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STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION

In Re:

Court File No.: 10-PR-16-46

Estate of Prince Rogers Nelson,

Deceased.

MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL

INTRODUCTION

Less than one week before the hearing to determine the personal representative for the Estate of Prince Rogers Nelson (the "Estate"), Tyka Nelson and Omarr Baker ("Tyka" and "Omarr") moved to compel responses to discovery that was never previously served.[1] These efforts represent an attempt to delay oncoming proceedings while seemingly harassing a personal representative candidate. Because the Motion improperly seeks to compel discovery that has not been served without meeting and conferring in advance of the Motion and it demands production beyond the scope of Minn. R. Civ. P. 26.02, Sharon, Norrine, and John Nelson ("Sharon," "Norrine," and "John," or "SNJ") respectfully request that the Court deny the motion in its entirety and award them fees and costs incurred in responding to the motion. Alternatively, Sharon, Norrine, and John request that the Court order formal discovery of both co-personal representative candidates.

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[1] This Memorandum is submitted under seal per the designation of the Motion to Compel. The basis for Tyka and Omarr filing their entire Motion under seal is unknown since their counsel omitted an explanation for the designation.

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STATEMENT OF FACTS

The majority of the non-excluded heirs of the Estate seek to appoint Comerica Bank & Trust, N.A. ("Comerica") and L. Londell McMillan ("McMillan") as co-personal representatives for the Estate. Sharon, Norrine, and John petitioned the Court for the appointment on December 6, 2016. (Dec, 6, 2016 Joint Pet. at ¶ 7.) They requested that Comerica "have sole custody of the estate assets and have sole authority for handling receipts and disbursements." (*Id.* at ¶ 7.) In addition, they provided an affidavit from McMillan detailing his qualifications. (Dec. 7, 2016 Affi of L. Londell McMillan.)[2] Alfred Jackson ("Alfred") joined in nominating McMillan and Comerica as co-personal representatives. (Dec. 21, 2016 Nomination of Personal Representative and Renunciation of Priority for Appointment, at ¶ 3.)

Tyka nominated Fiduciary Trust Company International ("Fiduciary Trust") to serve as personal representative, but also agreed to appoint Comerica. (Dec. 6, 2016 Pet. for Appointment, at ¶ 15; Dec. 6, 2016 Pet. for Formal Adjudication of Intestacy, at ¶ 14.) Omarr petitioned to appoint Comerica and Anthony "Van" Jones ("Van Jones") as co-personal representatives. (Dec. 13, 2016 Pet. for Formal Adjudication of Intestacy, at¶¶ 14, 15.) Omarr objected to McMillan's appointment and requested disclosures from McMillan. (*Id.* at ¶ 16.) Of note, Van Jones is currently counsel for both Tyka and Omarr. (Jan. 4, 2017 Substitution of Counsel; Dec. 13, 2016 Petition at ¶ 15.) Sharon, John, and

[2] McMillan submitted previous filings to the Court as well and his background was addressed in pleadings leading to the Court's previous rulings. (*See* Sept. 27, 2016 Aff. of L. Londell McMillan; Oct. 6, 2016 Am. Order Granting in Part the Special Administrator's Mot. to Approve Recommended Deals & Den. Mot. to Void Advisor Agreement.)

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Norrine objected to appointing Van Jones. (Dec. 23, 2016 Objection to Pet. for Formal Adjudication.")

Per the Court's order dated December 12, 2016, the Petitions were scheduled for hearing on January 12, 2017. Tyka and Omarr never served discovery requests or sought to schedule formal discovery before submitting a motion to compel at approximately 4:30 p.m. on Friday, January 6, 2017.

In the absence of formal discovery requests and although significant information was available in the court filings, McMillan initiated attempts to meet with all the parties and repeatedly made himself available to address questions from all non-excluded heirs. This included appearing in person at the offices of Omarr's attorney on December 5, 2016. Omarr and Omarr's attorney were present and Tyka and her counsel attended by phone. (Jan. 9, 2017 Aff. of Randall W. Sayers at ¶ 6.)

