

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

<p>In re:</p> <p>SRC Holding Corporation, f/k/a Miller & Schroeder, Inc., and its subsidiaries,</p> <p style="text-align: right;">Debtors.</p>	<p style="text-align: center;">Chapter 7 Case BKY Case Nos. 02-40284 to 02-40286 Jointly Administered</p>
<p>McIntosh County Bank, First State Bank Of Bigfork, Security First Bank Of North Dakota, Campbell County Bank, Inc., Security State Bank, Choice Financial Group, United Community Bank Of North Dakota, Community National Bank, Lake Country State Bank, Bank of Luxemburg, People State Bank Of Madison Lake, New Auburn Investment, Inc., Oregon Community Bank & Trust, State Bank Of Park Rapids, Farmers State Bank, Citizens State Bank Of Roseau, First Independent Bank, First National Bank Of The North, Security State Bank Of Sebeka, Northstate, LLC, First American Bank & Trust, First Federal Savings Bank Of The Midwest, North Country Bank & Trust, Dacotah Bank – Valley City, First National Bank & Trust Co. Of Williston, Ultima Bank Minnesota, Security Bank Usa, The Ramsey National Bank And Trust Co. Of Devils Lake, Mcville State Bank, Page State Bank, First National Bank Of The North, Brian F. Leonard, Trustee, and Marshall Investments Corporation, a Delaware Corporation,</p> <p style="text-align: right;">Plaintiffs,</p> <p>v.</p> <p>Dorsey & Whitney LLP, a Minnesota Limited Liability Partnership,</p> <p style="text-align: right;">Defendant.</p>	<p style="text-align: center;">ADV Case No. 03-4291</p> <p style="text-align: center;">DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT</p>

INTRODUCTION

In February 1999, Miller & Schroeder Financial, Inc. ("Miller & Schroeder") made two loans totaling more than \$12 million to President R.C. – St. Regis Management Company ("President") to assist President in financing the development, construction and operation of a casino in upstate New York owned by the St. Regis Mohawk Tribe ("Tribe"). Miller & Schroeder hired Defendant Dorsey & Whitney LLP ("Dorsey") to structure and document the loan transaction. After the loans were closed and funded, Miller & Schroeder sold the entire beneficial interest in the two loans to 32 individual banks, 31 of which are plaintiffs in this action ("Bank Participants").

It is undisputed that, after the casino was constructed and operating, President refused to perform its repayment obligations with respect to the two loans. Miller & Schroeder, on behalf of the Bank Participants, thereafter obtained a \$15 million judgment against President. In a desperate attempt to find someone else to blame for President's refusal to pay, the Bank Participants have now turned their guns on Dorsey, concocting an incredible claim that they were Dorsey's clients and that Dorsey acted solely for their direct benefit in structuring and documenting the loan transaction. This misguided and unsupported allegation forms the basis of the Bank Participants' legal malpractice, breach of contract and negligent misrepresentation claims against Dorsey in Counts I, II and III of the Adversary Complaint.

The Bank Participants' claims against Dorsey fundamentally lack any basis in law, fact or reality. The undisputed facts establish that: (1) Dorsey's sole client in the loan transaction was Miller & Schroeder; (2) Dorsey intended to and, in fact, did represent only Miller & Schroeder; (3) Dorsey did not and could not represent the Bank Participants in any capacity; and (4) the Bank Participants were admittedly not the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder.

Dorsey was retained by Miller & Schroeder to provide legal advice and services solely to Miller & Schroeder in connection with the structuring, documentation and closing of the two loans (the "Transaction"). Dorsey had no direct communications, either oral or written, with any of the Bank Participants regarding the Transaction. Dorsey had no oral or written agreement, either express or implied, with any of the Bank Participants to represent them in connection with the Transaction. The Bank Participants did not sign any written retainer agreement or engagement letter with Dorsey. Nor did the Bank Participants expressly request, either orally or in writing, that Dorsey represent them in connection with the Transaction. Miller & Schroeder never advised Dorsey that it had retained Dorsey for the benefit of the Bank Participants. Dorsey sent billing statements to and collected fees for the Transaction from Miller & Schroeder, not from any Bank Participant. Finally, Dorsey was ethically prohibited — by the Rules of Professional Conduct and Dorsey's own internal ethics policy — from simultaneously representing Miller & Schroeder and the Bank Participants in the Transaction.

Incidentally, the Bank Participants' lawsuit against Dorsey is not their only attempt to punish someone for President's refusal to pay. Within a few months of suing Dorsey, on December 8, 2003, the Bank Participants simultaneously commenced two separate actions in New York state and federal courts against the Tribe, Park Place Entertainment Corporation ("Park Place") and certain executives of Park Place and President. *See McIntosh County Bank et al. v. St. Regis Mohawk Tribe*, No. 03-018263 (N.Y. Sup. Ct., Nassau County Dec. 8, 2003) (Asmus Aff., Ex. A) and *McIntosh County Bank et al. v. Park Place Entertainment Corp., Clive Cummis, Ivan Kaufman and Walter Horn*, No. CR-03-6181 (E.D.N.Y. Dec. 8, 2003) (Asmus Aff., Ex. B). In these actions, the Bank Participants seek in excess of \$20 million in damages from the Tribe and \$25 million in compensatory damages and \$300 million in punitive damages

from Park Place and the executives. (*Id.*) As discussed more fully herein, these New York actions further highlight some of the serious factual and legal misconceptions that plague the Bank Participants' claims.

The Trustee's breach of fiduciary duty claim in Count IV is similarly misguided. The gravamen of the Trustee's claim is that Dorsey had a conflict of interest when it represented Miller & Schroeder in litigation commenced in 2000 by Bremer Bank, the only Bank Participant who has conspicuously not joined in this action. The Trustee's claim fails for at least three equally dispositive reasons. First, because the Bank Participants had no attorney-client relationship with Dorsey in connection with Transaction, Dorsey's representation of Miller & Schroeder in the Bremer litigation did not pose any conflict of interest that would have precluded Dorsey's representation of Miller & Schroeder. Second, at the time Bremer commenced its lawsuit against Miller & Schroeder, Bremer advised Miller & Schroeder that it believed Dorsey gave Miller & Schroeder erroneous legal advice in connection with the Transaction. Miller & Schroeder nonetheless retained Dorsey despite Bremer's allegations, thereby waiving any claim that Dorsey was precluded from accepting the representation. Third, Dorsey had no obligation under the Minnesota Rules of Professional Conduct to advise Miller & Schroeder of any potential third-party claim because no such claim existed. The Trustee's claim must necessarily fail because Dorsey did not breach any fiduciary duty to Miller & Schroeder.

Because the undisputed facts establish that Dorsey is entitled to judgment as a matter of law on all claims, Dorsey brings this motion for summary judgment pursuant to Fed. R. Civ. P. 56 and Bankruptcy Rule 7056 and respectfully requests that the Court dismiss the Adversary Complaint in its entirety.

STATEMENT OF ISSUES WITH AUTHORITY

1. Is Dorsey entitled to summary judgment on the Bank Participants' legal malpractice claim?

ANSWER: Yes.

(a) Did Dorsey and the Bank Participants have an attorney-client relationship under the contract theory?

ANSWER: No.

- *Spannaus v. Larkin, Hoffman, Daly & Lindgren*, 368 N.W.2d 395, 398-99 (Minn. Ct. App. 1985), *review denied* (Minn. Aug. 20, 1985)
- *Sandum v. Doherty, Rumble & Butler, P.A.*, No. C7-94-801, 1994 WL 593925 (Minn. Ct. App. Nov. 1, 1994) (Asmus Aff., Ex. P)
- *TJD Dissolution Corp. v. Savoie Supply Co.*, 460 N.W.2d 59, 62 (Minn. Ct. App. 1990)
- *Hill v. Schaffner*, No. C5-94-960, 1994 WL 615049, at *1 (Minn. Ct. App. Nov. 8, 1994) (Asmus Aff., Ex. Q)

(b) Did Dorsey and the Bank Participants have an attorney-client relationship under the tort theory?

ANSWER: No.

