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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
PROBATE DIVISION

In Re:

Estate of Prince Rogers Nelson,
Decedent.

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

[REDACTED]
L. LONDELL MCMILLAN'S MEMORANDUM OF LAW IN RESPONSE TO COMERICA'S MOTION TO APPROVE RESCISSION OF EXCLUSIVE DISTRIBUTION AND LICENSE AGREEMENT

L. Londell McMillan ("McMillan") respectfully submits this memorandum in response to Comerica Bank & Trust, N.A.'s ("Comerica") Motion to Approve Rescission of the Exclusive Distribution and License Agreement between the Estate of Prince Rogers Nelson ("the Estate") and Universal Music Group ("UMG").

INTRODUCTION

Comerica was appointed by this Court as personal representative to succeed Bremer Trust National Association ("Bremer"), the prior special administrator, effective February 1, 2017. On February 9th, UMG announced the January 31, 2017 Exclusive Distribution and License Agreement ("the UMG contract"), a landmark multi-platform deal, which was the largest deal made by the Prince Estate with the largest music company in the world. The agreement was set to bring highly anticipated Prince music to his fans, and there were also unique allowances made for Prince fans to share in the selling of his music. Almost immediately after the contract was announced, Warner Brothers Records ("WBR") sought to undermine the UMG agreement by contacting both Comerica (new to the Prince Estate and the music business) and UMG and claiming that a April 16, 2014 agreement it had with Prince [redacted]

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[redacted]

[redacted]This claim is simply wrong and unsupported by such agreement.

Comerica has brought this motion to rescind, even though it does not claim that there is an actual conflict between the UMG and WBR contracts, or that anyone fraudulently induced UMG to enter into the UMG contract. Rather, Comerica states that it cannot "unequivocally assure UMG or the Court" that there is not an overlap between the rights held by WBR and those granted under the UMG contract. Even if there were some potential overlap – which there is not – this would not justify walking away from the contract and compelling the Estate to return more than [redacted] already received, and giving up the potential to receive [redacted]

The claim by WBR that a conflict exists is wrong, particularly when the WBR and UMG contracts are read as a whole and with an understanding of the music industry business. [redacted] There is no conflict between the rights granted to UMG under the UMG contract and the rights held by WBR.

It is remarkable that Comerica is asking the Court to rescind the agreement with UMG without even providing a declaration or affidavit from any industry expert – including from its own entertainment advisor, Troy Carter. It is even more remarkable that Comerica actually signed the rescission agreement without involving the heirs or seeking prior approval of the Court. Because the alleged conflict between the WBR agreement and the UMG contract is

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technical in nature – hinging substantially on the meaning and intent of [redacted] The UMG contract was reviewed by two separate law firms with experienced entertainment lawyers retained by Bremer before the final agreement was submitted to this Court for approval. It was the job of those firms to determine if there were any conflicts between the rights granted to UMG and those retained by WBR. Neither firm raised any concerns. Moreover, Anthony "Van" Jones, the attorney for Tyka Nelson and Omar Baker, who testified that he put together the team that negotiated the WBR agreement on behalf of Prince, never claimed that the rights being granted to UMG conflicted with those owned by WBR.

[redacted] That explains why UMG has alleged fraudulent inducement (pointing at Bremer and its former advisor McMillan). [redacted]

Thus, Comerica's odd statement to UMG that it could not "unequivocally" rule out a conflict is not the standard that should control. [redacted] Rather, the issue should be whether this Court believes that UMG can meet its heavy burden of showing that it was fraudulently induced to enter into the contract. Comerica has not affirmatively argued that Bremer, McMillan, or

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Koppelman made any misrepresentations to UMG about the rights UMG would receive under its contract with the Estate, and, in fact, they did not make any misrepresentations to UMG. Since Comerica itself has not suggested that UMG is likely to prove fraudulent inducement, the Court should not allow rescission.

By asking this Court to approve rescission of the contract, Comerica is allowing WBR to sabotage the UMG deal, which is in the best interest of the Prince Estate. Upon becoming personal representative, Comerica assumed a duty to both protect and defend the assets of the Estate. Despite this, Comerica failed to obtain WBR's consent to disclose the key terms of its 2014 agreement to UMG. When WBR refused to waive confidentiality, Comerica failed to seek a court order compelling such disclosure. McMillan suggested to Comerica that it seek such an order. Without even seeing the WBR agreement, UMG is certainly not in a position to claim that it was fraudulently induced into entering into the contract with the Estate. Comerica also should have sought the advice and assistance of Bremer and McMillan, who – after all – led the negotiations of the UMG contract. Ultimately, Comerica should have protected and defended the UMG contract, not agreed to its rescission.

