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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

MEMORANDUM OF LAW IN SUPPORT OF THE ESTATE'S MOTION FOR SUMMARY JUDGMENT SEEKING A REFUND OF THE ENTERTAINMENT ADVISORS' COMMISSION BASED FEES

[REDACTED VERSION]

INTRODUCTION

The Estate of Prince Rogers Nelson (the "Estate") brings this motion for summary judgment for a refund of [redacted] paid to the expert Entertainment Advisors' CAK Entertainment, Inc. (providing the services of Charles Koppelman) ("CAK") and NorthStar Enterprise Worldwide, Inc. (providing the services of L. Londell McMillan) ("NorthStar") (collectively the "Advisors") in respect of the Court-ordered-rescinded UMG Agreement. This Court has previously held, and the Minnesota Court of Appeals affirmed, that the plain and unambiguous language of Minnesota Statute Section 524.3-721 (2018) vests in this Court, upon motion, the equitable power to order a refund of the overpayment of unreasonable compensation to any person who has performed services on behalf of the Estate. *See In Re Estate of Nelson*, 936 N.W.2d 897, 908 (Minn. App. 2019) ("[T]here is nothing in the statute indicating that a contract establishing any type of fee arrangement deprives the district court of authority to decide the reasonableness of compensation received.") The anticipated claim by the Advisors that they are entitled to retain the [redacted] is based on the sophistry that they have [redacted]. The Advisors are not, as a matter of

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law, entitled to retain the [redacted] because no [redacted] as that term is defined in their contract with the Estate, resulted in the realization of any monetary value to the Estate.

At the time the Estate received the [redacted] from UMG, the Advisors received [redacted] directly from UMG as provided for in the Advisor Agreement. (*See* Gleekel Dec., Ex. 1 at 3, § 6(a).) Yet, when the Court issued its ruling rescinding the UMG Agreement based upon a finding that it was in the best interest of the Estate, the Advisors failed and refused to repay the [redacted] despite the fact that the UMG Agreement on which the Advisors were paid [redacted] resulted in the recognition of no monetary value to the Estate. In fact, not only did the Estate ultimately receive nothing of value from the UMG Agreement, the Estate repaid the entire UMG [redacted] including the [redacted] the Advisors received and have refused to return. As developed below, it is readily apparent that pursuant to the terms of the Advisor Agreement, and as a matter of law, the [redacted] paid directly to the Advisors are unreasonable and excessive, and should be ordered to be returned to the Estate forthwith.

ISSUES

I. Is the $3.1 Million the Advisors Received for the UMG Agreement Excessive and Thus, Refundable to the Estate Where the Estate Derived No Financial Value Therefrom?

DOCUMENTS COMPRISING THE RECORD FOR THIS MOTION

- Declaration of Peter J. Gleekel *(with Exhibits 1-22)*:

1. Advisor Agreement between the Estate and CAK Entertainment/Charles Koppelman and NorthStar Enterprises Worldwide, Inc./L. Londell McMillan, effective June 16, 2016 (*with Exhibits A and B*).

2. Special Administrator's Notice of Motion and Motion re: Entertainment Industry Experts, filed June 2, 2016.

3. Affidavit of Craig N. Ordal, dated June 2, 2016.

4. Email correspondence by the Advisors amongst themselves and with counsel for the Estate and potential Tribute promoters prior to the Advisor Agreement being effective on June 16, 2016.

5. Amendment and Extension of Advisor Agreement, dated September 14, 2016.

6. Orders from the Honorable Kevin W. Eide, extending the appointments of the Special Administrator and Advisors.

7. Affidavit of L. Londell McMillan, dated September 27, 2016.

8. Letter from Prince Rogers Nelson and the agreement between Warner Bros. Records, Inc. and Prince Rogers Nelson, dated April 16, 2014.

9. 1983 and 1986 agreements between Warner Brothers Records, Inc. and Prince Rogers Nelson.

10. 1991 agreement between Warner Brothers Records, Inc. and Prince Rogers Nelson.

