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**STATE OF MINNESOTA** **DISTRICT COURT**

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

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In the Matter of:

The Estate of Prince Rogers Nelson,

Decedent

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

**THE SECOND SPECIAL ADMINISTRATOR'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH SUBPOENA OF KOPPELMAN/CAK**

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## INTRODUCTION

Contrary to the Court's May 26, 2020, Order, Koppelman/CAK have failed to articulate specifically the scope of the discovery they seek through the deposition of the SSA, and how the discovery is relevant. Rather than addressing the Court's directive, they generally argue that the SSA has knowledge of his investigation and because they were allowed to depose the SSA in the Jobu Presents action, subject to Court limitations and oversight by Special Master Solum, an action with differing circumstances and unique issues, they should, as a matter of right, be entitled to depose the SSA despite their failure to specifically articulate how the discovery sought is relevant in this matter. The failure is not surprising because in Koppelman/CAK's contemporaneous filing seeking reconsideration of this Court's April 20, 2020 Scheduling Order it is argued that all that is relevant to the SSA's motion seeking a refund of the Advisor's commissions is the Advisor Agreement. Put another way, Koppelman/CAK make clear the belief that the issue is solely a matter of contract – a question of law. Pursuant to this view of what is relevant to the Court's determination of the issue, clearly none of the topics set forth in the subpoena at issue are relevant and thus, the deposition of the SSA is not only unnecessary but, unreasonable and unduly burdensome.

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## ADDITIONAL BACKGROUND

In addition to the Scheduling Order that set the scope of the hearing on the SSA's motion for refund of commissions, this Court entered an Order for Submissions Regarding Motions to Quash on May 26, 2020 ("the May 26, 2020 Order"). (Doc. ID # 4024.) That Order stated "[a]ny parties desiring to do so shall submit any responsive memoranda or objections to the various motions to quash by June 5, 2020. Such objections **shall clearly identify the scope of the discovery sought and a description of why it is relevant**." (*Id.* (emphasis added).)

In response to this Court's May 26, 2020 Order for submissions, Koppelman/CAK submitted a response that neither addressed the scope of discovery sought nor the relevance of the unidentified scope. (Doc. ID # 4035). Additionally, Koppelman/CAK submitted a motion and memorandum in support of this Court reconsidering its April 20, 2020 Order setting the scope of the evidentiary hearing. (Doc. ID # 4038, 4039.) In that memorandum, Koppelman/CAK argued the Advisor Agreement is the only relevant consideration for the evidentiary hearing.[1] (Doc. ID # 4039 at 3-6.)

## ARGUMENT

### I. Koppelman/CAK Have Ignored this Court's Order: They Did Not Articulate the Scope of Discovery and Why It Is Relevant.

In their response Koppelman/CAK have ignored what this Court expressly directed responsive papers to address. In setting a deadline by which to respond to the SSA's motion, this Court noted any response "shall clearly identify the scope of discovery sought and a description as to why it is relevant." Doc. ID # 4024. Koppelman/CAK's response does neither of these. Rather, they

[1] The SSA is not responding to Koppelman/CAK's motion to reconsider. The motion appears to be procedurally improper. The motion was not pursuant to any rule of Civil Procedure, provision of the Probate Code, or order by this Court. A motion to reconsider is only permitted in narrow circumstances not present here. *See* Minn. Gen. R. Prac. 115.11 (requiring a showing of "compelling circumstances" after a party requests, via letter, and is granted "express permission of the court" to file a motion). However, should this Court seek a response to the motion, the SSA will respond.

