 n.46 (there was "no clear foreseeable harm known to Dorsey").

The third and fourth *Lucas* factors — the degree of certainty that plaintiff suffered injury and causation — also fail to support Respondents. It is undisputed that Miller & Schroeder secured the $15 million President Judgment, and that Respondents were entitled to receive their respective proportionate share of that judgment. Respondents had the opportunity to pursue collection, but chose not to do so. Instead, Respondents assigned their interest in the President Judgment to the Tribe for a discounted payment of $3.4 million and voluntarily waived further claims.

[11] The Court of Appeals also concluded that by virtue of the Participation Agreement, Respondents could not reasonably or justifiably rely on Dorsey's legal advice as a matter of law. *See McIntosh*, 726 N.W.2d at 119-20.

Even assuming the Pledge Agreement is unenforceable against the Tribe, all loan repayment obligations remain intact.[12] The Tribe was obligated to repay President once casino revenues exceeded expenses, even after President was terminated as the casino's manager. *See* App. 65 § 8.10(C). President was then obligated to pay the money received from the Tribe to Miller & Schroeder. *See* App. 379 § 2.02(b) and 411 § 7. Miller & Schroeder would remit any payments received from President to Respondents under the Participation Agreements. *See* App. 328-67. However, the Tribe's repayment obligations were never triggered because the casino's revenues never exceeded operating expenses. *See* App. 562-637. Respondents' participation losses were caused by the casino's poor performance, not Dorsey's actions.

With respect to the fifth *Lucas* factor – prevention of future harm – Respondents incorrectly argue that if they are not allowed to sue Dorsey for legal malpractice, Dorsey is responsible to no one. *See* Resp. Br. at 21-22; 40-41. Dorsey has never maintained that it is responsible to no one. Rather, Dorsey is responsible to its client, Miller & Schroeder. If Miller & Schroeder breached any duty to Respondents, then Respondents could sue Miller & Schroeder for damages suffered as a result, which is exactly what four participants did by filing proofs of claim in Miller & Schroeder's bankruptcy estate. If it is determined that Miller & Schroeder is liable to the participants because of Dorsey's

[12] The Pledge Agreement simply required the Tribe to make any required repayments to an account for the benefit of Miller & Schroeder, instead of President. *See* App. 76-78.

negligent advice, then Miller & Schroeder could pursue claims against Dorsey.[13]

Respondents also argue that they have standing to sue Dorsey because Miller & Schroeder was merely a nominal lender with no incentive to sue Dorsey. *See* Resp. Br. at 31. The *Goldberger* court rejected a similar argument out of hand. In *Goldberger*, the estate beneficiaries 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. 534 N.W.2d at 739. "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.* Just like the attorney in *Goldberger*, Dorsey would not be "shielded" from potential liability if Respondents are not allowed to sue Dorsey.

The sixth *Lucas* factor – imposition of an undue burden on the legal profession – also weighs strongly in favor of Dorsey.[14] Allowing Respondents to sue Dorsey would impact attorneys' duties of loyalty, zealous advocacy, avoidance of conflicts, and confidentiality, and would also exponentially increase the number of potential non-clients to whom attorneys may be liable. *See* Dorsey Op. Br. at 37-40 and Amici Br. at 5-6; *see also Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 769-70 (S.D. 2002).

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[13] The Trustee for Miller & Schroeder asserted a contribution and indemnity claim against Dorsey to recover any money the estate would be required to pay if Bremer successfully prosecuted its proof of claim.

[14] Respondents fail to identify or even address the sixth *Lucas* factor. *See* Resp. Br. at 38-41.

Thus, even if this Court concludes that the *Lucas* factors are relevant, Respondents lack standing to sue Dorsey as a matter of law.

E. <u>**Minnesota Has Never Recognized a "Contract-Based" Third-Party Beneficiary Test, and The Theory is Factually Inapplicable**</u>

Respondents' alternative suggestion that the Court should adopt a "contract-based" third-party beneficiary test to establish Respondents' standing to sue, *see* Resp. Br. at 41-42, should be rejected.

First, a "contract-based" third-party beneficiary theory is not the law in Minnesota. Respondents concede as much by arguing that Minnesota has adopted the "negligence/policy" theory allegedly established in *Marker*. *See* Resp. Br. at 32. Moreover, Respondents do not identify a single Minnesota case that even remotely suggests that Minnesota courts would be favorable to a contract-based test, much less apply the test in this context.

