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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

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

[REDACTED VERSION]

INTRODUCTION

This Reply is submitted by the SSA in further support of its Motion for a refund to the Estate of the [redacted] paid to the monetization expert advisors, CAK and NorthStar ("Advisors"), in respect of the rescinded UMG and terminated Jobu Agreements.[1]

The abject sophistry of the Advisors in opposing the Motion, in their continuing efforts to retain [redacted], should be seen by this Court for what it is: an avaricious attempt to hold on to sums to which the Advisors are not entitled.

[1] Both of the Advisors' responses were untimely. The hearing on this Motion, noticed and briefed by the SSA as a dispositive Motion, is October 2. The responses were both filed and served on September 24, eight days before the hearing. Rule 115.03 of the General Rules of Practice required that the Advisors' oppositions be filed ". . . at least 9 days prior to the hearing." (emphasis added). Pursuant to Rule 115.03, though 9 days before the hearing fell on Sunday, September 23, the "at least" wording in the rule mandated service and filing prior to September 24.

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The SSA is entitled to the Order sought in its Motion, and the Estate is entitled to a refund of the excessive [redacted], for the following reasons:

- Minn. Stat. § 524.3-721 specifically empowers this Court to determine the unreasonableness of the excessive compensation retained by the Advisors, specialized agents of the Estate, and to order a refund of that excessive compensation. That the statute has not previously been applied to a situation precisely as this in any reported case is of no moment.
- The [redacted] retained by the Advisors were not, pursuant to the terms of the Advisor Agreement, earned. The Advisor Agreement [redacted] fee. Having failed to deliver to the Estate [redacted] Estate, the [redacted] are excessive and the Estate is entitled to a refund of those [redacted].
- The Motion does not violate the Advisor Agreement. While the Advisor Agreement provides the basis on which the Advisors were to be compensated namely, [redacted], the reasonableness of any actual compensation paid to the Advisors at all times has been subject to Court oversight; the Estate could not agree to something in contravention to the Probate Code. As provided by Minn. Stat. §§ 524.3-721 and 524.3-105 the reasonableness of that compensation is exclusively within the jurisdiction and discretion of this Court for so long as the Estate is under administration. The assertion that the Estate [redacted] the reasonableness of the Advisors'

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compensation is wrong. The basis of the Motion is statutory, not contractual and thus, not a "dispute pursuant to [the Advisor] Agreement.

- Nor does the Motion implicate due process considerations. In order for due process to be a consideration, state action is required. *See, e.g.*, *State v. Beecroft*, 813 N.W.2d 814, 837 (Minn. 2012). There being no argument advanced by the Advisors (nor can there be) of state action being implicated herein, the Motion does not give rise to any due process concerns.

ARGUMENT

Due to the Advisors' shotgun argumentation, the SSA has not addressed individually each of their arguments. Rather, the SSA refocuses herein the relevant arguments to the Motion for Refund.

1. The Motion Is Not Procedurally Improper as Minn. Stat. § 524.3-721 Expressly Applies to Any "Specialized Agent" Employed By A Personal Representative.

Section 524.3-721 is restated in full below for the sake of clarity:

> 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. (Emphasis added.)

Minn. Stat. Annotated § 524.3-721.

That the statute has not been applied to persons such as the Advisors, professed experts retained to [redacted], is a non-sequitur. Stated otherwise, the idiom that there is a first time for everything is applicable here. What is relevant is that the statute expressly applies to ". . . any person . . . including any . . . other specialized agent . . .. Minn.

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Stat. § 524.3-721. It is beyond pale to credibly argue that the Advisors were not "specialized agents" employed by the Estate. The Advisors were specially retained by the Estate, through Bremer, to render their "[redacted]." (Gleekel Decl. Ex. A at 1, 7th, 8th and 9th "WHEREAS" clauses and 2, 13th "WHEREAS" clause.[2]

As detailed in the SSA's Memorandum at Pages 4-5, the Advisor Agreement [redacted]. Section 6(a) of the Advisor Agreement entitled the Advisors to [redacted] (Gleekel Decl. Ex. A at 3, § 6(c).) The Advisor Agreement makes clear that if the [redacted].

NorthStar at Page 5 of its Memorandum admits inasmuch:

[redacted]

[2] Minn. Stat. § 524.3-105 also vests in this Court jurisdiction to order a refund of the excessive [redacted]. The comment to Section 3-721 of the Uniform Probate Code recognizes this point:

> In view of the broad jurisdiction conferred on the probate court by Section 3-105, description of the special proceeding authorized by this section might be unnecessary. . . . Also, if excessive fees have been paid, this section provides a quick and efficient remedy.

