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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF CARVER FIRST JUDICIAL DISTRICT
PROBATE DIVISION
Case Type: Special Administration

In the Matter of:

Estate of Prince Rogers Nelson,

Deceased.

Court File No. 10-PR-16-46
Honorable Kevin W. Eide

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISQUALIFICATION

CAK Entertainment, Inc. and Charles Koppelman (together, "CAK"), submit this memorandum of law in support of their motion, pursuant to Rule 63.02 of the Minnesota Rules of Civil Procedure and Rule 106 of the Minnesota General Rules of Practice for the District Courts (the "Motion"), respectfully requesting that Your Honor enter an order recusing himself from considering the August 2, 2018 Notice of Motion and Motion (the "Fee Motion") filed by the Second Special Administrator ("SSA") on behalf of the Estate of Prince Rogers Nelson (the "Estate"), seeking the return of purported "excessive compensation" received by CAK Entertainment, Inc. ("CAK Entertainment") and NorthStar Enterprises Worldwide, Inc. ("NorthStar" and, together with CAK Entertainment, the "Advisors").[1]

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[1] Mr. Koppelman was not listed as a party to the Fee Motion in the SSA's Notice of Motion and Motion. Nor should he be a party to the Fee Motion given that CAK Entertainment is the entity that signed the agreement to act as an advisor to the Estate. Nevertheless, this Motion is brought on his behalf because the SSA refers incorrectly to Mr. Koppelman interchangeably with CAK Entertainment in the Fee Motion. Mr. Koppelman does not waive, and in fact reserves, all rights.

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INTRODUCTION

CAK respectfully brings this Motion to recuse Your Honor from considering the Fee Motion based on the unique circumstances that exist here concerning the appointment of the SSA and Your Honor's authorization of the SSA to pursue claims against CAK, among others. CAK understands the gravity of this motion and does not take it lightly. Nonetheless, having reviewed and approved the claims the SSA is actively pursuing against CAK, and having discussed those claims with the SSA in *ex parte* communications -- including the SSA's strategy concerning the pursuit of those claims -- it is not appropriate for the Court to decide the Fee Motion. Given Your Honor's role in the SSA process, an objective observer would reasonably question whether Your Honor can be impartial and therefore recusal is warranted here.

There are at least three independent reasons that warrant the Court's recusal from the Fee Motion. *First*, Your Honor has participated in multiple *ex parte* communications with the SSA concerning the substance of the SSA's contentions in the Fee Motion, as well as the SSA's strategies to recover compensation from CAK. CAK (among others) was specifically excluded from these communications between Your Honor and the SSA, and the substance of those discussions has never been disclosed to CAK. Nor was CAK ever provided an opportunity to respond to those communications, notwithstanding that the Court stated on two separate occasions that CAK would have such an opportunity before the SSA pursued any action against CAK. Under these circumstances, recusal is warranted.

Second, Your Honor previously recused himself from a separate litigation between CAK and Jobu Presents, LLC that concerned issues identical to those addressed in one of the reports the SSA submitted to and discussed with Your Honor, stating that any decision by Your Honor "might be perceived as clouded" by the information Your Honor previously obtained from, and discussed with, the SSA. Those same reasons apply equally here, and dictate that Your Honor

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should recuse himself from the Fee Motion. Given Your Honor's role in reviewing and approving the SSA's pursuit of claims against CAK, including *ex parte* discussions of strategies the SSA may pursue, any decision by Your Honor on the Fee Motion -- even more so than in the separate litigation -- will also be subject to being "perceived as clouded" by the information obtained outside of the Fee Motion. As Your Honor has already recognized, under those circumstances, recusal is warranted.

Finally, Your Honor recently stated when authorizing the SSA to pursue certain claims against CAK (and others) that Your Honor owed a "fiduciary duty" to the Estate, and when CAK raised the issue of recusal from the Fee Motion, Your Honor also equated Your Honor to the Estate itself, saying that a fraud on or breach of duty to the Estate would be a fraud on or breach of duty to Your Honor. While CAK respectfully disagrees with Your Honor's statements, they nonetheless indicate that Your Honor appears to equate CAK's alleged conduct directed toward the Estate to also be conduct directed toward the Court. In light of this it is reasonable to question Your Honor's impartiality with regard to the Fee Motion and warrants Your Honor's recusal from the Fee Motion.

