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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LUNA GAMING – SAN DIEGO, LLC, a Michigan Limited Liability Company, Plaintiff, vs. DORSEY & WHITNEY, LLP; HOLLAND & KNIGHT, LLP; BLEDSOE DOWNES & ROSIER, P.C.; JAMES TOWNSEND; PHILIP M. BAKER-SHENK; and BRADLEY GRANT BLEDSOE DOWNES, jointly and severally, Defendants.	Case No.: 06-cv-2804-BTM-WMc **PLAINTIFF LUNA GAMING – SAN DIEGO, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DORSEY & WHITNEY'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** Date: February 22, 2008 Time: 11:00 a.m. Courtroom: 15 Judge: Hon. Barry T. Moskowitz Action Filed: December 28, 2006

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I. INTRODUCTION

After repeatedly referring to Plaintiff Luna Gaming – San Diego, LLC ("LGSD" or "Plaintiff") as its client and expressly confirming the representation, Defendant Dorsey & Whitney ("Dorsey") now denies the attorney-client relationship. Dorsey's denial, however, is crushed by the vast weight of the evidence showing that Dorsey represented Plaintiff. Just as Dorsey called LGSD a client, LGSD expressly referred to Dorsey as its attorneys. In keeping with the parties' stated understanding of their attorney-client relationship, Dorsey and LGSD conducted themselves as attorney and client – LGSD sought and received legal advice for its own benefit outside any contractual obligation to do so, received Privileged and Confidential memoranda from Dorsey, communicated confidentially with Dorsey, demanded access to Dorsey's communications with LGSD's joint client the Ewiiaapaayp Tribe, directed Dorsey's work, substantively negotiated Dorsey's bills, and had access to Dorsey's unredacted billing records reflecting work for both joint clients. As a result, the very case relied upon by Dorsey to deny the attorney-client relationship demonstrates that the parties did have such a relationship, and the evidence establishes multiple and significant disputed issues of material fact preventing summary judgment in Dorsey's favor.

Dorsey's words referring to LGSD as a client, and its consistent conduct over the course of years behaving as LGSD's attorney also reinforce the reasonableness of Plaintiff's belief that Dorsey represented it, a primary factor in determining the existence of an attorney-client relationship. The reasonableness of that belief is buttressed by Dorsey's representation of Tom Celani, the sole member of Plaintiff, and entities owned by him for twelve years before this matter arose, and Dorsey's continuing representation of Celani and his entities during the entire pendency of this matter. The totality of the parties' words and conduct points to the existence of an attorney-client relationship, and Dorsey's parsing of a handful of documents to infer the contrary cannot support summary judgment in its favor. Nor is Dorsey entitled to partial summary judgment on any theory. Dorsey attorney Jim Townsend made actionable misrepresentations which Plaintiff has standing to pursue. Plaintiff therefore respectfully requests that this Court deny Dorsey's motion in its entirety.

II. STATEMENT OF FACTS

A. Dorsey Represented Tom Celani, The Sole Member Of Plaintiff, And Entities Owned By Celani, For Twelve Years Before This Matter Arose

Dorsey has represented Tom Celani, the sole member of Plaintiff LGSD and its predecessor Action Gaming LLC ("Action")[1], and Celani-owned entities for nineteen years in more than twenty discrete engagements. (UMF 164)[2] Dorsey's relationship with Celani began when Dorsey represented Sodak Gaming, an entity owned by Celani, in 1988. (UMF 166) Dorsey then represented Celani and entities formed by him from 1995 through 2005 in Celani's first ever Indian gaming project, located in Manistee, Michigan (the "Manistee Project"). (UMF 167) With Dorsey's assistance, the development of the Manistee Project proceeded smoothly and according to the timeline Dorsey predicted. (UMF 168) Despite the fact that Dorsey's Manistee representation spanned ten years, Dorsey never entered into any written fee agreements or a formal engagement letter with either Celani or his entities (UMF 169).

B. Dorsey's Early Contacts With Celani And Plaintiff About This Matter

1. Late 1999: Dorsey Monitors California Gaming Developments for Celani

In light of Dorsey's representation of Celani and his entities, Dorsey knew that Celani was interested in becoming involved in Indian gaming opportunities beyond Michigan, and therefore Dorsey monitored Proposition 5, the ballot proposition that legalized Indian gaming in California. (UMF 170) Celani's consultant, Don Buch, began working with Jim Townsend, a Dorsey partner, to identify potential California Indian gaming opportunities. (UMF 171) In late 1999, Dorsey provided a memorandum to Celani summarizing the status of Indian gaming in California. (UMF 172) Also in 1999, the Detroit law firm Dykema Gossett ("Dykema") was working to prepare Celani's Michigan commercial gaming license application. (UMF 173)

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[1] Action became LGSD for reasons unrelated to this lawsuit, and Celani was the sole member/owner of both entities. (UMF 165) For ease of reference, this brief refers to LGSD in place of Action unless a specific reference to Action is needed.

[2] Plaintiff has submitted concurrently herewith a Joint Notice of Lodgment of Exhibits attaching exhibits in opposition to both this motion and Defendants Holland & Knight's and Baker-Shenk's Motion for Summary Judgment.

Dorsey lawyers spoke to Dykema lawyers regarding the status of California Indian gaming, and how Celani's entry into California Indian gaming might affect his Michigan commercial gaming license application. (UMF 174)

2. January 2000: Townsend Sells Celani On The Ewiiaapaay Project

In January 2000, Dorsey partner Jim Townsend telephoned Celani directly to present the possibility of a California Indian gaming opportunity (the "Project") with the Ewiiaapaayp Band of Kumeyaay Indians (the "Tribe"). (UMF 175) Townsend explained the deal terms, and represented that Dorsey had already completed due diligence on the transaction. (UMF 176) Townsend told Celani that a development partner for the Tribe, Alliance Gaming, had already backed out of the deal because it was getting out of the gaming business. (UMF 177) Townsend further said another investor was also considering the Project. (UMF 178)

During this call, Celani raised specific concerns about the Project, and Townsend advised Celani that all of those issues were handled. (UMF 179) Among other things, Townsend told Celani that the Tribe held property in trust prior to the Indian Gaming Regulatory Act, and that the Tribe had an agreement to move their health clinic to a different site to allow gaming on the clinic site. (UMF 180) Townsend also represented that the casino could be up and running within 24 months, and advised Celani to meet with the Tribe in California immediately. (UMF 181) Based on this conversation and Dorsey's previous representations of Celani and his entities, Celani believed that Dorsey would represent any entity that he formed to consummate this Project, and Townsend said nothing to alert Celani to the contrary. (UMF 182) In reliance on Townsend's representations, Celani flew to California to meet with the Tribe in January 2000. (UMF 183) Townsend was the only attorney present at Celani's meeting with the Tribe. (UMF 184) Celani and a competing investor, First Nation Gaming ("FNG"), submitted proposals to the Tribe, and Townsend later informed Celani that the Tribe had selected FNG. (UMF 185)