Uniform Probate Code Section 3-721, Comment.

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Because any [redacted] to the Advisors were [redacted] the Court need not consider the time spent on tasks performed by the Advisors in respect of either transaction. Nor does the Court need to consider any alleged complexity or uniqueness of the transactions in ruling on the excessiveness of the commission compensation. The only factor the Court needs to consult of those set out on Pages 18-19 of the SSA's Opening Memorandum is the results obtained.

As it is undisputed that neither the rescinded UMG nor the terminated Jobu transaction [redacted] are excessive and should be refunded.

To avoid this finding, the Advisors have advanced an argument that [redacted] (*See* NorthStar Memo. at Page 6) such that they are entitled to [redacted]. As addressed in the SSA's Memorandum, while the Advisor Agreement allows [redacted].

The contractual construction doctrine-*expressio unius est exclusio alterius* which means the expression of one or more things is the exclusion of another is apt here. *See, State v. Caldwell*, 803 N.W.2d 373, 383 (Minn. 2011). Clearly an [redacted]. On the other hand, rescission or termination is [redacted]

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.[3] Where the Estate is not is rightfully due the Advisors under the Advisor Agreement.

Neither discovery or trial is necessary to reach the conclusion that the constitute excessive compensation. While the Advisors have not explicitly argued that the Advisor Agreement is ambiguous, the argument that resolution of the reasonableness of their require discovery and trial seem to implicitly argue that the terms of the Advisor Agreement are ambiguous. However, "interpretation of an unambiguous contract is a question of law for the court, as is the determination that a contract is ambiguous." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). "A contract's terms are not ambiguous simply because the parties' interpretation differ." *Id.* "Absent ambiguity, the terms of a contract will be given their plain and ordinary meaning and will not be considered ambiguous solely because the parties dispute the proper interpretation of the terms." "[W]hen a contract is unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, in clear, plain, and ambiguous terms are conclusive of that intent." *Id.* Once the plain meaning of a contract is established, it must be enforced according to its terms. *See, Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003).

There exists no ambiguity with respect to the finding that the entitling the Advisors to

[3] As the Court in *Knopff v. Olson*, C7-95-601, 1995 WL 497275 (Minn. Ct. App. 1995) observed:

> When a rescission is granted, the underlying contract is erased: "Rescission is the unmaking of a contract, which not only terminates the contract but abrogates it and undoes it from the beginning." *Johnny's, Inc. v. Njaka*, 450 N.W.2d 166, 168 (Minn. App. 1990) (citation omitted). The parties are returned to their precontract positions to the extent possible. *Liebsch v. Abbott*, 265 Minn. 447, 451, 122 N.W.2d 578, 581 (Minn. 1963).

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their . As previously set forth, ." In turn, . Jobu's termination of the short form and the Estate's , and the Court's rescission of the UMG Agreement makes clear . The clear and unambiguous intent of the Advisor Agreement .

It is for this reason that the real estate broker fee cases relied upon by CAK, *Nelson v. Rosenblum Co.*, 182 N.W.2d 666, 667 (Minn. 1970) and *ERA Town & Country Realty, Inc. v. TEVAC, Inc.*, 376 N.W.2d 526, 528 (Minn. Ct. App. 1985) (at p. 28 of CAK's Memorandum) do not insulate the Advisors from an Order commanding them to refund . In both cases, the parties' listing agreements entitled the broker to a commission upon the procurement of a ready, willing and able buyer, not upon a successful transaction that resulted in an actual sale. In fact, in *Knopff v. Olson*, C7-95-601, 1995 WL 497275 (Minn. Ct. App. 1995), the Court recognized that where an agent receives something of value under a rescinded transaction, the agent may be responsible for the value so received.