Each of these reasons on their own warrant Your Honor's recusal from the Fee Motion. At a minimum, even if they each do not warrant recusal individually, the cumulative effect of all of these circumstances certainly would cause an objective observer to reasonably question whether Your Honor could be impartial. Accordingly, Your Honor's recusal from deciding the Fee Motion is warranted here.

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FACTUAL BACKGROUND

A. THE SSA AND THE SSA REPORTS

As the Court is well aware, the Estate (through its then-Special Administrator, Bremer National Trust, N.A. ("Bremer")) retained the Advisors to assist in exploiting the Estate's entertainment assets.[2] The Advisors advised the Estate in connection with at least [redacted] entertainment deals that collectively provided the Estate with [redacted] After their negotiation and execution, issues arose concerning two of those deals: (i) a recorded music agreement with Universal Music Group (the "UMG Agreement"); and (ii) an agreement with Jobu Presents LLC ("Jobu") to promote and stage a tribute concert in honor of Prince (the "Jobu Agreement").

Although the instant motion is not the appropriate time or place to set out all of the details concerning the disputes that arose relating to those agreements, suffice it to say that (i) a dispute arose concerning the UMG Agreement, following which the Estate voluntarily chose to rescind the UMG Agreement -- even though it was not legally required to do so -- and requested and received the Court's approval to do so; and (ii) Jobu unilaterally terminated the Jobu Agreement -- even though it had no right to do so -- and thereafter demanded the return of the initial payment it made to the Estate, which the Estate subsequently returned with a full reservation of rights. Thereafter, given apparent conflicts of the Personal Representative to the Estate, certain heirs asked the Court to appoint a second special administrator to investigate whether the Estate had any claims concerning the UMG Agreement and the Jobu Agreement, and whether such claims should be pursued by the Estate.

[2] Given the Court's familiarity with this matter, only the facts relevant to this motion are set forth herein.

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1. The UMG Report

On August 21, 2017, the Court entered an Order Appointing Second Special Administrator (the "SSA Order"). (*See* Ex. A.)[3] In the SSA Order, the Court appointed Peter J. Gleekel and the law firm Larson King, LLP as the Second Special Administrator to the Estate, and granted the SSA the authority to "[c]onduct[] an independent examination of the facts, circumstances and events relating to the rescission of the UMG Agreement." (Ex. A at 1.)

On December 15, 2017, after a several-month investigation that included the production to the SSA of a substantial amount of documents and numerous witness interviews conducted by the SSA, the SSA issued its Report and Recommendation Concerning the Rescission of the Universal Music Group Agreement (the "UMG Report"). (*See* Ex. B.) In the UMG Report, the SSA stated that "there exists a reasonable basis for a claim against [Stinson Leonard Street LLP ("Stinson") (counsel to Bremer)], [Meister Seelig & Fein LLP (special entertainment counsel to Bremer)], and the Advisors in connection with the UMG rescission." (Ex. B at 30.) In particular, the SSA concluded that "there exists a reasonable basis to pursue a claim against the Advisors for repayment of [redacted] in connection with the UMG Agreement because the Advisors "received something of value in the nature of an unjust action and are not entitled to it under the circumstances," and that "the rescinded UMG Agreement does not constitute a commissionable contract." (Ex. B at 31, 33.)

Following the completion and filing of the UMG Report, on December 20, 2017, Stinson submitted a letter to the Court (the "December 20 Stinson Letter") [redacted]

[3] Citations herein to "Ex. __" are to the exhibits annexed to the September 18, 2018 declaration of Erin K.F. Lisle, submitted herewith.

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[redacted] (*See* Ex. C at 1.) On December 21, 2017, L. Londell McMillan submitted a letter to the Court (the "December 21 McMillan Letter") [redacted] (*See* Ex. D.)

That same day, Your Honor responded by letter to the December 20 Stinson Letter (the "December 21 Court Letter").[4] (*See* Ex. E.) In the December 21 Court Letter, Your Honor [redacted] (Ex. E at 1.)

