Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

STATE OF MINNESOTA

COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION

Case Type: Special Administration
Court File No.: 10-PR-16-46
Judge: Kevin W. Eide

In Re:

Estate of Prince Rogers Nelson,
Decedent.

REDACTED

OMARR BAKER, ALFRED JACKSON, AND TYKA NELSON'S MEMORANDUM IN OPPOSITION TO MOTIONS TO QUASH THE SUBPOENA DUCES TECUM TO L. LONDELL MCMILLAN

INTRODUCTION

Omarr Baker ("Baker"), Alfred Jackson ("Jackson"), and Tyka Nelson ("Nelson"), by and through counsel, submit this memorandum in opposition to Sharon Nelson, Norrine Nelson, and John Nelson's and L. Londell McMillan's Motions to Quash the Subpoena Duces Tecum to L. Londell McMillan (the "Subpoena").[1]

This Court's description of L. Londell McMillan ("McMillan") as "a '**lightning rod**' for disputes" is no exaggeration. (*See* Order for Transition from Special Administrator to Personal Representative, filed Jan. 18, 2017 ¶ 4(iv) (emphasis added)). In the past months, McMillan has created mistrust among the Non-Excluded Heirs,[2] misappropriated estate property, caused

[1] Omarr Baker served the Subpoena on L. Londell McMillan, and McMillan and Sharon, Norrine, and John Nelson filed motions to quash the Subpoena. Alfred Jackson and Tyka Nelson support the Subpoena in its entirety. The undersigned have been advised by counsel for the Personal Representative that it supports Request No. 4 of the Subpoena ("All documents sent to or received from any Music Business Entity relating to Prince Rogers Nelson"). The Personal Representative will file a separate memorandum.

[2] Pursuant to the Court's July 29, 2016 *Order Regarding Genetic Testing Protocol and Heirship Claims following the June 27, 2016 Hearing and Judgment* and subsequent orders, the Non-Excluded Heirs are defined in this proceeding as Omarr Baker, Alfred Jackson, John Nelson, Norrine Nelson, Sharon Nelson, and Tyka Nelson.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

confusion among various parties, and generally acted in a manner inconsistent with the best interest of the Estate of Prince Rogers Nelson (the "Estate"). The Court declined to appoint McMillan as personal representative for the Estate, predicting that such an appointment was sure to cause "**continued disagreements** and **conflicts of interest**." (*Id.* (emphasis added)).

Precisely what the Court feared has now transpired. Officially, McMillan's only official role in the Estate has been to serve as an entertainment industry expert during Bremer Trust, N.A.'s ("Bremer" or "Special Administrator") term. Unofficially, as early as September 2016, McMillan —while still working for the Estate—commenced working with Sharon Nelson. Three of the Non-Excluded Heirs—Sharon, Norrine, and John Nelson—have now retained McMillan as a so-called 'advisor' in matters pertaining to the Estate. McMillan has approached other Non-Excluded Heirs with the proposition of signing a purported "management agreement." At the hearing on January 12, 2017, Sharon Nelson represented under oath that with respect to appointing McMillan as co-personal representative, any Non-Excluded Heir's mistrust of McMillan was immaterial.[3] On March 10, 2017, counsel for Sharon, Norrine, and John Nelson objected to Comerica Bank & Trust, N.A.'s ("Comerica" or "Personal Representative") proposed order in part due to Comerica's refusal to allow McMillan to participate in its discussions and be privy to confidential information alongside the Non-Excluded Heirs. (*See* Objection to Proposed Order, filed March 10, 2017.)

With respect to at least two agreements, McMillan—as the Special Administrator's agent—is directly involved in potential claims for breach of fiduciary duty. First, in early April 2017, [redacted] threatened imminently and seemingly inevitable litigation involving

[3] Testifying before the Court on January 12 in support of McMillan, Sharon Nelson stated: "We have four votes on our side of the family. Should we have any disagreement, we will *hear them out* and *vote them out*. That's our motto." *See* Transcript of January 12, 2017 Proceedings, p. 110 (emphasis added).

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

the Estate. In light of this, Baker and Jackson argued that Bremer's discharge must be delayed. (*See* Omarr Baker and Alfred Jackson's Supplemental Objections to Bremer Trust, National Associations Final Accounts through January 31, 2017, filed April 7, 2017.) After learning of the potential litigation, the Court stayed Bremer's discharge. (*See* Order Staying Discharge of Special Administrator ("Stay Order"), filed April 12, 2017.)

Second, later in April 2017, Jobu Presents, LLC ("Jobu Presents") filed a complaint in Carver County District Court against McMillan for actions taken in his role as one of the "Monetization Experts selected by Bremer Trust in June of 2016." (*Jobu Presents, LLC v. The Estate of Prince Ro[]gers Nelson, Bremer Trust, National Association, Charles Koppelman and Londell McMillan*, Court File No. 10-CV-17-368, the "Complaint.") The Complaint contains Jobu Presents' allegations that while acting as Bremer's agent, McMillan engaged in "systematic and material misrepresentations." (*See* Complaint, ¶¶ 24, 52, 81-92.)

