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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF CARVER **FIRST JUDICIAL DISTRICT**
PROBATE DIVISION

In the Matter of:

The Estate of Prince Rogers Nelson,

Decedent

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

MEMORANDUM OF LAW IN SUPPORT OF THE SECOND SPECIAL ADMINISTRATOR'S MOTION FOR REFUND OF FEES

[REDACTED VERSION]

INTRODUCTION

The Second Special Administrator ("SSA"), on behalf of the Estate, brings this motion for a refund of the [redacted] commissions paid to the expert entertainment advisors CAK Entertainment, Inc./Charles Koppelman ("Koppelman") and North Star Enterprises Worldwide, Inc./L. Londell McMillan ("McMillan") in conjunction with the terminated Jobu Agreement and Court-ordered, rescinded UMG Agreement. Pursuant to Minnesota Statute Section 524.3-721, this Court is vested with the equitable power to order a refund of the overpayment of unreasonable compensation to any person who has performed services on behalf of the Estate.

Any claim by the Advisors to the commissions in respect of the Jobu or UMG transaction is based on the sophistry that they have earned the commissions. The Advisors are not entitled to retain the commissions because [redacted]

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At the time the Estate received payment from Jobu and UMG, the Advisors received commissions [redacted]. (*See* Gleekel Decl., Ex. A at 1, ¶ 6(d).) But when [redacted], the Advisors did not repay their commissions [redacted]. Under these circumstances, it is readily apparent that retention of the commissions constitute unreasonable and excessive compensation and should be refunded to the Estate.

FACTUAL BACKGROUND

A. The Advisor Agreement.

In order to "preserve and protect the assets of the Estate," Bremer Trust National Association, as Special Administrator ("Bremer"), retained the "expertise, management, monetization abilities, advice and services" of entertainment industry professionals Koppelman, on behalf of CAK Entertainment, and McMillan, on behalf of NorthStar Enterprises Worldwide, Inc. (collectively, "the Advisors"). (Gleekel Decl., Ex. A at 1, 7th "WHEREAS" clause and 2, 13th "WHEREAS" clause.) Though performing tasks, putatively on behalf of the Estate, related to the Prince Tribute Concert prior to official appointment by the Court (*see generally* Gleekel Decl. Ex. B), Bremer and the Advisors executed an Advisor Agreement effective June 16, 2016 based upon Bremer's June 2, 2016 recommendation, and the Court's June 8, 2016 authorization.[1]

[1] This Court's June 9, 2016 Order was incorporated in the Advisors Agreement as Exhibit A and stated, "…the duties and powers of the Special Administrator are subject to and governed by orders issued by the Carver County District Court including…Order and Memorandum Authorizing Special Administrator's Employment of Entertainment Industry Experts dated June 8, 2016…."

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(Gleekel Decl., Ex. A.) This Court authorized the Advisors "to advise and assist [Bremer], and as contemplated by Minn. Stat. § 524.3-715(21), 'to perform any act of administration, whether or not discretionary.'" In its Order, the Court recognized the "…unique challenges and opportunities" presented by the Estate and requirement for:

> …the Special Administrator to take all prudent steps to monetize the Estate's intellectual property and to raise funds necessary for the administration of the Estate and for the payment of Estate taxes.

(Gleekel Decl., Ex. A at Ex. A "Order," p. 1.)

On June 16, 2016, the Advisors executed a "Co-Management Agreement" to which Bremer was not a party. (Gleekel Decl., Ex. A at Ex. B.) [redacted]

The appointment under the Advisor Agreement lasted initially for 90 days but was then extended on September 14, 2016 for a term contemporaneous with Bremer's appointment as Special Administrator. On January 31, 2017, the Advisor Agreement ended.

During the term of appointment and consistent with the Court's June 8, 2016 Order, the Advisors services included, among others, "[redacted]" the Estate's intellectual property assets, [redacted] (Gleekel Decl., Ex. A at 2, § 5.) Stated otherwise, and consistent with the Court's June 8 Order, the Advisors contractually agreed [redacted] based

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upon their professed expertise and experience in the entertainment industry. The Advisors were the [redacted] to the Estate during the term of the Advisor Agreement. (Gleekel Decl., Ex. A at 1, 8th "WHEREAS" clause.) Section Five ("Services") of the Advisor Agreement provided:

[redacted]

(Gleekel Decl., Ex. A at at 2, § 5.)

For any [redacted], the Advisors were entitled to compensation in the form of a commission as set forth in Section Six of the Advisor Agreement. (Gleekel Decl., Ex. A at 2, § 6.)

[redacted]

(Gleekel Decl., Ex. A at 3, § 6(a).)