CAK understands that, as the Court indicated in the December 21 Court Letter, [redacted] Indeed, invoices submitted by the SSA for payment of the SSA's fees confirm that this *ex parte* meeting took place on January 5, 2018.[5] (*See* Ex. F at 3.) Notably, CAK was never advised what was discussed at that *ex parte* meeting, nor given the opportunity to respond to the allegations and conclusions in the UMG Report. Similarly, CAK has never been provided most of the materials

[4] At the time, CAK was working on a letter joining the requests set forth in the December 20 Stinson Letter and the December 21 McMillan Letter. The December 21 Court Letter mooted the need for such a letter from CAK.

[5] The SSA's billing records suggest that other *ex parte* communications also took place. Specifically, the SSA's Statement for Professional Services and Disbursements Rendered through January 31, 2018 indicates that the Court and the SSA exchanged letters on or about January 5 and 12, 2018. (Ex F at 3.) CAK was never provided a copy of these letters between the SSA and the Court, nor are they publicly available on the Court's docket.

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on which the SSA relied in the UMG Report and that the SSA obtained in its investigation concerning the UMG Agreement.

2. The Jobu Report

On February 2, 2018, the Court entered an order (the "SSA Expansion Order") expanding the authority of the SSA to "[c]onduct[] an independent examination and mak[e] an informed decision regarding whether any action should be pursued for the return of the advance paid by Jobu Presents to the Estate." (Ex. G at 2.) On May 15, 2018, after yet another several-month investigation that included the production of a substantial amount of documents to the SSA and numerous witness interviews by the SSA, the SSA issued its Report and Recommendation Concerning the Jobu Presents Agreement (the "Jobu Report" and, together with the UMG Report, the "SSA Reports"). (*See* Ex. H.) In the Jobu Report, the SSA contends [redacted] (*See id.* at 25-44.)

Following the submission of the Jobu Report, on May 22, 2018, Your Honor entered an order (the "Jobu Recusal Order") recusing himself from considering the separate litigation captioned *Jobu Presents, LLC v. CAK Entertainment, Inc., et al.*, Court File No. 10-CV-17-368 (the "Jobu Litigation"). (*See* Ex. I.) As the Court is aware, the Jobu Litigation concerns claims among Jobu, its chief executive officer, Vaughn Millette, CAK Entertainment, Mr. Koppelman, NorthStar, and Mr. McMillan, concerning the Jobu Agreement and a note between Jobu, Mr. Millette, and Mr. Koppelman. Nearly all of the claims in the Jobu Litigation concern substantially similar, if not identical, issues and claims as discussed and recommended in the SSA's Jobu Report. In the Jobu Recusal Order, the Court explained that it "d[id] not believe it can listen to the arguments advanced in connection with [the Jobu Litigation] without concern

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that its decisions might be perceived as clouded by the information" that the Court already reviewed as part of the Jobu Report. (*Id*. at 1.)

Thereafter, on May 25, 2018, the Court entered an order scheduling an in-person, hearing on June 14, 2018 to address "[t]he recommendations stemming from" the SSA Reports (the "SSA Reports Hearing Order"). (*See* Ex. J.) Similar to the *ex parte* meeting concerning the UMG Report, CAK understands that the Court did, in fact, have an *ex parte* hearing with the SSA (and potentially other representatives of the Estate and the heirs' counsel) concerning the substance of the recommended claims in the Jobu Report, as well as strategies concerning the SSA's pursuit of such claims. (*See* Ex. T at 4 (the SSA's billing records [redacted] Indeed, counsel for CAK was advised by other interested parties that the Court indicated that the targets of the Jobu Report (including CAK) were not invited to attend the June 14 hearing referenced in that order.