The above facts suggest conflicts of interest regarding McMillan's role in the Estate, particularly as Bremer's agent. Considering (1) McMillan's unclear and unexplained relationships with some of the Non-Excluded Heirs, (2) the threatened litigation involving one of the entertainment deals, (3) the commenced litigation from Jobu Presents, and (4) the Court's order to Comerica to investigate McMillan's commission with respect to the Tribute Concert, the Court should deny the motions to quash and require McMillan to submit to the Subpoena.

The information sought from the Subpoena requests are reasonably calculated to lead to the discovery of admissible evidence, the purpose of which is to determine if the Non-Excluded Heirs have any claims against the Special Administrator or any of its agents. The Estate is now under siege due to the Advisors' conduct. McMillan cannot continue to hide his involvement in this matter. There are questions about McMillan's role, and the Non-Excluded Heirs deserve

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

answers. In the Subpoena, Baker has narrowed his requests for information and seeks documents related to two areas: (1) his interactions with the Non-Excluded Heirs, and (2) his interactions in the music industry with respect to the Decedent.

Sharon, Norrine, and John Nelson's concerns regarding the discovery of communications among them and McMillan that allegedly include privileged or implicate the work-product doctrine are without merit. McMillan is not counsel of record for Sharon, Norrine, and John Nelson in this proceeding. Even so, the Subpoena does not seek the production of privileged communications. Furthermore, to the extent the limited factual information the Subpoena seeks contains any confidential information, Baker is willing to enter into a protective order to prevent the disclosure of that information outside of this proceeding.

McMillan's arguments against the production of documents requested in the Subpoena do not pass the straight-face test. McMillan argues that Baker had an opportunity to cross-examine him at the January 12 hearing, and as such, no further inquiry is necessary. However, questioning McMillan without documents is insufficient. Moreover, McMillan's veracity, which has been adjudicated as questionable by other courts (*see* Affidavit of Steven H. Silton, filed Sept. 27, 2016, ¶ 5, Ex. 2), cannot be accepted alone. In fact, at the January 12 hearing, McMillan's testimony that [redacted] (*Compare* Transcript of January 12, 2017 Proceedings, pp. 109-110 (Sharon Nelson testifying that she retained McMillan as a business advisor) *with* pp. 183-84 ([redacted]).

The Subpoena requests are reasonable. None of the requested information is privileged, none of the requests subject McMillan to undue burden, and none of the requests require the

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

disclosure of confidential information. *See* MINN. R. CIV. P. 45.03(c). For all the following reasons, Baker, Jackson, and Nelson respectfully request the Court deny the motions to quash the Subpoena.

RELEVANT BACKGROUND

As early as September 2016, Baker informed the Court of a judgment entered against McMillan in the United Kingdom in the amount of $540,000. (*See* Affidavit of Steven H. Silton, filed Sept. 27, 2016, ¶ 5, Ex. 2.) In its opinion, the UK justice described McMillan as "unwilling to accept what was plain on the face of documents and seemed to me to have convinced himself of a version of events which was inconsistent with the contemporaneous record. **I did not feel able to rely on his evidence where it was in dispute and not supported by a document**." (*Id.*, Ex. 2 at ¶ 9, emphasis added.) At the same time, Baker informed the Court that Sharon Nelson was "working directly with L. Londell McMillan with regard to . . . business interests." (*See* Affidavit of Omarr Baker, filed Sept. 27, 2016.)

On December 7, 2016, Sharon, Norrine, and John Nelson filed a Joint Petition for General Administration of Estate, Formal Adjudication of Intestacy, Determination of Heirs and Appointment of Co-Personal Representative ("Petition"). The Petition requested the Court appoint McMillan as co-personal representative of the Decedent's estate. (*See* Petition, ¶ 15.)

Upon receipt of the Petition, Baker requested certain information from McMillan. (*See* Affidavit of Thomas P. Kane filed Jan. 6, 2017, ¶ 3; Affidavit of Steven H. Silton filed Jan. 11, 2017 ("Silton Aff."), ¶¶ 3-4.) In December 2016, Baker's counsel met with McMillan and questioned him, but did not receive full responses to the questions answered and left without all the information needed. (Silton Aff., ¶ 3.) At the meeting, McMillan indicated he would provide the information requested at a later date. (*Id.*) He never provided the information. Baker's counsel

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

then requested the information—without success—from counsel for John, Norrine, and Sharon Nelson. (*Id.*, ¶¶ 4-7, Ex. A-D.)

In January 2017, Baker moved the Court to require McMillan produce information necessary to determine his suitability to act as personal representative. (*See* Mem. in Supp. of Mot. to Compel, filed Jan. 6, 2017.) Sharon, Norrine, and John Nelson filed a memorandum in opposition. (*See* Mem. in Opp. to Mot. to Compel, filed Jan. 9, 2017.) Sharon, Norrine, and John Nelson's objection was largely procedural, stating the only method by which to obtain discovery from non-parties is Rule 45.[4] (*Id.*, p. 5.)

