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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF CARVER FIRST JUDICIAL DISTRICT
PROBATE DIVISION

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

Estate of Prince Rogers Nelson,

Decedent.

NORTHSTAR ENTERPRISES WORLDWIDE, INC. AND L. LONDELL MCMILLAN'S MEMORANDUM OF LAW ADDRESSING *DAHLBERG* FACTORS AND IN OPPOSITION TO ISSUANCE OF A TEMPORARY INJUNCTION

This Memorandum is submitted on behalf of NorthStar Enterprises Worldwide, Inc. (individually, "NorthStar Enterprises") and L. Londell McMillan (individually, "McMillan") (collectively, "NorthStar"), in response to the Court's November 26, 2019 Order requesting briefing on the injunction factors set forth in *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965).

INTRODUCTION

A prerequisite to issuance of a temporary injunction is a showing that the injunction is necessary to prevent "great and irreparable injury" that cannot be compensated with money damages. Here, the ultimate relief being sought by the Second Special Administrator (the "SSA") is the payment of money – namely, the commissions that had been received by NorthStar Enterprises and by CAK Entertainment, Inc. (Charles Koppelman and CAK Entertainment are collectively referred to herein as "CAK".) By definition, when the remedy sought is the payment of money, the loss can be compensated by money damages. As a result, a temporary injunction is not an appropriate remedy as a matter of law.

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Furthermore, there is no irreparable harm because there is no immediate need for payment of money to the Estate. Comerica Bank ("Comerica"), rescinded the Estate's contract with Universal Music Group ("UMG") in May 2017 (taking the opposite position than had been taken by Bremer Trust ["Bremer"]). and that rescission was approved by this Court in July of that year. The contract with Jobu was terminated even earlier - in September 2016 and Bremer decided to return the initial payment received to avoid potential litigation. NorthStar Enterprises and CAK have retained the commissions they earned in connection with the UMG transaction for two and one-half years, and NorthStar has retained sums received from Jobu for over three years. There is no irreparable harm to the Estate that would now require issuance of a mandatory temporary injunction. A mandatory temporary injunction here would not preserve the status quo – but rather would alter it, and require payment of millions of dollars to the Estate without giving the Advisors an opportunity for discovery or an evidentiary hearing prior to ordering such payment.

BACKGROUND FACTS

This Court is very familiar with the facts that led both to the payment of commissions to NorthStar and to CAK and the circumstances that led to the rescission of the UMG contract and termination of the Jobu agreement. This Memorandum will not therefore repeat those facts and instead incorporates by reference the Statement of Factual Background set forth in NorthStar's Memorandum of Law in Opposition to the Second Special Administrator's Motion for Refund of Fees, which was filed with this Court on September 24, 2018. The background facts most relevant to the *Dahlberg* analysis can be found in the discussion of the Advisor Agreement set forth on pages 4 – 6 of NorthStar's Memorandum. Those provisions will also be addressed below in the discussion of the relationship between the parties and the likelihood of success on the merits.

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ARGUMENT

This Court should not issue a temporary injunction. The SSA did not move for such an injunction, and it has not – and cannot – satisfy the criteria for the issuance of an injunction. The most significant flaw in the injunction analysis is the fact that the SSA's claims against NorthStar and CAK are a request for payment of commissions or fees – i.e. money damages. An injunction is not an appropriate remedy and should not be issued absent irreparable harm that cannot be compensated in money damages. As a matter of law, a claim for payment of money does not provide a basis for an injunction because, by definition, such a claim can be compensated with money damages.

I. THE LEGAL STANDARD FOR ISSUANCE OF A TEMPORARY INJUNCTION.

A. The *Dahlberg* Factors.

The Minnesota Supreme Court in *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965) articulated five criteria that a district court must examine before issuing an injunction: (1) the nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief; (2) the harm to be suffered by the plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial, i.e. the balance of hardships; (3) the likelihood that one party or the other will prevail on the merits; (4) consideration of public policy; and (5) the administrative burdens involved in judicial supervision and enforcement of the temporary injunction. A temporary injunction is "an extraordinary equitable remedy. *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982).

II. A TEMPORARY INJUNCTION SHOULD BE DENIED BECAUSE OF LACK OF IRREPARABLE HARM – THE SSA CAN BE FULLY COMPENSATED IN DAMAGES IF HE PREVAILS.