11. Special Administrator's Notice of Motion and Motion to Approve Recommended Deals, filed September 27, 2016.

12. Order Granting in Part the Special Administrator's Motion to Approve Recommended Deals, dated September 30, 2016.

13. Declaration of L. Londell McMillan in Response to Comerica's Motion to Approve Rescission of Exclusive Distribution and License Agreement *(without exhibits)*, dated June 6, 2017.

14. Comerica's Reply in Support of Motion to Approve Rescission of the Exclusive Distribution and License Agreement, filed June 9, 2017.

15. Email correspondence between L. Londell McMillan and representatives from Universal Music Group, dated October 31, 2016.

16. Exclusive Distribution and License Agreement between UMG Recordings, Inc. and the Estate of Prince Rogers Nelson, dated January 31, 2017.

17. Comerica's Memorandum in Support of Motion to Approve Rescission of the Exclusive Distribution and License Agreement, filed May 17, 2017.

18. Email correspondence between representatives for Warner Brothers Records, Inc. and Universal Music Group, dated February 11, 2017.

19. Letter from Warner Bros. Records, Inc. to Comerica, dated February 10, 2017.

20. Letter from Universal Music Group to Comerica, dated April 4, 2017.

21. Declaration of Joseph J. Cassioppi in Support of Motion to Approve Rescission of Exclusive Distribution and Licensing Agreement *(without exhibits)*, filed May 17, 2017.

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22. Order & Memorandum Granting Motion to Approve Rescission of the Exclusive Distribution and License Agreement, filed July 13, 2017.

UNDISPUTED MATERIAL FACTS

A. The Expert Advisors/Advisor Agreement.

On April 27, 2016, the Court appointed Bremer Trust, National Association ("Bremer") as Special Administrator of the Estate. (Gleekel Dec., Ex. 1, at Ex. A, Order at ¶ 2.) On June 2, 2016, Bremer requested authority from the Court to employ the Advisors and advised the Court of the proposed scope of the retention. (Gleekel Dec., Ex. 2.) On June 8, 2016, the Court authorized Bremer to retain the Advisors. (*See* Gleekel Dec., Ex. 1, at Ex. A, Order.)

Bremer requested authority of the Court to retain the expert Advisors in order to "preserve and protect the assets of the Estate." (Gleekel Dec., Ex. 1 at 2, 13th "WHEREAS" clause.) To effectuate that purpose, Bremer sought and then retained the Advisors, entertainment industry professionals Koppelman, on behalf of CAK, and McMillan, on behalf of NorthStar, for their "expertise, management, monetization abilities, advice and services." (*Id.* at 1, 7th "WHEREAS" clause and § 2.) The industry professionals were identified as appropriate by counsel and Bremer to expertly fulfill the role of providing their advice and services to monetize the assets of the Estate. (*See* Gleekel Dec., Ex. 3 at ¶¶ 5-8(a).) Though performing tasks on behalf of the Estate related to the Prince Tribute Concert prior to official appointment by the Court (*see generally* Gleekel Dec. Ex. 4), Bremer and the Advisors executed an Advisor Agreement effective June 16, 2016 based upon Bremer's June 2, 2016 recommendation and the Court's June 8, 2016 authorization. (Gleekel Dec., Ex. 1.)[1] This Court authorized the Advisors "to advise and assist [Bremer], and as contemplated by

[1] This Court's June 8, 2016 Order was incorporated in the Advisor Agreement as Exhibit A and the Advisor Agreement stated ". . . The duties and powers of the Special Administrator are subject to and governed by Orders issued by the Carver County District Court including . . . Order and Memorandum authorizing Special Administrator's employment of entertainment industry experts dated June 8, 2016 . . ." (Gleekel Dec., Ex. 1 at 1, 3rd "WHEREAS" clause.)

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Minn. Stat. § 524.3-715(21), 'to perform any active administration, whether or not discretionary.'" In its Order, the Court recognized the ". . . unique challenges and opportunities" presented by the Estate and the requirement for:

> . . . the Special Administrator to take all prudent steps to monetize the Estate's intellectual property, and to raise funds necessary for the administration of the Estate and for the payment of estate taxes.