[redacted]

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(Gleekel Decl., Ex. A at 3, § 6(c).)

(Gleekel Decl., Ex. A at 4, § 6(d)(i).) Bremer was to use good faith efforts to ensure the Advisors received their

(Gleekel Decl., Ex. A at § 6(d).) In Section Three of the Advisor Agreement, the Advisors acknowledged and agreed

(Gleekel Decl., Ex. A at 2, § 3.)

Bremer and the Advisors agreed that

(Gleekel Decl., Ex. A at 6, § 15(f).) Further, the Advisors

(Gleekel Decl., Ex. A at 2, § 2.)

B. The Jobu Agreement and Subsequent Termination.

At the time of his death, Prince was scheduled to perform at U.S. Bank Stadium in August of 2016. As a Minnesota music icon, Prince looked to christen the new stadium with the first musical concert to be performed there. After his death, certain family members sought to honor his legacy by holding a Prince Tribute Concert ("Tribute") at U.S. Bank Stadium.

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Bremer and its counsel, Stinson Leonard Street, LLP ("SLS"), agreed to aid the family members in their desire to hold a Tribute concert. (Gleekel Decl., Ex. C at 5.) After retention of the Advisors on June 16, 2016, the Tribute largely became their endeavor. Of initial and primary importance for the realization of the Tribute was the retention of a promoter. Koppelman appears to have recruited Vaughn Millette ("Millette") and Jobu to submit a promoter proposal. Koppelman subsequently put Millette in contact with McMillan. (Gleekel Decl., Ex. B at June 2, 2016 email from Vaughn Millette; *see also*, Ex. C at 6.) Much of this appears to have occurred before the Advisors were retained, and without any genuine consideration of Jobu's capacity to promote such a large, significant event. (*See generally*, Gleekel Decl., Ex. B and Ex. C at 5-7.) The nature of these initial communications and the submission of the proposal is, in part, the subject of on-going litigation between Jobu and Koppelman and McMillan. (*See* Court File No. 10-cv-17-368.)[2]

Ultimately, Jobu and Live Nation, among others, submitted proposals for consideration. After vetting the proposals, the [redacted]. (*See generally*, Gleekel Decl., Ex. D.) [redacted]

[2] The SSA recognizes the importance of these facts is disputed. The Court need not resolve, or even rely, on these communications in order to make a determination on this motion. Such information is merely provided as background.

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[redacted]

(Gleekel Decl., Ex. E.) [redacted]

From the onset, Jobu had difficultly securing talent for the Tribute and ascertaining from the Advisors whether and to what extent [redacted]

3 [redacted]

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Between July 7, 2016 and August 5, 2016, Jobu, through Millette, repeatedly assured the Estate that it would be making prompt payment as [redacted]. (*See generally* Gleekel Decl., Ex. F.) Yet, [redacted]. (Gleekel Decl., Ex. G.) [redacted] (Gleekel Decl, Exs. C at 17, H.) Jobu [redacted].

On August 24, 2016, Jobu [redacted]. (Gleekel Decl, Ex. I.) On August 29, 2016, Jobu [redacted]. (Gleekel Decl., Ex. J.) [redacted] (Gleekel Decl., Ex. K.) [redacted] (Gleekel Decl, Exs. C at 21, L.)

[redacted] (Gleekel Decl., Ex. H.) On October 13, 2016, Rand Levy and Rose Presents co-promoted a Tribute with McMillan, in a role outside of his role as entertainment advisor to the Estate. In addition to [redacted], McMillan [redacted] financially benefitted from his efforts in personally promoting the Tribute that went forth without Estate involvement on October 13, 2016.

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C. The UMG Agreement and Subsequent Rescission.

At the time of his death, Prince had three categories of sound recordings: (1) recordings initially released by Warner Brothers Records, Inc. ("WBR Masters"), including his major hits from 1979-1995; (2) recordings independently released by the Prince's recording company, NPG Records, Inc. ("NPG Masters"); and (3) unreleased recordings ("Vault Masters"). The NPG Masters and the Vault Masters were not being fully commercially exploited. [redacted]

[redacted]

4 [redacted]

[redacted]

[redacted] Within this context, Bremer, through SLS and the Advisors, negotiated a license and distribution deal with Universal Music Group Recordings, Inc. ("UMG") in June, 2016. [redacted] (Gleekel Decl., Ex. Q at 2.) [redacted]

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[redacted] (Gleekel Decl., Ex. R.)

On January 31, 2017, Bremer and UMG entered into an Agreement ("the UMG Agreement"), which was announced on February 9, 2017. [redacted] January 31, 2017 also marked the final day of the Advisors' term and the end of Bremer's appointment as Special Administrator. On February 1, 2017, Comerica Bank & Trust, N.A. ("Comerica") become Special Administrator to the Estate.