Critical to the *Dahlberg* analysis is consideration of the balance of hardships. Consequently, Minnesota courts have concluded that even though it is just one of the five *Dahlberg*

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factors, harm to the moving party – the showing of irreparable harm – is a threshold issue and is an absolute prerequisite to the issuance of a temporary injunction. *See Miller*, 317 N.W.2d at 712 (" Because a temporary injunction is granted prior to a complete trial on the merits, it should be granted only when it is clear that the rights of a party will be irreparably injured before a trial on the merits is held."). *See also Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. Ct. App. 1990) ("The failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction."), *rev. denied* (Minn. Sept. 28, 1990).

Furthermore, it is firmly established in Minnesota that irreparable harm cannot be shown where the moving party is merely seeking money damages, and thus there is not a showing of an injury where there is not a remedy at law. For example, in *Morse, supra,* the court reversed a grant of temporary injunctive relief to a city clerk who obtained an order from the district court enjoining termination of her employment. The court of appeals held that although the grant of a temporary injunction is largely a matter of judicial discretion, it is an "extraordinary remedy" intended to preserve the status quo until the case can be adjudicated on its merits. *Id.* 458 N.W.2d at 729. The court of appeals noted that the trial court had made findings on all five *Dahlberg* factors but limited its review to the issue of irreparable harm, noting that "the failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction." *Id.* And to support a finding of irreparable harm, the injury must be of "such a nature that money alone could not suffice," and the evidence must be more than "conclusory." *Id.* at 729-730.

Morse was cited with approval by the court in *Haley v. Forcelle*, 669 N.W.2d 48 (Minn. Ct. App. 2003), which the court noted that the parties seeking an injunction "must demonstrate that legal remedies are inadequate and that an injunction is necessary to prevent great and irreparable injury. *Id*. at 56, (citing *Metro. Sports Facilities Comm'n v. Minnesota Twins P'ship*,

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638 N.W.2d 214, 220 (Minn. Ct. App. 2002)). Citing *Morse,* the Court reaffirmed that "[g]enerally, the injury must be of such a nature that money damages alone would not provide adequate relief." 669 N.W.2d at 56.

In *Hinz v. Neuroscience, Inc.*, 538 F.3d 979 (8th Cir. 2008) the court held that the party seeking the injunction must establish that "his legal remedy is not adequate . . . the injury must be of such a nature that money damages alone did not provide adequate relief." In *Hinz,* a manufacturer sought to permanently enjoin a former distributor from promoting and using the manufacturer's trademarks and tradenames in marketing and selling its products. In denying the motion for permanent injunction to the manufacturer, Hinz, the district court stated, "The only injury Hinz has identified in this action is lost profits, which are obviously compensable with money damages. Hinz has not shown that he has suffered, or will suffer, any other type of injury." The Eighth Circuit Court of Appeals agreed, stating that because Hinz had failed to show irreparable injury, he was not entitled to a permanent injunction. 538 F.3d at 987-988.

In a more recent case, *Minnesota Vikings Football Stadium, LLC v. Wells Fargo Bank,* 157 F.Supp.3d 834 (D. Minn. 2016) the federal court, the Honorable Donovan Frank, denied a motion for injunction sought by the Minnesota Vikings Football stadium to require Wells Fargo Bank to remove or cover up illuminated rooftop signs on office towers that were adjacent to U.S. Bank Stadium and that were alleged to encroach on the plaintiff's rights to the stadium's image. The court stated that irreparable harm occurs "when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Id*. at 840 (citing *Gen. Motors Corp. v. Harry Brown's LLC,* 563 F.3d 312, 219 (8th Cir. 2009)). The court also noted that a moving party's long delay after learning of threatened harm may indicate that the harm

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is neither great nor imminent. *See also Novus Franchising, Inc. v. Dawson*, 725 F.3d 885 (8th Cir. 2013) (discussing impact of delay in seeking preliminary injunction.)

Applying the above legal principles to this case, it is clear that the Court should not issue a temporary injunction, but rather should allow the parties an opportunity for discovery and then consider the parties arguments at the time of trial. There is no reason why an injunction should be issued now when neither the personal representative nor the SSA sought an order requesting payment of funds into Court or to the Estate for over two years after the Jobu and UMG contracts were terminated or rescinded. As stated by the Court in *Minnesota Vikings Football*, a long delay in bringing a motion for injunction is an indication that harm is neither great nor imminent. 157 F.Supp. 3d at 840. In this case, there is more than simply delay – the SSA never brought a motion for temporary injunction. This is likely because he recognized that there are no grounds for such a motion.