The hearing regarding the petition to appoint McMillan as co-personal representative took place on January 12, 2017. Prior to the hearing, Baker and Nelson filed an opposition to McMillan's appointment. (*See* Objection to Petition for Formal Adjudication of Intestacy, Determination of Heirs and Appointment of Personal Representative, filed Jan. 11, 2017.) On the eve of the hearing, McMillan offered Nelson a $10,000,000.00 loan for her cooperation with respect to the Estate. (*See* Affidavit of Tyka Nelson, filed Jan. 11, 2017.) Baker and Nelson brought these issues before the Court, and addressed the same at the January 12 hearing.

At the January 12 hearing, McMillan's testimony was inconsistent at best and dishonest at worst. While Sharon Nelson testified that McMillan was her business advisor (*see* Transcript of January 12, 2017 Proceedings, pp. 109-10), [redacted]

[4] Baker anticipated the procedural objection on the basis that a subpoena had not been served—and addressed the same in his motion and reply. (*See* Mem. in Supp. of Mot. to Compel, p. 4, Reply in Supp. of Mot. to Compel, p. 5.) Knowing that a subpoena (and the likely objection from McMillan) would expend significant time, and making no headway with requesting the information informally, Baker filed the motion on January 6 in order to expedite the process and obtain the information before the January 12 hearing. As expected, service of the Subpoena and motion practice regarding this Motion to Quash has and continues to expend considerable time and expense—something which could have been avoided had McMillan provided the information as requested back in December 2016.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

[redacted] (*Id.*, pp. 183-84.) Citing these and other issues regarding McMillan, Baker urged the Court to [redacted] (*Id.*, pp. 185-190.) The Court took the matter under advisement. (*Id.*)

On January 18, 2017, along with denying McMillan's appointment as co-personal representative, the Court denied Baker's motion for documentation from McMillan. (*See* Order for Transition from Special Administrator to Personal Representative, filed Jan. 18, 2017, p. 3.) After the Court declined to appoint McMillan as co-personal representative, McMillan's role in the Estate was arguably complete and Baker considered the matter resolved. However, Sharon, Norrine, and John Nelson's counsel later confirmed that McMillan had signed 'management agreements' with the three Non-Excluded Heirs and that McMillan was consulting with these three Non-Excluded Heirs regarding Estate matters. (*See* Affidavit of Thomas P. Kane ("Kane Aff."), Ex. 4.) McMillan offered a similar 'management agreement' to Jackson. (*Id.*, Ex. 5.)

Frustrated with the piecemeal receipt of information, and trying to understand the full picture of McMillan's continued involvement in the Estate and the potential conflicts that exist, Baker served McMillan with the Subpoena on March 3, 2017. (*See* Kane Aff., Ex. 1.) As one of the Non-Excluded Heirs, Baker sought to understand the scope of McMillan's relationship with the others in this Estate. In the Subpoena, Baker reduced the scope of the information to the following categories of factual information:

1. All documents sent to or received from Norrine, Sharon, and/or John Nelson.

2. All documents sent to or received from Tyka Nelson, Alfred Jackson, and/or Omarr Baker.

3. All documents sent to or received from any Music Business Entity relating to Norrine Nelson, Sharon Nelson, John Nelson, Alfred Jackson, Tyka Nelson and/or Omarr Baker.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

4. All documents sent to or received from any Music Business Entity relating to Prince Rogers Nelson.

5. All documents in the possession or control of L. Londell McMillan relating to Norrine Nelson, Sharon Nelson, John Nelson, Alfred Jackson, Tyka Nelson and/or Omarr Baker.

(*Id.*) That information is relevant to the continued administration of the Estate and reasonably calculated to lead to the discovery of admissible evidence relating to (1) the conflicts with [redacted] and Jobu Presents and McMillan, Koppelman, and Bremer's liability for the damage these conflicts caused or will cause to the Estate, and (2) any conflicts in McMillan's dual roles as Bremer's agent and Sharon, Norrine, and John Nelson's 'business advisor.' The Subpoena does not require McMillan to produce documents beyond these five categories—or to sit for a deposition.[5] (*See id.*)

On March 10, 2017, Sharon, Norrine, and John Nelson filed an objection to the Personal Representative's proposed order. (*See* Objection to Proposed Order, filed March 10, 2017.) The objection was partially based on Comerica's restriction of confidential business information:

> The Non-Excluded Heirs themselves are not business or entertainment experts, so they or their counsel should be able to retain experts to assist in the evaluation of business deals, and **those experts should have access to confidential business information relevant to evaluating the deals**.