- *Schuler v. Meschke*, 435 N.W.2d 156, 161-62 (Minn. Ct. App. 1989)
- *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 30 (Minn. 1982)
- *TJD Dissolution Corp.*, 460 N.W.2d at 62
- *Gramling v. Memorial Blood Centers of Minn.*, 601 N.W.2d 457, 460 (Minn. Ct. App. 1999)

(c) Were the Bank Participants the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder?

ANSWER: No.

- *Holmes v. Winners Entm't, Inc.*, 531 N.W.2d 502, 505 (Minn. Ct. App. 1995)
- *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995)
- *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981) (en banc)
- *Francis v. Piper*, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999)

2. Is Dorsey entitled to summary judgment on the Bank Participants' breach of contract claim because the Bank Participants had no contract with Dorsey?

ANSWER: Yes.

- *Sandum*, 1994 WL 593925 (Asmus Aff., Ex. P)
- *TJD Dissolution Corp.*, 460 N.W.2d at 62
- *Gerdin v. Princeton State Bank*, 371 N.W.2d 5, 7 (Minn. Ct. App. 1985), *aff'd*, 384 N.W.2d 868 (Minn. 1986)
- *Hill*, 1994 WL 615049, at *1 (Asmus Aff., Ex. Q)

3. Is Dorsey entitled to summary judgment on the Bank Participants' negligent misrepresentation claim because Dorsey made no representations to the Bank Participants?

ANSWER: Yes.

- *Schuler*, 435 N.W.2d at 162
- *TJD Dissolution Corp.*, 460 N.W.2d at 63
- *Eustis v. David Agency, Inc.*, 417 N.W.2d 295, 298 (Minn. Ct. App. 1987)

4. Is Dorsey entitled to summary judgment on the Trustee's breach of fiduciary duty claim?

ANSWER: Yes.

- *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982)
- Minn. R. Prof. Conduct 1.7(b)

IDENTIFICATION OF THE RECORD

1. Excerpts from April 27, 2004 Deposition of Mary Jo Brenden;
2. Excerpts from April 28, 2004 Deposition of Paula Rindels;
3. Excerpts from April 28, 2004 Deposition of Mark Jarboe;
4. May 26, 2004 Affidavit of Paula S. Rindels, with Exhibit A;
5. May 25, 2004 Affidavit of Mark A. Jarboe, with Exhibit A;
6. May 25, 2004 Affidavit of William J. Wernz;
7. May 28, 2004 Affidavit of Jason R. Asmus, with Exhibits A-W.

STATEMENT OF UNDISPUTED FACTS

A. The Management Agreement Between President and the Tribe

Effective February 27, 1997, President entered into a Fourth Amended and Restated Management Agreement ("Management Agreement") with the Tribe. (Asmus Aff., Ex. C.) Under the terms of the Management Agreement, President agreed to finance, construct and manage the Akwesasne Mohawk Casino in Hogansburg, New York ("Casino") on the Tribe's reservation land near the Canadian border. (*Id.*) President agreed to furnish the capital – up to \$20 million – needed for all development costs and expenses incurred in developing and constructing the Casino ("Development Expenses"). (*Id.*, § 6.1(B).) The Management Agreement provided that after the Casino was completed, President would manage the Casino for five years from the date of its opening. (*Id.*, § 5.1.) As compensation for its services, President would receive a management fee, as well as reimbursement of its \$20 million in development costs and expenses. (*Id.*, §§ 1.19 & 8.10.) Pursuant to the terms of the Management Agreement, Tribe was entitled to receive 75% of the net revenues generated by the Casino ("Tribe Revenues"). (*Id.*, § 8.6(D).) President received the remaining 25% of the Casino's net revenues as a portion of its compensation for its management services. (*Id.*)

The Development Expenses advanced by President "constitute[d] a loan from [President] to TRIBE, reimbursable to [President], with interest accruing. . . at a rate equal to the prime rate of Citibank plus five percent (5%)." (*Id.*, § 6.01(B).) The Management Agreement required the Tribe to reimburse President for Development Expenses provided up to the \$20 million ceiling:

[President's] contribution of the Development Expenses incurred by [President] pursuant to Section 6.1(B) plus interest shall be repaid by the TRIBE as follows: (i) the Development Expenses up to and including the amount of Twelve Million Dollars (\$12,000,000) shall be repaid with monthly payments by the Tribal Gaming Operation on behalf of the Tribe from the Revenue

Account in the amount of the Monthly Base Payment; and (ii) contemporaneously with the payments described in (i), any and all Development Expenses above Twelve Million Dollars (\$12,000,000) shall be repaid with payments by the Tribal Gaming Operation from the Revenue Account on behalf of the TRIBE in the amount of Five Hundred Thousand Dollars (\$500,000) per month until all principal and interest amounts are repaid in full. Such payments shall be made after the payment of TRIBE's guaranteed monthly minimum payment and after the split of the Gaming Net Revenues and Non-Gaming Revenues, but prior to the actual distribution to TRIBE of the remaining monies due TRIBE pursuant to the split (other than the guaranteed monthly payment, which shall in no case be reduced).

(*Id.*, § 8.10(C).) Since the Management Agreement only obligated the Tribe to repay the Development Expenses out of the "Revenue Account," the Tribe was not obligated to repay any of the Development Expenses until there were sufficient net revenues from Casino operations, after payment of operating expenses, to permit repayment. (*Id.*, §§ 6.1(B) and 8.10(C).)

The Tribe signed a promissory note in favor of President on or about January 14, 1998 promising to repay all Development Expenses up to the \$20 million cap in the Management Agreement. *See* Complaint ¶ 38.

B. The St. Regis I & II Loans

After executing the Management Agreement, sometime in 1998 President began negotiations with Miller & Schroeder for Miller & Schroeder to make loans to President to assist in financing the construction of the Casino, as well as financing the acquisition of equipment, furniture and fixtures for the Casino and the St. Regis Mohawk Bingo Palace. *See* Complaint ¶ 51. Miller & Schroeder ultimately agreed to make two loans to President – a Senior Lien Construction Loan in the amount of \$8,624,000 ("St. Regis I Loan") and a Senior Lien Furniture, Fixtures & Equipment Loan in the amount of \$3,492,000 ("St. Regis II Loan") (collectively, the "Loans"). *Id.* at ¶¶ 40 and 42. Payment of the Loans was to be secured by a pledge of, or a security interest in, President's interest in the management fees and repayment by the Tribe of the

Development Expenses owed by the Tribe to President under the Management Agreement (the "Pledged Revenues"). *Id.* at ¶¶ 41 and 43.

C. Dorsey's Representation of Miller & Schroeder

In November 1998, Miller & Schroeder retained Dorsey to structure and document the Loans. (Jarboe Depo. at 12; Jarboe Aff. ¶¶ 3, 6.) Paula Rindels ("Rindels") was the Dorsey attorney primarily responsible for structuring and documenting the Loans for Miller & Schroeder. (Rindels Depo. at 31; Jarboe Depo. at 25; Rindels Aff. ¶ 3; Jarboe Aff. ¶ 8.) Ms. Rindels was the principal drafter of the necessary loan documents for Miller & Schroeder and "participated in helping [Miller & Schroeder] put together the necessary pieces of the transaction." (Rindels Depo. at 29.) Ms. Rindels had also previously represented Miller & Schroeder on loans that Miller & Schroeder made to various tribes. (Rindels Depo. at 21-22.) In those approximately 10-15 loan transactions, Dorsey did not represent any of the banks who eventually purchased participation interests in those loans. (Rindels Aff. ¶ 4.)

At no time did Miller & Schroeder advise Dorsey that it retained Dorsey to represent the banks that would eventually purchase participation interests in the Loans. (Rindels Depo. at 67; Rindels Aff. ¶ 7; Jarboe Aff. ¶ 4.) Nor did Miller & Schroeder ever tell Dorsey that the participating banks were the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder. (Rindels Depo. at 68; Rindels Aff. ¶ 8; Jarboe Aff. ¶ 9.) Dorsey had no direct oral or written communications with any Bank Participant in connection with the Transaction. (Rindels Depo. at 68; Rindels Aff. ¶ 10; Jarboe Aff. ¶ 11.) In fact, from the time Dorsey was hired through the closing and funding of the Loans, Dorsey did not even know the identity of any of the Bank Participants. (Rindels Depo. at 45-46, 55-56; Jarboe Depo. at 33; Rindels Aff. ¶ 9; Jarboe Aff. ¶ 10.)