Correspondence between the parties further documents McMillan's efforts to make himself available and provide information. He reached out to Tyka's previous counsel after the three-plus hour call later on December 20, 2016. (Sayers Aff. at Ex. A.) Tyka's attorney wrote back that night:

> Londell, I'm not sure what an additional call would accomplish when we previously spent 3 ½ hours on a prior call. In that call, you were able to discuss your offerings and capabilities and we listened closely and intently.

(*Id.*) Tyka later declined McMillan's offer to speak with her again via her attorney, "Hi Londell, I reached out to Tyka to deliver your request. *She believes there is not a need for further discussion* . . . ." (*Id.*) (emphasis added.)

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Without warning or any attempt to meet and confer regarding the discovery requests which had not been previously served, counsel for Tyka and Omarr submitted the motion at issue late last week. They seek to compel SNJ's attorneys to produce information from McMillan in addition to compelling McMillan himself to produce voluminous and sensitive information. (Jan. 6, 2016 Aff. of Thomas P Kane, at Exs. A and B.) By way of just a few examples, they seek any and all physical and electronic documents related to his last three years of federal and state tax returns, communications or agreements with potential heirs regardless of time, relationships with any entertainment company, previous litigation, and communications with attorneys. (*Id.*) Despite the expansive nature of the requests, counsel for Tyka and Omarr seek production "in advance of the hearing on January 12, 2017." (Mem. in Supp. of Mot. to Compel at p. 5.)

Contrary to their attached affidavit, opposing counsel did not meet and confer with counsel for SNJ. (Kane Aff., at ¶ 3; Sayers Aff. at ¶¶ 3-5.) The discovery sought in Kane's attached exhibits was never previously submitted to counsel for SNJ or served upon McMillan. Moreover, counsel for Tyka and Omarr participated in a call with the Court earlier on the morning of January 6, 2016 with counsel for the non-excluded heirs. (Sayers Aff. at ¶ 9.) When asked about the upcoming hearing to address the personal representative appointment, he made no reference to the need for discovery or outstanding issues that required the Court's intervention in advance of the hearing. (*Id.*)

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ARGUMENT

I. THE MOTION TO COMPEL IS UNTIMELY AND FAILS TO COMPLY WITH THE MINNESOTA RULES OF CIVIL PROCEDURE.

Before considering the nature of the discovery sought, the Motion should be dismissed because it seeks compel untimely discovery that was never served and was submitted without attempting to meet and confer. Discovery in probate matters is governed by the Minnesota Rules of Civil Procedure. *In re Smith's Estate,* 444 N.W.2d 566 (Minn.App.1989); *In re Wingen's Estate*, No. A08-0944, 2009 WL 1586876, at *3 (Minn. Ct. App. June 9, 2009) ("objectors have a right to conduct discovery in the probate proceeding, so long as the discovery sought is consistent with the rules of civil procedure") (unpublished and attached as Ex. B.) Courts have significant discretion in discovery matters and may deny, or even strike, an improper motion. *See EOP-Nicollet Mall, L.L.C.* v. *County of Hennepin,* 723 N.W.2d 270, 275 (Minn.2006); *e.g.*, Minn. Gen. R. Prac. 115.06. In determining whether to grant requests for relief to facilitate discovery, courts may consider a moving party's diligence in pursuing discovery. *See In re Hill's Estate*, No. A03-1775, 2004 WL 1192123, at *2 (Minn. Ct. App. June 1, 2004) (unpublished and attached as Ex. C.)

Rule 26.02(a) provides the methods for parties to obtain discovery. Minn. R. Civ. P. 26.02(a). Rule 45 allows discovery from non-parties. Minn. R. Civ. P. 45. Rule 34 controls requests for production, the discovery method sought by Tyka and Omarr, and proper service of the requests triggers the requirement for a party to produce responsive materials. Minn. R. Civ. P. 34.01 ("Any party may serve on any other party a request"). Motions to

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compel discovery are governed by Rule 37 which limits filing a motion to compel a discovery response to when another party fails to answer or respond to a discovery request. Minn. R. Civ. P. 37.01(b)(2). Even then, the parties must attempt to confer in good faith in an effort to avoid court intervention. *Id.*; Minn. Gen. R. Prac. 115.10.