[5] Both McMillan and Sharon, Norrine, and John Nelson spend considerable time in their filings complaining about the scope of the document requests in the Subpoena. *See* Sharon, Norrine, and John Nelson's Mem. in Supp. of Mot. to Quash, filed March 16, 2017, pp. 3, 6; McMillan's Mem. in Supp. of Mot. to Quash, filed April 26, 2017, pp. 3, 8. McMillan and Sharon, Norrine, and John Nelson further aver that McMillan was never offered compensation for responding to the Subpoena. *Id.* Respectfully, this misstates the facts. As discussed below, neither McMillan nor Sharon, Norrine, and John Nelson ever contacted Baker to meet and confer prior to filing their motions to quash. Before the motions to quash were filed, there was no discussion with Baker of scope, compensation, a protective order, or other issues that may have ameliorated the need for these motions to quash. Instead, it was Baker who subsequently reached out to the parties—with little success—to attempt to reach an understanding. *See* Kane Aff., ¶¶ 3-7.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

(*Id.*, p. 6 (emphasis added)). The "expert" to whom Sharon, Norrine, and John Nelson refer is McMillan.

Even *after* it declined to appoint McMillan as personal representative, the Court found that further investigation regarding McMillan's conduct with respect to the Estate was necessary. On April 5, 2017, the Court directed the Personal Representative to "investigate and make an informed decision regarding whether any action should be pursued for the return of the commission paid to L. Londell McMillan in connection with the agreement with Jobu Presents to conduct the Tribute Concert." (*See* Order Granting Special Administrator's Request to Approve Payment of Special Administrator's and Attorneys' Fees and Costs through January 31, 2017 and Final Accounts and Inventory ("Discharge Order"), p. 5.) The Subpoena requests directly address the issue raised by the Court regarding McMillan's commission in connection with Jobu Presents' potential claim.

Prior to service and notice of their motions to quash,[6] neither McMillan nor Sharon, Norrine, and John Nelson contacted Baker to meet and confer. (*See* Kane Aff., ¶¶ 3, 5.) Baker was not contacted about the scope of the discovery requested, the time period to respond, the compensation pursuant to Rule 45, or about any privilege or undue burden concerns that McMillan had. (*Id.*) Instead, Baker received—without warning—Sharon, Norrine, and John Nelson's Motion to Quash on March 14, 2017. McMillan later filed his Motion to Quash on April 26, 2017. Had

[6] In their Memorandum, Sharon, Norrine, and John Nelson incorrectly state that in violation of MINN. R. CIV. P. 45.01(e), the Subpoena "was served upon Mr. McMillan in advance of the Notice to the parties in this action." *See* Mem. in Supp. of Mot. to Quash at 3, 4, 7. This misstates the rule and the service requirement. McMillan was served with the Subpoena at the time Baker provided notice via the Court's EFS system. As stated in the Committee Comment to Rule 45, the notice requirement is satisfied by providing the parties with "a copy of the subpoena ***at the time it is served*** on the non-party." *See* MINN. R. CIV. P. 45 advisory committee's comment – 2007 Amendment (emphasis added).

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

McMillan or Sharon, Norrine, and John Nelson's counsel requested a meet and confer prior to filing their motions, the Court may not have been burdened with this unnecessary motion practice.[7]

The concerns expressed in the Motions to Quash regarding the discovery of allegedly privileged communications are without merit. The scope of the requests encompass a few categories of information that do not implicate any such communications. Baker is not interested in obtaining privileged communications, but rather factual information that relates to McMillan's interactions with the Non-Excluded Heirs and his role in negotiating agreements related to the Estate as Bremer's agent to assist in determining if a claim should be made.

Sharon, Norrine, and John Nelson previously told the Court that "absent substantial evidence from counsel suggesting McMillan is somehow unsuitable," discovery is unnecessary. (*See* Mem. in Opp. to Mot. to Compel, filed Jan. 9, 2017, p. 9.) Baker has demonstrated ample evidence suggesting the need for discovery regarding McMillan's inconsistent statements and roles in this Estate. (*Compare* Transcript of January 12, 2017 Proceedings, pp. 109-110 (Sharon Nelson testifying that she retained McMillan as a business advisor) *with* pp. 183-84 (McMillan testifying that he did not have a contractual relationship with Sharon Nelson).) The Court has similarly found additional investigation of McMillan is necessary. (*See* Discharge Order, p. 5.) The above facts—compounded by the newly discovered information regarding conflicts with [redacted] and Jobu Presents—suggest McMillan's involvement in the Estate is extensive and muddled. This warrants discovery. As Non-Excluded Heirs, Baker, Jackson, and Nelson are entitled to documents that will

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[7] As is required pursuant to MINN. GEN. R. PRAC. 115.10, counsel for McMillan and Sharon, Norrine, and John Nelson failed to engage in a meet and confer prior to filing their Motions to Quash. In a genuine good faith effort to avoid the time and expense of motion practice, after being served with McMillan and Sharon, Norrine, and John Nelson's Motions to Quash, Baker's counsel immediately requested a meet and confer. *See* Kane Aff. ¶¶ 3-6, Ex. 2.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

explain McMillan's true role in this Estate. Baker, Jackson, and Nelson respectfully request the Court deny the motions to quash the Subpoena.