During the course of its representation of Miller & Schroeder, Dorsey drafted various documents in connection with the Transaction. (Rindels Depo. at 40.) The most relevant documents included: (1) a loan agreement for each of the St. Regis Loans ("Loan Agreements"); (2) a corresponding promissory note for each Loan ("Promissory Notes"); (3) an escrow agreement ("Escrow Agreement"); and (4) the Notice and Acknowledgement of Pledge ("Pledge Agreement"). (Rindels Aff. ¶ 11.) Dorsey had no communications or contact with any of the Bank Participants during the drafting and execution of any of the Loan documents. (Rindels Depo. at 67-68; Rindels Aff. ¶ 12; Jarboe Aff. ¶ 11.)

1. The Loan Agreements

The Loan Agreements, which were executed by Miller & Schroeder and President on February 24, 1999, obligate President to repay Miller & Schroeder the principal amount of the Loans, plus interest, in equal monthly installments:

Commencing June 20, 1999, and continuing on each Monthly Payment Date thereafter to and including the Final Maturity Date, the unpaid principal balance of the Note shall be payable in equal monthly installments of principal and interest sufficient to amortize fully the unpaid principal balance thereof by the Final Maturity Date.

(Asmus Aff., Exs. D & E, § 2.02(b).) As security for repayment of the Loans, President granted Miller & Schroeder a lien on and a security interest in Pledged Revenues:

As security for the payment and performance of all payment and other obligations of [President] pursuant to the Note and this [Loan] Agreement, [President] hereby pledges and grants a first and prior security interest to the Lender in the Pledged Revenues. Pursuant to the [Pledge Agreement], [President] has directed the Tribe to pay all Pledged Revenues to an escrow agent designated by [President] and the Lender. [President] and the Lender hereby agree that the Tribe shall be further directed to pay all Pledged Revenues to the Escrow Agent for deposit in the Pledged Revenues Fund created pursuant to the Escrow Agreement.

(*Id.*, § 3.)

The Loan Agreements provide that the Loans were not made to the Tribe or supported directly by the Tribe's credit, but were rather made directly to President. (*Id.*) No real estate, personal property, or guaranty of the Tribe was given to support repayment of the Loans or serve as additional capital. (*Id.*) As such, the Tribe was not an obligor of either of the Loans. (*Id.*) The Loan Agreements did not create a direct payment obligation of the Tribe to Miller & Schroeder. (*Id.*)

2. The Promissory Notes

The Promissory Notes, also executed on February 24, 1999, secure President's repayment obligations to Miller & Schroeder. (Asmus Aff., Exs. F & G.) The Promissory Notes provide that President would pay interest-only payments from March 20 until May 20, 1999, with principal and interest payments occurring thereafter until the balance of the Loans were repaid. (*Id.*, § 7.) Payment of the Promissory Notes was to be made by President from the Pledged Revenues:

The payment and performance of this Note are secured by the Loan Agreement and by an Escrow Agreement. . . . Pursuant to the Loan Agreement, [President] has pledged to the Lender a first and priority security interest in payment of management fees and loan repayment amounts (the "Pledged Revenues") required to be paid by St. Regis Mohawk Tribe . . . to [President] pursuant to the Fourth Amended and Restated Management Agreement. . . .

(*Id.*, § 10.)

3. The Escrow Agreement

In connection with the Loan Agreements and Promissory Notes, Miller & Schroeder and President executed the Escrow Agreement on February 24, 1999. (Asmus Aff., Ex. H.) The Escrow Agreement established U.S. Bank Trust, National Association ("U.S. Bank") as the escrow agent to receive the Pledged Revenues on behalf of Miller & Schroeder and hold them

irrevocably in trust for the benefit of Miller & Schroeder. (*Id.*, § 2.) President granted to Miller & Schroeder a first and prior security interest in the monies in the escrow fund. (*Id.*)

4. The Pledge Agreement

Dorsey also drafted the Pledge Agreement, which was executed as of February 12, 1999 by the Tribe, President and Miller & Schroeder. (Asmus Aff., Ex. I.) Pursuant to the Pledge Agreement, the Tribe recognized its obligation under the Management Agreement to make monthly reimbursements of President's development expenses and an additional monthly payment of \$500,000:

That loan [from President to the Tribe] is to be repaid by the Tribe to [President] in monthly payments consisting of a "Monthly Base Payment", as defined in Section 1.21 of the [Management] Agreement, and an additional payment of \$500,000, as described in Section 8.10(C) of the [Management] Agreement (the "Repayment Amounts"). As provided in Section 10.7 of the [Management] Agreement, the obligation of the Tribe to pay the Repayment Amounts shall survive any termination of the Agreement for cause until the total Development Expenses, with interest, have been repaid by the Tribe to [President].

(*Id.* at ¶ A.) Tribe further recognized that President had pledged to Miller & Schroeder the amounts due to President from Tribe:

[President] and Miller & Schroeder Investments Corporation ("M&S") have entered into a loan agreement pursuant to which M&S will lend money (the "Loan") to [President] in order to finance a portion of the Development Expenses. As security for the repayment of the Loan, with interest, [President] has pledged to M&S the Repayment Amounts and all other amounts payable by the Tribe to [President] under the [Management] Agreement.

(*Id.* at ¶ D.) The parties acknowledged that the Loans were the obligation of President, not the Tribe. (*Id.* at ¶ 1.) The Tribe agreed to pay the Pledged Revenues into an escrow account designated by Miller & Schroeder and President:

The Tribe acknowledges that [President] has pledged its interest in the Agreement Payments to M&S as security for repayment of the

Loan. Upon notice to the Tribe, jointly given by [President] and M&S, Tribe agrees that the Agreement Payments will be paid by Tribe, or on its behalf, to an escrow account established with a state or national bank and designated by [President] and M&S.

(*Id.* at ¶ 2.) On February 24, 1999, President and Miller & Schroeder gave the Tribe notice that U.S. Bank would act as escrow agent. (Asmus Aff., Ex. J.)

The Pledge Agreement did not, however, alter the terms of the Management Agreement regarding the Tribe's obligation to repay the Loans. That is, even after the Pledge Agreement was executed, the Tribe was not obligated to repay any Development Expenses until there were sufficient net revenues from the operations of the Casino, after payment of the Casino's operating expenses, to permit repayment. (Asmus Aff., Ex. C, §§ 6.1(B) and 8.10(C).)

D. Dorsey's Lack of Knowledge or Contact with the Bank Participants

At no time during Dorsey's representation of Miller & Schroeder did Miller & Schroeder ever advise Dorsey that it had retained Dorsey to represent the Bank Participants:

Q: Did Miller & Schoeder ever ask you or Dorsey & Whitney to the best of your knowledge to represent any potential or future participants as clients of Dorsey in connection with this Transaction?

* * *

A: They did not.

(Rindels Depo. at 67) *See also* Rindels Aff. ¶¶ 7-8; Jarboe Aff. ¶ 4. Nor did Miller & Schroeder ever tell Dorsey that the Bank Participants were the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder:

Q: Did Miller & Schroeder ever suggest to you that in connection with these two loans that the participants were the intended beneficiary of the legal services being provided by Dorsey and Dorsey in some fashion should protect the participants' interests?

A: No.

(Rindels Depo. at 68.) *See also* Rindels Aff. ¶ 8; Jarboe Aff. ¶ 9. Mary Jo Brenden, Miller & Schroeder's in house counsel, agrees:

Q: Did you ever have a conversation with anybody at Dorsey & Whitney during the time period they were representing Miller & Schroeder in connection with the two loans we have been discussing where you instructed them that they were to take direction in connection with this transaction from any one of the bank participants?

A: Not to my knowledge.

(Brenden Depo. at 37.) In fact, Dorsey did not even know the identity of any of the Bank Participants at any time prior to the closing and funding of the Loans:

Q: Now, what discussions did you have with Miller & Schroeder about the Bank Participants prior to closing the loan in February of '99?

A: None.

Q: You never discussed the issue of bank participants with Miller & Schroeder prior to closing?

A: No.

* * *

Q: Were you aware that some of the banks had committed to buy participation interests in this loan before the loan closed on February 24, 1999?

A: No.