The fact that the Estate's claimed injury can be compensated in damages may explain why the SSA did not seek an injunction following his appointment or immediately following his authorization to proceed against the Advisors, nor did Comerica as personal representative of the Estate seek an injunction prior to the appointment of the SSA. As stated above, the cases are universal in holding that an injunction should not issue if the plaintiff's injury can be compensated in money damages. See *Morse, Jelco, Haley*, and the other cases cited above.

To the extent the SSA claims that funds may be dissipated if not paid to the Estate – and it's unknown whether such an argument will be made – such a claim, raised years after NorthStar Enterprises and CAK earned and were paid their contractual commission, would merely be speculative, and "mere speculation as to unsatifiability of the judgment or potential dissipation of

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assets in the absence of any facts supporting such a claim is insufficient to meet its burden to demonstrate irreparable harm." *Nissen v. Rozsa*, 2009 WL 2391244 (D.N.J. Aug. 4, 2009).

The *Nissen* case is factually on point. There, the plaintiffs had an oral agreement with the defendant to split a commission that they would be paid as a result of their joint representation of a company regarding the sale of its business. Upon a successful sale, the commission was paid to the defendant who notified the plaintiffs that the money had been placed in a bank account. The parties quarreled about their respective shares of the commission, and the plaintiffs sought to have the commission deposited with the court pending the outcome of litigation. The court denied the claim, holding that the plaintiffs had not proven that the defendants would be unable to satisfy a future judgment.

In summary, the fact that any claim to commissions or fees is simply a claim for money damages is in itself sufficient to negate a claim of irreparable harm, and to require denial of the issuance of a temporary injunction. The SSA cannot show that there is a lack of legal remedy at law or irreparable harm.

III. THE REMAINING DAHLBERG FACTORS ALSO DO NOT JUSTIFY THE ISSUANCE OF AN INJUNCTION.

A. Nature and Background of the Parties Relationship.

The relationship between the Estate and the Advisors is contractual. Therefore, whether an injunction should issue is governed by the parties' contract, the Advisor Agreement. Under that Agreement, the Advisors earned their commission upon payment of the underlying transaction funds to the Estate, and the terms of the Agreement specifically negate any obligation to repay those funds, notwithstanding the Estate's subsequent voluntary decision to terminate or rescind of those contracts. That is particularly true because the record shows that the decisions to rescind or terminate were business decisions made by the personal representative or special administrator of

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the Estate, without any finding of fault by the Advisors. Indeed, the Special Administrator was pleased with NorthStar's work and registered no complaints or objections whatsoever.

The commissions and payments that are now in issue were paid pursuant to the provisions of Section 5 of the Advisor Agreement, which states as follows:[1]

> 5. Services: During and throughout the Term, Advisor agrees to be available to perform and shall undertake to perform services in the Entertainment Industry and *advise* and *counsel* Administrator in all aspects of Administrator's business in the Entertainment Industry related to the Artist. (hereafter "Services") . . . .

(LLM Decl. Ex. C at p.2 § 5)(emphasis added). Section 5 of the Advisor Agreement continues by enumerating an extensive list of the types of advice that the Advisors might offer the Estate.

In exchange for these counseling and advisory Services, the Advisors were to be paid by Bremer, on behalf of the Estate, on a commission-basis only. Specifically, the Advisors were to be paid collectively an amount equal to ten percent (10%) of all income earned by the Estate resulting from the non-excluded agreements the Estate entered into or substantially negotiated during the term of the Advisor Agreement, or executed within one hundred and twenty (120) days after its expiration. (LLM Decl. Ex. C at p.3, § 6). In essence, all compensation earned by the Advisors was based solely on: (1) the Estate's decisions whether or not to enter into the agreements or pursue the business opportunities negotiated and presented to them by the Advisors; and (2) whether those deals generated income for the Estate. There was no minimum compensation guaranteed to the Advisors, and the Advisors received no hourly fees or regular salary for the considerable time and effort they spent performing the extensive and complex list of Services defined under the Agreement.

[1] The Advisor Agreement is set forth at Exhibit C of the Declaration of L. Londell McMillan (LLM Decl., Ex. C), dated September 24, 2018, filed in conjunction with NorthStar's Memorandum of Law in Opposition to the Second Special Administrator's Motion for Return of Fees.

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Accordingly, under the Advisor Agreement, the Advisors "earned" their commissions simultaneously with the payment of any compensation to the Special Administrator on behalf of the Estate. Section 6(d) of the Advisor Agreement expressly provides:

> [C]ompensation payable to third parties by the Administrator, including, but not limited to, compensation to agents, attorneys, accountants, or otherwise, shall not be deducted from Advisor's share of Gross Monies, as defined herein, nor shall such third party compensation otherwise affect Advisor's compensation hereunder. Advisor shall be deemed to have earned Advisor's Commissions simultaneously with the payment to the Administrator or Administrator's affiliates of Gross Monies . . . .