Second, none of the alleged facts cited by Respondents support their argument. While Respondents argue that Dorsey's advice to Miller & Schroeder was conveyed to Respondents, *see* Resp. Br. at 42, Dorsey's advice was <u>never</u> communicated to Respondents. *See supra* p. 3.

Respondents also suggest that Erickson did not "undercut" his affidavit statement that "'Dorsey was retained for the benefit of all the lenders.'" *See* Resp. Br. at 42. But Erickson testified at his deposition that: (1) Dorsey was "retained to represent Miller & Schroeder and I'll leave it at that"; (2) Dorsey owed its duty of loyalty to Miller & Schroeder, not Respondents; and (3) Miller & Schroeder would not have allowed Dorsey to act adverse to Miller & Schroeder's interests. *See* App. 754-55.

Finally, Respondents posit, without record support, that Dorsey knew it was retained to protect Respondents' interests. *See* Resp. Br. at 42. Yet, it is undisputed that there were no communications whatsoever between Dorsey and Respondents, and Dorsey was not told that it was retained to represent Respondents in the loan transaction or that Respondents were the direct and intended beneficiaries of Dorsey's retention. *See* App. 242-44 ¶¶ 12-18; *see also supra* p. 2. In the absence of any such communications, Dorsey could not know whether it was retained to represent Respondents' interests.

Even if this Court adopted a "contract-based" intended third-party beneficiary theory, no facts support its application here.

F. <u>**The Restatement of the Law Governing Lawyers Test Should Not Be Adopted, and Is Factually Inapplicable**</u>

Respondents' other alternative argument, that this Court should adopt § 51 of the Restatement (Third) of the Law Governing Lawyers, *see* Resp. Br. at 43-44, also lacks merit.

First, no Minnesota court has ever adopted or applied the Restatement § 51 test. The treatise cited by Respondents states that the test's adoption would be unwise because it is "novel," "unwarranted," "confusing" and "[un]workable":

> The Restatement approach is unique and questionable. The "primary objectives" inquiry is not the same as the judicially developed, intended-beneficiary standard. The focus of the common law is whether that nonclient is the intended beneficiary of the lawyer's retention; whereas the Restatement asks only if a benefit is "one of the primary objectives. . . ." This deviation from the case law raises factual issues regarding the client's motives. Further, the multiple objectives could be inconsistent, so that claimant's perceptions of the lawyer's obligations could be in conflict with

> the client's objectives. The risk of conflicting interests is minimized, if not eliminated, by "the intended beneficiary" standard.

R. Mallen & J. Smith, *supra* § 7.8, at 838.

Second, even if this Court adopted Restatement § 51, liability is imposed only if: (a) counsel knows that the client intends that "one of the primary objectives of the representation" is to benefit the non-client; and (b) such representation does not impair counsel's obligations to the client; and (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). The undisputed material facts do not satisfy this test.

Respondents cannot satisfy subpart (a) because the undisputed material facts demonstrate that Miller & Schroeder's primary objective in retaining Dorsey was to benefit itself, rather than Respondents.[15] *See supra* Section I.C. Dorsey had no knowledge to the contrary. *Id.*

Respondents cannot satisfy subpart (b), either, because Dorsey could not represent both the seller (Miller & Schroeder) and buyers (Respondents) in the same transaction. "No court can impose a duty of divided loyalty upon a lawyer." *See Hill*, 1994 WL 615049, at *2. *See also supra* Section I.C.3.

Finally, subpart (c) is absent because Dorsey's obligations to Miller & Schroeder can be enforced without conferring upon Respondents standing to sue Dorsey for legal malpractice. *See supra* Section I.D. Even if the adoption of the § 51 standard was legally

[15] Judge Frank also concluded that the main or primary purpose of Dorsey's retention was to benefit Miller & Schroeder, not Bremer. *See* App. 848-49.

prudent, the facts here do not justify its application.

G. <u>Respondents' Foreign Cases Are Inapposite</u>

Respondents cite a number of foreign cases that are allegedly "similar" to this case. *See* Resp. Br. at 43-44. Respondents provide virtually no discussion of these cases, and for good reason. The cases involve: (1) attorneys issuing certifications and reports, *see First Fin. Sav. & Loan Ass'n v. Title Ins. Co.*, 557 F. Supp. 654 (N.D. Ga. 1982) and *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995); (2) specifically identifiable non-clients who were direct and intended beneficiaries, as expressed in the documents drafted by the attorneys, *see Collins v. Binkley*, 750 S.W.2d 737 (Tenn. 1988) and *Friske v. Hogan*, 698 N.W.2d 526 (S.D. 2005); (3) a Restatement § 51 analysis of a non-client's standing, *see Estate of Leonard v. Swift*, 656 N.W.2d 132 (Iowa 2003); and (4) a standing determination made under the *Lucas* factors, without first determining whether the non-client was the direct and intended third-party beneficiary, *see Credit General Ins. Co. v. Midwest Indemnity Corp.*, 872 F. Supp. 523 (N.D. Ill. 1995).