In light of the failure to comply with the Rules in the present case, the Motion to Compel is unfounded. Indeed, counsel for Tyka failed to comply with the Rules upon which they rely. Had they acted in a timely manner, they would have had numerous options for timely seeking discovery. Counsel likely could have served discovery and/or moved the Court for a scheduling order facilitating discovery in conjunction with the hearing or serving a subpoena *duces tecum*, among other options. They failed to attempt to conduct discovery and are instead bringing a last-minute, baseless motion while seeking to rush discovery in advance of a hearing currently less than four days away. Because their Motion fails to identify any previously served discovery, it should be denied.

SNJ also note the lack of a good faith attempt to meet and confer as required by Rule 37. The vague assertion in the supporting affidavit supports SNJ's contention that no attempt occurred. (Kane Affi at ¶ 3; Sayers Affi at ¶¶ 4-5.) The lack ofi any attached evidence demonstrating the discovery requests were previously served and counsel's silence during the most recent Court conference further corroborate the omission of any good faith meet and confer process. (Sayers Aff. at ¶ 9.) Under such circumstances, the requested relief should be denied.

In addition, the lack of diligence in pursuing discovery warrants denying the motion in the present case. Counsel for Tyka and Omarr moved to compel production just six days

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before a hearing despite receiving SNJ's Petition over a month ago, advance notice of the upcoming hearing, direct access to McMillan, and several opportunities to address discovery during conferences with the Court. Characterizing their Motion as a "Motion to Compel" is an attempt to mask their lack of diligence by burdening SNJ and McMillan when the question should be whether Tyka and Omarr have a reasonable excuse for delaying discovery.

In summary, absent compliance with the applicable rules counsel for Tyka and Omar cannot rely on those same rules, particularly when the moving party fails to demonstrate a diligent attempt to seek discovery. Accordingly, the Motion to Compel should be denied.

II. THE MOTION TO COMPEL SEEKS INFORMATION BEYOND THE SCOPE OF PERMISSIBLE DISCOVERY PER RULE 26.02.

Even if the Court considers the substantive requests from counsel for Tyka and Omarr, those requests seek information far beyond the scope of discovery permitted under the current circumstances.

Pursuant to the changes in 2013 to the Minnesota Rules of Civil Procedure, discovery "must be limited" to materials that enable a party to prove or disprove a claim or defense or to impeach a witness, and must also meet proportionality factors. Minn. R. Civ. P. 26.02(b). Under the more recent Rules, the party seeking discovery must establish good cause and proportionality in order for a court to order discovery of a matter relevant to the subject matter involved in the action. *Id.* In addition, the Minnesota Rules of Civil Procedure are construed to "secure the just, speedy, and inexpensive determination of every action. Min. R. Civ. P. 1. The United States Supreme Court has noted that "the

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district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Herbert* v. *Lando*, 441 U.S. 153, 177, 99 S. Ct. 1635, 1649 (1979) (citations omitted).

In the present case, SNJ respectfully submit that the available record sufficiently addresses McMillan's suitability to be a co-personal representative, particularly when he has the support of four of the six non-excluded heirs. As noted above, counsel for Tyka and Omarr had over three hours of interviewing McMillan and when presented with chance to obtain additional information, Tyka refused. Throughout that time, there was no request for additional information other than a general statement in Omarr's Petition.

In addition to their direct access to McMillan, the non-excluded heirs and the Court have had access to several filings detailing his qualifications and ability to assist the Estate. When a court has significant experience with a probate matter and the issues involved in the case, that court can reasonably decline to order additional discovery. *See In re Gosnell's Estate*, No. A05-1879, 2006 WL 2348079, at *3 (Minn. Ct. App. Aug. 15, 2006) (district court did not abuse its discretion when it denied request for additional discovery when it had extensive experience with the probate and issues involved in this case) (unpublished and attached as Ex. D.) In the present case, the Court is presumably well aware of McMillan's involvement, as he was instrumental in facilitating several profitable entertainment deals for the Estate that were subject to Court review, and he has submitted two previous affidavits. The records detail his credentials and his ability to be more than just a competent personal representative, but an asset to the Estate.