On June 14, 2018, immediately following the *ex parte* hearing between Your Honor and the SSA, the Court entered an Order & Memorandum Approving Litigation (the "Estate Litigation Order"). (*See* Ex. K.) In the Estate Litigation Order, the Court authorized the SSA to pursue all of the claims recommended in the SSA Reports, including claims against the Advisors. (*See id*. at 1.) In the Estate Litigation Order, the Court noted that the matter "came before [Your Honor] on June 14, 2018," and that "[a]ppearances were noted on the record." (*Id*.) The Estate Litigation Order also stated that, in authorizing the SSA to pursue claims against, *inter alia*, the Advisors, the Court was "relying significantly on the analysis of the causes of action set forth" in the SSA Reports. *(Id.* at 2.) Finally, Your Honor stated in that order that "[t]his Court has a

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fiduciary duty to the Estate to attempt to preserve the assets and to pursue claims of wrongdoing against the Estate." (*Id.*)

Shortly after the issuance of the Estate Litigation Order, on June 21, 2018, Stinson submitted a letter to the Court (the "June 21 Stinson Letter"), [redacted] (Ex. L at 1.) Subsequently, on June 27, 2018, CAK and Mr. McMillan also submitted letters to the Court in response to the Estate Litigation Order (respectively, the "June 27 CAK Letter" and the "June 27 McMillan Letter"), [redacted] (*See* Ex. M; Ex. N.)

On July 3, 2018, the Court responded by letter to the June 21 Stinson Letter, the June 27 CAK Letter, and the June 27 McMillan Letter (the "July 3 Court Letter"). (*See* Ex. O.) In the July 3 Court Letter, Your Honor stated that [redacted] (*Id.* at 1-2.)

B. THE SSA'S FEE MOTION AND INTERVENTION IN THE JOBU LITIGATION

On August 2, 2018, without any attempt to meet and confer, any sharing of documents, or any discussion of the matter with CAK, the SSA filed the Fee Motion on behalf of the Estate,

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seeking an order, pursuant to Minnesota Statute Section 524.3-721, directing the Advisors "to refund excessive compensation" purportedly received "related to the Jobu Presents and UMG transactions." (Ex. P at 1.) The Fee Motion is based on the SSA's allegations, analysis, and conclusions in the UMG Report, effectively asserts claims recommended in the UMG Report, and seeks much of the damages identified in the UMG Report.

Similarly, on August 9, 2018, again without any prior attempt to meet and confer, any sharing of documents, or any discussion of the matter with CAK, the SSA filed a Notice of Intervention in the Jobu Litigation, seeking to intervene therein to assert the claims recommended in the Jobu Report against, *inter alia*, CAK. Of course, the SSA's claims in the Jobu Litigation are based on the analysis and conclusions in the Jobu Report.

CAK never was given any (much less ample) [redacted] prior to the SSA's commencement of multiple actions against CAK. The SSA made no attempts to honor the Court's representations in the December 21 Court Letter, which were reiterated in the July 3 Court Letter.[6]

C. CAK'S LETTER REQUEST FOR RECUSAL

On August 28, 2018, CAK filed a letter with the Court (the "August 28 CAK Letter") requesting that Your Honor recuse himself from considering the Fee Motion for the same reasons that Your Honor recused himself from the Jobu Litigation, and because Your Honor engaged in *ex parte* "communications with the SSA (and potentially others) without the Advisors being present concerning the facts, allegations, and recommended claims in the SSA Reports." (Ex. Q

[6] [redacted] Thus, the SSA's conduct was [redacted]

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at 1-2.) The SSA responded by letter dated August 30, 2018 (the "August 30 SSA Letter"), objecting to CAK's request. (*See* Ex. R.)

On August 31, 2018, Your Honor entered an Order Denying Request for Recusal (the "Recusal Order"), denying CAK's request for recusal. (*See* Ex. S.) In the Recusal Order, the Court stated that it issued the Estate Litigation Order "[a]fter a hearing and upon receipt of" the SSA Reports. (*Id.* at 2.) Further, the Court noted that it "has been integrally involved in this Estate matter," and that, in connection with the Fee Motion, "[i]f there was a fraud upon the Court, or a violation of a fiduciary duty, it was a fraud or a violation of a duty on this Court." (*Id.* at 3 (emphasis in original).) Neither the August 30 SSA Letter, nor the Recusal Order, addressed the issue of the *ex parte* communications raised in the August 28 CAK Letter.

