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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

**CONSOLIDATED REPLY MEMORANDUM IN FURTHER SUPPORT OF THE ESTATE'S SUMMARY JUDGMENT MOTION SEEKING A REFUND OF THE ENTERTAINMENT ADVISORS' COMMISSION-BASED FEES**

**[REDACTED VERSION]**

## INTRODUCTION

As the Advisors have largely asserted the same arguments in response to the Estate's Motion for Summary Judgment, the Estate submits this Consolidated Reply Memorandum in further support of its motion for summary judgment seeking a refund of the Entertainment Advisors' commission-based fees.

## ARGUMENT

### I. Because The Estate Received No Monetary Benefit, i.e. Value, From the Rescinded UMG Agreement, the Advisors Did Not Deliver a Commissionable Contract Entitling Them to Retain Their Commissions.

The Estate has addressed both in its Memorandum of Law in Support of its Motion for Summary Judgment (pg. 12-15.) and its Response to the Advisors' Motions for Summary Judgment (pg. 4-6.) that the rescinded UMG Agreement did not constitute a Commissionable Contract and thus the [redacted] retained by the Advisors is excessive and should be ordered to be refunded to the Estate. Those arguments are not repeated here. The Advisors' arguments in support of their positions

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that they are entitled to retain the commissions (NorthStar's Response Memo. at 4-8) (CAK Response Memo. at 11-17) are predicated on the argument that the rescinded UMG Agreement constitutes a Commissionable Contract. As earlier and fully addressed in the Estate's Memorandum of Law in Support of its Motion for Summary Judgment and its Memorandum of Law in Response to the Advisors' Motions for Summary Judgment, it did not.

## II. The Rescinded UMG Agreement Did Not Constitute a Substituted or Replaced Transaction Entitling the Advisors to Retain the Commissions.

Both of the Advisors argue that the rescinded UMG Agreement was "replaced" by the Sony Agreement entered into by the Estate seventeen (17) months after the Advisors' term expired. The Advisors' position is incorrect. The Advisors' position in this respect ignores the September 14, 2016 Amendment and Extension of the Advisor Agreement. *See* Gleekel Dec., Ex. 5. In that Amendment, the parties contractually amended the term [redacted] in Paragraph 6(a) of the Advisor Agreement. The Amendment, significantly, deleted therefrom any entitlement to a commission [redacted] *Id.* at 1, § 2 (amending Section 6(a)). Therefore, even if the Sony Agreement could arguably be considered a "replacement" (which the Estate contends it is not in light of the fact it was not between the same parties and was executed seventeen (17) months after the UMG Agreement) the Advisors are not entitled to claim a right to a commission-based thereon. It is also relevant that in amending the Advisor Agreement, and consistent with the Advisors agreeing that any substitution or replacement of a Commissionable Contract entered into after the end of the Advisors' Term did not entitle them to a commission, the parties also deleted from Paragraph 6(a) the provision stating that [redacted] *Compare* Gleekel Dec, Ex. 1 at § 6(a) *with* Ex. 5 at § 2. Thus, any reliance on that sentence in the original Advisor Agreement is also without merit.

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The Advisors' argument that the provision in Paragraph 6(a) of the Advisor Agreement that their agency interest was not revocable " unless modified as outlined in Paragraph 3" does not lead to the conclusion that the commissions at issue are not refundable upon an order of this Court. Paragraph 3 of the Advisor Agreement addressed and recognized that the power of the Administrator was limited by law and orders of this Court. Gleekel Dec., Ex. 1. The paragraph further acknowledged that the Advisor Agreement may have been impacted by [redacted] *Id.* Based thereon, it was agreed that if this Court limited the scope of the Advisors' agency with the Estate, the Advisors and the Estate agreed to meet and negotiate an amendment to evidence any modification required by an order of this Court. The provision in Paragraph 6(a) does not address in any respect whether the Advisors are entitled to the [redacted] retained by the Advisors in respect of the UMG Agreement. A fair reading of the sentence on which the Advisors rely in Paragraph 3 of the Advisor Agreement makes this clear.