3. March 2000: Townsend Presents Another Chance And Urges Quick Action

In March 2000, Townsend again called Celani directly and told him that FNG had backed out of the Project. (UMF 186) In this call, Townsend told Celani that: (1) if he still

wanted to become involved, he needed to be "very serious," (2) the Tribe wanted a deal "immediately," (3) Dorsey could get the property in trust within 12 months, and (4) the casino could be open in 24 months. (UMF 187) Importantly, Townsend never mentioned to Celani that Dorsey would be unable to represent Celani or any entity he formed to consummate the deal with the Tribe like Dorsey had represented Celani in the past. (UMF 188) Townsend made no statements about conflicts of interest arising from proposing his client the Tribe's Project to Celani, another Dorsey client. (UMF 189) Townsend also said nothing about conflicts of interests relating to a joint representation of the Tribe and Celani (or an entity he formed) on the Project. (UMF 190) In fact, despite the fact that Dorsey had represented Celani and his various entities since the late 80's, no Dorsey attorney (including Townsend) ever discussed with Plaintiff any concerns about representing Celani and/or any entity owned by him in the Project. (UMF 191) Based on Townsend's representations, Celani entered into a letter of intent (on behalf of Action, an entity to be formed by him) with the Tribe. (UMF 192)

C. March 2000: Celani Retains The Dykema Gossett Firm For A Limited Purpose

In early 2000, Dykema was working on the preparation of Celani's Michigan commercial gaming license application. (UMF 193) When Celani decided to pursue the Project, he also retained Dykema to document the Project in a manner that would avoid disruption of his gaming license application. (UMF 194) Jim Oegema, a young Dykema associate, worked on the Project agreements. (UMF 195) The Project agreements were signed on March 29, 2000. (UMF 196) Shortly thereafter, Oegema left Dykema, and became General Counsel for what later became Luna Entertainment ("Luna"), an entity owned by Celani. (UMF 197) After the closing, Dykema did not advise Celani or any of his entities regarding the Project, other than a single corporate filing effort. (UMF 198)

D. Post-Closing: Plaintiff And Dorsey Conduct Themselves As Client And Attorney

1. LGSD Seeks And Receives Legal Advice From Dorsey For Its Own Benefit

LGSD repeatedly and regularly sought and received legal advice directly from Dorsey attorneys throughout the course of the Project both for its own benefit and to advance the Project. (UMF 199) Jim Oegema, LGSD's new General Counsel, graduated from law school

in 1998 and at that time was inexperienced in Indian gaming; he therefore relied heavily on legal advice from Dorsey attorneys. (UMF 200)

a. Dorsey Provides LGSD With Advice Early On In The Project

An August 29, 2000 Memorandum sent by Dorsey's Townsend jointly to Plaintiff and the Tribe provides an early and revealing example of Dorsey's advice to Plaintiff that could only benefit Plaintiff, and not the Tribe or the Project as a whole. The memo, (marked "Privileged and Confidential" and "Attorney Work Product") was addressed directly to Celani and his consultant Don Buch, as well as members of the Tribe, and provided advice regarding negotiations with the Southern Indian Health Council ("SIHC"). (UMF 201) Throughout the memo, Townsend referred to Plaintiff and the Tribe jointly as "us," "we," and "our." Id. Importantly, Townsend advised that Plaintiff must be designated as a third party beneficiary of the contracts with the SIHC, advice that could only benefit Plaintiff. (UMF 201) Townsend also recommended that "we first confer among ourselves to determine what our objectives really should be, given the time we now have . . .," and noted that "It is imperative that we remain in control of the negotiations and the contracts," and "[u]nless we act to create bargaining power, our position will continue to weaken."[3] Id.

b. Dorsey Continues To Provide Legal Advice To LGSD

Dorsey continued to provide legal advice to Plaintiff for Plaintiff's sole benefit throughout the course of the Project. For example, Dorsey's Brad Downes advised that Action and Celani apply for a temporary gaming license to satisfy legal requirements, and he worked to obtain other licenses for Plaintiff. (UMF 203) As part of that work, Downes asked Plaintiff to submit license applications to him and held such applications without disclosing them to the

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[3] Even prior to the August 29, 2000 memo, Don Buch received an email from a third party suggesting that "[i]t would be good to have *your attorney* document the deed of trust issues regarding the alleged limitation of use to health clinic and confirm the authority of the tribe to use the land for a casino . . ." (emphasis added). (UMF 202) Buch forwarded this email to Dorsey attorney Jim Townsend and Jim Oegema, asking "Please advise . . ." Mr. Oegema then emailed Townsend, asking for advice regarding "our" ability to game on the land. Id. Townsend advised that gaming could occur on the land, and said he would have his assistant locate a Dorsey memo on the issue for Mr. Oegema. (UMF 202)

Tribe. Id. Downes also provided advice regarding Plaintiff's business plan. (UMF 204) Dorsey also repeatedly advised Plaintiff regarding Celani's political contributions and gifts for Plaintiff's sole benefit. (UMF 205) Additionally, Dorsey advised regarding Luna's license application, the need for background investigations, and whether Plaintiff should submit an application to the National Indian Gaming Commission for independent consultant Don Buch. (UMF 206) Dorsey also continued to provide legal advice and circulated documents jointly to LGSD (sometimes directly to Celani) and the Tribe, including multiple memoranda marked "Privileged and Confidential" and "Attorney Work Product." (UMF 207)

c. Dorsey Worked To Find A Project Partner For LGSD

Although Dorsey's Townsend had represented that the Project casino would be built within 24 months of the closing, Dorsey did not even obtain the necessary regulatory approvals during that time. As the Project dragged on, LGSD began to actively consider taking on a partner to share its financial burdens. (UMF 208) Oegema asked Dorsey's Philip Baker-Shenk in September 2002, "Not that we need bigger bills, but I would like you to spend some time looking for a partner for Luna. Long ago Townsend mentioned that many of your **other clients** would be interested in becoming our partner. Tom is now at the point where he will actively consider taking a partner. Let me know if you find anyone interested?" (emphasis added) (UMF 209) Baker-Shenk responded, "Understood. I'll get back to you." Id. Dorsey attorneys then introduced LGSD to two potential partners, and communicated with them on behalf of LGSD. (UMF 209)

2. Dorsey Communicated Privately And Confidentially With Plaintiff

Throughout the course of the Project, Dorsey attorneys repeatedly held private telephone conferences with Plaintiff, met privately in person with Plaintiff, and emailed privately with Plaintiff without the participation of the Tribe. (UMF 210) Even a small sample of Dorsey's billing entries confirm numerous such private contacts between Dorsey and Plaintiff, many of which were directly with Celani and not with attorney Oegema. (UMF 211) Dorsey also communicated directly to Celani in writing about the Project. (UMF 212).