Given that CAK made its request that Your Honor recuse himself in a letter, and notwithstanding that the Court denied that request in the Recusal Order, CAK is now making this motion to ensure that the proper procedures are followed should CAK need to raise these issues with an appellate court.[7]

ARGUMENT

I. RECUSAL IS APPROPRIATE HERE FOR THE SAKE OF IMPARTIALITY

Rule 63.02 of the Minnesota Rules of Civil Procedure provides in part that "[n]o judge shall sit in any case if disqualified under the Code of Judicial Conduct."[8] Minn. R. Civ. P. 63.02. Rule 2.11 of the Minnesota Code of Judicial Conduct (the "Code"), in turn, provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality

[7] Moreover, this Motion is being made in accordance with the procedure we understand that the Chief Judge of the Court requested to be followed.

[8] "Where judicial functions are involved in probate proceedings, [such as here,] a probate judge, like a judge in any other civil proceeding, is subject to disqualification." *Payne v. Lee*, 222 Minn. 269 (1946).

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might reasonably be questioned." Minn. Code Jud. Conduct Rule 2.11. While Rule 2.11 sets forth a non-exclusive list of specific circumstances in which a judge's impartiality might reasonably be questioned -- including where the judge has a personal bias or prejudice -- the Comment to Rule 2.11 confirms that under that rule "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions" set forth in Rule 2.11 are applicable. *Id.*

The Minnesota Supreme Court has held that, in considering whether a judge is disqualified under Rule 2.11, the question is "whether an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge's impartiality." *In re Jacobs*, 802 N.W.2d 748, 752 (Minn. 2011); *accord State v. Burrell*, 743 N.W.2d 596, 601 (Minn. 2008). "The question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of his or her ability to act fairly." *Roatch v. Puera*, 534 N.W.2d 560, 563 (Minn. Ct. App. 1995). This objective evaluation is not to be considered from "the perspective of a chief judge, but rather from the perspective of a reasonable examiner: an objective, unbiased layperson with full knowledge of the facts and circumstances." *State v. Finch*, 865 N.W.2d 696, 703 (Minn. 2015)(citation omitted).

Based on this objective analysis, disqualification is required "not only when there is in fact impropriety, but also when there is an *appearance* of impropriety." *Roatch*, 534 N.W.2d at 563 (emphasis added); *accord In re Collection of Delinquent Real Prop. Taxes*, 530 N.W.2d 200, 206 (Minn. 1995) ("The controlling principle is that no judge, when other judges are available, ought ever to try the cause of any citizen, *even though he be entirely free from bias in fact*, if

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circumstances have arisen which give a bona fide appearance of bias to litigants.") (emphasis in original).

Here, for multiple, independent reasons, as set forth below, an objective observer would reasonably question the Court's impartiality with respect to the Fee Motion. Moreover, even if each of these reasons are not themselves sufficient to warrant recusal, the cumulative effect of all of these circumstances clearly warrant recusal. *See, e.g., In re Martinez-Catala*, 129 F.3d 213, 221 (1st Cir. 1997) ("The cumulative effect of a judge's individual actions, comments and past associations could raise some question about impartiality, even though none (taken alone) would require recusal . . . the cumulative effect would warrant [recusal] . . . ."); *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 41 (4th Cir. 1995) (while the judge's actions were "probably insufficient to merit recusal in isolation," when viewed in context of other actions "the appearance of impropriety" required recusal); *In re Sch. Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir.), *as amended* (Oct. 8, 1992) ("We need not decide whether any of these facts alone would have required disqualification, for . . . we believe that together they create an appearance of partiality that mandates disqualification.").

A. The *Ex Parte* Communications Between Your Honor and the SSA Warrant Recusal

The *ex parte* communications between the Court and the SSA regarding the facts, allegations, and recommended claims in the SSA Reports, as well as the SSA's strategy in pursuing relief against the Advisors, support recusal here. Rule 2.9 of the Code provides that "[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." Minn. Code Jud. Conduct Rule 2.9. Although Rule 2.9 provides limited exceptions to this general rule for certain things like "scheduling,

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administrative, or emergency purposes, which does not address substantive matters," those communications are only permitted provided "the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication, *and gives the parties an opportunity to respond*." *Id.* (emphasis added). None of the exceptions in Rule 2.9 are applicable here, and thus recusal is appropriate. *See State v. Schlienz*, 774 N.W.2d 361, 366-69 (Minn. 2009) (*ex parte* communications between judge and litigant "reasonably called the judge's impartiality into question" and thus judge was required to recuse "[b]ecause a judge is disqualified when his or her impartiality is reasonably called into question").