(Rindels Depo. at 45-46 and 55.) *See also* Rindels Aff. at ¶ 9.

Q: Now, did you have any discussions with Miller & Schroeder about bank participants or the fact that the loan was going to be sold in participations before the loan closed in February of 1999?

A: No. I don't believe so.

(Jarboe Depo. at 33.) *See also* Jarboe Aff. at ¶ 10.

Dorsey had no communications, either oral or written, with the Bank Participants prior to the closing and funding of the Loans:

Q: Am I correct, if I understand your testimony, please correct me if I'm wrong, you did not have a single conversation with any participant or future or possible participant prior to the closing or funding of the loan?

A: I did not.

Q: Do you know of anybody at Dorsey who had a direct conversation of any kind with any potential or existing participant for these two loans prior to the closing?

* * *

A. No.

(Rindels Depo. at 67-68.) *See also* Rindels Aff. at ¶ 10; Jarboe Aff. at ¶ 11. Miller & Schroeder confirmed that no such communications ever occurred.

Q: Are you aware of in connection with this transaction a single communication with a single participant prior to the closing and funding of the loan?

A: Communication from Miller & Schroeder?

Q: No. I'm sorry. From Dorsey to a participant?

A: I am not.

(Brenden Depo. at 14.)

In addition, the Bank Participants had no direct communications with Dorsey, either orally or in writing, in which they advised Dorsey that they considered themselves the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder in the Transaction. (Jarboe Aff. ¶ 13; Rindels Aff. ¶ 14.) Dorsey did not send any documents to the Bank Participants. (Jarboe Aff. ¶ 15; Rindels Aff. ¶ 16.) Indeed, the Bank Participants have not produced even one document that Dorsey sent directly to the Bank Participants prior to the closing and funding of the Loans. (Asmus Aff., Exs. N & O.) Dorsey had no oral or written

agreement, either express or implied, with any of the Bank Participants to provide legal advice or services in connection with the Transaction. (Jarboe Aff. ¶ 16; Rindels Aff. ¶ 17.) Dorsey did not sign any written retainer agreement or engagement letter with any of the Bank Participants. (Jarboe Aff. ¶ 17; Rindels Aff. ¶ 18.) Nor did the Bank Participants expressly request, either orally or in writing, that Dorsey represent them in connection with the Transaction. (Jarboe Aff. ¶ 18; Rindels Aff. ¶ 19.) Dorsey sent statements for legal services rendered in connection with the Transaction to Miller & Schroeder, not to any Bank Participant. (Brenden Depo. at 18; Jarboe Aff. ¶ 19; Rindels Aff. ¶ 20 and Ex. A.)

E. The Bank Participants Approve Closing and Funding the Loans Without NIGC Approval

Pursuant to the Indian Gaming Regulatory Act, the National Indian Gaming Commission ("NIGC") must approve any management contracts, certain types of collateral agreements, assignments of rights under management contracts or modifications of management contracts before such agreements are valid and enforceable. *See* Complaint ¶ 66. The Bank Participants claim that Dorsey's alleged advice to Miller & Schroeder that the Pledge Agreement likely did not require NIGC approval was erroneous. The Bank Participants claim that the Loans are uncollectible because the NIGC did not approve the Pledge Agreement, therefore causing them damages. *Id.* at ¶¶ 76, 89.¹

Despite their after-the-fact protestations, the Bank Participants were fully aware that the NIGC had not yet approved the Pledge Agreement prior to the closing and funding of the Loans and well before they purchased their respective participation interests. On February 23, 1999,

¹ Pursuant to the parties' agreement concerning the issues subject to this summary judgment motion, the issue regarding whether Dorsey's advice concerning NIGC was correct is not ripe for determination at this time. Nonetheless, Dorsey asserts that its advice was absolutely legally correct and accurate. And the Bank Participants admit in their New York lawsuit against the Tribe that the Pledge Agreement, without NIGC approval, is enforceable. (Asmus Aff., Ex. A.)

Miller & Schroeder sent a memorandum to the then-known potential Bank Participants advising them that the NIGC had not yet approved the Pledge Agreement ("Approval Memorandum"). (Asmus Aff., Ex. K.) Miller & Schroeder advised the Bank Participants that, notwithstanding the lack of NIGC approval, President wanted to move forward. (*Id.*) Miller & Schroeder thus requested that the Bank Participants approve closing and funding of the Loans without NIGC approval of 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.* at ¶ 6.) In response to the Approval Memorandum, a majority of the then-known Bank Participants sent to Miller & Schroeder their approval of the closing and funding of the Loans without NIGC approval of the Pledge Agreement. (Asmus Aff., Ex. K.) The Loans closed and funded on February 24, 1999. *See* Complaint ¶ 39.

Dorsey did not draft the Approval Memorandum, nor did it have any communications with Miller & Schroeder or any of the Bank Participants regarding the Approval Memorandum:

Q: Do you recall you or anyone within your law firm either having discussions or making reference or records with respect to what participants had agreed to buy participation with certain NIGC approvals not being obtained?

A: No.

Q: That was nothing that you participated in?

A: No, it was not.

Q: To the best of your knowledge, did anyone else at Dorsey participate in that?

A: No.

(Rindels Depo. at 56.) *See also* Rindels Aff. at ¶ 21.

Q: With respect to your work on the St. Regis loans, were you aware of there being contacts between Miller & Schroeder and various participants in the week or two before the St. Regis loan closed about issues about NIGC approval on related matters?

A: I don't believe so, no.

* * *

Q: Well, did you have any discussions with Miller & Schroeder in February of 1999 as to what information, if any, should be provided to bank participants regarding any issues with respect to the NIGC?

A: I do not recall any such discussions.

(Jarboe Depo. at 25, 40.) *See also* Jarboe Aff. at ¶ 20. Therefore, without any input from Dorsey, the Bank Participants knowingly and voluntarily approved the closing and funding of the Loans without NIGC approval.

F. The Participation Agreements

After the closing and funding of the Loans, Miller & Schroeder negotiated and executed Participation Agreements with 32 individual banks, participating out the entire balance of both Loans. *See* Complaint ¶ 45. Dorsey did not draft the Participation Agreements. (Jarboe Depo. at 33; Rindels Depo. at 58; Jarboe Aff. ¶ 21; Rindels Aff. ¶ 22.) The Participation Agreements were drafted internally by Miller & Schroeder. (Brenden Depo. at 24.) Each Bank Participant signed its respective Participation Agreement after the closing and funding of the Loans sometime between March 1 and March 20, 1999.

The Participation Agreements contain critical language that further diminishes the Bank Participants' claims against Dorsey. First, in the Participation Agreements the Bank Participants

acknowledge that they received and made a complete and independent examination of all Loan documents, including the Pledge Agreement, and approved of same:

Participant has received and made a complete examination of copies of all Loan Documents it requires to be examined and approves of the form and content of the same. Participant acknowledges that Participant has been provided with or granted access to all of the financial and other information that Participant has requested or believes to be necessary to enable Participant to make an independent and informed judgment with respect to the Collateral, 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.

(Asmus Aff., Exs. L & M, § 3.1.) The Participation Agreements further provide that Miller & Schroeder made no representations or warranties concerning the legality, validity, enforceability or collectibility of the Loans or any documentation relating thereto:

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. 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.

(*Id.*, § 5.2.) The Participation Agreements also absolve Miller & Schroeder of all liability for actions taken on the advice of counsel, accountants or other professionals:

In the exercise of any of its duties or powers or in its administration of the Loan, the Lender may act on the advice of or information obtained from any accountant, attorney, appraiser,

evaluator, surveyor, engineer or architect or other expert and shall not be responsible for any loss occasioned by acting thereon and shall be entitled to take legal or other advice and employ such assistance as may be necessary to the proper discharge of its duties and to pay proper and reasonable compensation for all such legal and other advice or assistance which compensation shall be an "Extraordinary Expense" and, upon demand of Lender, shall be paid by the Participant in its Participation Percentage.

(*Id.*, § 5.3.) The agreement provides that Miller & Schroeder is "not responsible for any negligence or misconduct on the part of any accountant, attorney, appraiser, evaluator, surveyor, engineer or architect or other expert." (*Id.*)

Miller & Schroeder required the Bank Participants to agree to and accept these provisions in the Participation Agreements:

Q: Right. And that was an important provision, you weren't having them to rely on anything that you may have said or Miller & Schroeder may have said or a salesperson may have said, that they did their own independent due diligence and made their own decision and didn't rely on any reps or warranties of Miller & Schroeder, right?