On February 10, 2017, the day after the announcement of the UMG Agreement, [redacted] (Gleekel Decl., Ex. S.) The [redacted]

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[redacted] UMG demanded Comerica rescind the UMG Agreement or face litigation for fraud and breach of contract. [redacted] on May 17, 2017, Comerica brought a motion before this Court recommending rescission. The Advisors (and especially McMillan) went "to great lengths to [redacted] (Gleekel Decl., Ex. Q at 1.) But, as astutely noted by Comerica, this missed the point as Comerica needed to act in the best interest of the Estate. The Court ultimately agreed. (*Id.*) On July 13, 2017, this Court, recognizing the unenviable position of the Estate, granted the motion because it was in the best interests of the Estate. (Gleekel Decl., Ex. T.) [redacted]

ARGUMENT

The Second Special Administrator brings this motion because [redacted] is unreasonable, inequitable and unfair. Over the course of their six and half month appointment as entertainment advisors, [redacted]. Regardless, [redacted]

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[redacted] The plain language of the Advisor Agreement and equity [redacted]. Minnesota law enables this Court to order a refund of [redacted].

> After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for personal representative services, may be reviewed by the court. *Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds*.

Minn. Stat. § 524.3-721 (emphasis added). The statute does not supply an analysis for determining when compensation is "excessive," but rather it is left to the sound discretion of this Court to make such findings. *See, e.g. In re Estate of Baumgartner*, 274 Minn. 337, 346, 144 N.W.2d 574, 580 (1966) (finding allowance of personal-representative and attorney fees is a matter largely within the discretion of the district court).

I. Disgorgement of the Advisors' Commissions for the Failed Jobu and UMG Transactions is Required by the Language of the Advisor Agreement.

The Advisor Agreement made clear [redacted] Both terms are defined in the Advisor Agreement. [redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

Axiomatic to the definition of a [redacted]. With respect to Jobu, [redacted] that is now the subject of litigation against the Advisors. Regardless, [redacted] there was no "written contract for sponsorship, endorsement, or licensing" of any Estate rights. Nor was there [redacted].

The Advisor Agreement allows [redacted]. The only reasonable inference from the [redacted]. In light of Jobu's termination of [redacted].

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Thus, McMillan is not entitled to a commission. The clear and unambiguous intent of the Advisor Agreement was [redacted].

The same reasoning applies to the UMG Agreement. With respect to UMG, the contract was rescinded. Minnesota law is clear: a rescinded contract is a contract that never existed. *Graves v. Wayman*, 859 N.W.2d 791, 799 (Minn. 2015) ("[T]he effect of the remedy of rescission is generally to extinguish a rescinded contract so effectively that in contemplation of law it has never had existence.") Without a contract, [redacted]. Moreover, just as with Jobu, [redacted]. The only proper remedy is an order requiring [redacted].

It is anticipated that the Advisors will argue against [redacted] because the decision by Comerica to move the Court to rescind the UMG Agreement was a business decision on the part of the Estate. Any such argument is without merit.

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First, as addressed above, given the meaning ascribed to [redacted] UMG posed the real threat of commencing litigation against the Estate. The prospect of litigation thus posed the risk to the Estate of protracted litigation with an uncertain outcome and, while pending, the inability of the Estate to monetize the rights at issue, together with a potential, substantial liability.

Second, on motion, this Court recognized the potential damage to the Estate and granted the motion to rescind upon finding that it was in the best interests of the Estate. The Advisors recognized and agreed in the Advisor Agreement, their power and actions, as well as those of Bremer, were subject to "Court Limitations." (*See* Gleekel Decl., Ex. A at 2, § 3.) Thus, the Court's determination that rescission of the UMG Agreement was in the best interests of the Estate forecloses any claim that rescission was simply a business decision. Any argument to the contrary is nonsense.

It is also anticipated the Advisors will argue the Estate and the SSA lack standing to bring this motion, [redacted]. First, no such formal procedural requirement is imposed by Section 524.3-721. *See, e.g., In re Estate of Reiman*, No. A11-203, 2012 WL 5754, at *4 (Minn. Ct. App. Jan. 3, 2012) (interpreting Section 524.3-721 as only requiring interested parties be put on notice of a challenge to their fees). Second, any such argument relies on a sleight-of-hand. [redacted] Moreover, Jobu and UMG would have no standing to pursue a claim against the Advisors [redacted].