As CAK understands it, the Court engaged in multiple *ex parte* communications with the SSA concerning a "pending or impending matter" -- namely, the SSA's investigations and its intent to seek relief from CAK on behalf of the Estate -- which communications were made outside the presence of CAK or its counsel (despite requests from CAK and other parties that they be given an opportunity to be heard). Indeed, these *ex parte* communications appear to have included discussions of the substance of the analysis in the SSA Reports, which are indisputably the basis for the relief sought by the SSA in the Fee Motion. Based on the Court's statements, during these *ex parte* communications, [redacted] (*See* Ex. E at 1 [redacted]; Ex. K at 1 (noting that Your Honor discussed with the SSA whether the SSA should be granted authority to initiate litigation on behalf of the Estate); Ex. O at 1-2 [redacted]

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[redacted]

The substantive nature of those discussions also preclude application of the exceptions under Rule 2.9. The discussions with the SSA were not "for scheduling, administrative, or emergency purposes." Minn. Code Jud. Conduct Rule 2.9(1). Moreover, the Court never "notif[ied] all other parties of the substance of the *ex parte* communication," nor gave "the parties an opportunity to respond." *Id.* Rule 2.9(1)(b). In addition to the fact that no one disclosed the substance of the *ex parte* communications, CAK (and other parties) requested an opportunity to respond to those communications and the SSA Reports, and -- multiple representations otherwise notwithstanding -- CAK was never provided such an opportunity to respond.

CAK respectfully submits that as a result of the *ex parte* communications, an objective observer would reasonably question whether the Court is impartial concerning the Fee Motion. Indeed, in similar circumstances, the Supreme Court of Minnesota held that *ex parte* communications between a judge and a litigant concerning an impending matter were improper and required disqualification of the judge. *See Schlienz*, 774 N.W.2d at 366-69. In *Schlienz*, the judge initiated and conducted *ex parte* communications with the prosecutor during which the judge discussed with the prosecutor an anticipated motion from the defendant, and strategies for how the prosecutor might respond. *Id.* at 366-67. The Supreme Court found that "[t]he nature of the communication leads us to conclude that the communication, at a minimum, reasonably called the judge's impartiality into question," and held that the judge was disqualified pursuant to the Code. *Id.*

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Here, the *ex parte* communications between the Court and the SSA regarding how the SSA should proceed in the best interests of the Estate at a minimum "reasonably call" into question the Court's impartiality. *Schlienz*, 774 N.W.2d at 367. Despite the fact that CAK raised these *ex parte* communications as a basis for recusal in the August 28 CAK Letter, neither the Court nor the SSA addressed those communications in the Recusal Order or the August 30 SSA Letter, respectively. Accordingly, CAK respectfully requests that the Court grant CAK's motion for recusal.

B. Recusal is Appropriate for the Fee Motion for the Same Reasons Recusal was Appropriate for the Jobu Litigation

In the Jobu Recusal Order, Your Honor recused himself from considering the Jobu Litigation because Your Honor's familiarity with the SSA Reports led Your Honor to determine that Your Honor could not "listen to the arguments advanced in connection with [the Jobu Litigation] without concern that its decisions might be perceived as clouded by the information contained within the [Jobu Report]." (Ex. I at 1.) The very same reasoning applies here, if not even more so than in the Jobu Litigation, and CAK respectfully submits that Your Honor should recuse himself from considering the Fee Motion for those reasons.

As reflected in the SSA Reports, the SSA contends that [redacted] (Ex. B at 25-30; Ex. H at 30-40.) The Fee Motion, in turn, seeks an order directing the Advisors to return to the Estate the compensation the Advisors received in connection with the very same transactions, and for the very same reasons articulated in the SSA Reports. (Ex. P at 12-20.) The Fee Motion includes

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many of the same arguments and citations to authority contained in the SSA Reports, and submits the SSA Reports as purported evidence and support for the factual assertions set forth in the Fee Motion. (Ex. P at 6, 9 n.4.)

