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STATE OF MINNESOTA

COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION

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

In re Estate of Prince Rogers Nelson, Decedent.

MEMORANDUM OF LAW OF CAK ENTERTAINMENT, INC. IN OPPOSITION TO THE MOTION OF THE SECOND SPECIAL ADMINISTRATOR TO QUASH SUBPOENA *AD TESTIFICANDUM*

CAK Entertainment, Inc. ("CAK") submits this Memorandum of Law in opposition to the Motion of the Second Special Administrator (the "SSA") to the Estate of Prince Rogers Nelson (the "Motion") to quash the subpoena *ad testificandum* served upon, and directed to, the SSA (the "Subpoena").[1]

INTRODUCTION

Through his present Motion, the SSA seeks to quash the portion of CAK's Subpoena that requires the SSA to appear for his deposition and provide testimony concerning the matters at issue in this proceeding.[2] Remarkably, however, nowhere in the SSA's voluminous submission, spanning some 60 pages, does the SSA even mention that, in the related litigation commenced by

[1] Although styling the Motion broadly as a "motion to quash subpoena," the SSA in fact does *not* seek through his Motion to quash CAK's Subpoena in its entirety; rather, the SSA seeks only to quash that portion of the Subpoena that requires the SSA to appear for his deposition. As noted below, counsel for CAK and the SSA have conferred and are working cooperatively regarding the SSA's production of documents in response to CAK's Subpoena *duces tecum* to the SSA.

[2] As the SSA notes in its Motion, the Court appointed "Peter J. Gleekel and the law firm Larson King, LLP" as SSA. Since, as discussed below, it is not disputed that Mr. Gleekel was personally appointed as SSA; Mr. Gleekel conducted the investigation into the matters at issue in this proceeding; and Mr. Gleekel recommended to the Court that claims be pursued against, *inter alia*, CAK, CAK will refer in this Memorandum specifically to Mr. Gleekel as the SSA.

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Jobu Presents concerning a contemplated Prince tribute concert (Court File 10-cv-17-368) (the "Jobu Action"), Judge Cain of the District Court already considered and rejected—in connection with a substantively identical motion to quash filed by the SSA in that action—precisely the same arguments proffered by the SSA in his present Motion. In compelling Mr. Gleekel to appear for his deposition in the Jobu Action, Judge Cain entered an Order incorporating comprehensive Findings and Conclusions that addressed the precise issue of whether Mr. Gleekel may be compelled to appear for his deposition in his capacity as SSA. While the motivation behind the SSA's troubling failure to apprise this Court of Judge Cain's Order is not hard to guess—Judge Cain rejected Mr. Gleekel's attempt to avoid his deposition—it is difficult to imagine why the SSA thought it appropriate not to apprise this Court of Judge Cain's earlier determination of the *same* issue, involving the *same* parties, entered after consideration of the *same* arguments. Indeed, the SSA does not offer in his Motion—in which he has simply copied and pasted the unsuccessful arguments that Judge Cain considered and rejected—any reason why this Court should depart from Judge Cain's well-reasoned analysis and determination of this very issue.

As such, CAK respectfully submits that this Court should, consistent with Judge Cain's determination in the Jobu Action, deny the SSA's Motion and direct Mr. Gleekel to appear for his deposition, and, as a concomitant thereto—in light of the SSA's failure to apprise this Court of Judge Cain's earlier determination of the precise issue raised by the SSA's present Motion, thus forcing CAK to again address these previously resolved issues—order that the SSA reimburse CAK for its fees and costs incurred in opposing the SSA's present Motion.

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FACTUAL BACKGROUND AND PROCEDURAL HISTORY

As this Court is fully familiar with the background and procedural history of this proceeding, CAK will not burden the Court with an extended recitation concerning those matters here. To place the present issues in proper context, however, CAK offers the following regarding Judge Cain's determination of the issue of Mr. Gleekel's deposition in the Jobu Action and the events giving rise to CAK's Subpoena to the SSA in this proceeding:

The SSA's Motion in the Jobu Action.

On September 3, 2019, CAK and Charles Koppelman (against whom the SSA has also asserted claims in the Jobu Action) served in that litigation a Notice of Deposition of the Estate by and through the SSA.[3] On September 10, 2019, the SSA filed with the Court (Judge Cain) a Motion for Protective Order seeking a judicial ratification of his refusal to appear for his deposition in the Jobu Action (the "Jobu Motion"). In that submission—as in his present Motion—the SSA argued, *inter alia*, that CAK and Mr. Koppelman's deposition Notice constituted an improper attempt to depose "opposing counsel"; that the SSA possessed no first-hand knowledge of the events at issue in the Jobu Action and "the information sought can be obtained elsewhere"; and that the only knowledge Mr. Gleekel did possess concerning those matters was protected attorney work product. (See Jobu Motion at pp. 2-3, 11-17.) Indeed, in his submission, the SSA accused CAK and Mr. Koppelman—an averment he repeats almost verbatim in his present Motion—of seeking his deposition only to "harass" him and to "delve into attorney work product." (Id. at p. 3.) Instructively in the present context, the SSA also

[3] CAK and Mr. Koppelman previously had served on the SSA a Notice of a Minn. R. Civ. P. 30.02(f) Deposition of the Estate. CAK and Mr. Koppelman served their subsequent Notice of Deposition of the SSA after the SSA objected to and refused to comply with the Rule 30.02(f) Notice.