By caving into UMG's threat, Comerica exposes the Estate and the heirs to a potential [redacted] and risks the personal reputations of Bremer, McMillan, Koppelman, and the Stinson and Meister Seeger law firms who reviewed and negotiated the UMG contract. Comerica suggests that rescission of the UMG contract will save litigation costs – but the opposite is true. Rescission risks exposing the Estate and its heirs to monumental and complex litigation – for there is no shortage of parties who may try to find someone to blame if the UMG contract is set aside, particularly since Comerica has not disclosed to the Court or to the heirs that it has other purchasers in the wings who will mitigate the loss of

the contract by paying a price equivalent to the amount that UMG agreed to pay. If it has such a buyer, Comerica has not disclosed its identity.

McMillan joins Bremer and three of the heirs in asking that this Court direct Comerica to allow UMG the right to review the WBR agreement. In addition, it asks that the Court deny approval of the request for rescission. Alternatively, if the Court approves rescission – and it should not – McMillan asks that any order of this Court make it clear that there has been no finding of fraudulent inducement or other wrongdoing on his part in negotiating a contract that was – and remains – in the best interest of the Estate.

STATEMENT OF FACTS

A. THE 2014 WBR SETTLEMENT AGREEMENT.

On April 16, 2014, Prince Rogers Nelson entered into the agreement with WBR. [redacted] (The agreement will hereby be referred to as the WBR 2014 Settlement Agreement.) [redacted] (Declaration of L. Londell McMillan in Response to Comerica's Motion to Approve Rescision of Exclusive Distribution and License Agreement ["McMillan Decl."], Ex. A.)

[redacted]"[1]

[1] [redacted].

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[redacted]

Notably, after Prince's death in April 2016, WBR attempted to enter into a proposed amendment to the WBR 2014 Settlement Agreement in August 2016. [redacted]

B. NEGOTIATION OF THE UMG DISTRIBUTION AND LICENSE AGREEMENT – ROLE OF McMILLAN, STINSON, AND MEISTER FIRMS.

As the Court is well aware, from June, 2016 through February 1, 2017, McMillan acted in a business capacity (not as a lawyer) as co-entertainment advisor to the Special Administrator. (*Id.*, ¶1.) He was appointed because of his vast experience representing high-profile recording artists and estates, and his long-term friendship and professional relationship with Prince. (September 27, 2016 Affidavit of L. Londell McMillan ["9/27/17 McMillan Aff."], ¶¶ 7-8.) In fact, even before McMillan was named as a business advisor, he was contacted by various recording companies regarding entertainment deals related to the Estate, precisely because of his reputation and relationship with Prince. (McMillan Decl., ¶8.) Specifically, immediately after

Prince's death, McMillan was contacted by Michelle Anthony ("Anthony"), Executive Vice President of UMG. Anthony expressed her condolences to McMillan, as she had worked jointly with McMillan and Prince during her years at Sony Music and thereafter. (*Id.*) She encouraged McMillan to engage and reach out to help the Estate, and she in fact agreed to serve as an unofficial supportive advisor to help the Estate. (*Id.*, ¶8, Ex. B.)

After McMillan and Koppelman became co-advisors to the Special Administrator, they reached out to multiple recording companies to request proposals for the administration and distribution of all categories of Prince's works, including UMG, BMG, and WBR. (*Id.*, ¶9.) McMillan had multiple meetings in New York with Michelle Anthony. (*Id.*, ¶10.) As part of those meetings, Anthony inquired about the rights of WBR and other recording companies to Prince's recordings. (*Id.*) McMillan subsequently had conversations with Mark Cimino ("Cimino"), a UMG senior executive, who had previously been the head of business and legal affairs at WBR. (*Id.*) Significantly, Cimino had signed the 2014 WBR Settlement Agreement on behalf of WBR, and therefore was familiar with its terms, as well as the history of disputes and dealings between Prince and WBR. (*Id.*, ¶10, (*Id.*, ¶10, x. A p. 13.) Later, Anthony stated that she had discussions with Cimino regarding WBR rights, and she advised McMillan regarding her understanding of the terms of the WBR Settlement Agreement. (*Id.*, ¶10.) Cimino did not disclose all of the details of the WBR 2014 Settlement Agreement, but he enthusiastically supported a deal between UMG and the Estate. (*Id.*) Anthony affirmed UMG's desire to obtain rights to Prince's sound recordings, and she indicated her belief that the Estate and UMG could reach a deal regarding Prince's music catalog. (*Id.*)

After meeting with Anthony and talking with Cimino, McMillan requested that counsel for the Special Administrator provide him with a copy of the WBR 2014 Settlement Agreement. (*Id.*, ¶11.) McMillan reviewed the agreement in July, 2016, and he had discussions with

Koppelman and with the Estate's lawyers at Stinson Leonard Street ("Stinson") so that he could better understand its terms. (*Id.*) Based on his review of the agreement, the 2014 press release that described the agreement and the input her received from Stinson, McMillan understood that [redacted] (*Id.*)

While McMillan was involved in negotiations with UMG, McMillan and Koppelman also met with other senior executives from recording companies who were all interested in Prince's music catalog, and also requested proposals from other recording companies for the release of Prince's sound recordings, including WBR. (*Id.*, ¶12.) In fact, some of McMillan's and Koppelman's initial acts as advisors to the Estate was to meet with WBR and request such a proposal. (*Id.*) WBR never indicated that the Estate would be prohibited from entering into an agreement with another recording company [redacted] (*Id.*) Notably, counsel for the heirs were involved in all of these negotiations.