Because of Your Honor's familiarity with the SSA Reports and Your Honor's *ex parte* discussions with the SSA, any decision Your Honor makes concerning the Fee Motion would be subject to the very same perception that such a decision was "clouded by information in the reports" that Your Honor cited as the basis for recusing himself in the Jobu Recusal Order. In the Recusal Order, Your Honor asserted that the circumstances here are different from those in the Jobu Litigation because: (i) the SSA Reports were not part of the record in the Jobu Litigation, whereas they are part of the record in this matter, and (ii) all of the parties relevant to the Fee Motion have been subject to the jurisdiction of the Court at all relevant times. (*See* Ex. S at 2-3.) CAK respectfully disagrees. Whether these distinctions are meritorious,[9] they do not change the fact that Your Honor's pre-existing knowledge of the contents of the SSA Reports and the SSA's analysis would lead an objective observer to reasonably question whether Your Honor could consider the Fee Motion in an impartial manner. Any decision Your Honor makes with respect to the Fee Motion would be "clouded by" Your Honor's prior knowledge of the

[9] The SSA Reports are not proper evidence on any motion, let alone, the Fee Motion. The reports themselves are hearsay, and, of course, they are riddled with, among other things, hearsay statements purportedly from numerous witnesses. Most of the documents and none of the witness interviews on which the SSA bases his conclusions in the SSA Reports were provided to CAK, despite several requests. Nor has CAK ever received the full and unredacted record of the Estate's motion to rescind the UMG Agreement and all filings related thereto. Notwithstanding the SSA's refusal to provide the information it obtained in its investigation to CAK, the SSA relies exclusively on that information not only for the conclusions in the SSA Reports, but also for the relief sought in the Fee Motion. Therefore, the SSA's inclusion of and reliance on the SSA Reports in support of the Fee Motion is improper, and violates CAK's Due Process rights under the United States Constitution, among other things. The SSA's reliance in the Fee Motion on reports that were obtained by a one-sided discovery process is a sufficient reason alone to deny the Fee Motion.

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contents of the SSA Reports, and, significantly, the information and strategies discussed during the *ex parte* communications between Your Honor and the SSA. Indeed, the substance of those *ex parte* discussions with the SSA are *not* part of the record in this matter or in connection with the Fee Motion, and were never disclosed to CAK.[10]

In *State v. Osterkamp*, No. A11-1103, 2012 WL 3262953 (Minn. Ct. App. Aug. 6, 2012), the Court of Appeals held that a judge who previously requested and reviewed a presentence investigation report ("PSI") and conducted a plea hearing in connection with the defendant's anticipated plea deal was disqualified from hearing the defendant's subsequent bench trial after the plea deal was abandoned. *Id.* at *6. The Court of Appeals held that, because the PSI and the communications at the plea hearing included inculpatory facts, an objective observer could have reason to believe "that the judge may have convicted appellant based on his previous inculpatory statements at the plea hearing or in the PSI, rather than solely on the evidence produced at trial," and that the judge's failure to recuse himself from presiding over the defendant's bench trial "affected [defendant's] substantial right to have his case heard by an unquestionably impartial decision maker." *Id.*

The reasoning set forth in *Osterkamp* applies equally here. Having commissioned, reviewed, and discussed with the SSA *ex parte*, the contents of the SSA Reports -- which Reports form the basis for the relief sought in the Fee Motion -- as well as the strategies that the SSA could or would implement to carry out the recommendations in the SSA Reports, an objective observer would reasonably believe that any decision Your Honor makes in connection

[10] Indeed, there is no reasonable basis to contend that a new judge could not adjudicate the Fee Motion. The Fee Motion should be decided only on the record submitted with the motion (except, of course, for the inadmissible SSA Reports), and thus a new judge could easily review that record and decide the Fee Motion without the questions of partiality based on prior *ex parte* communications.

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with the Fee Motion would be impacted by that knowledge and familiarity, as opposed to being based solely on the basis of the proper evidence presented in connection with the Fee Motion. Accordingly, CAK respectfully submits that, in order to ensure CAK is given an objectively fair and impartial hearing on the Fee Motion, the motion must be heard by a judge without Your Honor's intimate familiarity with the contents of the SSA Reports and the *ex parte* discussions with the SSA. *See State v. Dorsey*, 701 N.W.2d 238, 249-50 (Minn. 2005) ("An impartial trial requires that conclusions reached by the trier of fact be based upon the facts in evidence . . . and prohibits the trier of fact from reaching conclusions based on evidence sought or obtained beyond that adduced in court.").