A: Right.

Q: Correct?

A: That's correct.

* * *

Q: Again, I just want to refer you to paragraph 5.2 on page 9. Again, the no warranty provision. That was a provision, again, to the extent it was signed, it was a provision that Miller & Schroeder required as far as the participation agreements?

A: Yes.

Q: Now, and that would be true of paragraph 5.3, where Miller & Schroeder states that it will not be liable for any negligence or default save the direct acts or omissions of itself and its employees and then only arising out of gross negligence or willful misconduct?

* * *

Q: That was a valid and enforceable part of the agreement that you had with the participants?

* * *

A: Yes.

(Brenden Depo. at 31-32.)

As the foregoing makes clear, there are no facts that support any of the Bank Participants' or the Trustees' claims.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

A motion for summary judgment must be granted if the evidence and affidavits 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." Fed. R. Civ. P. 56(c). A fact is material only when its resolution might effect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Id.* at 252.

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). "The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing court's trial time for those cases that really do raise genuine issues of material fact." *City of Mount Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273 (8th Cir. 1988).

Once a summary judgment motion has been made and properly supported, the non-moving party may not rest upon the mere allegations of their pleadings, but must produce significant probative evidence demonstrating a genuine issue for trial. Fed. R. Civ. P. 56(e); *see*

also *Anderson*, 477 U.S. at 248-49. If the opposing party fails to carry that burden, or fails to establish the existence of an essential element of its case on which the party will bear the burden of proof at trial, summary judgment should be granted. *Celotex*, 477 U.S. at 322. "[A] complete failure in proof regarding an essential element renders all other facts immaterial." *Dominium Mgmt. Servs. v. Nationwide Hous. Group*, 986 F. Supp. 578, 581 (D. Minn. 1997) (citing *Celotex*, 477 U.S. at 322-23). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient, there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

II. APPLICABLE LAW

This Court applies Minnesota law to the claims made by the Bank Participants. See *Middleton v. Farmers State Bank of Fosston*, 45 B.R. 744, 749 (Bankr. D. Minn. 1985) ("A federal court must follow the substantive law of the state in which it sits") (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)); see also *In re Vista Med. Investors, Ltd.*, 98 B.R. 29, 32 (Bankr. S.D. Cal. 1989) (bankruptcy court applies state law to breach of contract claim); *Rampy v. Messerli*, 224 B.R. 701, 704-05 (D. Minn. 1997) (applying state law on review of bankruptcy court's determination of legal malpractice claim). Minnesota law applies, as well, to the Trustee's breach of fiduciary duty claim. See *In re MacGregor Sporting Goods, Inc.*, 199 B.R. 502, 510-511 (Bankr. D.N.J. 1995) (state law governs bankruptcy trustee's breach of fiduciary duty claim).

III. THE BANK PARTICIPANTS' LEGAL MALPRACTICE CLAIM FAILS BECAUSE THEY HAD NO ATTORNEY-CLIENT RELATIONSHIP WITH DORSEY

To prove Dorsey's liability for malpractice, the Bank Participants must establish three elements: (1) an attorney-client relationship with Dorsey, (2) Dorsey acted negligently or in breach of contract, and (3) Dorsey's negligence or breach proximately caused damage to them.

TJD Dissolution Corp. v. Savoie Supply Co., 460 N.W.2d 59, 62 (Minn. Ct. App. 1990) (quoting *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692 (Minn. 1980) (*per curiam*)). Failure to establish any one of these elements defeats the entire claim. *Godbout v. Norton*, 262 N.W.2d 374, 376 (Minn. 1977), *appeal dismissed*, 437 U.S. 901 (1978). That is to say, with respect to any element, if it is not "possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded," the claim will be dismissed. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (quoting *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)). The Bank Participants cannot even prove the threshold requirement that they had an attorney-client relationship with Dorsey.

A. No Attorney-Client Relationship Existed Between the Bank Participants and Dorsey

The existence of the attorney client relationship is critical to recovery under a malpractice theory. An attorney is liable for professional malpractice "only to a person with whom the attorney has an attorney-client relationship." *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995) (quoting *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981)). Minnesota recognizes two methods of establishing an attorney-client relationship – contract or tort theory. *TJD Dissolution Corp.*, 460 N.W.2d at 62. The Bank Participants cannot sustain their claim under either theory.

1. No attorney-client relationship under the contract theory

Under the contract theory, an attorney-client relationship exists only if the parties explicitly or implicitly contract for the attorney to provide representation. *Veit v. Anderson*, 428 N.W.2d 429, 431 (Minn. Ct. App. 1988). Here, Dorsey contracted with Miller & Schroeder to provide legal advice and services only to Miller & Schroeder. Dorsey never explicitly agreed to

represent the Bank Participants. Indeed, the Bank Participants do not allege that they had an explicit contractual relationship with Dorsey. *See* Complaint ¶¶ 98-102 and 108-112.

Nor did Dorsey have an implicit contract with the Bank Participants. Although the Bank Participants claim that "a contract for professional services existed between the Bank Participants and Dorsey," *see* Complaint at ¶ 109, this hollow allegation lacks any reasoned support. As a matter of law, a party's mere expectation that an attorney will represent it is insufficient to create an attorney-client relationship. *Spannaus v. Larkin, Hoffman, Daly & Lindgren*, 368 N.W.2d 395, 398-99 (Minn. Ct. App. 1985), *review denied* (Minn. Aug. 20, 1985).

Several additional factors demonstrate the complete absence of any attorney-client relationship between the Bank Participants and Dorsey. First, the Bank Participants did not have any direct communications or contact with Dorsey relating to the Transaction. *See Sandum v. Doherty, Rumble & Butler, P.A.*, No. C7-94-801, 1994 WL 593925, at *2 (Minn. Ct. App. Nov. 1, 1994) (Asmus Aff., Ex. P) (no attorney-client relationship because alleged client did not have contact with law firm); *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 30 (Minn. 1982) (same). Second, none of the Bank Participants asked Dorsey to represent their interests in the Transaction and Dorsey never promised to represent any Bank Participant. *See TJD Dissolution*, 460 N.W.2d at 62 (no attorney-client relationship because no request for representation and no promise to represent); *Spannaus*, 368 N.W.2d at 398 (same); *Sandum*, 1994 WL 593925, at *2 (same). Third, the Bank Participants either knew or should have known that Dorsey represented the interests of Miller & Schroeder in the Transaction. *See Gerdin v. Princeton State Bank*, 371 N.W.2d 5, 7 (Minn. Ct. App. 1985) (no attorney-client relationship because neither party intended attorney-client relationship and individual knew that attorney

represented other parties), *aff'd*, 384 N.W.2d 868 (Minn. 1986). Fourth, Dorsey never sent any written correspondence or other documents to the Bank Participants. *See 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; attorney sent correspondence to corporation client), *review denied* (Minn. Apr. 19, 1989). Finally, Dorsey never billed the Bank Participants and the Bank Participants never paid Dorsey for any legal services rendered in connection with the Transaction. *See Hill v. Schaffner*, No. C5-94-960, 1994 WL 615049, at *1 (Minn. Ct. App. Nov. 8, 1994) (Asmus Aff., Ex. Q) (no attorney-client relationship because "(1) legal services performed by the attorneys were billed to the corporation; (2) the director and her husband never were billed for any legal services performed by the attorneys; (3) the director and her husband never paid for any legal services performed by the attorneys; and (4) the director and her husband told the attorneys they were represented by their own personal attorney"); *Sandum*, 1994 WL 593925, at *2 (no attorney-client relationship because law firm never billed alleged client).

There are no facts to support either an explicit or implicit contract between the Bank Participants and Dorsey. Therefore, as a matter of law, no attorney-client relationship existed between the Bank Participants and Dorsey under the contract theory.