(LLM Decl. Ex. C at p.4, § 6(d)(ii)).

Notably, there is no provision anywhere in the Advisor Agreement requiring the Advisors to return or refund commissions earned should there be a subsequent substitution, replacement, or modification to any income-generating contract or deal procured by the Advisors. In fact, the Advisor Agreement explicitly provides for the retention of commissions earned by the Advisors should a contract or deal be modified or replaced, based on the business decisions of the Estate. Section 6(a) of the Advisor Agreement specifically provides:

> [T]o the extent that the duration of a Commissionable Contract[2] is extended, amended, replaced, modified or substituted under materially different arrangement and structure after the expiration of the Term, then Advisor shall not be entitled to Commission on the Gross Monies earned under such new agreement. *The immediately preceding sentence is not intended to deprive Advisor from its Commission hereunder in connection with all other*

[2] A Commissionable Contract is defined in the Advisor Agreement as "written contracts, amendments, extensions, additional, substitutions, replacements and modifications (including without limitation amendments, extensions, additions, substitutions, replacements and modifications to pre-existing Term contracts) for sponsorship, endorsement, licensing of rights owned or controlled by Administrator related to the Artist and the Estate, or the acquisition, disposition, or sale of rights owned or controlled by Administrator related to the Artist and the Estate, or the rendering of services in the Entertainment Industry in connection with the Artist or the Estate, regardless of when rendered, that are entered into during the Term or substantially negotiated during the Term and executed within on hundred and twenty (120) days after the term expires." (LLM Decl. Ex C at p.3, § 6(a)).

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> *Commissionable Contracts in connection with the Services rendered herein.* . . . The interest and compensation set forth in this Agreement which shall be paid to Advisor shall be a continuing interest, and shall not be revocable by Administrator unless modified . . .

(LLM Decl. Ex. C at p.3, § 6(a)) (emphasis added).

B. Balance of Hardships.

This element of the *Dahlberg* analysis compares the harm suffered by the claimant if the temporary injunction is denied as compared to that inflicted on the defendant if the injunction issues short of trial. Here, the balance of hardships strongly tilts in favor of the Advisors, and in fact the lack of irreparable harm precludes the issuance of an injunction. As described above, the cases universally hold that the failure to show irreparable harm is more than simply one ground to deny a temporary injunction. For the reasons described above, this factor not only tilts in favor of the Advisors, it is dispositive of any grant of a temporary injunction.

C. Likelihood of Success on the Merits.

The third *Dahlberg* factor considers whether one party or the other is likely to prevail on the merits. Even ignoring that no injunction may properly be entered here as the SSA is seeking only monetary relief, an injunction ordering the payment of all of the funds that the Estate would recover if it prevails on the merits of its claims against the Advisors should not properly be ordered unless the Court first determines that the SSA is likely to prevail. NorthStar Enterprises' commissions were earned pursuant to a valid and carefully negotiated contract, and each party was represented in the negotiations by legal counsel. Under the Advisor Agreement, NorthStar Enterprises and CAK were retained to "undertake to perform services in the Entertainment Industry and advise and counsel Administrator in all aspects of Administrator's business in Entertainment Industry related to the Artist." (LLM Decl. Ex C at p.2, § 5). The Advisor Agreement, including the fees and method by which the Advisors were to be paid for their services,

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was deemed reasonable and approved by this Court, eliminating the need for a traditional or further "reasonableness" analysis. Moreover, Bremer was pleased with NorthStar's services and concluded that there was nothing done by NorthStar Enterprises or McMillan that was not in best interest of the Estate.

Under Section 6(d) of the Advisor Agreement, it is expressly agreed that the Advisors' commissions are "earned" simultaneously with the payment of any compensation to the Special Administrator on behalf of the Estate. (LLM Decl. Ex. C at p.4, § 6(d)(ii)). Because their actions resulted in payment to the Estate, there is no question as to whether NorthStar performed its duties under the Advisor Agreement and thus earned its commissions for those transactions. Even though the Jobu agreement was terminated and the UMG agreement was rescinded – business decisions of the Special Administrator and Personal Representative, respectively – NorthStar Enterprises did what it contracted to do, earned the commissions for doing so as specified by the Advisor Agreement, and as a result is entitled to retain the commissions for its efforts. *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). The Estate's decisions thereafter

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do not invalidate the commissions that were earned by the Advisors as a result of their performance under the Advisor Agreement.