ARGUMENT

McMillan and Sharon, Norrine, and John Nelson claim the Subpoena should be quashed because it allegedly is unduly burdensome; seeks information that is proprietary, confidential, and trade secret information; seeks information protected under the work product doctrine and/or attorney-client privilege; and seeks information that is not relevant to any issue in underlying action. (*See* Sharon, Norrine, and John Nelson's Mem. in Supp. of Mot. to Quash, filed March 16, 2017 ("SNJ Mem."); McMillan's Mem. in Supp. of Mot. to Quash ("McMillan Mem."), filed April 26, 2017.) However, McMillan and Sharon, Norrine, and John Nelson fail to provide any explanation for the purported undue burden, fail to identify any proprietary and/or confidential information that would be disclosed, fail to identify any work product or privilege concerns that would arise by responding to the Subpoena, and fail to demonstrate how the information is not relevant to this proceeding. As detailed below, their arguments are without merit.

A. Legal Standard

Rule 26.02 of the Minnesota Rules of Civil Procedure regarding discovery provides that "[p]arties may obtain discovery regarding <u>any matter</u>, <u>not privileged</u>, that is <u>relevant to a claim or defense of any party</u>, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter" (emphasis added). The objective of the rules of discovery is to encourage the exchange of relevant information by the parties prior to trial and to discourage and prevent unjust surprise and prejudice at trial. *Gale v. County of Hennepin*, 609 N.W.2d 887, 891 (Minn. 2000).

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

Rule 45 of the Minnesota Rules of Civil Procedure governs subpoenas. Rule 45.03 provides that "an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." *Id*. The decision to quash a subpoena is within the discretion of the trial court. *Phillippe v. Comm'r of Pub. Safety*, 374 N.W.2d 293, 297 (Minn. App. 1985). When ruling on a motion to quash a subpoena, courts "should balance the need of the party to inspect the documents or things against the harm, burden, or expense imposed upon the person subpoenaed." *Ciriacy v. Ciriacy*, 431 N.W.2d 596, 599 (Minn. App. 1988).

If the Court finds that the Subpoena relates to information **"sufficiently entwined" with the underlying action to make further discovery proper**, it must deny the motion to quash. *Lohmann v. Supply Co.*, No. A04-608, 2005 Minn. App. LEXIS 45, at *6 (Minn. Ct. App. Jan. 18, 2005) (emphasis added); *see also Fannie Mae v. Heather Apts. L.P.*, No. 27-CV-07-20736, 2011 Minn. Dist. LEXIS 266, at *11-12 (Minn. 4th Dist. Dec. 15, 2011) (denying motion to quash and implementing a protective order with an "attorneys' eyes only" provision); *In re Investigation of Underwager*, No. C0-97-55, 1997 Minn. App. LEXIS 728, at *4 (Minn. Ct. App. July 8, 1997) (denying motion to quash and noting that "a subpoena is sufficiently specific when it provides enough detail and clarity that the documents being sought are readily identifiable") (internal citations omitted); *Berry & Co. v. County of Hennepin*, No. 27-CV-13-07304, 2017 Minn. Tax. LEXIS 3, at *2-8 (Minn. Tax Ct. Jan. 24, 2017) (denying motion to quash based on argument that the subpoenaed parties "had no information relevant to this dispute and that the purpose of the subpoenas was to harass").[8]

[8] Rule 45 of the Minnesota Rules of Civil Procedure reflects its federal equivalent. *See* FED. R. CIV. P. 45. As such, recent interpretations of motions to quash before courts in the Eighth Circuit may be instructive for this Court. In turn, the Eighth Circuit generally looks to the Federal Circuit

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

Applying the legal standards in Rules 26 and 45 and the accompanying case law, Baker's need for the documents regarding McMillan's business dealings with Sharon, Norrine, and John Nelson outweighs the harm, burden, or expense (to the extent any exists) to McMillan—and the Subpoena requests are generally limited in time and scope. The Court should use its broad discretion regarding discovery to deny the motions to quash.

B. Producing the Limited Categories of Information the Subpoena Requests Will Not Create Any Undue Burden on McMillan or Sharon, Norrine, and John Nelson.

Baker served the subpoena on McMillan. And yet, in addition to McMillan filing a Motion to Quash, Sharon, Norrine, and John Nelson have also interjected themselves into this discovery proceeding, arguing that they would be unduly burdened in responding to a subpoena that was not issued to them and to which they have no obligation to respond. (*See* SNJ Mem., p. 6.)

In any event, prior to service of the Subpoena, Baker reduced the scope of documents he is seeking from what was previously requested. None of those categories will require an extensive review for privileged information or work product related to McMillan's communications with