(Gleekel Dec., Ex. 1, at Ex. A at 1.) On June 16, the Advisors executed a "Co-Management Agreement" to which Bremer was not a party. (Gleekel Dec., Ex. 1 at Ex. B.) CAK and NorthStar acknowledged and agreed the Administrator was bound by the terms and conditions of the Advisor Agreement only and in no way was obligated pursuant to the terms and conditions of the Co-Management Agreement. (Gleekel Dec., Ex. 1 at § 2.) The appointment under the Advisor Agreement initially lasted 90 days but was extended on September 14, 2016 for a term contemporaneous with Bremer's appointment as Special Administrator. (Gleekel Dec., Ex. 5.) On January 31, 2017, Bremer's appointment as the Special Administrator came to an end and thus, the Advisor Agreement terminated as did the Advisors' roles. (*See* Gleekel Dec., Ex. 6.)

During the term of appointment and consistent with the Court's June 8, 2016 Order, the Advisors' services included, among others, "maximally capitalizing upon" the Estate's intellectual property assets, "the adoption of proper formats for presentation of Estate's rights in the Entertainment Industry," "the solicitation of Financial Transactions and advisory services," "general new business practices and opportunities in the Entertainment Industry," and the "terms upon which [Bremer] should render services or license rights to third parties related to the Entertainment Industry." (Gleekel Dec., Ex. 1 at 2, § 5.) Stated differently, consistent with the Court's June 8 Order, the Advisors contractually agreed to monetize the Estate's assets based upon their professed expertise and experience in the Entertainment Industry. The Advisors were the exclusive monetization experts

to the Estate during the term of the Advisor Agreement. (Gleekel Dec., Ex. 1 at 1, 8th "WHEREAS" clause.) Section 5 ("Services") of the Advisor Agreement provided:

(Gleekel Dec., Ex. 1 at 2, § 5.)

The Advisors' compensation was contractually agreed to be . Section 6(a) of the Advisor Agreement set forth the and what transactions were

(*Id.* at 3, § 6(a) (emphasis added).)

Section 6(c) of the Advisor Agreement defined as:

(*Id.* at 3, § 6(c) (emphasis added).)

All compensation was split evenly between the Advisors. (*Id.* at 4, § 6(d)(i).) Bremer was to use good faith efforts to ensure the Advisors received their [redacted] (*Id.*) The Advisor Agreement made clear that for any [redacted] to be paid to the Advisors, the [redacted] was to be calculated based upon the [redacted] paid to the Estate. (*Id.* at 3, § 6(a).) To that end, Section 6(d) of the Advisor Agreement provided as follows:

[redacted]

(*Id.* at 4, § 6(d)(ii).)

In Section 3 of the Advisor Agreement, the Advisors agreed and acknowledged [redacted] (*Id.* at 2, § 2.)

B. The UMG Agreement and Subsequent Rescission.

At the time of his death, Prince had three categories of sound recordings: (1) recordings initially released by Warner Brothers Records, Inc. ("WBR Masters"), including his major hits from 1979-1995; (2) recordings independently released by Prince's recording company, NPG Records, Inc. ("NPG Masters"); and (3) unreleased recordings ("Vault Masters"). (*See* Gleekel Dec., Ex. 7 at ¶ 25.) The NPG Masters and the Vault Masters were not being fully commercially exploited. (*Id.* at ¶ 26.)

The WBR Masters were licensed to WBR pursuant to a License and Distribution Agreement dated April 16, 2014, by and between WBR on the one hand, and Prince, PRN Music Corporation, Paisley Park Enterprises, Inc., and NPG Records, Inc., on the other hand ("2014 WBR Agreement"). (*See* Gleekel Dec., Ex. 8.)

The 2014 WBR Agreement provides WBR [redacted] (*Id.*) After June 30, 2018, [redacted] (*Id.* at 4, § 2(b) (emphasis added).)

The 2014 WBR Agreement did not define [redacted] (*Id.* at 2.) The 1983 and 1986 Agreements between Prince and WBR [redacted] (*See* Gleekel Dec., Ex. 9 at 30, § 15(e) (1983) and 36, § 15(e) (1986).) The 1991 Agreement provided that [redacted] (Gleekel Dec., Ex. 10 at 2, § 4(a).)