So too is CAK's argument that the word "received" in Paragraph 6(c) defining [redacted] unavailing. It suffers from the same myopia as the Advisors' argument concerning the word "earned" in Paragraph 6(d)(ii) of the Advisor Agreement. Like their "earned" argument, the Advisors' position cannot be harmonized with the purpose of the Advisor Agreement to [redacted] Gleekel Dec., Ex. 1 at 1, 7th WHEREAS clause and 2, 13th WHEREAS clause. *See*, *e.g.*, *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990) (citations omitted) (meaning of terms determined within the context of the whole, not in isolation). The discussion in the Estate's Memorandum of Law in Support of its Motion for Summary Judgment at pg. 16 is equally applicable to the CAK's argument concerning "received" wherein it asks the Court to dissect the word in isolation from the context and obvious purpose of the Advisor Agreement as a whole. *See, Republic Nat'l Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979) (citations omitted).

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Finally, the cases relied upon by NorthStar in its argument that rescission of the UMG Agreement pursuant to this Court Order cannot serve as a basis to order a refund of the commissions at issue because a rescission is implicitly subsumed within a replacement or substitution do not stand for the proposition argued by NorthStar. The decision in *Cooperative Refinery Association v. Consumers Public Power District*, 190 F.2d 852 (8th Cir. 1951) puts in perspective the fallacy of NorthStar's argument.

In *Cooperative Refinery Association* the issue was whether a subsequent agreement superseded a prior executory agreement between the same parties. Finding the latter contract inconsistent with the executory aspect of the first contract, the court held that the second contract superseded the prior contract and thus "excluded the operativeness of a previous contract." What NorthStar fails to address is that the subsequent contract at issue in *Cooperative Refinery* was found by the court to completely cover the same executory subject matter, made by the same parties as their earlier agreement. Addressing the effect of the subsequent agreement, the court held that the second agreement implicitly superseded the first contract to the extent that the two were inconsistent. 190 F.2d at 858. The court further recognized that while earlier cases addressing the situation had used the term "rescission" or "rescind" that term had "not been of significance in the specific situations and the use of the term has been consistent with the sense or consequence of 'abandonment.'" *Id.* The court further found that to the extent a second agreement superseded a first agreement it was more accurately characterized as ". . . terminating or discharging the previous contract in its executory obligation, than to treat it as plenarily having rescinded . . ." the first contract. The facts of this matter are nowhere reflective of those in *Cooperative Refinery Association*.

Nor do the other two cases, *Clark v. Otto B. Ashbach Sons, Inc.*, 241 Minn. 267 (Minn. 1954) or *Richards v. Allianz Life Ins. Co.*, 133 N.M. 229 (N.M. Ct. App. 2002) relied upon by NorthStar support an argument that a substitution or replacement assumes a rescission. In *Clark v. Ashbach*, the issue

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was whether a seller's agents were entitled to commissions after the buyer made final payments on goods. The agency contract between the agents and the seller called for the agents to make a payment in the event the buyer defaulted. When the buyer defaulted, the seller and buyer entered into a new sales contract extending the time for payment without the agents' knowledge. The court in *Clark* found the new sales contract terminated the guarantee made by the agents because it was an entirely different contract to which they were total strangers. The court in *Clark* never addressed the issue of rescission.

In *Richards v. Allianz Life*, the plaintiff entered into an agency contract with Fidelity Union Life Insurance in 1966 and again in 1968. The 1966 contract contained different notice periods for termination (i.e. 30 vs. 15 days). Defendant purchased all of Fidelity's rights and obligations under the contracts in the 1970's. In 1995, *Allianz* issued notices that all existing agent contracts would terminate December 31, 1995 and be replaced by a new service agreement. The plaintiff signed a new agreement, effective January 1, 1996, on December 28, 1995. The court in *Richards* noted that parties to a contract may substitute a prior agreement for a new one. The court then found that the 1996 contract constituted a substitute of the 1960's agreements and thus the termination periods were irrelevant. In responding to plaintiff's defense on contract formation, the court noted the continuation of the relationship formed the requisite consideration. 62 P.3d 320, 325-26. In a nutshell, the issue in the *Richards* case was the substitution of a contract between parties to the original contract, not rescission of an earlier agreement and then a subsequent agreement entered into by only one of the parties to the original agreement.