C. <u>The Court's Relationship to the Estate Warrants Recusal</u>

Impartiality is defined by the Code as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Minn. Code of Jud. Conduct, Terminology. Here, while Your Honor may not in fact be biased or partial to the Estate, Your Honor's statements would cause an objective observer to reasonably question whether Your Honor may be biased or prejudiced in favor of the Estate, on whose behalf the SSA brought the Fee Motion.

In the Estate Litigation Order, Your Honor stated that "[t]his Court has a fiduciary duty to the Estate to attempt to preserve the assets and to pursue claims of wrongdoing against the Estate." (Ex. K at 2.) Subsequently, in the Recusal Order, Your Honor noted that, in connection with the Fee Motion, "[i]f there was a fraud upon the Court, or a violation of a fiduciary duty, it was a fraud or a violation of a duty on <u>this</u> Court." (Ex. S at 3 (emphasis in original).) CAK respectfully disagrees with the Court's statements.

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First, both the Code and the Minnesota Probate Code include definitions of "fiduciary," neither of which include the Court or the judge presiding over a probate matter.[11] *See* Minn. Code of Jud. Conduct, Terminology (defining "fiduciary" to "include[] relationships such as executor, administrator, trustee, or guardian"); Minn. Stat. § 524.1-201 (defining "fiduciary" in the probate context to "include[] personal representative, guardian, conservator and trustee").

Second, Your Honor's suggestion that any fraud on, or violation of a fiduciary duty to, the Estate would constitute a fraud on, or violation of a duty owed to, the Court is, respectfully, incorrect both factually and legally. The Fee Motion is not based on any alleged fraud or violation of fiduciary duties, on the Court or anyone else. Rather, the Fee Motion attempts to recover compensation from the Advisors largely (and incorrectly) based on the language of the Advisor Agreement, equitable principles, and the inherent power of this Court to oversee the administration of the Estate.

Moreover, even assuming *arguendo* that there had been a fraud or a breach of fiduciary duty by the Advisors in connection with either the UMG Agreement or the Jobu Agreement (and there was not), any such fraud or breach would not be on the Court, as the Advisors made no false representations to the Court, and never were acting as fiduciaries of the Court. There is no allegation, or even suggestion, in the SSA Reports or the Fee Motion -- nor can there be -- [redacted]

[redacted]

[11] Moreover, if Your Honor did in fact have a fiduciary duty to the Estate, the duties and obligations that a fiduciary relationship imposes would unquestionably render Your Honor biased in favor of the Estate, and thus require Your Honor's recusal from considering the Motion. *See* Minn. Code Jud. Conduct Rule 3.8(B) ("A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction."). Further, if this Court has a fiduciary duty to "pursue claims of wrongdoing against the Estate," that necessarily biases the Court against the parties against whom such claims are brought.

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In any event, Your Honor's statements are evidence of Your Honor's close relationship with the Estate, and would lead an objective observer to reasonably question Your Honor's impartiality with respect to the Estate and the Fee Motion. Therefore, CAK respectfully submits that Your Honor should recuse himself from considering the Fee Motion. *See Schlienz*, 774 N.W.2d at 368-69 (finding that judge's use of "inclusive language referring to the State and the court as 'us'" raised question as to judge's impartiality); *see also Finch*, 865 N.W.2d at 705 (holding that judge was disqualified from hearing probation revocation proceeding where judge's prior statements would cause a reasonable person to "question whether the judge could impartially conduct the proceeding"); *State v. Mims*, 306 Minn. 159, 168 (1975) (a judge's capacity as "the neutral factor in the interplay of our adversary system" requires them to "ensure the integrity of all stages of the proceedings" including "avoidance of both the reality and the appearance of any impropriety").

CONCLUSION

For the reasons set forth above, CAK respectfully requests that the Court enter an order recusing Your Honor from considering the Fee Motion.

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