2. No attorney-client relationship under the tort theory

An attorney-client relationship with Dorsey under the tort theory is similarly lacking. An attorney-client relationship arises under the tort theory only when "a person seeks and receives legal advice from a lawyer under circumstances in which a reasonable person would rely on the advice." *Schuler*, 435 N.W.2d at 161-62 (citation omitted); *Langeland*, 319 N.W.2d at 30. The tort theory "protects lay persons where it would be reasonably foreseeable to the lawyer that the person might be injured if the advice is given negligently." *TJD Dissolution*, 460 N.W.2d at 62.

The tort theory has never been extended to create an attorney-client relationship in a situation like this.²

The Bank Participants did not request legal advice from Dorsey in connection with the Transaction. "Absent a request for legal advice, [a court] cannot conclude an attorney-client relationship exist[s] under the tort theory of representation." *Gramling v. Memorial Blood Centers of Minn.*, 601 N.W.2d 457, 460 (Minn. Ct. App. 1999). Dorsey did not even know the identity of any of the Bank Participants prior to the closing and funding of the Loans. *See Gerdin v. Princeton State Bank*, 371 N.W.2d 5, 8 (Minn. Ct. App. 1985) (no attorney-client relationship under the tort theory because attorney had never met plaintiff). The Bank Participants did not seek advice directly from Dorsey and Dorsey had not previously represented the Bank Participants. *See Schuler*, 435 N.W.2d at 162 (no attorney-client relationship under tort theory because "respondents did not seek advice and [the lawyer] had never represented any of the respondents"). Dorsey had no direct contact with the Bank Participants and did not act gratuitously on their behalf. *See Sandum*, 1994 WL 593925, at *3 (Asmus Aff., Ex. F) (no attorney-client relationship under tort theory because attorney was hired by corporation, dealt directly with corporation and did not act gratuitously on plaintiff shareholders' behalf). Any benefit the Bank Participants received from Dorsey's representation of Miller & Schroeder was merely secondary and incidental. *Id.*

² Minnesota courts have found an issue of fact whether an attorney-client relationship exists under the tort theory only when: (1) an unrepresented lay person has a direct discussion with an attorney he had consulted with in the past on other matters, (2) an unrepresented lay person seeks and receives advice not to pursue a legal claim and the attorney does not advise that party to consult another attorney, or (3) the plaintiff is paying a portion of the legal fees, the attorney renders legal advice directly to the plaintiff and the attorney is aware that part of the liability would fall on plaintiff. *See Veit*, 428 N.W.2d at 432; *Togstad*, 291 N.W.2d 686; *Admiral Merchants Motor Freight v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn. 1992).

Finally, given the one-sided language in the Participation Agreement, the Bank Participants either knew or should have known that Miller & Schroeder's interests were at least potentially adverse to theirs. See *TJD Dissolution Corp.*, 460 N.W.2d at 62 (tort theory of representation not "extended to apply to a situation where the lawyer represented a client known by the plaintiff to have interests adverse to the plaintiff"); *Hill v. Schaffner*, No. C5-94-960, 1994 WL 615049, at *2 (Minn. Ct. App. Nov. 8, 1994) (Asmus Aff., Ex. Q) (same). The Bank Participants were sophisticated and experienced businesses and either could or should have had their own counsel representing them in connection with the Transaction. No facts support the inference of an attorney-client relationship under the tort theory.

B. The Bank Participants Were Not the Intended Beneficiaries of Dorsey's Representation of Miller & Schroeder

Recognizing the futility of proving a direct attorney-client relationship with Dorsey, the Bank Participants attempt to avoid the privity requirement by claiming that they are the intended beneficiaries of Dorsey's representation of Miller & Schroeder. See Complaint ¶ 100. The facts adduced during discovery simply do not bear out this allegation.

1. The Bank Participants were not intended beneficiaries of Dorsey's representation of Miller & Schroeder

The doctrine of intended beneficiary legal malpractice is a very narrow exception to the strict privity requirement for professional malpractice claims. *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981) (en banc). Under this theory, "[a]n attorney may be held liable to a non-client when 'the client's sole purpose in retaining attorney is to benefit directly [that] third party.'" *Holmes v. Winners Entm't, Inc.*, 531 N.W.2d 502, 505 (Minn. Ct. App. 1995) (quoting *Marker*, 313 N.W.2d at 5) (emphasis added). The third party must be the "direct and intended beneficiary of the lawyer's services." *Id.* (emphasis added) (same). "The requirement that the third party be an intended beneficiary is a threshold requirement for an attorney to have a duty to

a third party." *Francis v. Piper*, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999). If the plaintiff alleging malpractice is not a sole and direct intended beneficiary, then plaintiff's claim fails as a matter of law without further consideration. *See, e.g., id.* at 924-25 (determining that third party was not an intended beneficiary and not reaching multi-factor analysis); *Holmes*, 531 N.W.2d at 505 (determining third party was not an intended beneficiary and not reaching multi-factor analysis); *Marker*, 313 N.W.2d at 5-6 (determining that third party was not an intended beneficiary and not reaching multi-factor analysis).

Minnesota courts have routinely disallowed third-party legal malpractice claims. Most claims are denied as a matter of law because the plaintiff is, at best, a mere incidental beneficiary, not a sole and direct intended beneficiary, of the attorney's services. *See, e.g., Francis*, 597 N.W.2d at 925 (testator's sister was not a sole and direct intended beneficiary of attorney's representation of testator in drafting will that excluded sister); *Holmes*, 531 N.W.2d at 505 (shareholder was not the sole and direct intended beneficiary of attorney's representation of corporation); *Goldberger*, 534 N.W.2d at 738-739 (trust beneficiaries are not the sole and direct intended beneficiaries of the services rendered by attorney retained by personal representative of estate); *Marker*, 313 N.W.2d at 6 (surviving joint tenant was not the sole and direct intended beneficiary of attorney's representation of property owner in drafting deeds); *Witzman v. Gross*, 148 F.3d 988 (8th Cir. 1998) (trust beneficiary was not the sole and direct intended beneficiary of attorney's services; attorney's duty and loyalty lie with serving the best interests of the trust) (applying Minnesota law).

The *Goldberger* and *Holmes* cases are most apposite here. In the *Goldberger* case the personal representative of an estate hired an attorney to assist in the administration of the estate. *Goldberger*, 534 N.W.2d at 736. A fee dispute arose between the estate beneficiaries and the

personal representative and the attorney. *Id.* The estate beneficiaries sued the attorney for malpractice. *Id.* The trial court dismissed the malpractice claim for lack of standing. *Id.* The Court of Appeals affirmed, finding that the estate beneficiaries were "not the direct and intended beneficiaries of the personal representative's attorney's services." *Id.* at 738. The Court held that the estate beneficiaries were merely incidental beneficiaries of the attorney's services to the personal representative. "The attorneys' services . . . must be directed towards serving the best interests of the *estate*, and thus, all beneficiaries." *Id.* at 739 (emphasis in original). Thus, the estate beneficiaries could not maintain a malpractice action against the attorney.

In the *Holmes* case, Golden Palace Casinos, Inc. ("GPC") hired an attorney to negotiate and draft a management contract for GPC to manage the Treasure Island Casino. *Holmes*, 531 N.W.2d at 503. Because of a flaw in the management contract, the tribe successfully asserted a *qui tam* action against GPC to recover all compensation that the tribe paid to GPC under the management contract. *Id.* at 504. One of GPC's shareholders thereafter commenced a malpractice action against GPC's attorney. *Id.* The district court granted summary judgment to the attorney, finding that no attorney-client relationship existed between the shareholder and the corporation's attorney. *Id.*

The Court of Appeals affirmed, finding that any benefit to the shareholder was not "direct," but merely incidental to his status as a shareholder. *Id.* at 505. The following facts were key to the Court's decision: (1) the management agreement drafted by the attorney expressly benefited the corporation and did not name the shareholder; (2) the shareholder did not play a part in retaining the attorney; (3) the shareholder did not sign the retainer agreement with the attorney; and (4) the management agreement was intended solely to bind and benefit the corporation. *Id.* Thus, the shareholder had no standing to sue the attorney for malpractice.

Just like the plaintiffs in the *Goldberger* and *Holmes* cases, it is undisputed that the Bank Participants were not the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder. Miller & Schroeder's in-house counsel admitted in her deposition that the Bank Participants were not the sole beneficiaries of Dorsey's representation. *See* Brenden Depo. at 14 ("[Dorsey] would act on our [Miller & Schroeder] benefit as well as the Bank Participants") and 39 ("I thought [Dorsey] would be documenting the loans for our benefit and for the benefit of the participants") (emphasis added). Because Dorsey admittedly represented Miller & Schroeder, the Bank Participants' malpractice claim necessarily fails. *See Holmes*, 531 N.W.2d at 505; *Marker*, 313 N.W.2d at 5.