McMillan continued to meet with Anthony, as well as with Jeff Harleston, UMG's General Counsel and Executive Vice President of Business and Legal. (*Id.*, ¶14.) They engaged in numerous meetings and conference calls to put together the scope of the UMG contract. (*Id.*) Throughout his dealings with UMG, McMillan cautioned UMG that Prince had previously conveyed certain rights to WBR to which any subsequent deal was subject; that the full extent of rights to and ownership of Prince's recordings could not be ascertained; and that the Estate obviously could not convey rights it did not own. (*Id.*, ¶15.) UMG understood this, yet continued to push for a deal. (*Id.*, ¶16.) Thereafter, the Estate and UMG entered into a publishing deal, which resulted in UMG pushing even harder to reach a recording deal – especially since it was aware that McMillan and Koppelman were soliciting proposals from other recording companies. (*Id.*)

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In August 2016, McMillan traveled to Los Angeles to meet with Anthony and Harleston, along with Lucian Grange, Chief Executive Officer and Chairman of UMG, and UMG executives Monte Lipman and Boyd Muir, during which several proposals were discussed. (*Id.*, ¶17.) The parties continued their negotiations via email and phone conferences. (*Id.*) Finally, on September 8, 2016, UMG provided the Estate with an official proposal for a recording deal. (*Id.*)

Notably, the UMG contract was extensively reviewed by numerous lawyers, including entertainment and intellectual property lawyers at Stinson and later, entertainment specialists from Meister, Seelig & Fein ("Meister"). (*Id.*, ¶18.) None of these lawyers raised any objections to the UMG contract – in fact, counsel for the Special Administrator vigorously sought (and obtained) approval of the UMG contract from the Court (September 27, 2016 Memorandum in Support of Motion to Approve Recommended Deals.) Several of the heirs' counsel objected to the UMG deal but not based on any claim of conflict with WBR's rights after June 30, 2018. (*Id.*, ¶18.)

The UMG short-form agreement, which allowed the Estate to proceed with the UMG contract, was approved by order dated September 29, 2016. (*Id.*, ¶19.) In addition, the Court ordered counsel for the heirs to participate in negotiating the official, long form UMG contract. (*Id.*, ¶30.)The vast attorney fees incurred evidences that numerous professional advisors reviewed the UMG contract, without objection to its contents. (*Id.*) All parties were aligned and supported the final contract. (*Id.*, ¶18.)

The official UMG contract was approved by the Court on January 31, 2017. (Id., ¶19.) Under the contact, UMG [redacted] (Cassioppi Decl., Ex. C.) The Agreement also included [redacted] (*Id.*)

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C. THE CLAIMS BY WBR.

Pursuant to Court order, The UMG contract was not announced to the public until February 9, 2017. (May 17, 2017 Comerica Brief in Support of Motion to Approve Rescission ["Comerica Brief"], p. 5; Cassioppi Decl., Ex. D.) Just one day after that announcement, WBR wrote to Comerica in response to the press release, requesting confirmation that the UMG contract did not conflict with the WBR 2014 Settlement Agreement. (Cassioppi Decl., Ex. E.) It appears that, simultaneously, WBR contacted UMG directly and affirmatively alleged that the UMG contract interfered with the WBR 2014 Settlement Agreement. (Cassioppi Decl., Ex. F.) Even though WBR had not even seen the UMG contract, it went so far as to state that [redacted]

[redacted][2]

In response, UMG asked WBR to waive the confidentiality provision in the WBR 2014 Settlement Agreement to allow UMG to evaluate that contract to see if there was any conflict. (*Id.*) WBR refused to waive the confidentiality provision, and continued (without any basis or support) to argue that the contracts conflicted. (*Id.*) And WBR did not stop there. It indicated it had no interest in trying to resolve the matter and/or read the contracts in harmony, and instead took the position that the Estate had simply erred and that it was up to the Estate to fix the problem. (*Id.*)

[redacted]

WBR's aggressive and overreaching behavior is not surprising when considered in light of WBR's contentious history with Prince. (McMillan Decl., ¶ 21.) Throughout the course of their strained relationship, which goes back to the late 1970s, it is well documented that WBR consistently and repeatedly attempted to exploit Prince and control his artistic expression. (*Id.*, ¶¶21-22.) It reached a point that Prince chose to write "slave" on his face and later seek his emancipation from WBR. (*Id.*, ¶23.) Despite the WBR 2014 Settlement Agreement, the

[2] Notably, WBR's initial accusations were not limited solely to the [redacted] They further alleged that the UMG contract gave [redacted] (Cassioppi Decl., Ex. J.) This allegation apparently has been withdrawn.

relationship between WBR and Prince remained strained, [redacted] (*Id.*, ¶24.)