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The available information far exceeds the requirements for the appointment of personal representative as demonstrated in SNJs' Petition and by Alfred's support. Indeed, personal representatives are commonly approved by courts with less information and none of the information sought via the Motion to Compel. Indeed, the information sought appears to be a classic "fishing expedition" as commonly referred to in discovery disputes. Under these circumstances, counsel for Tyka and Omarr must do more than make vague suggestions that McMillan requires further vetting. Instead, no discovery should take place at this time absent substantial evidence from counsel suggesting that McMillan is somehow unsuitable. The attorneys have failed to present such evidence to-date and their request for last-minute discovery lacks merit in light of McMillan's qualifications, experience, work for the Estate, relationship with Prince Rogers Nelson, and continued nominations from the majority of the non-excluded heirs.

Moreover, the discovery is likely unnecessary given the procedural posture in this matter. As noted in SNJs' other pleadings, SNJ have a strong statutory argument in support of appointing McMillan. SJN combined with Alfred constitute heirs with interests worth more than half of the probable distributable value of the estate and their majority approval of McMillan supports his appointment as personal representative per Minn. Stat. § 524.3-203(b)(2). In addition, McMillan would not have control of the assets and would be co-personal representative with a corporate representative per SNJs' Petition. Under these circumstances, the expansive requests are disproportionate in that they do not justify forcing a non-party to respond to erroneous and untimely discovery.

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Counsel for SNJ also note 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." Minn. R. Civ. P. 34.01.

Even if additional discovery is appropriate, the current requests are objectionable for a myriad of reasons and the anticipated objections from McMillan in the event he was served with this discovery would be warranted. Much of the requested material is also irrelevant and disproportionate to the issues at hand. Indeed, the requests far exceed information typically sought from personal representative candidates in Minnesota probate proceedings. The proposed requests seek McMillan's confidential, proprietary business information spanning a career that exceeds two decades in the entertainment industry in addition to production of his state and federal tax returns. Putting aside the proposed rapid production deadline, the requests would be unduly burdensome as they seek to compel a non-party, non-corporate entity to produce extensive electronically stored information and identify documents with no defined date range. These are only a fraction of the likely objections to the purposed discovery and a protective order would be warranted if discovery were ordered. Given the extensive information already available, the Court's familiarity with McMillan, and the limited issues in selecting a personal representative, and the combined support of a majority of the presumed heirs, SNJ respectfully submit that the Motion to Compel should be denied.

III. IN THE ALTERNATIVE, BOTH POTENTIAL CO-PERSONAL REPRESENATIVES AND RELATED ENTITIES SHOULD BE SUBJECT TO FORMAL DISCOVERY.

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Alternatively, in the event the Court is inclined to order discovery regarding McMillan, SNJ request that the Court issue a schedule for discovery allowing all parties equal opportunity to conduct discovery regarding the co-personal representative candidates. Tyka and Omarr are represented by Mr. Jones, the individual they seek to appoint as co-personal representative. Putting aside the apparent conflict in serving as personal representative for an estate that would include two of his clients as heirs in addition to the four other heirs, the role he seeks and the lack of available information present a greater need for related discovery than McMillan. Unlike the Petition for McMillan, the Petition placed no limitations on Van Jones' access to assets and his nomination lacks majority support. Moreover, he has had limited involvement with the Estate, again unlike McMillan.

In conclusion, SNJ again note that the Motion to Compel and the requested discovery are improper and highly objectionable. But if the discovery sought is appropriate for vetting McMillan, it would be similarly appropriate for Mr. Jones and wherever that discovery leads the parties.

CONCLUSION

For the foregoing reasons, Sharon, Norrine, and John respectfully request that the Court deny the Motion to Compel in its entirety and move forward with the hearing on January 12, 2016 as planned. In addition, they further request payment of attorney's fees and costs in the event they are the prevailing party on this motion per Minn. R. Civ. P. 37.

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Respectfully submitted,

Dated: January 9, 2017

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