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[redacted]

[redacted]

II. Equity Demands the Advisors Repay the Estate for Commissions from the Failed UMG and Jobu Transactions.

Minnesota law does not appear to directly address the issue of overpayment to agents, other than attorneys, hired by a personal representative. This is unsurprising given the rarity of situations where a personal representative will be faced with the need to utilize estate assets to receive expert advice. Though an analogy for assessing this situation is articulated below, this Court need not look any further than the concept of fairness that is well ingrained in Minnesota jurisprudence. To wit, Minnesota Statute Section 524.3-721 gives this Court significant power to recoup the payment of fees based upon its discretion. By simply consulting its own equitable moral compass and the terms of the Advisor Agreement, it is apparent the Advisors' retention of their commission for the failed Jobu and UMG transactions requires disgorgement.

The Advisors were paid [redacted]. In the final days of both the Jobu and UMG transactions, the Estate faced the threats of significant litigation. But for Bremer's [redacted] the Court ordered rescission of the UMG Agreement, respectively, the Estate would be in protracted litigation. Even arriving at the decision [redacted] required significant resources that would not have been expended but for the Advisors. [redacted] In the end, the Advisors' "services"

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[redacted]

Should this Court wish to consult an established standard, there are two appropriate analogies. As regards personal representatives' fees and attorneys' fees, Minnesota law is well developed. A personal representative is entitled to "reasonable compensation for services." Minn. Stat. § 524.3-719(a). In order to determine "reasonable compensation" for a personal representative, a court is to consider three factors:

> (1) the time and labor required;
> (2) the complexity and novelty of problems involved; and
> (3) the extent of the responsibilities assumed and *the results obtained*.

Minn. Stat. § 524.3-719(b) (emphasis added).

Similarly, an attorney performing services for an estate at the instance of a personal representative is entitled to fees as is "just and reasonable." Minn. Stat. § 525.515(a). In determining what is reasonable, five factors are considered:

> (1) the time and labor required;
> (2) the experience and knowledge of the attorney;
> (3) the complexity and novelty of problems involved;
> (4) the extent of the responsibilities assumed and *the results obtained*; and
> (5) the sufficiency of assets properly available to pay for the services.

Minn. Stat. § 525.515(b) (emphasis added). Regardless of the factors, an attorney requesting fees must present "proof of a benefit to an estate before an attorney may be paid for providing 'services' for the estate at the request of a personal representative." *In re Estate of Evenson*, 505 N.W.2d 90, 92 (Minn. Ct. App. 1993) (interpreting Minn. Stat. § 525.515(b)); *see also In re Estate of Weisberg*, 242 Minn. 150, 152, 64 N.W.2d 370, 372 (1954) (stating "courts have a duty to prevent dissipation of estates through allowance of exorbitant fees to those who administer them.")

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Either (or both) of these well-established principles for compensation in the probate of an estate supply an apt analogy for considering whether [redacted]. Consider that "[t]he reimbursement of overcharged personal representative fees is analogous to a case of improperly charged attorney's fees. If attorney's fees are improperly charged to the estate, they are returned to the estate because the improper fees constituted damage or loss the estate." *In re Estate of Sweetland*, 770 A.2d 1017, 1020 (Me. 2001); *see also Bookman v. Davidson*, 136 So.3d 1276, 1280-81 (1st D.C.A. Fla. 2014) (finding, based upon similar language to Minn. Stat. § 524.3-721, that district court had authority to order disgorgement). There exists no sound policy for treating an "advisor," who is also an agent with a fiduciary duty to the personal representative, differently within the context of fees and disgorgement.

Because the test for attorneys' fees replicates the test for a personal representative but with the addition of two factors, it seems appropriate to analyze the advisors' fees through that lens as informed by the Advisor Agreement. Under this test, [redacted]. *In re Estate of Evenson*, 505 N.W.2d at 92. [redacted] Thus, there is no reason to account for any factors to determine the reasonableness of the fees/commissions [redacted]. The Advisors will be hard-pressed to [redacted]

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[redacted]. Thus, the Advisors' fees should be refunded on the premise that [redacted].

The SSA recognizes that Koppelman did not [redacted]. It would be unjust, however, for McMillan to [redacted] he received [redacted]. He received something of value for a [redacted] that was not only recommended by the Advisors, [redacted]. More to the point, [redacted]. Indeed, McMillan's efforts arguably generated additional work and expense for the Estate because the Advisor's improvident recommendation of Jobu led to [redacted]. Perhaps most egregious, McMillan's [redacted] financially benefited when he personally promoted the Tribute that actually went forth. Any claim by McMillan to this commission is an overt act of greed that this Court should reject.

CONCLUSION

For the foregoing reasons, the SSA requests this Court order that the Advisors refund to [redacted] received on the [redacted] Jobu and UMG transactions because it constitutes excessive compensation to which they are not entitled.

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