The proposal for a recorded music agreement with UMG recommended and negotiated by the Advisors contemplated [redacted] (Gleekel Dec., Ex. 7

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at ¶¶ 29-31.) The proposal with UMG further contemplated [redacted] (*Id.* at ¶ 30.)

The UMG draft proposal (together with other proposed entertainment transactions) was submitted by Bremer and its counsel to the Court in September 2016. (Gleekel Dec., Ex. 11.) Upon hearing, over the objection of the Heirs, and based the recommendation and endorsement of the Advisors and Bremer, the Court approved the UMG short-form proposal, and authorized Bremer and the Advisors to negotiate an agreement with UMG consistent with the terms of the short-form proposal. (*See* Gleekel Dec., Ex. 12 at 2, ¶¶ 2-3.) In recommending and endorsing the UMG proposal, Bremer and the Advisors took the position that under the [redacted] (Gleekel Dec., Ex. 13 at 9-10.) In its Order, the Court noted that the proposed deals were "'short-form deals' and the drafting, and perhaps negotiation, may need to take place before the parties could execute a 'long-form deal.'" (Gleekel Dec., Ex. 12 at 2, ¶ 2.)

The Estate, principally through Mr. McMillan, negotiated the long-form agreement with UMG. (Gleekel Dec., Ex. 13 at ¶ 8.) Counsel to the Heirs raised concerns, as they did in respect of the short-form proposal, [redacted]. (Gleekel Dec., Ex. 14 at 5-8.) Bremer and the Advisors, however, again took the position that [redacted] (Gleekel Dec., Ex. 7 at ¶¶ 5-6; Ex. 14 at 2.) Largely, it was McMillan who communicated with UMG, in summary fashion, the nature and scope of WBR's rights [redacted] (Gleekel Dec., Ex. 15.) The

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"understanding" that McMillan conveyed was [redacted] (*Id.*)

On January 31, 2017, Bremer and UMG entered into an agreement (the "UMG Agreement"). (*See* Gleekel Dec., Ex. 16.) The UMG Agreement provided that in exchange for an immediate [redacted] (*Id.* at 2-11.) Specifically, the UMG Agreement provided UMG with [redacted]. (*Id.* at 7, ¶ 2.1.1.) As a result of the UMG Agreement, the Advisors were paid [redacted]. (Gleekel Dec., Ex. 17 at 5.) January 31, 2017 also marked the final day of the Advisors' term that was coterminous with the end of Bremer's appointment as Special Administrator. (Gleekel Dec., Ex. 6.)

Comerica Bank & Trust, N.A. ("Comerica") was appointed Special Administrator to the Estate on February 1, 2017, and the UMG Agreement was announced on February 9, 2017. (Gleekel Dec., Ex. 17 at 5.) The next day, February 10, 2017, WBR contacted Comerica expressing its concern that the UMG Agreement infringed on rights held by WBR until December 31, 2020. (Gleekel Dec., Ex. 18.) Specifically, WBR claimed that WBR and UMG had been "ill-used by Bremer Trust, their lawyers and their advisors, as [UMG had] been granted rights that the Estate [did] not possess." (*Id.*; *see also id.*, Ex. 19.) In light of the issues pertaining to the grant to UMG of rights claimed by WBR, UMG threatened litigation unless Comerica agreed to rescind the UMG Agreement. (Gleekel Dec., Ex. 20.)

Facing claims by WBR and UMG, Comerica conducted an investigation of the issue. (Gleekel Dec., Ex. 21 at ¶ 14.) Bremer and McMillan continued to insist there was no overlap between WBR's and UMG's rights. (Gleekel Dec., Ex. 13 ¶ 5.) Upon completing its investigation, Comerica brought a motion before this Court recommending rescission of the UMG Agreement. (Gleekel Dec., Ex. 17.)

