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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'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SEEK REVIEW OF THE COURT'S PRELIMINARY RULING CONCERNING THE SCOPE OF ISSUES TO BE HEARD AT THE OCTOBER 13-15 HEARING ON COMMISSION REIMBURSEMENT

This memorandum is submitted by the NorthStar parties to address the Court's preliminary ruling as to the scope of issues to be heard on October 13–15, 2020 in connection with the Second Special Administrator's motion for commission reimbursement.

INTRODUCTION

In a conference call with counsel on March 26, 2020, the Court discussed the issues that would be before the Court at the hearing on the Second Special Administrator's motion for reimbursement of commissions. During that call, the Court stated that the SSA might have the burden of showing that the UMG contract actually infringed on Warner Records Inc.'s ("Warner") rights. However, in a written Memorandum Order dated April 20, 2020, the Court modified that directive, making a "preliminary ruling" as follows:

> As to the UMG Agreement rescission, the Court makes the preliminary ruling that the Second Special Administrator does not need to establish that the UMG Agreement overlapped the Warner Brothers Agreement but, instead, that the Estate had reasonable and articulable concerns about the overlap such that, considering the other alternatives available to the Estate, it was reasonable and prudent for the Estate to rescind the agreement. Further, the Second Special Administrator would

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> need to prove that the entertainment advisors knew, or had reason to know, of the potential for the overlap, before recommending the approval of the UMG Agreement.

April 20, 2020 Memorandum Order at p. 3. In its April 20, 2020 Memorandum Order, the Court invited the parties to seek review of the Court's preliminary ruling on or before June 5, 2020.

NorthStar disagrees that a mere "reasonable and articulable concern" about an overlap between the UMG and Warner contracts is sufficient to justify a return of commissions. That standard may have been appropriate for the Court's consideration as to whether to grant Comerica's motion for rescission; however, the Advisors should not bear the brunt of that business decision - or if the Court ultimately concludes that Comerica mishandled the Warner claim - merely because of a "concern" as distinguished from an actual overlap or infringement. In addition, there are numerous other issues that are relevant to the Court's determination as to whether the Advisors must refund commissions. This memorandum will identify additional issues that NorthStar believes the Court should address at the October 13-15, 2020 hearing.

DISCUSSION

The Second Special Administrator ("SSA") has consistently oversimplified the issue before this Court by arguing that all he needs to prove in support of his motion is that the UMG contract was rescinded, and therefore the Estate did not benefit from NorthStar and CAK's ("the Advisors") efforts in obtaining the UMG contract. The Court has effectively rejected that argument by not responding to the SSA's motion for return of commissions by immediately entering a final judgment granting the SSA's motion. By stating in the April 20, 2020 Order that the SSA must prove that the Estate had reasonable and articulable concerns about the overlap and that the Advisors knew, or had reason to know, of the potential for an overlap, the Court has recognized that the full extent of the Advisors' conduct in negotiating the UMG contract is relevant

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to the Court's determination. NorthStar believes, however, that in assessing that conduct, there are other issues that must be considered by the Court. These include the following:

1. Do Sections 6(a) & 6(d) of the Advisor Agreement control the Court's determination?

Section 6(a) of the Advisor Agreement between NorthStar, CAK and the Estate states as follows:

> [T]o the extent that the duration of a Commissionable Contract[1] 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 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 . . . .

(Sept. 24, 2018 LLM Decl., Ex. C at p.3, § 6(a)) (emphasis added).

In this Court's Order dated March 11, 2019, the Court stated that the contract between the Advisors and the Estate needs to be considered in reaching its final determination as to whether the Advisors must return commissions. The Court of Appeals quoted this language and wrote that "the terms of the Advisor Agreement may ultimately dictate whether the Advisors are entitled to retain their commissions." In NorthStar's view, the Advisor Agreement is controlling. Under paragraph 6(d) of that Agreement, the Advisors "shall be deemed to have earned Advisor's

[1] 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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commissions simultaneously with the payment to the Administrator or Administrator's affiliates of Gross Monies . . . ." (Sept. 24, 2018 LLM Decl., Ex. C at p.4, § 6(d))

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 above language of paragraph 6(a) explicitly provides for the retention of commissions earned by the Advisors should a contract or deal be modified or replaced based on business decisions of the Estate subsequent to the Advisors' Term under the Agreement. Any subsequent amendment or rescission of a contract where commissions were "earned" does not require return of the commissions – at least in the absence of a finding that the Advisors acted improperly in procuring the original contract.

2. In considering whether the Advisors knew, or had reason to know, of the potential for an overlap, the Court should address whose duty or responsibility it was to analyze the possibility of an overlap.