D. NEGOTIATIONS BETWEEN COMERICA, UMG, AND WBR

The Cassioppi Declaration and attached exhibits describe the efforts that Comerica undertook to try to determine whether there was a conflict between the UMG contract and WBR 2014 Settlement Agreement. (Cassioppi Decl., Exs. H-T.) However, the Declaration does not describe what Comerica failed to do. First, it failed to fully seek the advice and assistance of the people who had negotiated the UMG deal. (*Id.*, ¶¶25-26.) Comerica virtually excluded McMillan and Bremer from its negotiations after it received the letter from WBR's counsel on February 10, 2017. (*Id.*) Further, in contrast to Bremer, who hired counsel and advisors experienced in entertainment law and dealings, Comerica failed to retain litigation counsel experienced in music disputes. (*Id.*, ¶28.)

As described in the McMillan declaration, he had only one brief telephone conversation with Comerica's counsel in late February or early March, and then met with Comerica at the Fredrikson & Byron Law Firm on April 12, 2017. (*Id.*, ¶¶26-27.) By then, Comerica's counsel had already written a letter to Universal's counsel which stated that the Estate had "not reached a final determination" on the validity of WBR's claims, and that there is a "lack of full clarity regarding WB's rights." (Cassioppi Declaration, Ex. L.) At the April 12 meeting, rather than asking Mr. McMillan his view as to how to proceed, or seeking his assistance in negotiating a resolution, Comerica's counsel instead asked Mr. McMillan a few specific and limited questions, and then indicated that he had another appointment and adjourned the meeting after about twenty minutes. (McMillan Decl., ¶27.)

Following that meeting, McMillan's counsel wrote a letter to Cassioppi dated April 18, 2017, offering his assistance in working directly with UMG, or alternatively meeting with Troy

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Carter, or whoever else Comerica designated in order to assist "behind the scenes" in resolving the issues in dispute. (*Id.*, Ex. C.) Comerica's counsel responded with a letter dated April 26, 2017, rejecting Mr. McMillan's offer of assistance. (*Id.*, Ex. D.) McMillan's counsel sent a response to this communication in a letter dated May 2, 2017, once again stating that McMillan would be willing to contribute in any way he could in resolving the issues. (*Id.*, Ex. E.) Comerica did not respond to this letter.

In addition, Comerica failed to seek a court order compelling disclosure of the WBR 2014 Settlement Agreement to UMG. (*Id.*, ¶28.) McMillan strongly advised Comerica's counsel to do so. (*Id.*, ¶¶26, 28.) [redacted] of the WBR 2014 Settlement Agreement contains a [redacted] (McMillan Decl., Exhibit A, ¶11.) Comerica failed to go to this Court (or to the Court in New York) seeking disclosure of the terms of the WBR 2014 Settlement Agreement to UMG. (*Id.*, ¶28.) As Bremer's counsel argued to the Court in its letter dated June 1, 2017, if the WBR 2014 Settlement Agreement had been reviewed by UMG, there is a strong possibility that this would have satisfied UMG's concerns. Ultimately, rather than defending the deal that had been negotiated by Bremer and by its advisors, and preserving its value for the heirs, Comerica instead concluded that it could not "unequivocally" rule out the possibility of a conflict, and before even bringing its Motion to Rescind, it entered into a Rescission Agreement with Universal. (Cassioppi Decl., Ex. U.)

In entering into an agreement to rescind the UMG contract, Comerica failed to advise the Court or any of the other parties as to what reasonable alternatives exist to the UMG contract. In response to the letter from Bremer referenced above, Comerica's lawyers sent a response to the Court stating that it would have been inappropriate to seek another buyer while the UMG contract was in place. However, it had already signed the agreement to rescind the UMG

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contract, and the only party that might have standing to object to Comerica exploring other alternatives is UMG. It is highly unlikely that UMG would object to Comerica seeking an alternative to a contract that UMG has already indicated it wants to rescind. Thus, Comerica is asking that this Court rescind a contract [redacted] by the Estate without describing what alternatives exist, [redacted] or whether the Court's entry of an order of rescission would result in [redacted] to the Estate.