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Comerica concluded it was in the best interests of the Estate to "avoid protracted litigation" in bringing its motion and in connection therewith asked the Court for an Order rescinding the UMG Agreement and to return the [redacted] in exchange for mutual releases with UMG. (*Id.* at 11-12.) In response to Comerica's motion to rescind, the Advisors (and especially McMillan) went "to great lengths to try to preserve the [redacted] to McMillan associated with the UMG Agreement." (Gleekel Dec., Ex. 14 at 1.) The Court ultimately agreed with Comerica that the motion to rescind was in the best interests of the Estate and granted the motion for rescission. (Gleekel Dec., Ex. 22.) The Estate returned [redacted] to UMG which included the [redacted]. To date, the Advisors have failed to return [redacted]

ARGUMENT

I. Standard of Review.

As an initial point, the Estate notes that summary judgment is an unnecessary procedural hurdle to reach the issue of the excessiveness of the Advisors' fees on the UMG Agreement. Minnesota Statute Section 524.3-721 provides that this Court, upon a motion, has the authority to review the reasonableness of the commissions received by the Advisors for the UMG Agreement. *See In re Estate of Nelson*, 736 N.W.2d at 708. The Estate, having properly moved under Section 524.3-721, it is submitted followed the appropriate procedure to employ the Court to decide the issue. Stated otherwise, this is not the type of motion that contemplates a Rule 56.01 summary judgment motion.

Rule 56.01 of the Minnesota Rules of Civil Procedure provides that summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Although evidence is view in a light most favorable to the non-moving party, *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993), a party opposing the motion for summary judgment cannot "rest upon the mere averments or denials" of its pleadings. *DLH, Inc.*

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v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). The non-moving party must "present specific facts showing that there is a genuine issue for trial." *Id.* at 69. A fact is material only when its resolution affects the outcome of the case. *Zappa v. Fahey,* 310 Minn. 555, 556, 245 N.W.2d 258, 259 (1976). Here, there is an unanimity of Agreement among the parties that the Advisor Agreement is outcome determinative of the issue. The Estate believes so; as do the Advisors. (*See* CAK June 5, 2020 Memo. at 3 ". . . CAK believes that the central issue for the Court's consideration is one based on and cabined by the agreement"; *see also* NorthStar June 5, 2020 Memo. at 3: "In NorthStar's view, the Advisor Agreement is controlling.")

II. The Estate Realized No Monetary Benefit From The Rescinded UMG Agreement; Therefore, The Advisors Received Excessive Compensation And Should Be Ordered To Refund The [redacted] They Received And Have Failed To Refund The Estate.

It is critical to a determination on the motion to reiterate and crystalize the purpose of the Advisor Agreement. It is undisputed the Advisors were hired to provide their expert service and advice to Bremer to monetize the assets of the Estate. In recognition thereof, the Advisor Agreement recited and acknowledged the object was to (1) "preserve and protect the assets of the Estate," and (2) for their entertainment industry "expertise, management, monetization abilities . . ." Gleekel Dec., Ex. 1 at 1, 7th WHEREAS clause and 2, 13th WHEREAS clause. Consistent with these expressed purposes, the Advisors were entitled to [redacted] resulting from a [redacted] In a nutshell, the Advisors were contractually entitled to [redacted] and which resulted in the realization by the Estate of that monetary value. Both the terms [redacted] and [redacted] are defined in the Advisor Agreement. Contracts on which the Advisors were entitled to [redacted] are defined as follows:

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[redacted]

Gleekel Dec., Ex. 1 at 3, ¶6(a). The definition of those contracts on which the Advisors were entitled [redacted] is unambiguously and directly described as [redacted] (*Id.* at ¶ 6(c).) It is defined to include:

[redacted]

Id. (emphasis added).

It is indisputably self-evident that a [redacted] as defined in the Advisor Agreement, [redacted] In other words and as stated in the Advisor Agreement, [redacted] The Court-ordered rescission of the UMG Agreement did not result in the [redacted] To the contrary, it [redacted] In any event, Minnesota law is clear: a rescinded contract is a contract that effectively never existed. *Graves v. Wayman*, 859 N.W.2d 791, 799 (Minn. 2015) ("[T]he effect of the remedy of rescission is generally to extinguish a rescinded contract so effectively that in contemplation of law it has never had existence.") "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. The parties are returned to their pre-

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contract positions to the extent possible." *Knopff v. Olson* , case no. C7-95-601, 1995 WL 497275, at *2 (Minn. App. 1995) (citations, parentheticals, and quotations omitted).