Dorsey and LGSD frequently explicitly excluded the Tribe from their private

communications. In May 2002, Dorsey sent a "Privileged and Confidential" letter to the Tribe containing legal advice. (UMF 213) Dorsey blind copied Jim Oegema on this letter, such that the Tribe would be unaware of Oegema's receipt. Id. In January 2003, Jim Oegema emailed Dorsey's Baker-Shenk and three lobbyists to set up a telephonic conference to discuss progress and establish definitive time lines. (UMF 214) Oegema made clear that the Tribe would not be involved in the call, and that everyone else was expected to participate. Id. On other occasions, Dorsey made explicit the confidentiality of its own communications with LGSD. (UMF 215) Additionally, LGSD often sought and received legal advice from Dorsey relating to the Project without either side involving the Tribe in the communications.[4] (UMF 216)

3. July 2003: Dorsey Meets Privately With Plaintiff In Las Vegas

By June of 2003, over three years after the closing, the regulatory approvals necessary for the Project had not yet been obtained, and Plaintiff had spent approximately $15 million on the Project. Dorsey's Mark Jarboe called Oegema in June 2003 to schedule a meeting with Oegema and Celani to discuss the Project and "personnel issues." (UMF 218) Jarboe told Oegema that Dorsey attorneys Downes and Eric Eberhard would also attend the meeting, but asked that Plaintiff not tell either Dorsey's Baker-Shenk or the Tribe about the meeting. Id. This crucial meeting between Dorsey attorneys and Plaintiff (and without any representatives of the Tribe) occurred in July 2003 in Las Vegas. (UMF 219) At the meeting, Dorsey and Plaintiff discussed the status of the Project, and a strategy for bringing in a partner for LGSD. Id. Dorsey and Plaintiff agreed not to tell the Tribe about this strategy until Dorsey and Plaintiff knew more about whether they could obtain a partner. (UMF 219) Dorsey and Plaintiff further agreed at the Las Vegas meeting that Baker-Shenk (who, unbeknownst to Plaintiff at this time, had already informed Dorsey of his intent to leave Dorsey and join

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[4] For example, when Dorsey's Townsend didn't approve of a suggestion by the Tribe, Townsend privately questioned the Tribe's position in an email to Oegema, Buch and Dorsey attorney Downes. Oegema provided his opinion without including the Tribe, and after receiving Oegema's input, Townsend emailed the Tribe and LGSD jointly explaining his disagreement with the Tribe's suggestion. (UMF 217)

Holland & Knight ("H&K") would be removed as the lead attorney on the Project. (UMF 220)

4. LGSD Communicates To Dorsey Its Belief That Dorsey Represents LGSD

Philip Baker-Shenk's preparation to leave Dorsey and join H&K precipitated a writing clearly communicating LGSD's belief that Dorsey represented LGSD on the Project. On September 15, 2003, Dorsey sent a letter to Celani and Oegema notifying them that Baker-Shenk would be leaving Dorsey to join H&K. (UMF 221) The letter asked LGSD to select one of three options: (1) "to be represented as to all matters by Philip Baker-Shenk and his new law firm of Holland & Knight," (2) "to be represented as to all matters by the law firm of Dorsey & Whitney" or (3) to be represented by each firm as to certain matters. Id. Importantly, LGSD selected the third option:

> X I wish to be represented as to only the following specific matters by Philip Baker-Shenk and his new law firm: Ewiiaapaayp Project / Delaware Project / Mi Wok Project / Luna files in DC.

(Emphasis added). (UMF 221) LGSD then specifically requested transfer of:

> X all my client files maintained by Mr. Baker-Shenk as to the matters listed immediately… to Mr. Baker-Shenk's new firm as soon as possible (because I seek a split representation by both Dorsey & Whitney and Mr. Baker-Shenk's new firm.)

(Emphasis added). (UMF 222) Dorsey did not respond in any manner denying that it represented LGSD on the Ewiiaapaayp Project. (UMF 223)

LGSD expressly reiterated its attorney-client relationship with Dorsey in writing in February 2004, when Oegema learned he had been excluded from communications between Dorsey and the Tribe. Oegema admonished Dorsey that was unacceptable in light of LGSD's status as Dorsey's client, emailing Downes and Eberhard, "**Never before, other than for agreements directly between Luna and the Tribe, have you made a distinction on when we see the work-product. Tom believes very strongly that we are entitled to see the work-product we are paying our lawyers to produce.**" (UMF 224) Oegema insisted to Dorsey on other occasions that LGSD be included in communications relating to the Project, and Dorsey shared its communications with the Tribe with LGSD. (UMF 225)

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5. Dorsey Repeatedly Recognizes Celani And LGSD As Its Clients

Dorsey not only acted as LGSD's attorneys, it explicitly referred to LGSD and Celani as clients. In July 2002, Baker-Shenk emailed Oegema regarding strategy for a Project-related meeting, and concluded by asking if Oegema concurred with his recommendation. (UMF 226) Oegema responded, "Concurr (sic) – although it sounds as though we have few other options." Id. Baker-Shenk responded, "that's how we control **clients**." (emphasis added) (UMF 226) On another occasion, Dorsey attorney Downes emailed the Tribe and LGSD jointly that, "I recommend that we discuss this matter in a **protected attorney-client manner** before anything (sic) further action is taken." (emphasis added) (UMF 227) Additionally, at the Las Vegas meeting, Dorsey attorney Jarboe expressly told Celani, "Dorsey represents you." (UMF 228) Dorsey's Eric Eberhard also indicated at the Las Vegas Meeting that Dorsey represented Plaintiff.[5] (UMF 229) In keeping with Dorsey's recognition of Plaintiff as its client, Baker-Shenk introduced Celani to others as his client in connection with the Project. (UMF 231)

6. LGSD Directs Dorsey's Work On The Project

The Project agreements gave both parties equal footing in moving the Project forward, as exemplified by the creation of a Business Board, a joint decision-making entity comprised of two representatives from both Plaintiff and the Tribe. (UMF 232) The Project agreements required Plaintiff to pay for all legal work relating to the Project, which must be approved by the Business Board as a "Project Cost." (UMF 234) As the development period continued longer than anticipated, the parties frequently bypassed Business Board meetings in favor of Plaintiff communicating directly with Dorsey and Baker-Shenk to direct their work. (UMF 235) LGSD's direction of Dorsey's work was so overarching that beginning in 2001, Dorsey

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[5] Dorsey's conduct on a much earlier occasion also implicitly recognized its attorney-client relationship with LGSD. On April 12, 2000, John Peebles, an attorney for FNG, wrote a letter regarding a dispute between FNG and the Tribe relating to the Project. (UMF 230) Peebles noted that, "gives (sic) Dorsey & Whitney's representation of both the Band and Celani this issue requires further investigation." Id. Dorsey's Townsend received a copy of this letter, responded to it and communicated with Oegema about it, but never disputed Peebles' statement that Dorsey jointly represented the Tribe and Celani. (UMF 230)

generally submitted its work plans for the Project to LGSD for approval before performing the work. (UMF 236) After LGSD revised and approved Dorsey's work plans, the work plans were sent to the Tribe. (UMF 237) LGSD continued to direct Dorsey's work and pre-approve Dorsey's billings as time went on, and Dorsey readily accepted that direction.[6] (UMF 238)