ARGUMENT

I. COMERICA HAS NOT MADE A SUFFICIENT SHOWING THAT RESCISSION IS IN THE BEST INTERESTS OF THE ESTATE.

McMillan recognizes that, where it is in the best interest of the estate, a Court will ordinarily afford some deference to the recommendations of a personal representative regarding transactions involving an estate. *See, e.g.*, Minn. Stat. 524.3-703, 524.711. However, as matter of practice, Minnesota courts act with great caution in setting aside a written agreement between parties, particularly where the evidence advanced in support of rescission is weak or inconclusive. *See Martin v. Guarantee Reserve Life Ins. Co.*, 155 N.W.2d 744, 748 (Minn. 1968). This Court has made it clear that this particular estate is "extraordinary" – and accordingly, there are many reasons why the Court should exercise great care to carefully examine the rescission request made by Comerica.

First, the UMG contract was previously presented to and approved by this Court, after review by multiple lawyers, including entertainment law specialty lawyers retained by the former special administrator, as well as counsel for the non-excluded heirs. This involved a very thorough review process, during which multiple briefs were submitted to the Court, and oral testimony was taken. Following this extensive review, the Court determined the UMG contract to be in the interest of the Estate. As a result, the Estate [redacted]

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[redacted] UMG contract. Notably, UMG is the largest recording company in the world, and its representatives include people who had a direct relationship with Decedent over the years. There is no reason to think that [redacted]

A. There is no conflict between the WBR 2014 Settlement Agreement and the UMG contract. [redacted]

WBR's assertion [redacted] WBR would have UMG and the Estate believe [redacted] This argument defies common sense, industry custom, and black-letter Minnesota law regarding contract interpretation. There is no conflict, and no basis to rescind the UMG deal.

1. [redacted]

In construing contract language, a court must give effect to the plain meaning of the contract and refrain from using the canons of construction to rewrite or otherwise distort it. *See*

Ostendorf v. Arrow Ins. Co., 288 Minn. 491, 495, 182 N.W.2d 190, 192 (1970) ("When the language is unambiguous . . . we are not at liberty to rewrite or to undertake judicial construction of the [contract]. Any construction of the [contract] must do no more than give effect to the plain meaning of the language.") (citation omitted). The primary goal of contract interpretation is to determine and enforce the intent of the contracting parties. *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 418 (Minn. Ct. App. 2008) (citing *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003)). "[T]he intent of the parties is determined from the plain language of the instrument itself." *Id.* (citing *Travertine*, 683 N.W.2d at 271).

The plain language of the contracts establishes that there is no conflict [redacted]

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[redacted]

The rights granted under the two respective contracts are entirely consistent. [redacted]

[redacted] There is no conflict. (McMillan Decl., ¶30, Ex. F.)

[redacted]

[redacted]

Under Minnesota law, "the contract terms may not be construed to yield a harsh or absurd result." *Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Courts must "attempt to avoid an interpretation of the contract that would render a provision meaningless." (*Id.*)

Bremer's counsel made this same point to the Court in a recent letter dated June 1, 2017 in which it noted that [redacted]

Further, reading the contract as a whole underscores the parties' intent [redacted]

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[redacted]

This interpretation is consistent with the understanding of the former counsel for heirs Sharon Nelson, Norrine Nelson, and John Nelson ("SNJ"), Ken Abdo. On September 21, 2016, Mr. Abdo sent an email on behalf of all of those who at the time had been referred to as the non-excluded heirs. [redacted]

2. [redacted] There are numerous flaws in this argument. [redacted] These terms have easily definable meanings and can be consistently applied. [redacted] Although the contract states this term should be given the meaning ascribed to it in prior agreements with WBR, [redacted] As pointed out in the Cassioppi Declaration, [redacted]

Further, the WBR 2014 Settlement Agreement [redacted] Thus, the definition that must apply is the one that best evidences the parties' prior course of dealing. The best evidence of the parties' prior course of dealing are the most recent agreements, [redacted]

That the Court should not adopt [redacted]

[redacted]

(*Id.*)

The parties also reiterated this agreement [redacted]

[redacted]

Thus, there is simply no evidence that the parties intended [redacted]

Finally, WBR's behavior after Decedent's death [redacted] In August 2016, when WBR was aware that the Estate was requesting proposals from recording companies for release of Prince's recordings, WBR attempted to negotiate an amendment to the WBR 2014 Settlement Agreement. The August 2016 proposed amendment [redacted]

Ultimately, that deal was rejected by the Court. However, if WBR truly felt that the WBR 2014

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Settlement Agreement contract [redacted] there would have been no need for it to seek to specify such rights in the proposed amendment.

B. Even if there were a theoretical conflict, [redacted]

Even if there was a conflict between the WBR 2014 Settlement Agreement and the UMG contract, rescission would not be justified. The parties knew that in light of Prince's death, the full extent of his contractual obligations was unknown. [redacted]

Comerica fails to even address [redacted] in its brief. Instead, it seeks the extraordinary remedy of undoing the UMG contract [redacted], it is not nearly enough for Comerica to state that it "cannot definitely rule out" some overlap between the UMG contract and the rights held by WBR. Rather, to

justify rescission of the UMG contract, [redacted] because the entire contract was fraudulently induced by the Special Administrator and its advisors. Notably, Comerica makes no such affirmative allegation that McMillan or Bremer made any fraudulent misrepresentation to UMG, or fraudulently induced UMG to enter into the UMG contract. It merely defers to UMG's arguments.