Contrary to the argument earlier advanced by the Advisors, the refund by the Estate to UMG of [redacted] cannot fairly be characterized as a "business decision" on the part of the Estate that entitles the Advisors to retain the [redacted]. It was on motion by the Estate that this Court recognized the potential damage to the Estate from the UMG Agreement recommended, endorsed, and negotiated by the Advisors. In recognizing the potential damage to the Estate therefrom, this Court granted the motion to rescind upon this Court's finding that it was in the best interests of the Estate. Gleekel Dec., Ex. 22. For the Advisors to now second guess the decision of this Court is abject sophistry. In fact, the Advisors recognized and agreed in the Advisor Agreement, their power and actions, as well as those of Bremer, were subject to "Court Limitations." *See* Gleekel Dec., Ex. 1 at 2, § 3. This Court's determination that rescission or, in other words, the unmaking of the UMG Agreement, was in the best interests of the Estate forecloses any credible argument that rescission was simply a business decision of the Estate.

To avoid refunding the [redacted] the Advisors retained on the rescinded UMG Agreement, the Advisors have advanced two arguments.[2] First, the Advisors have argued that [redacted]

[2] The Court of Appeals rejected (and this Court's preliminary ruling implicitly rejected) an earlier argument advanced by the Advisors that because this Court's September 30, 2016 Order approved the UMG short-form proposal and earlier the Advisor Agreement's provision [redacted]

> But [Advisors'] argument that Minn. Stat. § 524.3-721 cannot be applied in light of the September 30, 2016 order misconstrues both the September 30 order and plain language of the statute, by confusing the *reasonableness of the rate of compensation* with approval of the *reasonableness of the compensation for services actually rendered.*

In re Estate of Nelson, 936 N.W.2d at 907 (emphasis in original).

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[redacted] is synonymous with a rescinded contract. *See* NorthStar Memo. in Opposition to SSA's Motion for Refund of Fees at 6. While the Advisor Agreement allows for the retention of [redacted] it does not when a contract is rescinded. The reason for this is clear. If an [redacted] In the case of a rescinded contract, such as the UMG Agreement, the Estate realizes no monetary benefit. Additionally, a [redacted] presupposes the existence of an agreement. In the case of a rescinded agreement, legally there is none to [redacted].

The contractual construction doctrine *expressio unins est exclusio alterius* – which means the express mention of one or more things of a particular class is regarded as implicitly excluding others – also forecloses the Advisors' argument in this respect. *See Weber v. Sentry Ins. Co.*, 442 N.W.2d 164, 167 (Minn. 1989) (citations omitted). As indicated, an [redacted] presupposes a contract presented to the Estate by the Advisors that results in a realized [redacted] to the Estate that is subsequently [redacted] but that also results in delivery to and retention by the Estate of something of [redacted] On the other hand, rescission is not of like kind to an [redacted] Where the Estate is not the beneficiary of anything of value such in the case of the rescinded UMG Agreement, [redacted] under the Advisor Agreement.

The second argument advanced by the Advisors is that under Section 6(d)(ii) of the Advisor Agreement the Advisors [redacted] This argument is equally unavailing. The question presented by the Advisors' argument in this respect is the meaning of the word [redacted] in the specific section of the Advisor Agreement namely, Section 6(d)(ii). Yet,

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this Court should not be moved by definitions wrenched from one context and graphed onto another as the Advisors seek here. *See, e.g. Republic Nat'l Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979). "Intent is 'ascertained, not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the . . . contract as a whole." *Id.* (citing *Cement, Sand & Gravel Co. v. Agricultural Insurance Co.*, 30 N.W.2d 341, 345 (1947)). The process of synthesizing the words and phrases in a contract requires that all clauses of the contract are to be harmonized in accordance with the obvious purpose of the contract. *Id.*; *Telex Corp. v. Data Products Corp*, 135 N.W.2d 681, 685 (1965).