Several additional factors demonstrate that the Bank Participants were not the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder and therefore had no attorney-client relationship with Dorsey. Dorsey did not intend to represent the Bank Participants, but rather directed its services towards Miller & Schroeder's best interests. *See Goldberger*, 534 N.W.2d at 739. The various loan documents that Dorsey drafted expressly benefited Miller & Schroeder and did not name any of the Bank Participants. *See Holmes*, 531 N.W.2d at 505. Moreover, as identified above, the Participation Agreements contain language that is prejudicial to the rights of the Bank Participants. Further, the Bank Participants played no role in Miller & Schroeder's retention of Dorsey. *Id.* None of the Bank Participants signed any of the documents drafted by Dorsey. *Id.* The Bank Participants therefore could not have been the sole and direct intended beneficiaries of Dorsey's representation of Miller & Schroeder.

2. Even if the Bank Participants were intended beneficiaries, Dorsey owed them no duty

Even assuming that the Bank Participants could satisfy the threshold requirement that they actually were the sole and direct intended beneficiaries of Dorsey's representation of Miller

& Schroeder, the Bank Participants still cannot satisfy the six-factor test used by Minnesota courts to determine whether the attorney owes a duty to the non-client. The six factors are: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the law firm's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose undue burden on the profession. *Goldberger*, 534 N.W.2d at 738 (citing *Lucas v. Hamm*, 364 P.2d 685, 687-88 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962)); *Marker*, 313 N.W.2d at 5 (same). A majority of the *Lucas* factors unequivocally favor a dismissal of the Bank Participants' malpractice claim.

The first and second *Lucas* factors clearly demonstrate the lack of any attorney-client relationship between Dorsey and the Bank Participants. First, as shown above, it is undisputed that Dorsey was retained to represent the interests of Miller & Schroeder in the Transaction. Any benefit that may have flowed to the Bank Participants was merely incidental. Dorsey did not intend to directly benefit the Bank Participants, but rather protect Miller & Schroeder's best interests. Second, since it was never intended that Dorsey represent the interests of the Bank Participants, any harm to the Bank Participants was not foreseeable.

With regard to the third *Lucas* factor — the degree of certainty that the plaintiff suffered injury — while the Bank Participants claim to have suffered an injury because the Loans are allegedly uncollectible. There is, however, no indication that they have even attempted to collect any of the \$15 million judgment that Miller & Schroeder secured against President. Thus, any claimed injury is suspect.

The fourth *Lucas* factor examines the relationship between the attorney's action and the alleged harm suffered by the purported client. It is, in essence, a causation factor. An essential element of a legal malpractice claim is that the attorney's acts were the proximate cause of the claimed damages. *See, e.g., Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). An act is the proximate cause of an injury if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others. *Id.* at 113 (quotation omitted). The Bank Participants simply cannot, as a matter of law, demonstrate that any alleged erroneous legal advice given by Dorsey was the proximate cause of their purported damages.

The basis for the Bank Participants' claim is that they have suffered damage because the Pledge Agreement is unenforceable due to the lack of NIGC approval. In their litigation in New York against the Tribe, however, the Bank Participants have taken the polar opposite view, arguing that the Pledge Agreement is indeed enforceable against the Tribe and that the Tribe has breached its obligations by refusing to pay. (Asmus Aff., Ex. A.) The Bank Participants' about-face not only demonstrates that their claimed damages are directly caused by President's refusal to pay, but should also judicially estop the Bank Participants from arguing that Dorsey's advice concerning NIGC approval was erroneous.³ Moreover, Miller & Schroeder obtained a \$15 million judgment against President on behalf of the Bank Participants that the Bank Participants have not attempted to collect. The Bank Participants simply cannot show that the alleged negligence of Dorsey caused any of the Bank Participants' alleged damages.

³ Even though the issue of Dorsey's advice concerning NIGC approval of the Pledge Agreement is not ripe at this stage of the proceedings, the Bank Participants' allegations in its lawsuit in New York against the Tribe may indeed raise judicial estoppel concerns. *See State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999); *Hossaini v. Western Mo. Med. Ctr.*, 140 F.3d 1140, 1142 (8th Cir. 1998).

The sixth *Lucas* factor also weighs strongly in favor of Dorsey. If this Court finds that the Bank Participants have standing to assert a malpractice action against Dorsey, the manner in which attorneys represent clients would be thrown into disarray. If Miller & Schroeder had wanted to hire Dorsey to represent the Bank Participants in the Transaction, Dorsey would have had an impermissible conflict of interest that would have precluded it from representing Miller & Schroeder:

At all relevant time, Dorsey & Whitney's policies have specifically included the following: "Dorsey regularly declines joint representations of parties where they have directly adverse interests, even if the parties are on opposite sides of a business transaction or litigation matter. The Firm does not represent opposing parties in negotiations."

See Wernz Aff. ¶ 2 (emphasis added). Furthermore, cases in Minnesota, as well as other jurisdictions, have recognized this conflict problem as a reason for refusing to recognize intended beneficiary malpractice claims. *See Goldberger*, 534 N.W.2d at 739; *Goldberg v. Frye*, 217 Cal.App.3d 1258, 1269 (Cal Ct. App. 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). As a practical matter, if the Bank Participants' claim was accepted, an attorney could not represent a lender such as Miller & Schroeder if the lender intended to participate the Loans because doing so would pose a conflict of interest.

In sum, with respect to the Bank Participants' malpractice claim, to find an attorney-client relationship under these circumstances would improperly extend the relationship beyond any exception crafted or even contemplated by Minnesota courts. As such, the Bank Participants' malpractice claim should be dismissed.

IV. THE BANK PARTICIPANTS' BREACH OF CONTRACT CLAIM FAILS BECAUSE THEY HAD NO CONTRACT WITH DORSEY

In an attempt to circumvent the fatal deficiencies of its malpractice claim, the Bank Participants allege that they had a contractual relationship with Dorsey. The facts belie their contention. In order to succeed on their breach of contract claim, the Bank Participants must prove the following: (1) the formation of a contract; (2) performance by plaintiff of any conditions precedent; and (3) a breach of the contract by defendant. *Selstad v. City of Loretto*, No. C4-91-2555, 1992 WL 166795, at *2 (Minn. Ct. App. July 21, 1992) (Asmus Aff., Ex. R) (citation omitted). The Bank Participants fail on the threshold element of their claim – the existence of a contract between the Bank Participants and Dorsey. As shown above, the Bank Participants have utterly failed to prove that either an express or an implied contract existed between themselves and Dorsey. In fact, all of the undisputed facts conclusively prove the non-existence of any contractual relationship. *See supra* Section III.A.1. The Bank Participants' breach of contract claim therefore necessarily fails as a matter of law and should be dismissed.

V. THE BANK PARTICIPANTS' NEGLIGENT MISREPRESENTATION CLAIM FAILS BECAUSE DORSEY MADE NO REPRESENTATIONS TO THE BANK PARTICIPANTS

The Bank Participants' claim for negligent misrepresentation also fails as a matter of law. First, Minnesota courts do not recognize claims for negligent misrepresentation by non-clients against attorneys. Second, even if Minnesota courts allowed non-clients to sue attorneys, the Bank Participants cannot establish the essential elements of their claim because Dorsey made no representations to the Bank Participants.

A. Minnesota Courts Do Not Permit Non-Clients to Assert Negligent Misrepresentation Claims Against an Attorney

Minnesota courts have not extended the theory of negligent misrepresentation to claims by a non-client against an attorney. *Schuler*, 435 N.W.2d at 162; *TJD Dissolution Corp.*, 460

N.W.2d at 63. Liability arises from misrepresentations made by an attorney to a non-client only if the attorney acted with "fraud, malice or has otherwise committed an intentional tort." *Schuler*, 435 N.W.2d at 162 (quoting *Eustis v. David Agency, Inc.*, 417 N.W.2d 295, 298 (Minn. Ct. App. 1987)). As detailed above, no attorney-client relationship exists between Dorsey and the Bank Participants. *See supra* Section III. As such, the Bank Participants' only saving grace would be if Dorsey acted with fraud, malice or otherwise committed an intentional tort. But, the Adversary Complaint does even not allege that Dorsey acted with fraud or malice or that Dorsey committed any intentional tort. *See* Complaint ¶¶ 103-107. Thus, the Bank Participants' negligent misrepresentation claim against Dorsey fails as a matter of law.