In any event, as discussed above, the Extension and Amendment of the Advisor Agreement provided that the Advisors were not entitled to a commission on any [redacted]

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## III. In the Event the Court Denies the Motions for Summary Judgment, It Has Correctly Identified the Issues to be Determined at the Evidentiary Hearing.

The Estate has not, as argued by CAK, taken two contradictory positions. To be clear, it is the Estate's position that under the Advisor Agreement, the entire [redacted] retained by the Advisors is excessive and should be refunded. Yet, in recognition of this Court's June 19, 2020 Order Regarding Discovery Motions And The Scope Of The October Evidentiary Hearing, the Estate is mindful of the potential that this Court will not grant any of the motions for summary judgment. It is for that reason that the Estate in Section III of its original Memorandum of Law in Support of its Motion for Summary Judgment addressed a framework under Minn. Stat. § 524.3-721 to address any potential Advisors' fees.

NorthStar's argument concerning what it contends should be relevant at an evidentiary hearing continues to take issue with this Court's Order. *See* NorthStar Memorandum of Law in Opposition to Estate's Motion for Summary Judgment, at 12-15. It is submitted that the Court's identification of the issues at a potential evidentiary hearing are consistent with the framework set forth in the Estate's original Memorandum of Law in Support of its Motion for Summary Judgment. Specifically, the "results obtained" factor set forth in the statute. *See* Minn. Stat. § 525.515(a). In identifying the issue of whether the Estate "had reasonable and articulable concerns" about the UMG Agreement and if it was reasonable and prudent for the Estate to move this Court for rescission, it is submitted implicitly recognizes the result obtained factor of the framework outlined in respect of determining the reasonableness of fees. This is so because that inquiry goes to the heart of what the Advisors recommended and delivered to the Estate, namely the results of the Advisors' services in respect of the UMG Agreement. For example, if it is demonstrated there was an [redacted] then the "results obtained" by the Advisors carried with it the specter not only a loss of the UMG Agreement and a refund of the advance paid in connection therewith but, so too the incurrence

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of additional damage to the Estate [redacted].

So too does the question of what the Advisors knew, or had reason to know, in respect of the potential overlap between [redacted] before recommending approval of the UMG Agreement fundamentally define the result they delivered to the Estate. If it is proven that the Advisors knew or had reason to know of an issue pertaining to an [redacted], then again, the results obtained were tainted by this knowledge and the risks associated therewith.

Finally, if it is demonstrated, as the Estate is confident it will be, that the Estate not only had [redacted] and thus it was reasonable and prudent for the Estate to move this court for rescission of the UMG Agreement but also that the Advisors knew or had reason to know of that [redacted] to the Estate, the entirety of [redacted] in fees are excessive. The Advisors assumed the risk under the Advisor Agreement that if they did not deliver to the Estate an agreement that resulted in the recognition of pecuniary value by the Estate or, in other words, a monetization of the Estate's assets, they were not entitled to any commission-based fee. The risk allocation agreed to by the Advisors was incorporated into the Amended and Extended Section 6(a) of the Advisor Agreement wherein the Advisors recognized that they had [redacted] Gleekel Dec., Ex. 5. Having contractually agreed to assume the risk that if they did not deliver to the Estate a transaction on which their [redacted] was due, it is submitted that the Advisors are not entitled to a portion

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of [redacted] in retained commissions regardless of any alleged effort incurred in connection with the rescinded UMG Agreement.

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