But even UMG's allegation of fraudulent inducement is not based on an independent analysis of the WBR Agreement because UMG has never even seen the WBR Agreement. Instead, UMG's claim that it was fraudulently induced is based solely on (1) WBR's allegation that [redacted] and (2) the Personal Representative's inability to "unequivocally" rule out the possibility of overlapping rights [redacted] Thus, Comerica lets WBR's unsubstantiated allegations about the scope of its contract control its determination. These allegations are not sufficient to warrant rescission of a [redacted] for the Estate based on fraudulent inducement.

To establish fraudulent inducement, a party must show: (1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce the recipient to act in reliance thereon; (4) that the representation caused recipient to act in reliance thereon; and (5) that recipient suffered pecuniary damages as a result of the reliance. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009) (affirming summary judgment dismissal on plaintiff's fraud and fraudulent inducement claims) (citation omitted). In other words, fraudulent inducement requires far more than a showing of a potential conflict – even an actual conflict – between the rights given to UMG under its contract and those rights held by WBR. It requires a showing of either an intentional or reckless misrepresentation

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– something that Comerica does not even allege. Comerica has not established any of the essential elements of a fraudulent inducement claim.

First, there was no false representation. The only specific statement by Bremer or its advisors that has been identified by UMG that [redacted] Afterwards, WBR shall have only [redacted] (Cassioppi Decl., Ex. B.) That statement merely paraphrases what is in [redacted] – nothing more, nothing less. Notably, the only claim that McMillan's statement is false comes from WBR, which would benefit greatly from UMG backing out of the UMG contract.

Second, there is no evidence that any statement by Bremer or McMillan was made with *knowledge* that it was false, or without knowledge of its truth or falsity. McMillan certainly did not – and does not – believe that the statement that WBR's rights [redacted] was false. McMillan has been a leading entertainment law lawyer and industry professional. He has extensive knowledge of terms of custom, [redacted] and he has had past dealings with WBR.

Furthermore, the two law firms hired by Bremer, Stinson and Meister Seeger, reviewed the UMG and WBR contracts and did not raise any objections or identify any conflicts. Based on this, and on McMillan's experience, knowledge, and review of the WBR Agreement, he understood his statements to UMG to be true. (McMillan Decl., ¶ 30.) Further, he and Bremer also disclosed that, to some extent, [redacted] (*Id.*, ¶¶15-16.) That is why [redacted] was included in the UMG Agreement. (*Id.*, ¶15.)

Thus, Bremer and its advisors fully communicated any limitations of their knowledge with respect to their statements to UMG. This is all that the law asks them to do.

UMG also did not rely on any representations of Bremer or McMillan. UMG is a sophisticated, experienced entertainment industry company. Its executives regularly negotiate multi-million dollar entertainment and licensing deals. It was represented by counsel. It was well-aware that WBR had prior rights under prior agreements, and, in fact, its own COO, Mark Cimino, had previously been WBR's head of business and legal affairs and had signed the WBR 2014 Settlement Agreement. UMG was also aware that some of the rights it was acquiring were of an uncertain nature. Accordingly, its counsel took what it thought to be reasonable steps to protect UMG, and specifically crafted language in the UMG contract, [redacted] In fact, Cimino is the party who drafted [redacted] (McMillan Decl., ¶¶10, 15-16.) Under these circumstances, UMG did not reasonably rely on any statements from Bremer or McMillan regarding WBR's rights.

These same principles also support the argument that McMillan and Bremer's statements about WBR's rights is not material. Under Minnesota law, a factual misrepresentation is material if it "played a significant role in the [purchase] decision." *Gaertner v. Rees*, 107 N.W.2d 365, 368 (1961). A representation is not material unless it prejudices the party or is germane to the fraud alleged. *Rien v. Cooper*, 1 N.W.2d 847, 851 (Minn. 1942). A representation is not material if a reasonable person would not attach importance to and would not be induced to act on the information in determining his choice of actions in the transaction in question. *Nave v. Dovolos*, 395 N.W.2d 393 (Minn. Ct. App. 1986); *Lakeland Tool and Engineering, Inc. v. Thermo-Serv, Inc.*, 916 F.2d 476 (8th Cir. 1990) ("materiality is governed by an objective standard…"). UMG entered into the contract knowing there was uncertainty regarding WBR's rights and relying on its own independent counsel. Under these circumstances,

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a reasonable person would not be induced to act based on the statements of McMillan, a third-party who was not acting on UMG's behalf.