B. The Bank Participants Cannot Establish the Elements of Negligent Misrepresentation

Even if this Court made new law and extended the theory of negligent misrepresentation to allow non-clients to sue attorneys, the Bank Participants' claim nonetheless fails because they cannot prove critical elements of negligent misrepresentation. In Minnesota, the elements of the tort of negligent misrepresentation are: (1) a duty of reasonable care in conveying information; (2) breach of that duty by negligently giving false information; (3) reasonable reliance on the misrepresentations, which reliance is the proximate cause of physical injury; and (4) damages. *Smith v. Brutger Cos.*, 569 N.W.2d 408, 413 (Minn. 1997).

1. Dorsey did not make any representations to the Bank Participants

One of the requirements for negligent misrepresentation is that the actor supply false information to others. *Bresser v. Minn. Trust Co. of Austin*, No. C2-97-140, 1997 WL 559744, at *3 (Minn. Ct. App. Nov. 13, 1997). (*Asmus Aff.*, Ex. 5.) Here, there is no evidence that Dorsey ever made any representations, either oral or written, to the Bank Participants regarding the Transaction.

From the beginning of Dorsey's representation of Miller & Schroeder through the closing and funding of the Loans, Dorsey did not even know the identity of the Bank Participants. Dorsey did not have any communications with any of the Bank Participants prior to the closing and funding of the Loans. Dorsey only communicated with Miller & Schroeder concerning the Transaction. Dorsey did not have any telephone or in-person discussions with any of the Bank Participants at any time prior to the closing and funding of the Loans. Dorsey never sent any letters, memoranda or other correspondence to the Bank Participants prior to the closing and funding of the Loans. Dorsey did not give any Bank Participant any of the Loan documents that it had drafted prior to the closing and funding of the Loans. The Bank Participants could not produce even one document that they received directly from Dorsey prior to the closing and funding of the Loans. The Bank Participants cannot identify even a single oral communication with Dorsey. Neither can Miller & Schroeder. *See Brenden Depo.* at 14.

There is simply no evidence that Dorsey made any representations directly to the Bank Participants. The Bank Participants' claim thus fails as a matter of law.

2. The Bank Participants Did Not Reasonably Rely on Any Representations

To recover for negligent misrepresentation, the Bank Participants must show, among other things, that they reasonably relied on the allegedly false representation. *Smith*, 569 N.W.2d at 413 (emphasis added). Reliance is not reasonable or justified if the plaintiff is placed on guard or practically faced with the facts. *Plymouth Foam Prods., Inc. v. City of Becker*, 120 F.3d 153 (8th Cir. 1997).

In the Participation Agreements, the Bank Participants agreed that they would not rely on any representations made by Miller & Schroeder, even representations concerning information that Miller & Schroeder received from its attorneys. *See Asmus Aff., Ex. L & M*, §§ 5.2 and 5.3.

The Bank Participants thus knowingly and voluntarily waived their right to rely upon any representations made by Miller & Schroeder or its attorney — Dorsey. *See Citizens Nat'l Bank v. Mankato Implement, Inc.*, 441 N.W.2d 483, 487 (Minn. 1989) (waiver is a knowing and voluntary relinquishment of a known right). To make an end run around its waiver of claims against Miller & Schroeder, the Bank Participants will likely argue that they were entitled to rely on representations made to them by Miller & Schroeder concerning the representations that Dorsey made to Miller & Schroeder concerning NIGC approval of the Pledge Agreement.

The Bank Participants' waiver of their right to assert claims against Miller & Schroeder applies with equal force to their negligent misrepresentation claim against Dorsey. If the Bank Participants were not entitled to rely on any representations made by Miller & Schroeder, then they were also not entitled to rely on any representations that Dorsey allegedly made to Miller & Schroeder — which were then communicated by Miller & Schroeder to the Bank Participants. The Bank Participants' attempt to play the telephone game to string together a negligent misrepresentation claim against Dorsey should go unanswered.

The Bank Participants' negligent misrepresentation claim against Dorsey fails as a matter of law and should be dismissed.

VI. TRUSTEE'S BREACH OF FIDUCIARY DUTY CLAIM FAILS

The Trustee's breach of fiduciary duty claim also fails as a matter of law. In a last-ditch effort to recover some money for Miller & Schroeder's bankruptcy estate, the Trustee has concocted a claim seeking disgorgement of the fees that Miller & Schroeder paid to Dorsey in 2000 and 2001 for Dorsey's defense of Miller & Schroeder in the Bremer litigation. As a basis for its claim, the Trustee asserts that Dorsey violated the Rules of Professional Conduct, and hence its fiduciary obligations to Miller & Schroeder, by: (1) failing to disclose to Miller & Schroeder that Dorsey had a conflict of interest in representing Miller & Schroeder in any

litigation commenced by a Bank Participant; and (2) failing to disclose to Miller & Schroeder that it had a potential claim against Dorsey for malpractice. *See* Complaint ¶¶ 113-117. A claim for breach of fiduciary duty in the attorney-client context requires a showing that the attorney failed to represent the client with undivided loyalty, failed to preserve client confidences, or failed to disclose material matters bearing on the representation. *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982). The Trustee's claim fails for a host of reasons.

First, as shown above, Dorsey simply had no attorney-client relationship with the Bank Participants in connection with the Transaction under any theory. *See supra* Section III. Because the Bank Participants were not Dorsey's clients, it necessarily follows that no conflict of interest existed that would have precluded Dorsey from representing Miller & Schroeder in the Bremer litigation. *See* Wernz Aff. ¶¶ 5-6. Accordingly, Dorsey did not breach any duty of loyalty by representing Miller & Schroeder in the Bremer litigation.

Second, at the time it retained Dorsey in connection with the Bremer litigation, Miller & Schroeder was advised that one of Bremer's allegations was that Dorsey had given Miller & Schroeder erroneous legal advice concerning NIGC approval of the Pledge Agreement. (Asmus Aff., Ex. W.) Notwithstanding its knowledge of Bremer's allegations, Miller & Schroeder nonetheless retained Dorsey to defend against Bremer's claims and thereby waived any conflict of interest that may have existed. Miller & Schroeder's knowing and voluntary waiver precludes it from now asserting that Dorsey's representation was somehow improper.

Finally, Miller & Schroeder's claim that Dorsey was required by the Rules of Professional Conduct to disclose that, in the context of the Bremer litigation, Miller & Schroeder had a potential third claim against Dorsey is flat-out wrong. The Trustee's claim in this regard hinges on its allegation that Dorsey violated the "Rules of Professional Responsibility [sic]," that

is Rule 1.7(b) of the Minnesota Rules of Professional Conduct. *See* Complaint ¶ 115; Wernz Aff. ¶ 6. Rule 1.7(b), however, in general creates a conflict of interest for a law firm in determining its own possible liability to a client for the law firm's actions. *See* Minn. R. Prof. Conduct 1.7(b). Rather than evaluate any potential claim, the law firm should notify clients, where there appears to be a viable claim, that the client should seek independent counsel. *Id.* Where there is no such claim, there is nothing to disclose. *See* Wernz Aff. ¶ 6.

Because Dorsey had no conflict of interest, it did not violate any Rules of Professional Conduct or breach any fiduciary duty. The Trustee's claim must therefore be dismissed.

CONCLUSION

The Bank Participants' claims are fundamentally at odds with long-established Minnesota law. No Minnesota court has ever recognized the existence of an attorney-client relationship in or extended breach of contract and negligent misrepresentation claims to a case such as this. No set of facts or law can support the Bank Participants' claims. The Trustee's claim similarly lacks any legal or factual support. Because the undisputed facts conclusively establish that Dorsey is entitled to judgment as a matter of law, this Court should dismiss the Adversary Complaint in its entirety.

Dated: May 28, 2004

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