The Advisors' argument that the word [redacted] means they are entitled to a retention of the [redacted] on the rescinded UMG Agreement is flatly wrong. Section 6(d)(ii), on its face, addressed the timing on which the Advisors were to be paid [redacted] without any deductions for compensation paid to a third party in respect of the [redacted] The argument advanced by the Advisors not only ignores the section as a whole but fails to harmonize the provision within the entirety of the Advisor Agreement and the purpose of the Advisor Agreement, namely the monetization of the Estate's assets. *See, e.g., Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990) (citing *Telex*, 135 N.W.2d at 685); *Republic Nat'l*, 279 N.W.2d at 354 (holding the meaning of terms determined within the context of the whole, not in isolation.) Section 6(d)(ii) states:

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[redacted]

Gleekel Dec., Ex. 1 at 4, § 6(d)(ii).

As Section 6(d)(ii) incorporates the terms [redacted] and [redacted] it is obvious that the provision on which the Advisors base their argument that the [redacted] (and that they are thus entitled to retention of same despite the fact that the Estate realized no monetary value from the UMG Agreement) leads to the conclusion that the section did not modify or change in any respect the contractual basis on which the Advisors were entitled to a [redacted] Stated otherwise, the quoted section addresses the timing and clarified a [redacted] calculation on which the Advisors were entitled to [redacted]. It does not lead to a finding that the Advisors are entitled to a [redacted] if not properly [redacted]

To the contrary, the Advisors assumed the risk under the Advisor Agreement that if they did not deliver to the Estate an [redacted] Under the Advisors' argument, and taken to its logical conclusion, the Advisors would have this Court find that they would be entitled to retain a [redacted] pursuant to a mutual mistake of the Estate and a third party and thus, refunded by the Estate to the third party. The absurdity of such an argument is obvious. Not only would there be no generation of [redacted] in a mutual mistake scenario, there would be no [redacted]

More fundamentally, the Advisors' argument that the use of the word [redacted] flies in the face of the purpose of the Advisor Agreement in the first instance – namely, "to preserve and protect the assets of the Estate" by providing their "expertise,

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management and monetization abilities." Far from realizing upon the purpose of the Advisor Agreement, the Advisors have caused the Estate the opposite; [redacted] that the Advisors have refused to refund to the Estate.

III. If the Court Determines the Advisors are Entitled to Some Amount of Fees in Respect to the Rescinded UMG Agreement, Minn. Stat. § 524.3-721 Empowers the Court to Order a Refund of the Amount Found to be Excessive.

Assuming for the sake of argument that the Court believes the Advisors are entitled to some amount of money by way of fees in connection with the rescinded UMG Agreement, the Court has the authority to set a reasonable fee. Stated otherwise, and as held by the Court of Appeals in this case, ". . . the language of Minn. Stat. § 524.3-721 is clear and unambiguous, and there is nothing in the statute indicating that a contract establishing any type of fee arrangement deprives the district court of authority to decide the reasonableness of compensation received." *In Re Estate of Neslon*, 936 N.W.2d at 908. And, "[t]he statute also plainly and unambiguously allows the district court to order any specialized agent who has 'received excessive compensation from an estate for services rendered' to 'make appropriate refunds.'" *Id.* at 906 (quoting Minn. Stat. § 524.3-721).

For the reasons articulated above, it is submitted that the entire [redacted] being retained by the Advisors is excessive. The Advisors assumed the contractual risk of being entitled to no commission if they did not deliver to the Estate an agreement that resulted in the [redacted]. However, if the Court is inclined to determine that the Advisors are entitled to some amount in fees, the reasonableness thereof lies in the sound discretion of this Court, and the difference between the [redacted] and the reasonable fees, if any, determined by this Court should, pursuant to Minnesota Statute Section 524.3-721, be ordered to be refunded to the Estate.

If the Court is inclined to consider if any fees are reasonable, there are two frameworks to guide the Court; namely, personal representative fees and attorneys' fees.

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A personal representative is entitled to "reasonable compensation for services." Minn. Stat. § 524.3-719(a). In order to determine "reasonable compensation" for a personal representative, the court is to consider three factors;

(i) the time and labor required;
(ii) the complexity and novelty of problems involved; and
(iii) the extent of the responsibilities assumed and *the results obtained.*

Minn. Stat. § 524.3-719(b) (emphasis added).