C. Rescission cannot be justified here without testimony from entertainment industry experts.

Comerica's efforts to undo this [redacted] based on nothing more than unsupported allegations and threats, begs the question – why does Comerica seek to undo this deal, and more importantly, why so quickly? Notably, Comerica does not offer any legal analysis of its own regarding WBR's claims regarding its rights, and it has not offered any affidavit or other evidence from an entertainment industry expert. Presumably, a more reasonable approach would be to proceed cautiously, with all involved parties having the opportunity to evaluate the agreements, with input and testimony from experts.

Because the alleged conflict between the WBR 2014 Settlement Agreement and the UMG contract is technical – apparently hinging on the meaning of [redacted] in the WBR 2014 Settlement Agreement – no showing can possibly justify rescission in the absence of testimony from experts in the music industry about the meaning of those terms. It is alarming that Comerica has failed to provide an affidavit from its entertainment advisor, Troy Carter, regarding the meaning of these terms. In fact, Comerica does not offer any evidence that it even consulted with Mr. Carter or any other entertainment industry professionals in the wake of WBR's startling allegation immediately after the announcement of the UMG contract that [redacted] or in the wake of UMG's equally startling demand that Comerica rescind the UMG contract under the threat of a lawsuit.

Accompanying this response, McMillan is submitting a declaration of a highly regarded music and entertainment industry expert, Virgil Roberts, who states in his declaration that based on his 35 years' experience in the industry, [redacted]

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[redacted] (Roberts Dec. ¶ 8.)

D. Comerica has not shown that there is a reasonable alternative to the UMG contract that would be in the best interest of the Estate.

While Comerica asks the Court to undo a deal that would net the Estate [redacted] it has not offered any indication to the Court that it has any replacement deal options that would [redacted] In short, to ask the Court to rescind the [redacted] deal, without a replacement deal, based solely on WBR's self-interested allegations and UMG's mere speculation about a document it has not seen, is absurd. And Comerica's lack of defense of a [redacted] deal – for which the Estate previously sought and obtained Court approval – is surprising, to say the least.

Comerica's plea that rescission is necessary to avoid future litigation lacks credibility. By raising allegations of fraud and misrepresentation that are allegedly so serious that they warrant setting aside a [redacted] deal, Comerica has essentially invited McMillan, Koppelman, UMG, WBR, and countless others to sue each other if the UMG contract falls apart. (Mr. Kane has already alluded to this in a letter sent to the Court on June 5 in which he states that those who cause damage to the Estate as a result of the UMG deal must be "held accountable.") Rescission of the UMG contract will not make the threat of litigation disappear.

II. THE COURT SHOULD NOT APPROVE RESCISSION WITHOUT ALLOWING AN OPPORTUNITY FOR DISCOVERY.

Before the Court allows rejection of a lucrative contract that provides so many benefits to the Estate and its heirs, the Court should allow the parties to conduct limited discovery (such as service of subpoenas on UMG and WBR) for up to sixty days that would include exploring at least the following questions:

1. Does WBR have any documents showing internally how the terms [redacted] or [redacted] are defined? Did it enter into any other contracts that define these terms?
2. Do WBR's internal records show a legitimate concern about the UMG contract, or are there records showing that WBR decided to raise the issue of conflict as a negotiating ploy?
3. Are there records within UMG showing its understanding of the terms [redacted] during or after the period of negotiation?
4. Is there any evidence that UMG had "cold feet" immediately after the deal and was looking for an excuse to get out of the contract?
5. Was there any input to Comerica from Troy Carter or other industry experts?
6. What other efforts did Comerica make to determine whether there was an actual conflict, and what opinions did it receive?

III. IF THE COURT DOES ALLOW RESCISSION, THERE SHOULD BE NO AFFIRMATIVE FINDING OF FRAUD AND THERE IS NO BASIS TO REQUIRE AN INVESTIGATION INTO THE COMPENSATION EARNED BY THE SPECIAL ADMINISTRATOR'S ADVISORS.

In the event that the Court allows rescission of the UMG contract (which it should not), such rescission should have no effect on the commission earned by McMillan. As noted above, there is no evidence of fraud here. Furthermore, Comerica's suggestion that the UMG contract, if rescinded, is "*void ab initio*' is simply wrong. If the Court ultimately defers to Comerica's judgment and allow these parties to agree not to perform under the UMG contract, what Comerica and UMG might agree to regarding their obligations cannot effect the rights of third parties such as McMillan.