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have forced this Court to sift through their response to find anything suggesting what they believe the appropriate scope of discovery should be in this matter. At best, but without any articulated basis, Koppelman/CAK imply the scope of discovery should be all of the topics in the subpoena. Doc. ID # 4035 at 14-16. Instead of recognizing some of the topics are too far askew on which to question the SSA (e.g., asking about the formation of agreements that pre-date Prince's death), Koppelman/CAK double-down. They appear to take the position that all of their subpoena topics are germane for a deposition of opposing counsel. Koppelman/CAK do not give a description of *how* these topics are relevant; they simply state it is so. Doc. ID # 4035 at 15 ("These matters go directly to the heart of the Estate's claim against CAK.")[2]

The closest Koppelman/CAK come to explaining the relevance of the subpoena topics is to state the SSA has knowledge of his investigation. This misses the point. The critical inquiry is into the constituent parts of the investigation and, assuming for the sake of argument, if any part of the investigation is discoverable, what facts of the investigation are relevant in light of the Court's ruling are the issues to be addressed at the evidentiary hearing the Advisors have insisted take place. It is not enough for the SSA to have interviewed actors involved with the UMG transaction or reviewed emails and documents for the investigation to be discoverable. Koppelman/CAK have direct access to all of that information, which renders asking the SSA about it unnecessary and irrelevant. *See* Minn. R. Civ. P. 26.02(b). The inquiry Koppelman/CAK avoid is not only what the SSA has to offer that cannot be obtained elsewhere but so too what portion of the investigation is even arguably relevant to the evidentiary issues on the motion for a refund of the Advisors' unearned commissions. That answer is

[2] Of course, the Estate does not have a "claim" against CAK in this proceeding. The Estate has brought a motion for refund of excessive compensation pursuant to Minnesota Statute Section 524.3-721.

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nothing except work-product. Unlike Koppelman/CAK, the SSA went through, in detail, the irrelevance of the subpoena. Opening Mem. at 12-18.

Koppelman/CAK's response also fails to address the factors courts consider for deposing opposing counsel. *See Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327(8th Cir. 1986). Instead of addressing the factors, Koppelman/CAK simply claim the SSA is not opposing counsel and suggest they can depose the SSA as any other witness. Accordingly, it should be assumed that if it is determined the SSA is and has been functioning as counsel to the Estate, there is no meaningful opposition to the motion to quash. Yet, this Court need only address that consideration if it finds Koppelman/CAK have complied with the May 26, 2020 Order to identify the scope of discovery and articulate the relevance of the specific discovery they failed to identify in their response. If this Court finds Koppelman/CAK have not complied, it should summarily grant the SSA's motion.

## II. Koppelman/CAK Take Contradictory Positions that Undermine Their Subpoena.

While not in response to the SSA's motion, Koppelman/CAK have made clear in other filings their position as to the proper scope of the evidentiary hearing. In the contemporaneously filed Motion to Reconsider, Koppelman/CAK assert, "the starting - - and perhaps final - - point of this Court's analysis, it is submitted, must be with the Advisor Agreement." Doc. ID # 4039 at 4; *see also id.* at 6 ("...CAK respectfully submits that the primary issue for this Court's consideration at the evidentiary hearing…is whether, pursuant to the terms of the parties' Court-approved Advisor Agreement, the Advisors are entitled to retain, or are compelled to return, the commissions…") It is notable that Koppelman/CAK continue to rely on a spurious reading of the Court of Appeals decision to support this argument.[3] Regardless, for resolution of this motion, the important consideration is the box in which Koppelman/CAK have placed themselves.

[3] As quoted by Koppelman/CAK, the Court of Appeals merely noted the Advisor Agreement "may" dictate the outcome of the evidentiary hearing on the SSA's Motion for Refund of

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By opposing the SSA's Motion to Quash, Koppelman/CAK are, at least implicitly, suggesting there is relevant discovery that can be obtained by deposing Mr. Gleekel. However, in asking this Court to winnow the scope of the evidentiary hearing to, almost exclusively,[4] the Advisor Agreement, Koppelman/CAK are taking a contradictory position. Deposing Mr. Gleekel on the broad topics noticed, all of which rely on hearsay and secondhand information, cannot inform the legal question of what the Advisor Agreement means. If Koppelman/CAK believe the scope of the evidentiary hearing begins and ends with the Advisor Agreement, then it is unclear why Koppelman/CAK feel the need to take discovery at all before the evidentiary hearing. On such a position, the only reason to depose Mr. Gleekel, or anyone else, is to harass. Therefore, the subpoena should be quashed. Minn. R. Civ. P. 45.03(c)(1)(D) (requiring quashing of a subpoena if it subjects one to an undue burden).