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to determine whether a third-party subpoena creates an undue burden because of the "dearth of Eighth Circuit case law" on motions to quash. *DatCard Sys. v. PacsGear, Inc.*, No.: 11-mc-0025 (DSD/SER), 2011 U.S. Dist. LEXIS 67648, at *4 (quoting *Truswal Sys. Corp. v. Hydro-Air Eng'g, Inc.*, 813 F.2d 1207, 1209 (Fed. Cir. 1987)). A party seeking to quash a subpoena bears "a particularly heavy" burden. *Truswal*, 813 F.2d at 1210 (quoting *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 766, (D.C. Cir. 1965)). Courts in the Eighth Circuit have denied motions to quash when parties failed to meet that heavy burden. *See, e.g.*, *Broom, Clarkson, Lanphier & Yamamato v. Kountze*, No. 8:14CV206, 2016 U.S. Dist. LEXIS 140600, at *7-8 (D. Neb. Oct. 11, 2016) (denying motion to quash and holding that "relevant [and discoverable] information includes any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case") (internal quotations omitted); *In re Fortman*, No. 4:16-MC-421 RLW, 2016 U.S. Dist. LEXIS 97911, at *4 (E.D. Mo. July 27, 2016) (denying motion to quash and noting that the movant failed to "raise[] any privilege concerns that cannot be addressed through a protective order"); *DatCard Sys.*, 2011 U.S. Dist. LEXIS 67648, at *5 (denying motion to quash because movant "failed to satisfy its heavy burden to quash").

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

Sharon, Norrine, and John Nelson. Baker is not interested in those communications. McMillan is not counsel of record for Sharon, Norrine, and John Nelson, nor has he represented this to the Court. Thus, McMillan's and Sharon, Norrine, and John Nelson's concern that they would have to spend numerous hours reviewing a large volume of documents to identify documents subject to privilege or the work-product doctrine (*see* SNJ Mem., p. 6; McMillan Mem., p. 9) is inaccurate.

It is also worth noting that McMillan's statement that the Subpoena imposes an undue burden is based entirely on statements of counsel in his memorandum in support. (*See* McMillan Mem., pp. 1, 8-9.) McMillan did not file an affidavit in support of his own motion to quash. The documents subject to the Subpoena are generally assumed to be electronic documents that are easily producible. McMillan's lack of affidavit undercuts his argument of undue burden, as he has not shown there are numerous documents or that production of these documents would be an extreme effort. Without an affidavit from McMillan, the Court cannot and should not take his allegations of undue burden at their word. *See, e.g.*, *DatCard Sys. v. PacsGear, Inc.*, No.: 11-mc-0025 (DSD/SER), 2011 U.S. Dist. LEXIS 67648, at *5 (D. Minn. April 25, 2011) (finding movant's four-page affidavit lacked enough detail describing the time and expense movant would incur complying with the subpoena and holding that "[t]his conclusory, vague affidavit is insufficient to support [movant's] burden").

What is more, the documents relating to communications with the Non-Excluded Heirs would be limited to exactly one year—since the Decedent's death. (*See* Subpoena, Request Nos. 1, 2, 5.) Baker, Jackson, and Nelson are not aware of any interactions McMillan had with the Non-Excluded Heirs before the Decedent's death. The Subpoena seeks only documents related to this Estate. The only documents that would presumably exist before the Decedent's death would be communications with the Music Business Entity relating to the Decedent before his death. (*See*

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

Subpoena, Request Nos. 3, 4.) However, even these documents would be severely limited as relating to specific transactions.

Finally, it is not apparent what (if any) confidential information would be contained in the documents that the Subpoena seeks. Regardless, Baker is certainly willing to protect any such allegedly confidential information via a confidentially agreement and/or protective order with an "attorneys' eyes only" provision. (*See* Kane Aff., ¶ 6.) In fact, the parties are already subject to orders regarding confidentiality in the underlying proceeding which provides that confidential information produced or identified will be filed under seal. (*See* Order Regarding the Filing of Certain Documents under Seal, filed Jan. 19, 2017.) To the extent McMillan and/or Sharon, Norrine, and John Nelson require an additional protective order, Baker has told them he is amenable to discuss.

C. The Subpoena Does Not Seek Documents Allegedly Protected by the Work-Product Doctrine or Otherwise Privileged.

The discrete categories of documents sought here, narrowed substantially since what was initially requested in December 2016, do not involve information protected by the work-product doctrine or any other privilege. The Subpoena does not seek the production of privileged information that McMillan and/or Sharon, Norrine, and John Nelson seek to protect. Baker, Jackson, and Nelson are not aware of (nor have McMillan or Sharon, Norrine, and John Nelson disclosed to this Court) the presence of an attorney-client relationship with McMillan in the context of the underlying action.[9] Similarly, McMillan has not entered an appearance as attorney of record

[9] In his affidavit in support of the motion to quash, counsel for Sharon, Norrine, and John Nelson states that "[u]pon information, belief, and communication with [his] clients," McMillan has served as Sharon, Norrine, and John Nelson's attorney. *See* Affidavit of Randall W. Sayers, filed March 16, 2017, ¶ 4. McMillan has never noticed an appearance as attorney of record for Sharon, Norrine, and John Nelson in this action, nor did he file an affidavit stating the same. If

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

for any other parties in this action. Indeed, there should be nothing in the documents covered by the Subpoena that involve the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning this proceeding—and Sharon, Norrine, and John Nelson have not identified any. It is the business-related and other documents between McMillan and the Non-Excluded Heirs that the Subpoena seeks, not the privileged communications (if any) with McMillan. Thus, McMillan's and Sharon, Norrine, and John Nelson's concerns in that regard are misplaced.