Notably, and as described above, there is no provision anywhere in the Advisor Agreement requiring the Advisors to return or refund commissions earned should there be a subsequent substitution, replacement, or modification to any income-generating contract or deal procured by the Advisors. In fact, section 6(a) of the Advisor Agreement (which is quoted above) explicitly provides for the retention of commissions earned by the Advisors should a contract or deal be modified or replaced, based on the business decisions of the Estate, subsequent to the Advisors' Term under the Advisor Agreement.

In addition to the above analysis under the Advisor Agreement, there is an additional issue that applies to the Jobu contract only. Unlike the UMG rescission, when the Estate returned to Jobu the $2.1 million initial payment that Jobu had made to the Estate, it did not also pay to Jobu the compensation that Jobu had paid to NorthStar. Under the Agreement with Jobu dated July 7, 2016, the Estate was never entitled to receive the sums paid to NorthStar. In the unlikely event that Jobu prevails in its claims against NorthStar, it would receive the compensation that is being retained by NorthStar, not the Estate. Requiring NorthStar to pay those funds to the Estate – and ultimately any award of such amounts to the Estate – would give the Estate a windfall by paying it more than it was ever entitled to under the Jobu contract.

D. Public Policy.

The most significant public policy factor that impacts the Court's consideration is forcing the Advisors to pay millions of dollars into the Estate without any opportunity for discovery, the opportunity to present testimony, and – most importantly - without any finding of wrongdoing on the part of the Advisors. The Court approved the Advisor Agreement, setting forth the terms of the Advisors' commissions. To now force the Advisors to pay millions of dollars to the Estate

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without any finding of wrongdoing on their part would set a dangerous precedent, and discourage others from providing services to Minnesota estates. It would also deprive the advisors of due process, and violate principles of fundamental fairness. An order directing the payment of commissions to the Estate would be particularly troubling in light of the fact that the Court did not find any wrongdoing by the Advisors at the time it approved rescission of the UMG contract, and instead stated that it was simply deferring to the judgment of the personal representative. The personal representative, who succeeded Bremer, took an alternative position and made a business judgment that it would be better to rescind the UMG contract rather than potentially negotiating and offering WBR additional rights, or potentially conducting litigation in both California and New York with UMG and WBR – not based on a finding that the UMG contract was improper or that the Advisors did anything wrong.

In fact, the Court specifically stated during a hearing on the motion for rescission that there was no evidence of any fraud on the part of the Advisors – as had been eluded to by UMG and WBR. At a very minimum, before any funds are paid by the Advisors to the Estate, there should be a full opportunity for discovery in which the advisors are entitled to inquire as to WBR's internal documents showing how the terms "records" or "pressing and distribution" are defined or whether they had entered into any other contracts that define these terms: whether WBR's internal records show a legitimate concern about the UMG contract, or whether their records show that it decided to raise the issue of conflict as a negotiating tactic. In addition, are there documents within UMG showing its understanding of the terms "pressing and distribution" during or after the period of negotiation? Is there any evidence that UMG had second thoughts about its contract with the Estate and used the WBR intervention as a means to get out of the contract? Was there input to Comerica from Troy Carter or other industry experts? Was the decision to rescind motivated by

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the self-interests of Comerica's experts and advisors? What other efforts did Comerica make to determine whether there was an actual conflict and what opinions did it receive? Is there evidence that Comerica (or its representatives) acted negligently? Why did Comerica not invoke the provisions of Section 1.8 of the UMG contract which was specifically included in the contract to avoid rescission in the event of the Estate's inability to deliver fully on the rights contemplated under the UMG Agreement? With respect to the Jobu contract, why did the personal representative direct refund of the amounts that Jobu had paid without obtaining a release or requiring that those funds be placed in an escrow or a segregated account? There is a myriad of important and necessary questions that should be addressed in this very unique case before imposing an extraordinary equitable remedy. In the absence of answers to these questions, and an opportunity for discovery and ultimately trial on the merits, the Court should not order the Advisors to pay millions of dollars to the Estate without any clear finding of wrongdoing.

E. Administrative Burden.

There is very little administrative burden involved in either enforcing or not enforcing the grant of a temporary injunction.

CONCLUSION

For the foregoing reasons, the NorthStar defendants respectfully request that the Court deny any request for issuance of a temporary injunction.

BASSFORD REMELE, ***A Professional Association***

By: /s/ Alan I. Silver

Dated: December 20, 2019

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