### III. The Order from the Jobu Lawsuit Is Irrelevant To The Motion To Quash.

This Court is aware of the lawsuit proceeding in Carver County District Court regarding Jobu Presents, LLC and the failed Prince Tribute concert. *See Jobu Presents, LLC v. Estate of Prince Rogers Nelson et al.*, case no. 10-CV-17-368 (Minn. Dist. Ct. – Carver Cnty.) Koppelman/CAK put great stock in an order from the District Court in that case allowing a deposition of Mr. Gleekel and suggest this Court must be "consistent" with that order. In doing so, Koppelman/CAK present a false analogy while embracing the same false dichotomy that was presented to the District Court in the Jobu lawsuit.

First, the false analogy: this matter is not the Jobu lawsuit. A civil proceeding alleging breach of contract and breach of fiduciary duty is dissimilar to a proceeding under a provision of the Probate

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Commissions. The Court of Appeals did not state the Advisor Agreement decides the matter. Rather, the Court of Appeals left it to the discretion of this Court as to whether a refund was due because that is what is expressly provided in Minnesota Statute Section 524.3-721.

[4] Without authority, Koppelman/CAK suggests evidence of intentional misconduct by the Advisors would be the only relevant evidence beyond the Advisor Agreement. Doc. ID # 4039 at 6-7. But Koppelman/CAK are "confident" this could not be proven, and thus they have written out the possibility of there being any evidence thereof. *Id.* at 6.

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Code, Section 524.3-721. Whatever the District Court found in the Jobu lawsuit is a product of the circumstances and unique issues of that case. Koppelman/CAK ignore the bounds of trial court orders: the orders of a trial court pertain only to that case. Judge Cain's Order pertains *only* to the Jobu lawsuit.[5] Koppelman/CAK's brief reads as if the District Court's order is precedential and binding in this substantively and procedurally different matter. Whatever persuasive value Judge Cain's Order has, it does not carry over to this novel proceeding.

Second, Koppelman/CAK continue, incorrectly, to allege the SSA has been acting in a different capacity at different times. This is a false dichotomy Koppelman/CAK use to attempt to convince this Court that the SSA has had substantively different roles (one as counsel to the Estate and one not) because they cannot meet the burden (and make no attempt to) required to depose opposing counsel. It is telling that Koppelman/CAK discount the SSA's argument that it has no firsthand knowledge as irrelevant, Doc ID # 4035 at 16, despite that being part of the operative analysis. *Shelton*, 805 F.2d at 1327. These types of efforts to rewrite the rules are oblivious to the orders of this Court creating, appointing, and directing the SSA.

Despite having been appointed by this Court as the SSA to investigate and pursue claims on the part of the Estate, Koppelman/CAK suggest the Court-appointed SSA that investigated the UMG transaction differed from the SSA appointed to seek a refund of commissions. Koppelman/CAK do

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[5] Left out of Koppleman/CAK's Response is a reference to the circumstances that gave rise to Judge Cain's Order. Koppelman/CAK initially noticed a corporate representative deposition of the Estate. *See* Minn. R. Civ. P. 30.02(f). There is no basis in Rule 30.02(f) for such a deposition; there does not appear to be single court in the country that has allowed a corporate representative deposition of an estate. To say Koppelman/CAK's original position was extreme is an understatement. Koppelman/CAK retreated to deposing the SSA, which was still a radical position since the SSA was appointed as counsel to the Estate, albeit in the role of an SSA, to investigate and ultimately pursue claims on behalf of the Estate. The reasonableness of the radical position was a mirage brought on by Koppelman/CAK's original unauthorized position – though their can be little doubt deposing the SSA was their intent the whole time. Thus, Judge Cain's Order appears to have been an emulation of Solomon: disallow the (obviously) not-allowed deposition and allow the questionable deposition with special master oversight.