In a significant example of LGSD directing Dorsey's work, Plaintiff proposed that the opposition of Viejas, a competing Indian tribe, to the Project be neutralized by changing the Project to include a joint venture between the Tribe and Viejas. (UMF 241) Though initially hesitant, the Tribe agreed, and LGSD directed the attorneys' work accordingly. Id. In connection with these discussions, LGSD sought Dorsey's advice on how the Tribe's vote approving the joint venture could be formalized in order to give comfort to LGSD. (UMF 242)

7. LGSD Pays Dorsey and Negotiates Dorsey's Billings For The Project

LGSD paid all Dorsey's bills for work on the Project. (UMF 243) Importantly, although Dorsey addressed its bills to the Tribe, it sent all of its bills to LGSD for payment *without a single redaction*, notwithstanding that the bills revealed information about Dorsey's communications on strategy with the Tribe. (UMF 244) Nor did Dorsey make any reservation of rights or disclaimer regarding its waiver of the privilege as to the communications revealed by the substance of the bills. (UMF 245)

LGSD regularly negotiated with Dorsey regarding its billings, obtaining discounts as well as explanation and back-up to support billing entries. (UMF 246) Dorsey also discussed with LGSD a possible contingent fee arrangement for its work on the Project. (UMF 247) Dorsey made a risk sharing proposal to LGSD for future Project billings, and LGSD counter-offered. Id. Baker-Shenk made clear that the Tribe would only be consulted after LGSD and Dorsey reached a tentative agreement. (UMF 247)

E. The Tribe And LGSD Both Retain Additional Counsel For Discrete Purposes

The Tribe and LGSD both retained outside counsel for discrete issues in connection

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[6] In another example, in December 2004 LGSD emailed a strategy and timeline that included assigning tasks to Dorsey and H&K lawyers. (UMF 239) Dorsey responded that the plan "should be doable." (UMF 240)

with the Project. (UMF 248) LGSD retained (1) Mazarella & Calderelli to advise on California corporate law issues; (2) Marti Allbright of Brownstein, Hyatt & Farber to interact with the Board of Indian Affairs; (3) Fabianni PC to provide public relations services for the Project; (4) Holland & Knight for very limited and specific advice regarding slot machine licenses; and (5) Kerr, Russell & Weber, a Michigan firm, to draft corporate documents governed by Michigan law relating to a potential partnership agreement for LGSD and one of the investors introduced by Dorsey. (UMF 249) The only firm LGSD ever retained in connection with the Project that was not disclosed to the Tribe or Dorsey was Akin Gump, which LGSD retained primarily to get a second opinion regarding the eligibility of the lands for Indian gaming. (UMF 250) Dorsey never told LGSD it was necessary to retain any of these lawyers due to conflicts. (UMF 251) For its part, the Tribe retained (1) Pillsbury, Madison & Sutro, LLP to provide advice about local real estate issues, (2) Gordon & Rees to advise about real estate acquisitions and options, (3) Procopio Cory, Hargreaves & Savitch LLP to advise about zoning issues, and (4) Seltzer Caplan to provide advice relating to litigation between the Viejas Tribe and the SIHC. (UMF 252)

F. During the Project, Dorsey Continues To Represent Celani And His Entities

After Townsend's January 2000 call to Celani, Dorsey continued to represent Celani and his entities on separate Indian gaming matters. (UMF 253) From 2000 to 2006, Dorsey:

- continued its work on the Manistee Project through early 2005;
- represented Celani and Action Gaming Sacramento LLC, owned by Celani;
- represented Luna and Luna Gaming Corning LLC, both owned by Celani;
- represented Luna Smith River LLC and Luna SR LLC, both owned by Celani;
- introduced Celani and Luna to the Delaware Tribe of Oklahoma Indians and represented Luna in pursuing a transaction with the Delaware Tribe;
- traveled to Philadelphia with Celani and Oegema to discuss a potential commercial gaming matter;
- represented Luna on a potential Indian gaming project in Lima, Ohio;
- represented Luna on a potential project with the Loyal Shawnee Indians;
- represented Luna on a potential project with the Miwok Indian tribe;

- advised Luna on potential projects with Wilton Rancheria and Strawberry Valley Rancheria;
- advised Luna on a potential project with Terroes Martinez;
- advised Luna regarding Indian gaming issues in Oklahama;
- advised Luna regarding a potential transaction with Rhonerville Rancheria;
- represented Luna and Luna Gaming Cloverdale LLC, owned by Celani;
- advised Luna regarding a potential transaction with the Juaneno Band of Indians;
- advised Luna regarding a potential Indian gaming opportunity with the Tuscarora Band of North Carolina;
- represented Luna and Luna Gaming Upper Lake LLC, owned by Celani, in connection with an Indian gaming transaction with the Habematol Pomo of Upper Lake;
- represented Luna and Luna Gaming Randlett LLC in a financing transaction with the Kiowa Tribe of Oklahoma.

(UMF 254-271) Dorsey did not have any retention letter or engagement letter with Luna, Tom Celani, or any of the entities referenced above for any of these representations. (UMF 272)

III. STANDARD OF REVIEW

Although the existence of an attorney-client relationship is a question of law, when the evidence is conflicting, the factual basis for the conclusion must be determined before the legal question is addressed. Responsible Citizens v. Superior Court, 16 Cal. App. 4th 1717, 1733 (1993).

IV. ARGUMENT

A. The Evidence Shows That Dorsey Represented Plaintiff On The Project.

Dorsey argues that no attorney-client relationship ever arose between Plaintiff and Dorsey on the Project, relying almost exclusively on application of the factors enunciated in Sky Valley Limited Partnership v. ATX Sky Valley, Ltd., 150 F.R.D. 648 (N.D. Cal. 1993). The Sky Valley factors and other relevant legal standards, however, conclusively demonstrate that Dorsey and LGSD were attorney and client with reference to the Project.

1. The Attorney-Client Relationship Was Formed When Townsend Called Celani In January 2000 To Propose the Project

The attorney-client relationship first arose in this matter in January 2000, when Jim

Townsend (a partner at Dorsey) called Tom Celani (a client of Dorsey) to propose the Tribe's gaming Project. During that call, Celani asked for and received legal advice from Townsend regarding the Project. It is well-settled that when a party seeks and receives legal advice from a lawyer, a prima facie attorney-client relationship is established. Beery v. State Bar of California, 43 Cal. 3d 802, 812 (1987); Perkins v. West Coast Lumber Co., 129 Cal. 427, 429 (1900). Thus, Townsend formed an attorney-client relationship with Celani with respect to the Project with the January 2000 call. That attorney-client relationship was again confirmed when Townsend called Celani regarding the Project in March 2000.[7] Based on the ongoing conduct of Dorsey and Plaintiff as attorney and client, the attorney-client relationship formed when Townsend called Celani did not end until Plaintiff informed Dorsey that Plaintiff would be filing this lawsuit.[8]