There were two entertainment law firms retained by the Estate who had responsibility for reviewing the legality of the UMG contract. The question posed by the Court – whether the Advisors had reason to know of any overlap - cannot be determined without also addressing the question of who had the duty to analyze the contract and render an opinion as to its legality. The advisors were not charged with legal review of the contract, and they were entitled to rely upon the two entertainment firms retained by the Estate to determine whether there was any basis for an infringement claim by Warner or by any other third party.

3. Was there actually an overlap or infringement of the Warner agreement?

Whether there was an actual overlap or infringement of the Warner 2014 contract is certainly an important issue. If there was no overlap or infringement, then the decision by Comerica to rescind the contract cannot be attributed to any misconduct by the Advisors in

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negotiating the UMG contract. NorthStar is prepared to present testimony and evidence at the October hearing that the terms of the UMG contract did not infringe the Warner contract which for the applicable years was limited to retention of pressing and distribution rights – and in fact, it should be the SSA's burden to show that there was such an infringement. In the absence of an overlap or infringement, the SSA seeks to shift the financial impact of the rescission of the UMG contract to the Advisors, merely because Comerica made a business decision to rescind the contract and then blame the Advisors for that rescission.

4. Was rescission the result of any improper actions by the advisors, or simply a business decision made by Comerica?

This question is closely related to the prior question – was there an actual overlap or infringement of the Warner agreement? In granting rescission, the Court did not make any finding that there was an actual overlap or infringement, but rather the Court simply deferred to Comerica's business decision that it would be better to "start over" and not face the potential of lawsuits in California by UMG and in New York by Warner. Unless the Court finds that the Advisors acted improperly – which it should not - then a business decision made by Comerica to rescind the UMG contract should not result in any forfeiture of commissions by the Advisors.

5. Did Comerica or any of its advisors benefit from rescission of the UMG contract and UMG seek rescission because of legitimate concerns about an overlap or infringement, or did it have an underlying reason for seeking to rescind the deal that had been negotiated?

UMG made a significant change of position after Bremer resigned as special administrator and was replaced by Comerica. The parties had all recognized in negotiating the UMG agreement that the full scope of Prince's business activities was unknown, and that there could be conflicts with other contracts. That is why the parties included a dispute resolution provision in their contract, Section 1.8, which provided that in the event all products called for under the contract could not be delivered, the payment amount would be adjusted, rather than the contracted voided.

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It was perplexing that UMG suddenly changed its position from enthusiastic support of the contract to seeking rescission of that contract merely because Warner raised a question concerning overlap with its prior contract with Prince – not an unusual assertion in the entertainment industry or in the music business. The question is whether change in identity of the people UMG would be dealing with upon Bremer's resignation as special administrator and the appointment of Comerica and a new set of entertainment advisors who would be implementing the contract led to UMG's lack of comfort with the deal, and was the actual cause of its request for rescission.

6. Did Comerica or any of its advisors benefit from rescission of the UMG contract and receive compensation or commissions as a result of rescission of the contract and negotiation of a new entertainment deal?

Comerica's motivation for seeking rescission of the UMG contract should be addressed at the final hearing, including whether Comerica or any of its advisors had an incentive to rescind the contract and start over with negotiation of a new entertainment deal.

7. Could Comerica have avoided rescission of the UMG contract if it had offered alternative deals to Warner and negotiated an alternative resolution of the Warner infringement claims.

It is common in the entertainment business for parties to claim infringement and then negotiate resolution through future business considerations. What Comerica did or did not do in trying to negotiate with both UMG and Warner is highly relevant in determining whether the Advisors should be the parties who bear the economic impact of Comerica's decision to rescind.

8. What was the impact of Section 1.8 of the UMG contract which provided that in the event all of the products that were part of the contract could not be delivered, the purchase price would be reduced, rather than the contract rescinded?

What is the relevance of Section 1.8 in determining whether the Advisors should be required to return all of the commissions that they received? Did Comerica consider Section 1.8

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before it entered into the rescission agreement, and if so, why did it not utilize that contract provision?

9. What provisions of the contract with UMG were later incorporated into the subsequent replacement entertainment agreemen so that the Estate benefitted from the work of the Advisors?

In its April 20, 2020 Memorandum Order, the Court stated that work done in developing the UMG agreement might have been used in the development of the agreement that ultimately replaced the UMG agreement. Thus, the Court raised this as a potential issue to be addressed at the October final hearing. .In addition, were any of the Advisor's work product or contacts used in negotiating the replacement agreement, or any other agreements that benefited the Estate?

10. Were there other services provided by the Advisors for which they were not compensated, and which they provided in reliance upon the fact that they were going to receive commissions under the UMG contract?

CONCLUSION

In considering the SSA's motion claiming excessive compensation, this Court should consider all issues that go to the Advisors' conduct in negotiating the UMG contract, the responsibility of others for the ultimate rescission of the contract, and the overall impact on the Estate of the Advisors' service on behalf of the Estate.

BASSFORD REMELE
A Professional Association

Dated: June 5, 2020

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