In contrast, here: (1) Dorsey issued no certification or opinion letter to Respondents, and made no other representations that could have been reasonably relied upon by Respondents; (2) Dorsey did not know Respondents' identities, and Dorsey's services were complete before Respondents purchased their participation interests; (3) Restatement § 51 is inapplicable; and (4) Respondents were not the direct and intended beneficiaries of Dorsey's representation of Miller & Schroeder and, thus, the *Lucas* factors are inapplicable.

Analogous case law from other jurisdictions actually supports a reversal of the

Court of Appeals' decision in cases like this one where plaintiffs' identities are unknown and either actual or potential adversity exists. In *Zenith*, a reinsurer lacked standing to sue the ceding insurer's attorney even though the ceding insurer would be affected by the attorney's representation because of the potential for conflicts between the reinsurer and ceding insurer. 148 Cal. App. 4th at 1008. Likewise, in *One National Bank v. Antonellis*, 80 F.3d 606, 610 (1st Cir. 1996), the assignee of a second mortgage lacked standing to sue the mortgagee's attorney, even though both parties would benefit from an accurate certificate of title, because: (i) the assignee was unknown at the time of the attorney's retention; and (ii) there was a potential for conflict between the mortgagee and assignee. And, in *Briggs v. Sterner*, 529 F. Supp. 1155, 1178 (S.D. Iowa 1981), investors lacked standing to sue the corporation's attorneys because the attorneys had no way of knowing the investors' identities at the time the legal services were rendered and, thus, it was unforeseeable that the investors would rely on the attorneys.

In sum, because 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 Court of Appeals' contrary decision should be reversed.

II. <u>RESPONDENTS HAD NO IMPLIED CONTRACTUAL RELATIONSHIP WITH DORSEY</u>

Respondents do not seriously contend that they had an implied contractual attorney-client relationship with Dorsey. Although Respondents make a blanket assertion that "[a]t a minimum, there is a question of fact as to whether [an implied contractual attorney-client] relationship existed," Respondents fail to cite a single allegedly disputed material fact. *See* Resp. Br. at 45-47.

Respondents' litany of alleged "admissions" by Dorsey that purportedly "establish that there was an implied contract" also are erroneous and lack record support. For the reasons previously stated, Dorsey does <u>not</u> admit that: (i) its work was for the purpose of assisting Respondents; (ii) it knew that Miller & Schroeder would not retain an interest in the St. Regis loans; (iii) the loans would not have closed absent Miller & Schroeder's receipt of commitments from Respondents; or (iv) Respondents suffered the entire loss by virtue of President's default.

Moreover, Respondents' assertions are legally irrelevant. Even assuming the admissions proffered by Respondents are true, Respondents do not, and cannot, cite a single Minnesota case finding an implied contractual attorney-client relationship to exist under similar facts.[16] To the contrary, the undisputed material facts of this case provide no basis for this Court to recognize, for the first time in Minnesota, an implied contractual attorney-client relationship.

[16] Respondents inaccurately assert that in *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970) this Court concluded that a contractual attorney-client relationship was created "where [an] attorney began work." Resp. Br. at 46. Rather, this Court concluded that plaintiff presented sufficient evidence of an express contract with the attorney because there was a retention agreement, the attorney received medical authorizations from plaintiff, plaintiff had communications with the attorney and was advised that "'it's all been taken care of.'" *Christy*, 179 N.W.2d at 294. None of these facts exist here. Moreover, while Respondents cite *Schuler v. Meschke*, 435 N.W.2d 156 (Minn. Ct. App. 1989), the Court of Appeals concluded therein that "the correspondence did not establish a contractual relationship between [the attorney] and respondents." *Id.* at 162.

Minnesota law is clear that in the absence of: (i) a request by the client to the attorney to provide legal services; (ii) an agreement by the attorney to provide legal services; (iii) communications between the attorney and alleged client; and (iv) payment of legal fees by the client, there is no contractual attorney-client relationship as a matter of law. *See* Dorsey Op. Br. at 22-25. Respondents' implied contract argument should be rejected, and the Court of Appeals' 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: June 4, 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 6,924 words, excluding the Table of Contents, Table of Authorities, and Appendix.

Dated: June 4, 2007

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