2. The Parties' Continuing Conduct Establishes The Reasonableness Of Celani's Belief That Dorsey Would And Did Represent Plaintiff

The intent and conduct of the parties governs whether they have formed an attorney-client relationship. Hecht v. Superior Court, 192 Cal. App. 3d 560, 565 (1987). Here, the parties' words and conduct establish (1) that Celani's belief that Dorsey jointly represented Plaintiff and the Tribe was objectively reasonable, (2) that Dorsey in fact did so.

a. Dorsey's Prior Representation Of Celani

One of the most important facts to be examined in the determination of the existence of an attorney-client relationship is the expectation of the client – viewed from the perspective of

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[7] Despite Dorsey's contention regarding its longstanding attorney-client relationship with the Tribe, Dorsey indicated otherwise to Action Gaming LLC in an opinion letter delivered at the closing of the transaction. Dorsey wrote that its opinions were limited to its knowledge, and that "No inference as to our knowledge with respect to such matters should be drawn from the fact of our **limited** representation of the Tribe." (emphasis added) (UMF 273)

[8] See Gonzalez v. Kalu, 140 Cal. App. 4th 21, 28 (2006) (attorney-client relationship terminates only when brought to an affirmative end or when tasks for which attorney retained are completed); Worthington v. Rusconi, 29 Cal. App. 4th 1488, 1498 (1995) (letter to client manifested ongoing mutual relationship); Beery v. State Bar of California, 43 Cal. 3d 802, 812 (1987) (attorney-client relationship had not ended where nothing had occurred to signal the end of the relationship).

a reasonable person in that situation. Responsible Citizens, 16 Cal. App. 4th at 1733, citing Friedman, *The Creation of the Attorney-Client Relationship An Emerging* View (1986), 22 Cal.Western L.Rev. 209. Here, Dorsey had represented Celani and his entities on numerous and substantial matters for more than ten years before Townsend's call in 2000. Dorsey had never had an express agreement governing any of the prior representations, giving Celani no reason to believe that such an agreement should exist for this Project. Moreover, Dorsey made absolutely no attempt to tell Celani that Dorsey's representation of the Tribe would prevent Dorsey from representing Celani or the entity to be formed by him. Given Dorsey's conduct, Celani's belief that Dorsey represented him on the Project was eminently reasonable. [9]

b. Dorsey Fails To Inform Celani That It Would Not Represent Him On The Project

When Townsend telephoned Celani in early 2000, Celani was a former client of Dorsey, and several of Celani's entities were current Dorsey clients. Under those circumstances, had Dorsey truly believed at that time that it was *not* representing Celani on the Project, Dorsey had a duty to inform Celani that it would not represent his interests on the new matter being discussed (which was substantially similar to the Manistee Project, on which Dorsey was engaged). See e.g., Neville v. Vingelli, 826 P. 2d 1196 (Ariz. App. 1992) (where attorney was representing lenders in other matters, he had duty to lenders that he was not representing them in loan transaction in which he was representing borrower); Butler v. State Bar of California, 42 Cal. 3d 323, 329 (1986) ("[A]n attorney's duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney's knowledge at least to the extent of advising them that they are not clients.")

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[9] Dorsey attempts to distinguish its representation of Plaintiff from its other representations of Celani and his entities. Plaintiff requested in discovery all of Dorsey's conflict check memoranda relating to Celani and his entities, and Dorsey produced none. (UMF 284) This will be a major dispute between the parties because Plaintiff believes that when Dorsey checked conflicts for Celani-owned entities, Dorsey entered Celani's name as a principal for purposes of checking conflicts. While Celani is separate from entities owned by him, it would not be uncommon for Dorsey to have treated Celani as one and the same as his entities for purposes of checking conflicts.

Even if Townsend did not believe Celani to be a current client of Dorsey in early 2000 and thought Celani was unrepresented, Townsend owed Celani a duty to clarify that Dorsey would represent *only* the Tribe on the Project.[10] ABA Model Rule of Professional Conduct 4.3 addresses this situation directly, imposing a duty on lawyers to clarify the lawyer's role in a matter if the lawyer knows or reasonably should know that an unrepresented person misunderstands the lawyer's role, and prohibiting lawyers from giving legal advice to unrepresented persons if the lawyer knows or reasonably should know that the person's interests have a reasonable possibility of conflicting with the interests of the lawyer's client.[11]

Townsend and Dorsey knew, or reasonably should have known, in light of their prior and contemporaneous representations of Celani and his entities, that Celani may well misunderstand Dorsey's role unless it was clarified. Townsend and Dorsey should have clarified that the firm only represented the Tribe initially, but that obligation becomes even more apparent as the Project went on and the parties communicated as attorney and client. It is evident that the only reason no Dorsey lawyer ever made that clarification is because Dorsey believed that it jointly represented Plaintiff and the Tribe.[12]

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[10] Dorsey argues that joint representation of Plaintiff and the Tribe would have violated attorney ethics due to their conflicts of interest. That perhaps Dorsey *should* not have jointly represented Plaintiff and the Tribe does not establish that it *did not* jointly represent them. "Just because an act is prohibited or involves a potential violation of the disciplinary rules does not mean that it cannot or did not occur. If that were true, then no attorney would ever be guilty of violations of the disciplinary rules; he could simply argue that he could not be guilty because the rules prohibited the act in question." Vinson & Elkins v. Moran, 946 S.W. 2d 381, 402 (1997).

[11] Minnesota, where Townsend practiced, has adopted the ABA Model Rules of Professional Conduct. State v. Miller, 600 N.W. 2d 457, 463 (Minn. 1999). Although California has not adopted the Model Rules, they are persuasive and helpful in situations where the coverage of California rules is unclear or inadequate. Frye v. Tenderloin Housing Clinic, Inc., 38 Cal. 4th 23, 52 (2006). California does not have a rule of professional conduct relating specifically to lawyer communication with unrepresented persons.

[12] Dorsey underscores its own failure to disclose the conflicts inherent in Townsend's discussions with Celani by relying on Don Buch's statements that Celani would not be able to "use Dorsey on this one." It is not Don Buch's duty to disclose conflicts of interest, and he has no experience or knowledge on the issue; that duty lies squarely with Dorsey, the longstanding lawyer for Celani and his entities. (UMF 274). Additionally, Celani does not