Throughout its brief, Comerica has gone to great lengths to convince the Court that rescission is necessary for the purpose of avoiding litigation, and that the Rescission Agreement

was a good faith effort at resolution of a disputed claim. Perhaps if that is where Comerica left this issue, McMillan would not need to object. But by insinuating that the Court should investigate whether McMillan's commission be returned and attacking his work on the UMG contract, Comerica is essentially seeking to have this Court issue a ruling that implies wrongdoing by McMillan in a case to which McMillan is not even a party. Comerica thus fails to address a basic principle of Minnesota law, which is that, while reasonable attempts to resolve matters outside of litigation are encouraged, such resolutions cannot prejudice the rights of a third party. *See, e.g., Drake v. Ryan*, 514 N.W.2d 785, 788–90 (Minn. 1994) (allowing settlement with primary carrier while preserving claim against excess insurer); *Frey v. Snelgrove*, 269 N.W.2d 918, 921 (Minn. 1978) (approving a *Pierringer* release between a plaintiff and one joint tortfeasor, while preserving claim against another); *Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 894 (Minn. 1977) (allowing employee who had received workmen's compensation payments to settle his tort claims without employer's consent without affecting employer's subrogation rights).

In suggesting to the Court that McMillan's commission may need to be returned, Comerica is overreaching. First, contrary to what Comerica argues, rescission does not render the UMG contract void *ab initio*. To the contrary, under well-established Minnesota law, contracts which a party originally intends to be valid but later seeks to cancel for various reasons such as fraud, misrepresentation, or mistake, are not void *ab initio*. *See Dahlberg v. Young*, 231 Minn. 60, 67, 42 N.W.2d 570, 575 (1950) ("A deed which is procured through fraud or undue influence is not void but only voidable."); *Schaps v. Lehner*, 54 Minn. 208, 212, 55 N.W. 911, 912 (1893) (stating general rule that a contract entered into by an insane person is not void *ab initio*); *Cochran v. Stewart*, 21 Minn. 435, 438 (1875) (explaining that a contract of sale for personal property induced by fraud is not void, but can be rescinded at election of vendor).

Under these principles, the UMG contract is not *void ab initio* – as though it never existed. UMG and the Estate certainly intended it to be valid, and they are seeking rescission only because there is a change in the party acting as fiduciary, and at their own (and questionable) election. Thus, even if UMG and Comerica, on behalf of the Estate, elect to not be bound by the UMG contract, it is not null, as if it had never been entered into. Instead, it is a valid contract and remains a valid contract, although the Court may allow the parties to decline to perform. *See, e.g. Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 353 n.9 (Minn. 2003) (citing Black's Law Dictionary 1568 (7th ed. 1999)); *see also Spartz v. Rimnac*, 296 Minn. 390, 394, 208 N.W.2d 764, 767 (1973) (explaining with regard to voidable, as opposed to void contracts, "that action is necessary in order to prevent the contract from producing the ordinary legal consequences of a contract" (quoting Restatement of Contracts § 13 cmt. e (1932))). In fact, despite its argument, Comerica tacitly appears to concede the contract is not *void ab initio*, as it drafted the Rescission Agreement [redacted]

Second, Comerica acknowledges that the commission was paid [redacted] in connection with their work as advisors. (Comerica Brief, p. 15.) Even if the UMG contract is no longer in effect, McMillan and Koppelman's agreement with the former Special Administrator remains undisturbed.

Third, Comerica does not argue that McMillan failed to perform under his agreement. And in fact, McMillan did perform under his agreement by negotiating the UMG contract. As noted above, the UMG contract is valid (and in fact, this Court previously approved it), even if the Court now defers to the parties to the contract and allows them not to be bound by their agreement. Accordingly, even if the UMG contract is rescinded, McMillan did what he contracted to do, and he is entitled to the commission for his efforts in negotiating that contract.

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See, e.g. Nelson v. Rosenblum Co., 289 Minn. 32, 33-34, 182 N.W.2d 666, 667 (1970) (holding that broker's commission was fully earned when he performed under the agreement, and he was entitled to it even when agreement was subsequently undone); *Century 21-Birdsell Realty, Inc. v. Hiebel*, 379 N.W.2d 201, 205 (Minn. App. 1985 (holding that a seller's change of mind and subsequent rescission of the purchase agreement is not a defense to the agent's demand for the commission, where there is no evidence that the agent would not have performed his obligations under the agreement); *accord Bychowski v. ERA Tempo Realty, Inc.*, 274 Ill.App.3d 1093, 1094 (Ill. App. Ct. 1995) (noting that a majority of jurisdictions hold that a party is entitled to an earned commission, even though the contract is subsequently rescinded).

Finally, if Comerica seeks guidance as to whether it should investigate McMillan's commission, it should also seek guidance as to whether it should investigate all attorneys' fees that were incurred, and approved by the Court and paid by the Estate, in connection with the UMG contract. If McMillan's commission, earned for work he performed in negotiating the UMG contract must be returned, then presumably all attorney fees paid by the Estate for similar work must also be returned. If the Court grants Comerica's request for guidance on the investigation of McMillan's commission, then the Court should similarly issue guidance on whether such attorney fees should be returned.

CONCLUSION

For all of the foregoing reasons, McMillan respectfully requests that this Court deny Comerica's motion seeking rescission.

BASSFORD REMELE
A Professional Association

Dated: June 6, 2017

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