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not cite to one case, statute, or any persuasive authority for this position as there is none. Rather, they baldly assert that is what should have occurred. In advancing this position, Koppelman/CAK fail to acknowledge or accept that it was this Court that created and appointed the SSA to investigate the UMG transaction on behalf of the Estate, and it was this Court that expanded the authority of the SSA to pursue claims on behalf of the Estate. Contrary to the position taken by Koppelman/CAK, the SSA did not appoint himself/itself to pursue the claims on which it reported to the Court pursuant to the initial appointment. *See* Order & Mem. Approving Litigation, Court File No. 10-PR-16-46 (Minn. Dist. Ct., June 14, 2018) (Doc. ID # 2666). What the SSA created during its investigation is work-product and protected from discovery in this litigation.

Refusing to recognize that this Court initially appointed the SSA to investigate potential claims on behalf of the Estate, Koppelman/CAK persist in arguing the SSA is somehow not opposing counsel and the investigation by the SSA was not work-product. They try to accomplish this not with any legal authority or regard of the actual record but, with generalized rhetoric devoid of any basis in fact.[6] Consider a sample sentence from the response, which is an example of the narrative Koppelman/CAK seek to impose: "As an initial matter, as discussed above, Mr. Gleekel conducted his investigation and asserted his claim in this proceeding arising from that investigation in his role as SSA, *not* in his capacity as an attorney for the Estate." Doc. ID # 4035 at 17 (emphasis in original). This position is nonsensical. This Court appointed the SSA because the SSA is an attorney and was in the Court's view qualified to investigate potential claims *on behalf of* the Estate and *for* the Estate to pursue. The SSA has always been an attorney acting *for* the Estate, even if originally acting in an investigative capacity. Koppelman/CAK do not cite to one authority for the proposition that an

[6] A comparison of the amount of legal authority cited by the SSA compared with the amount cited by Koppelman/CAK could give this Court some sense of the relative grounding of each parties' positions. Koppelman/CAK's response is bereft of legal authority for their critical points.

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opposing attorney who conducts an investigation prior to pursuing litigation is not an attorney while investigating.

There is nothing unusual about an investigation occurring prior to litigation; this procedural step does not change the SSA's status as opposing counsel or undermine the work-product doctrine. *See, e.g., SEC v. Rosenfeld*, No. 97 CIV 1467 (RPP), 1997 WL 576021, at *2-3 (S.D. N.Y. Sept. 16, 1997) (rejecting efforts to depose an SEC employee about a pre-suit investigation because it "amounts to the equivalent of an attempt to depose the attorney for the other side"); *see also Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d 612, 622 (7th Cir. 2010) (rejecting the district court's finding that the work-product doctrine did not apply because a law firm "was hired as an investigator, not an attorney.") Absent from CAK/Koppelman's opposition is any mention of the order of the Special Master in the Jobu Lawsuit who oversaw the deposition of Mr. Gleekel. Recognizing that the investigation by the SSA constituted work product protected from discovery, Special Master Solum found, consistent with caselaw, the documents created by the SSA during the investigation were work-product. Second Gleekel Decl., Ex. G at 4-5 ("In short, not only was this investigation not in the ordinary course of either the Court's or Mr. Gleekel's business, but it was an investigation for the express purpose of assessing potential claims and factors associated with the interests of the Estate in their pursuit. The prospect of litigation, while not a certainty, was reasonably meaningful, and undoubtedly in the anticipation of Mr. Gleekel as he performed his investigative work.") Koppelman/CAK continue to try to confuse the issues with no regard for context, reality, the rules, authority or, for that matter, this Court's orders appointing the SSA to investigate and assess potential claims of the Estate and expanding the authority of the SSA to pursue claims such as the one presently before the Court..

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## CONCLUSION

Koppelman/CAK make no attempt to follow this Court's May 26, 2020 Order or meaningfully respond to the SSA's objections. Koppelman/CAK continue to try to run roughshod over the rules, this Court's Orders, and the parties' objections in this Probate. Attempting to depose the SSA is not an attempt to discover relevant information. It is an effort to harass. The motion to quash should be granted.

Date: June 10, 2020

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