3. The *Sky Valley* Factors Support The Existence Of An Attorney-Client Relationship Between Dorsey And LGSD

Magistrate Judge Brazil's decision in Sky Valley Limited Partnership v. ATX Sky Valley, Ltd., 150 F.R.D. 648 (N.D. Cal. 1993), fully supports the conclusion that Plaintiff and Dorsey had an implied attorney-client relationship. In Sky Valley, defendant project manager ATX asserted that the Luce Forward firm jointly represented it along with plaintiff developer Sky Valley, such that the joint client exception to the attorney-client privilege should apply. The court held that ATX did not have an attorney-client relationship with Luce Forward. When the Sky Valley factors are applied in this case, however, the exact opposite result is reached, because: (1) Dorsey referred to Plaintiff as its "client" in communications to Plaintiff and told Plaintiff that "Dorsey represents you;" (2) Dorsey never stated to a third party that it did *not* represent Plaintiff – to the contrary, Dorsey referred to Plaintiff as a "client" to third parties on various occasions; (3) Plaintiff paid Dorsey's bills, both for Project-related advice and for Dorsey's advice that was given specifically to benefit Plaintiff, and substantively negotiated Dorsey's bills; (4) Plaintiff communicated to Dorsey Plaintiff's belief that it was represented by Dorsey; (5) Plaintiff sought and received legal advice from Dorsey for matters not required by the Project agreements; (6) Plaintiff sought and received legal advice from Dorsey for matters specific to Plaintiff and for Plaintiff's own benefit; (7) Plaintiff did not believe it was obligated to accept Dorsey's legal advice; (8) Plaintiff directed Dorsey's work, was on equal footing with the Tribe under the Project agreements, and acted voluntarily and independently in seeking legal advice from Dorsey; and (9) Plaintiff sought and obtained access to communications between the Tribe and Dorsey. See Sky Valley, 150 F.R.D. at 652-3.

In sum, nearly all of the factors that the Sky Valley case held would demonstrate a joint attorney-client relationship are present here. Based on the parties' conduct and the express references by both parties to their attorney-client relationship, Plaintiff's belief that Dorsey represented it on the Project is reasonable, and is neither an unfounded assumption nor a

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recall the documents relied upon by Dorsey, and neither Celani nor Buch recall ever discussing what lawyers Celani could or would use for the Project. (UMF 275)

conclusion based on hindsight. Rather, it is Dorsey's position -- that Plaintiff was represented on the Project solely by its General Counsel, a new lawyer with no Indian gaming expertise -- that is patently unreasonable.

While the parties did not have a written fee agreement, the lack of such an agreement is not dispositive, and is perfectly reasonable under the circumstances here. See Beery v. State Bar of California, 43 Cal. 3d 802, 812 (1987) (absence of a fee agreement does not prevent the attorney-client relationship from arising). In Sky Valley, the court called into question the reasonableness of ATX's belief that it had an attorney-client relationship with Luce Forward in the absence of an express agreement, given the magnitude of the project and ATX's substantial investment in the project. Sky Valley, 150 F.R.D. at 655. In this case, however, Dorsey represented Celani and/or entities owned by him in dozens of different matters, some of very substantial magnitude, over the course of almost twenty years without a single express agreement. California law holds that the course of dealing established between an attorney and a client is important to determining the existence and scope of an attorney-client relationship on a particular matter. Kane, Kane and Kritzer, Inc. v. Altagen, 107 Cal. App. 3d 36, 42 (1980). Moreover, a formal contract is not necessary to demonstrate the existence of an attorney-client relationship. Bernstein v. State Bar, 50 Cal. 3d 221 (1990). It was not unreasonable in this case, in light of the course of dealing between Dorsey and Celani, for Plaintiff to believe that Dorsey represented it without an express agreement.

Plaintiff's occasional retention of other firms to represent it for discrete purposes does not weigh against the existence of Plaintiff's attorney-client relationship with Dorsey.[13] The Tribe also retained various other firms to represent it in connection with the Project, and the fees of all but one of the outside firms retained by Plaintiff and the Tribe were approved by the Business Board and charged as a Project Cost. Plaintiff's retention of Akin Gump, the only

[13] Celani retained Dykema for the limited purpose of documenting the Project agreements. Dykema's retention for that purpose was a limited carve-out to Dorsey's overall representation of Plaintiff in connection with the Project.

firm not disclosed to the Tribe, actually supports Plaintiff's belief that Dorsey represented Plaintiff, because Plaintiff retained that firm specifically to obtain a *second opinion* to back up Dorsey's advice on a limited issue. Importantly, Plaintiff did not retain any of these lawyers because Dorsey insisted upon it due to conflicts, as was the case in Sky Valley.

In communicating with Plaintiff, Dorsey referred to Plaintiff as its "client," told Plaintiff directly that Dorsey represented Plaintiff, and expressed a desire to have attorney-client privileged communications with Plaintiff and the Tribe. Dorsey also sent Plaintiff legal memoranda labeled "Attorney-Client Privileged" containing advice specific to Plaintiff. Plaintiff, in turn, plainly communicated to Dorsey its belief that Dorsey represented it, saying that it sought split representation by Dorsey and Holland & Knight on the Project, and referring to Dorsey as "our lawyers." Dorsey never responded to Plaintiff by saying that Dorsey did not represent Plaintiff. These unambiguous references by both parties to their attorney-client relationship defeat Dorsey's Motion.

Additionally, if Dorsey truly believed that Plaintiff was represented only by Mr. Oegema and the attorneys who provided discrete services on the Project, then Dorsey attorneys should not have directly contacted Celani, because doing so would violate both California and Minnesota attorney ethics codes. Cal. Rules of Prof. Conduct, Rule 2-100; Minnesota Rules of Prof. Conduct, Rule 4.2. Yet Dorsey did communicate directly with Celani, the sole member of Plaintiff, on numerous occasions, only some of which are outlined above and submitted in support of this Opposition. The evidence thus allows only one of two conclusions: either Dorsey jointly represented Plaintiff in the face of potential and actual conflicts with the Tribe, or Dorsey violated its ethical obligations to refrain from communicating directly with a represented party. The totality of the evidence establishing Dorsey's representation of Plaintiff in connection with the Project demonstrates that Dorsey felt free to contact Celani directly because Dorsey knew that it jointly represented Plaintiff and the Tribe.

To support its argument that it did not represent Plaintiff, Dorsey relies almost exclusively on letters to government agencies in which Dorsey states it is counsel for the Tribe. One glaring flaw in that argument is that none of those documents state that Dorsey is *only*

counsel to the Tribe or that Dorsey does *not* represent LGSD. Revealingly, Dorsey blind copied Plaintiff on nearly all of those letters. Dorsey, which markets its expertise in Indian gaming, faults Plaintiff for not revising the documents to add that Dorsey also represented Plaintiff and suggests that Plaintiff failed to do so in an attempt to mislead the recipients of the documents. Plaintiff, however, had no basis to believe that the recipients were interested in Dorsey's joint representation. Although Dorsey contends that the agencies would not have approved the transaction if the joint representation had been disclosed, Plaintiff has no knowledge or understanding of that due to Plaintiff's lack of expertise in Indian gaming. (UMF 200, 285) Plaintiff relied upon Dorsey's expertise to determine what information those letters should contain. Dorsey, on the other hand, referred to Plaintiff as a client and conducted itself as Plaintiff's attorney while apparently aware that its joint representation would be disapproved. The only logical explanation reconciling Dorsey's current argument (that the joint representation would be prohibited by the NIGC) and the weight of the evidence demonstrating the joint representation is that Dorsey – which was being paid hundreds of thousands of dollars a month for its acknowledged joint representation of Plaintiff and the Tribe – deliberately misled the agencies in order to preserve its own cash flow.[14]

Essentially, Dorsey's argument boils down to, "We said we represented the Tribe, therefore we could not have also been representing LGSD. Don't look at our conduct, look at our words."[15] California law does not permit this argument to prevail, because an attorney's

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[14] With respect to other communications in which Dorsey stated it represented the Tribe, those statements were true; Plaintiff readily acknowledges that Dorsey represented the Tribe, but it is clear based on Dorsey's words and its conduct that Dorsey also represented Plaintiff.