An attorney performing services for an estate at the instance of a personal representative is similarly entitled to fees as are "just and reasonable." Minn. Stat. § 525.515(a). Five factors are considered in determining what amount, if any, of attorneys' fees are "just and reasonable;"

(i) the time and labor required;
(ii) the experience and knowledge of the attorney;
(iii) the complexity and novelty of the problems involved;
(iv) the extent of the responsibilities and *the results obtained*; and
(v) sufficiency of assets properly available to pay for the services.

Minn. Stat. § 525.515(b) (emphasis added). Regardless of the factors, an attorney requesting fees must present "proof of a benefit to an estate before an attorney may be paid for providing 'services' for the estate at the request of the personal representative." *In re estate of Evenson*, 505 N.W.2d 90, 92 (Minn. App. 1993) (interpreting Minn. Stat. § 525.515(b)); see also *In re estate of Weisberg*, 64 N.W.2d 370, 372 (Minn. 1954) ("[C]ourts have the duty to prevent dissipation of estates through allowance of exorbitant fees to those who administer them.").

As the test for attorneys' fees replicates the test for personal representative but adds two factors; it is submitted that this framework is appropriate to analyze the Advisors' fees by that test as informed by the Advisor Agreement. Under that test, if the Estate receives nothing of value from the services rendered, the Advisors are not entitled to a [redacted] *In re Estate of Evenson*, 505 NW 2d at 92. As the Estate received [redacted] from the rescinded UMG Agreement, the Advisors' entire [redacted] would be unreasonable and thus, refundable to the Estate.

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To-date, the Advisors have not credibly presented any evidence demonstrating that they provided any value to the Estate in respect of the rescinded UMG Agreement. Had the Estate only been obligated to pay back to UMG exactly only what it received directly, it may be arguable that the transactions were a wash, but even a wash does not constitute any value added to the Estate.

Assuming the Court is inclined to overlook the fact that the result of the Advisors' advice and services on the UMG Agreement resulted in no monetary value to the Estate, at a minimum, it would be incumbent upon the Advisors to specifically, and in detail, provide to the Court the time and labor they actually expended in soliciting and negotiating the rescinded UMG transaction. If and only if the Advisors can properly document and prove the actual time and labor so expended, it is submitted that there would be nothing for this Court on which to base a finding that any fees are reasonable under the circumstances.[3]

CONCLUSION

The Advisors have steadfastly refused to voluntarily refund to the Estate the [redacted] they received on the rescinded UMG Agreement. At the time the Estate refunded UMG the [redacted] advance upon Order of this Court rescinding the UMG Agreement, the Estate not only repaid sums that had actually been sent to it by UMG but, also the sums directly paid by UMG to the Advisors, resulting in a net loss to the Estate. Clearly, this scenario did not comport with the purpose for which the Estate entered into the Advisor Agreement: to preserve, protect, and monetize the assets of the Estate.

[3] In the event the Court decides to address what fee may be reasonable based on the actual time and labor expended, the fact that apart from the [redacted], the Advisors have collected [redacted] over a period of nine (9) months in respect of other entertainment-related transactions entered into by the Estate during their tenure should be factored into the determination concerning the reasonableness of any additional fees.

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Further exacerbating their derelictions, and in their continuing refusal to make the Estate whole, the Advisors engage in the folly of arguing that they "earned" the commissions. The arguments advanced by the Advisors to hold on to the [redacted] are, at best, specious. The Advisor Agreement was executed to preserve and protect the assets of the Estate and the Advisors were retained to monetize those assets. The Advisor Agreement was a [redacted] that enabled the Advisors to collect [redacted] of monetary value realized by the Estate: not a net loss. Having failed to deliver any recognized monetary value to the Estate, the Advisors are not entitled to retention of the [redacted]. Retention of the [redacted] constitutes excessive compensation, as compelled by the unambiguous Advisor Agreement, for which the Estate is entitled to a refund under Minnesota Statute Sections 524.3-105 and 524.3-721.

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