Furthermore, the work-product doctrine is inapplicable to the materials the Subpoena seeks. The requests do not purport to cover documents created in anticipation of litigation. *See generally* MINN. R. CIV. P. 26.02(d). The purpose of the Subpoena requests is to determine the business interactions McMillan has had with the Non-Excluded Heirs and his involvement with certain entertainment deals related to the Decedent's intellectual property. Even if the work-product doctrine did apply, Baker, Jackson, and Nelson certainly have a substantial need for the straight-forward categories of information that they have been unable to obtain from other sources.

D. The Information Cannot Be Obtained from Any Other Party in this Action.

Even if McMillan or Sharon, Norrine, and John Nelson assert that Baker should have sought the information from sources other than McMillan, the Subpoena should not be quashed. The information in the Subpoena relates to McMillan's business interactions regarding the Estate. Baker has requested the information in the Subpoena from counsel for Sharon, Norrine, and John Nelson, both formally and informally. (*See generally* Affidavit of Thomas P. Kane, filed Jan. 6, 2017, ¶ 3; Affidavit of Steven H. Silton, filed Jan. 11, 2017, ¶¶ 3-4.) On each occasion, they have

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McMillan is serving as Sharon, Norrine, and John Nelson's attorney with respect to the Estate, this should be disclosed to the Court.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

refused to cooperate. In fact, counsel for Sharon, Norrine, and John Nelson categorically represented to the Court that they "do not represent McMillan. Accordingly, they are not obligated to answer discovery on his behalf and certainly would not produce discovery beyond their possession, custody, or control." (*See* Mem. in Opp. to Mot. to Compel, filed Jan. 9, 2017, p. 10.)

If Sharon, Norrine, and John Nelson refuse to produce documents and/or lack responsive documents in their control, it is even more confusing that they filed a motion to quash the Subpoena. It is also worth noting that McMillan did not file an affidavit in support of his own motion to quash, or in support of Sharon, Norrine, and John Nelson's motion to quash. Instead, the only affidavit filed in support of either motion was from counsel for Sharon, Norrine, and John Nelson, stating that "[u]pon information, belief, and communication with [his] clients," Sharon, Norrine, and John Nelson have communicated with McMillan regarding "their personal business and financial information" and that McMillan "has served as a business advisor and attorney" to his clients. (*See* Affidavit of Randall W. Sayers, filed March 16, 2017, ¶¶ 3-4.) The information in this affidavit is not based on personal knowledge. McMillan himself, rather than counsel, should have filed the affidavit attesting to his relationship with Sharon, Norrine, and John Nelson.

E. The Documents Baker Seeks Are Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

Contrary to McMillan and Sharon, Norrine, and John Nelson's objections, the documents requested pursuant to the Subpoena are *directly relevant* to this action. As early as September 2016, he had a business relationship with Sharon Nelson. (*See* Affidavit of Omarr Baker, filed Sept. 27, 2016.) McMillan has signed 'management agreements' with Sharon, Norrine, and John Nelson. (*See* Kane Aff., Ex. 4.) He signed a similar agreement with Alfred Jackson.[10] (*Id.*, Ex. 5.)

[10] McMillan's agreement with Alfred Jackson, attached as Exhibit 5 to the Affidavit of Thomas P. Kane, suggests McMillan is going to be paid a commission based on the inheritance

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

He offered Tyka Nelson a $10,000,000.00 loan for her cooperation with respect to the Estate. (*See* Affidavit of Tyka Nelson filed Jan. 11, 2017.) These interactions suggest McMillan is attempting to exercise an undue influence over select Non-Excluded Heirs, and is potentially damaging the value of the Estate.

These facts suggest numerous potential conflicts of interest, which concern Baker, Jackson, and Nelson and should similarly concern other parties in this action. McMillan was retained by the Special Administrator and had a financial interest in the entertainment deals, pursuant to the Advisor Agreement executed. If McMillan was working with Sharon, Norrine, and John Nelson while he was still Bremer's agent, he had conflicting interests. It is possible he shared confidential business information relating to the Estate with Sharon, Norrine, and John Nelson. It is possible his negotiation of the entertainment deals and/or his advice to Sharon, Norrine, and John Nelson was impacted by his conflicting interests. Baker, Jackson, and Nelson are entitled to find out this information, and soon.

The Court decided to stay Bremer's discharge. (*See* Stay Order.) In light of this, the Subpoena requests are even more relevant. Baker, Jackson, and Nelson deserve to know if McMillan was engaged in any untoward conduct regarding the entertainment deals, and the documents may show that he knew there was an issue involving one of the deals and hid it from the Non-Excluded Heirs. This would directly relate to Bremer's discharge and liability.