[15] Dorsey's conduct toward Plaintiff in this case is similar to, but even more extreme than its conduct at issue in In re SRC Holding Corp. v. Dorsey & Whitney, 364 B.R. 1 (D. Minn. 2007). In that case, Dorsey was found to have formed an implied attorney-client relationship with a lender involved in an Indian gaming transaction after the close of the transaction. As in this case, in SRC Holding Corp., Dorsey sent a legal memo jointly to its client Miller & Schroeder and to Bremer, the lender, labeled Attorney-Client Privileged and containing legal advice benefiting the lender. Dorsey participated in phone conferences and meetings with the lender, and never stated that Dorsey did not represent the lender or that the lender should obtain independent counsel, which the court found "disconcerting." SRC

conduct trumps his words. Thus, an attorney cannot rely upon disclaimers that an attorney-client relationship does not exist if the attorney is actually providing legal services. See Benninghoff v. Superior Court, 136 Cal. App. 4th 61, 73 (2006), quoting S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations, 48 Cal. 3d 341, 349 (1989) ("The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.").

4. Dorsey's Cited Cases Are Inapposite

The cases cited by Dorsey for the proposition that Dorsey did not form an attorney-client relationship with Plaintiff bear no factual similarity to this case, and in fact support the conclusion that Dorsey represented Plaintiff. In Zenith Ins. Co. v. Cozen O'Connor, 148 Cal. App. 4th 998 (2007), the Court held that a reinsurer had no attorney-client relationship with counsel chosen by a ceding insurer to represent its insured, and pointed out that the reinsurer had no direction of the attorney or right to participate in the litigation of the claims, and only received information from the attorney because it had the contractual right to do so. As discussed above, Plaintiff affirmatively directed Dorsey's work, and communicated with Dorsey to obtain legal advice for its own benefit outside any contractual obligation to do so. In the Texas case SMWNPF Holdings, Inc. v. Devore, 165 F.3d 360 (1999), the party claiming an attorney-client relationship with attorneys representing one side of a transaction had no dealings with the attorneys until years after the closing. In this case, by contrast, Plaintiff and Dorsey consistently communicated as attorney and client after the closing, and Plaintiff does not allege that Dorsey represented it in connection with the closing. Plaintiff's direction of Dorsey's work, communication with Dorsey apart from any request by the Tribe to do so, receipt of legal advice from Dorsey for Plaintiff's own benefit, and insistence upon being involved in communications between Dorsey and the Tribe also distinguish this case from McMorgan & Company v. First California Mortgage Co., 931 F. Supp. 699 (N.D. Cal. 1996), in which an agent claiming to be a joint client with its principal had done none of those things. Fox v. Pollack, 181 Cal. App. 3d 954 (1986), is similarly inapplicable to this case, since the

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Holding Corp., 364 B.R. at 20. Bremer, like Plaintiff, relied upon Dorsey's legal advice.

finding of no attorney-client relationship in Fox was based on the fact that the party urging such a relationship met only once with the attorney, had no prior contact with the attorney, never sought legal advice from the attorney, and was given no legal advice by the attorney. As discussed extensively above, this case presents diametrically different facts.

Dorsey relies on Brandlin v. Belcher, 67 Cal. App. 3d 997 (1977), in an attempt to minimize the importance of Dorsey's extensive representation of Celani and entities owned by him. Brandlin held that an attorney-client relationship must be formed with respect to a particular transaction, but its holding that the attorney in that case owed no duty to undertake certain work for a former client relied entirely on the facts that the attorney had no ongoing contact with the former client, no continuing employment relationship with her, and the former client never contacted the attorney about the matter at issue. Brandlin, 67 Cal. App. 3d at 1000. Brandlin's facts are radically different than this case, where Dorsey indisputably had an ongoing employment relationship and ongoing contact with Celani in connection with its representation of Celani or entities owned by him in dozens of other matters.

B. LGSD's Negligent Misrepresentation Claim Is Well-Supported

1. LGSD Has Standing To Pursue A Negligent Misrepresentation Claim

LGSD has standing to bring its negligent misrepresentation claim. Dorsey is liable to LGSD for fraud because Dorsey knew when it made the initial misrepresentations[16] to Celani that he would form an entity to pursue the Project, and that this entity would rely upon Dorsey's misrepresentations to its detriment. "The law is well-settled that representations made to one person with the intention that they will be repeated to another and acted upon by him ... gives the person ... the same right to relief as if the representations had been made to

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[16] LGSD obviously has standing to pursue claims for Dorsey's misrepresentations made after the formation of Action, particularly with respect to the amount of time that would be necessary to obtain approvals for the Project. LGSD also has standing to bring Celani's claims against Dorsey because Action adopted and ratified Celani's pre-formation actions. "A corporation is liable as a party to a contract entered into by its promoters before it comes into existence, if it knowingly accepts the benefits of the contract." Frye & Smith, Limited v. Foote, 113 Cal. App. 2d Supp. 907, 912 (1952); see also Smith v. Glo-Fire Co., 94 Cal. App. 2d 154, 160 (1949).

him directly." Geernaert v. Mitchell, 31 Cal. App. 4th 601, 605 (1995) (home seller liable for misrepresentations made to developer, who later repeated them to home buyer), citing Simone v. McKee, 142 Cal. App. 2d 307, 313 (1956); see also Shapiro v. Sutherland, 64 Cal. App. 4th 1534, 1548, 1550 (1998). Celani relied upon Townsend's initial misrepresentations in making his decision to pursue the Project. (UMF 276) Action, in turn, relied upon the same misrepresentations by closing the transaction with the Tribe and continuing to pour money into the Project. (UMF 277) Dorsey is liable for its representations to Celani and to the entity Dorsey knew would be formed by him.