Nor does the Advisors' distorted reading advanced by the Advisors compel a different result. The argument advanced by the Advisors not only ignores this obvious fact but, also fails to harmonize the provision within

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the context of the entire Agreement. *See, e.g., Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990) (*citing Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 293 (1965); *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979) (meaning of terms determined within the context of the whole, not in isolation). The provision states:

[redacted]

The foregoing quoted provision, by virtue of its [redacted]. Stated otherwise, because the [redacted]. Under the Advisors' argument, the Advisors would be entitled to retain a commission if paid pursuant to a mutual mistake of the Estate and a third party and thus, refunded by the Estate to the third party. Certainly, that would not be the

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case under the Advisor Agreement and any amounts so retained by the Advisors would be unreasonable, excessive and subject to a refund order of this Court.[4]

2. Due Process Concerns Are Not Implicated.

State action is required to implicate due process considerations. *See, e.g., State v. Beecroft*, 813 N.W.2d at 837 ("[A]s part of our analysis, we must first determine whether the alleged due process violations asserted by *Beecroft*, were cause by State action. This analysis must be conducted because the conduct of private parties generally lies beyond the scope of the United States Constitution. Likewise, "'[t]he Minnesota Constitution does not accord affirmative rights to citizens against each other; its provisions are triggered only by State action.'" (Citations omitted); *In re: Molnar*, 720 N.W.2d 604, 611 (Minn. Ct. App. 2006) ("The Fourteenth Amendment protects liberty and property rights against State action, but offers no protection against private conduct.") Constitutional restrictions on conduct may be applied against private conduct only if the conduct is sufficiently "entwined with governmental character." *Beecroft*, 813 N.W.2d at 837; *see Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (holding that private conduct becomes State action when a "sufficiently close nexus" exists between the State and the challenged conduct." "Neither general involvement by the State nor extensive regulation is sufficient to support a finding of State action." *In re: Molnar*, 720 N.W.2d at 612-13. The Advisors do not even attempt to argue that there is any State action implicated by the Motion. As such, the argument that granting the fee Motion would violate the Advisors' constitutional rights to due process is flatly wrong.

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[4] Not only would there be no generation [redacted] in a mutual mistake scenario, there would be no [redacted].

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So too is the Advisors' argument that in considering the Motion, the Advisors should be given the opportunity to conduct full discovery and an evidentiary hearing to address the misplaced. Unlike the situation in *In re: Estate of Meiners*, No. A07-0967, 2008 WL 2340695, at *7 (Minn. Ct. App. June 10, 2008), an evidentiary hearing on the reasonableness of the Advisors' fees is unnecessary. In *Meiners*, the issue was whether or not billed fees of the personal representative, also an attorney of the Estate, were reasonable. Because the fees at issue were based on the hours allegedly spent in respect of the Estate, the court was asked to determine the reasonableness of the amount of hours incurred and billed fees. The Advisor Agreement is . Having failed to by the Advisors are excessive. The Court need not engage in any fact finding or any other process to reach this inescapable conclusion.

3. This Motion Does Not Constitute A Breach Of The Advisor Agreement.

The Advisors' argument that this Motion violates the Advisor Agreement because the parties have not . The Advisor Agreement does not govern the reasonableness of compensation received by those performing services as agents of the Estate such as the Advisors here. The Advisor Agreement formed a

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[redacted]. Through the Advisor Agreement, the Advisors expressly recognized [redacted]. That is, for so long as this Court has jurisdiction over administration of the Estate, the reasonableness of the Advisors' fees is subject to Court oversight. Minn. Stat. § 524.3-721. The Estate could not agree to something in contravention of the Probate Code. As dictated by statute, the reasonableness of compensation is exclusively within the jurisdiction of the Probate Court, not pursuant to contractual agreements between an Estate and those acting on its behalf. As long as jurisdiction exists, a Probate Court retains the power and discretion to determine the reasonableness of compensation and direct a refund where necessary. Minn. Stat. § 524.3-721. Thus the assertion that the [redacted] on which this Motion rests; it is statutory, nor contractual. Stated otherwise, the Motion does not [redacted]. The relevancy of the Advisor Agreement to the Motion is simply that it, and it alone, [redacted]. The case law generally cited by the Advisors for the proposition that alternative dispute resolution is favored is of no moment to the issue of whether the [redacted]

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[redacted] is implicated by this Court's statutory jurisdiction and power under Minn. Stat. §§ 524.3-105 and 524.3-721.

CONCLUSION

To date, the Advisors have refused to [redacted].

Adding insult to injury, and in their continuing refusal to [redacted], the Advisors engage in abject sophistry to argue that [redacted]. The arguments advanced by the Advisors are, to say the least, specious. The Advisor Agreement was [redacted]. Having failed to deliver [redacted] constitutes excessive compensation for which the Estate is entitled to a refund under Minn. §§ 524.3-105 and 524.3-721.

Date: September 28, 2018

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