What is more, the recent complaint filed by Jobu Presents implicates McMillan. The allegations regarding McMillan in Complaint relate to McMillan's involvement in *all* of the music

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received. The agreement states McMillan will receive compensation, defined as "ten (10%) percent on all Gross Receipts (as defined below) in connection with any and all written contracts, amendments, extensions, replacements and modifications related to Mr. Jackson or the acquisition, disposition, license or sale of rights related to Mr. Jackson or the rendering of services under this Agreement." *See* Kane Aff., Ex. 5, ¶ 5.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

transactions regarding the Estate, not just the transaction with Jobu Presents. (*See* Complaint, ¶¶ 19-20.) McMillan suggests that with respect to the Jobu Presents allegations, Baker has failed to provide any "evidence that McMillan was involved in, or was even aware of, the alleged loan by Koppelman to Jobu related to the Tribute Concert." (*See* McMillan Mem., pp. 3-4.) As a result, McMillan argues the requests in the Subpoena are not relevant and should be quashed. (*Id.*, pp. 6-7.) This argument fails for several reasons.

First, the Special Administrator has always held out McMillan *and* Koppelman as the experts. As Bremer's agents, they did not have separate tasks or separate roles. Koppelman and McMillan have appeared before the Court together and have acted in concert throughout the special administration. Second, if McMillan truly had no role in the Jobu Presents transaction, he should have submitted an affidavit stating the same.[11] It strains credulity to suggest that McMillan does not or did not know about Koppelman's loan to Jobu Presents—and even if McMillan can represent the same under oath to the Court, McMillan still must respond to the Subpoena requests, which directly relate to this issue, as there are significant issues with McMillan's credibility. Third, McMillan represented that his role in the Tribute Concert was to obtain artists for Jobu Presents. (*See* McMillan Mem., pp. 6-7.) Even if this were his only role, it is enough to implicate McMillan in the wrongful conduct that Jobu alleges. (*See generally* Complaint.) This information and McMillan's role at the heart of the wrongful conduct—the failure to obtain artists. Baker, Jackson, and Nelson are seeking documents to determine if McMillan knew there was no charity component

[11] McMillan's memorandum includes a footnote denying "any allegation that [McMillan] was aware of Koppelman's alleged loan to Jobu or alleged wrongdoing in connection with the Tribute Concert." *See* McMillan Mem., p. 7 fn. 4. The memorandum further credits McMillan as "the chief reason that artists were secured, the venue was changed, and the Tribute Concert was successful." *Id.* However, as with McMillan's argument of undue burden, this statement is unsupported by an affidavit from McMillan.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

to the Tribute, which is part of the fraud alleged by Jobu Presents. (*See* Complaint, ¶¶ 20, 22, 24, 25, 37-40, 45, 48, 75, 83.) Finally, McMillan retained the commission received relating to the Tribute Concert. Baker, Jackson, and Nelson (and the Court) are entitled to know what McMillan claims he did to benefit the Estate for his commission for a failed Tribute Concert and who funded his commission payment. The Court ordered the Personal Representative to investigate this issue (*see* Discharge Order, p. 5), and the Subpoena requests are directly relevant to the investigation that the Court ordered. Baker, Jackson, and Nelson do not know what McMillan did or did not do regarding the Jobu Presents events, and that is in part the reason for the Subpoena.

The lack of information regarding McMillan's competing roles is part of a larger problem in this action. As has been stressed before, the haphazard production of documents that Bremer provided to the Non-Excluded Heirs—few of which are in the record—is insufficient. Similarly, the little information Baker, Jackson, and Nelson have received regarding McMillan's role is not sufficient to determine whether conflicts exist. Accordingly, Baker, Jackson, and Nelson respectfully request the Court deny McMillan and Sharon, Norrine, and John Nelson's motions to quash, and subject McMillan to the reasonable discovery requested under the Subpoena.

CONCLUSION

The subpoena to L. Londell McMillan relates to discrete categories of factual information necessary for the Non-Excluded Heirs, the Personal Representative, and the Court to determine whether any conflicts of interest exist with respect to McMillan's multiple roles in the Estate—as the Special Administrator's agent and as advisor to Sharon, Norrine, and John Nelson. The Subpoena is necessary to determine whether sufficient evidence exists to bring a claim against McMillan and others for breach of contract or breach of fiduciary duty. In light of the Court's order staying the Special Administrator's discharge and the complaint filed by Jobu Presents, LLC

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

against McMillan, this information is "sufficiently entwined" with the underlying action to make further discovery proper.

Omarr Baker has already tried to obtain the information from Sharon, Norrine, and John Nelson, who have unequivocally refused and asserted that they do not have custody or control of that information. McMillan, however, has the information. The concerns raised by McMillan and by Sharon, Norrine, and John Nelson regarding the production of communications that are allegedly privileged or protected by the work-product doctrine are without merit. Any remaining confidentiality concerns can be adequately addressed by a confidentiality agreement, as Baker has suggested to McMillan and to Sharon, Norrine, and John Nelson. Finally, McMillan has not submitted an affidavit supporting his assertion that the requests in the Subpoena do not comport with Rule 45 of the Minnesota Rules of Civil Procedure. Thus, Omarr Baker, Alfred Jackson, and Tyka Nelson respectfully request the Court deny the Motions to Quash.

Filed in First Judicial District Court
5/3/2017 3:44:09 PM
Carver County, MN

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