2. LGSD Disputes The Truth Of Dorsey's Material Statements

Dorsey also argues that four statements made by its attorneys to Tom Celani are actually true, and thus cannot support a negative misrepresentation claim.[17] (Dorsey MSJ at 20.) Luna disputes the veracity of two of the statements. First, though Dorsey attorneys asserted in late 1999 that the Tribe had land "eligible" for gaming, that issue has been and remains subject to significant dispute. (UMF 278) To date, there has been no final determination from the National Indian Gaming Commission that the lands at issue are eligible for Indian gaming. (UMF 279) Second, the enforceability of the Lease Relinquishment Agreement, which provided that the SIHC clinic would be moved and the casino placed on the original clinic site, is disputed. To induce Celani into the deal, Townsend represented that a Lease Relinquishment Agreement ("LRA") was already in place providing for the movement of a health clinic from the site of the future casino. (UMF 280) Townsend knew or should have known at the time he made this statement that the LRA would be successfully attacked as

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[17] Dorsey's request to strike portions of Plaintiff's negligent misrepresentation claim is a practice discouraged by many federal courts. "The plain language of Federal Rule of Civil Procedure 56 indicates that it is not appropriate to use summary judgment as a vehicle for fragmented adjudication of non-determinative issues." S.E.C. v. Thrasher, 152 F. Supp. 2d 291, 2995-6 (S.D.N.Y. 2001); see also In re U.S. Grant Hotel Assoc. Ltd. Sec. Litig., 1990 WL 260536, *2-*3 (S.D.Cal.).[17] Judicial economy is not served by this departure from Rule 56, as "motions seeking to resolve limited factual issues in a piecemeal fashion ... would waste judicial resources in almost every case." Capitol Records v. Progress Record Distrib., Inc., 106 F.R.D. 25, 29 (N.D.Ill.1985).

unenforceable, which happened soon after the Project agreements were signed. (UMF 281) The successful attacks on the enforceability of the LRA led to significant expense, delay and uncertainty for the Project. Summary judgment is thus not appropriate based on an argument that these statements made by Dorsey attorneys were true.

3. Dorsey's Statements Are Actionable Misrepresentations

Dorsey's assertion that LGSD's negligent misrepresentation claim depends upon non-actionable opinions fails for two reasons. First, opinions that are presented as facts become actionable. An "assertion [that] [i]s not a casual expression of belief, but [i]s a deliberate affirmation of the matters stated," is actionable even if it is actually an opinion. Gagne v. Bertran, 43 Cal. 2d 481, 489 (1954) (driller's opinion statement on soil quality actionable where presented as fact); see also Bily v. Arthur Young & Co., 3 Cal. 4th 370, 408 (1992) (accountants' opinions regarding financial health of a company actionable where presented as fact). Jim Townsend presented data regarding the Tribe's potential gaming project to Celani as if it was settled fact; that specific "issues … *were handled*," that the project "*will be open* in 24 months…"[18] (UMF 310) (emphasis added) As a result, Dorsey remains liable for its negligent misrepresentations.

Second, the Dorsey attorneys induced Celani's reliance by presenting themselves as experts. "[W]hen a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact."[19] Bily, 3 Cal. 4th at 408. While Celani had undertaken one previous Indian gaming development project (represented by Dorsey), his

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[18] Defendant Townsend's statements differ greatly from those in Vega v. Jones, Day, Reavis & Pogue, 121 Cal. App. 4th 282 (2004), which included vague references by *opposing* counsel that a financing was "standard" and "nothing unusual."

[19] Dorsey's cited cases are not to the contrary. The accountant in New-Visions Sports Inc., 86 Cal. App. 4th 303, 310-11 (2000) was not deemed an expert because he did not have specific expertise in financing roller rinks, the type of development that was at issue.

knowledge of Indian gaming cannot be viewed as equivalent to that of the Indian gaming law department at Dorsey. At the time of the statements, Dorsey promoted itself as one of the nation's preeminent Indian gaming law firms. Jim Townsend's biography page from the Dorsey & Whitney website in early 1999 touted his myriad achievements in Indian gaming law. (UMF 282) Indeed, it was precisely *because* the legal and regulatory issues surrounding Indian gaming were (and are) complex that Celani needed Dorsey to assist him. In light of Dorsey's self-proclaimed expertise and experience in Indian gaming, Celani was entitled to rely on Jim Townsend's statements.

Where there is a reasonable doubt whether any particular statement is an opinion or a factual misrepresentation, the decision is a matter of fact for the jury, not the Court, to decide. Pacesetter Homes, Inc. v. Brodkin, 5 Cal. App. 3d 206, 212 (1970). For all of the reasons discussed above, the jury must be permitted to decide this factual issue.

C. Dorsey Owed Plaintiff And Celani Fiduciary Duties

As LGSD has conclusively demonstrated, Dorsey did represent it jointly with the Tribe. Of course, as Dorsey admits, attorneys owe fiduciary duties to their clients. (Opp. at 23; *see Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086 (1995).) As Luna's attorney, Dorsey had an undeniable fiduciary duty to Luna, and the claim for breach of fiduciary duty must stand.

D. Partial Summary Judgment Cannot Be Granted For Misrepresentations And Breaches Of Duty After September 2003

Dorsey admits that Plaintiff and the Tribe had both potential and actual conflicts of interest. As a result, Dorsey's joint representation of Plaintiff and the Tribe, both before and after September 2003, breached Dorsey's fiduciary duties to Plaintiff.[20] See Pour Le Bebe, Inc.

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[20] Even if this Court were to find that Dorsey did not represent Plaintiff on the Project, Plaintiff's claims survive because Dorsey owed Plaintiff an independent duty of care. Attorneys are liable to third parties where, as here, the transaction in question was intended to benefit the third party, or it was foreseeable that the third party could suffer damage from the attorney's breaches of duty. First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler, 210 F.3d 983 (9th Cir. 2000); Lucas v. Hamm, 56 Cal. 2d 583, 588-9 (1961) (attorney liable to non-client/intended beneficiary of will); see also Business to Business Markets, Inc. v. Zurich Specialties, 135 Cal. App. 4th 165, 169 (2006) (insurance broker

v. Guess? Inc., 112 Cal. App. 4th 822 (2003) (attorney's representation of clients with conflicting interests is a breach of fiduciary duty); Cal. Rules of Prof. Conduct, Rule 3-310(C).

Additionally, genuine issues of material fact exist regarding Dorsey's misrepresentations after September 2003. The change in strategy to include Viejas in the Project did not change Dorsey's relationship with Plaintiff, did not result in any recission of the Project Agreements, did not change the manner in which the matter was billed, and did not result in any new Project agreements being executed. (UMF 283) In short, Dorsey, the Tribe and Plaintiff continued to behave as they had throughout the project, as attorneys and joint clients. Plaintiff alleges in the Complaint and in its discovery responses that Dorsey's misrepresentations continued after September 2003, and Dorsey has provided no evidence to the contrary that would shift the burden to Plaintiff on this Motion. As a result, Dorsey's alternative request for partial summary judgment must be denied.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court deny Dorsey's Motion For Summary Judgment, Or, In The Alternative, Partial Summary Judgment in its entirety.

DATED: February 8, 2008

CHAPIN WHEELER LLP

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owed duty to third party where coverage exclusions foreseeably damaged the third party); Meighan v. Shore, 34 Cal. App. 4th 1025, 1044 (1995) (attorney, representing husband, owed duty of care to non-client wife); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 111 (1976) (attorneys liable to third party where they issued opinion letter to induce third party to make loans to attorneys' client). Alternatively, Plaintiff's breach of fiduciary duty claim may be premised on the confidential relationship between Celani and Dorsey. See Richelle v. Roman Catholic Archbishop, 106 Cal. App. 4th 257, 273 (2003).