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argued in the Jobu Motion that CAK and Mr. Koppelman's Notice of Deposition was "procedurally improper" because the SSA is not himself a party to the Jobu Action and therefore must be subpoenaed as a third party. (Id. at pp. 11-12.)[4]

Judge Cain's November 22 Order on the Jobu Motion.

Following further briefing and oral argument on the SSA's motion for a protective order in the Jobu Action, on November 22, 2019, Judge Cain issued a comprehensive 11-page Order in which she granted in part and denied in part the SSA's Jobu Motion (the "November 22 Order"). (For the Court's convenience, a copy of Judge Cain's November 22 Order is appended to the contemporaneously-filed Declaration of Brett T. Perala ("Perala Decl."), as Exhibit 1.) Specifically, while observing that the Estate as an entity is a "legal fiction created for the sole purpose of distributing assets and debts of a deceased person" (November 22 Order at p. 8), and thus quashing CAK and Mr. Koppelman's Rule 30.02(f) Notice of Deposition of the Estate, Judge Cain nonetheless determined that CAK and Mr. Koppelman were entitled to depose the SSA, subject to certain "limitations," and directed Mr. Gleekel to appear for his deposition as noticed.

In that regard, Judge Cain directed that (1) "[t]he SSA's deposition shall be limited to the facts gleaned by the SSA in [his] limited role and in [his] examination and investigation into the two (2) specific events outlined in" this Court's August 21, 2017, February 2, 2018 and June 14,

[4] In the Jobu Motion, the SSA additionally argued that CAK and Mr. Koppelman's Rule 30.02(f) Notice of Deposition of the Estate was improper as "[t]he Estate does not embody the traditional characteristics of [the] types of organizations" covered by that Rule (Jobu Motion at pp. 7-10), and thus, according to the SSA, the Estate would be unable to produce a witness to testify in the Jobu Action.

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2018 Orders[5]; (2) [t]he deposition shall be overseen by a Special Master, who shall have the authority to rule on specific objections raised throughout the deposition . . . ."; (3) [t]here shall be limited questioning and/or requests for documents allowed regarding any knowledge the SSA may have had after July 12, 2018—the filing date of Judge Eide's Order in file 10-PR-16-46 approving Peter Gleekel, Esq. and the law firm of Larson King, LLP as the attorney for the Estate. The only questioning and/or documents discoverable are only those topics pertaining to Mr. Gleekel's and Larson King's role as the SSA, and not as an attorney for the SSA of the Estate"; and (4) [a]ny mental impressions, opinions, legal theories, tactics, trial strategies, weight of evidence, etc. of the SSA, either in [his] role as SSA or as attorney, are not subject to inquiry at the deposition as barred pursuant to attorney-client privilege and/or work product doctrine. . .." (November 22 Order at pp. 3-4.)

In her memorandum incorporating her Findings and Conclusions, Judge Cain offered an extensive analysis and discussion of this Court's Orders referenced in her November 22 Order. Specifically, Judge Cain observed that, in its August 21, 2017 and February 2, 2018 Orders, this Court granted the SSA significant power and authority, including "the power and authority to gather facts and evidence from individual witnesses and obtain documents . . . consistent with the powers of a general personal representative" and "'to compel and take evidence' from parties,

[5] In those Orders, this Court, respectively, (1) appointed the SSA to conduct an investigation and report to the Court concerning the circumstances surrounding the rescission of the UMG Agreement; (2) expanded the SSA's authority to investigate and similarly report to the Court concerning the circumstances surrounding Jobu's termination of its agreement with the Estate to produce a tribute concert; and (3) authorized the SSA to pursue the claims recommended in his dual Reports filed with the Court on December 15, 2017 and May 15, 2018. As discussed below, counsel for CAK and Mr. Koppelman limited his examination of the SSA in the Jobu Action (as directed by the Special Master appointed to oversee the deposition) to matters relevant to that litigation, and did not question the SSA regarding the SSA's claim against CAK asserted in the present proceeding or the matters summarized in the SSA's December 15, 2017 Report to this Court concerning his investigation and recommendations relevant to this proceeding.

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and the Court expected 'all parties to this matter, especially those interested parties who participated in'" the events at issue "to cooperate with the [SSA's] investigation and request for access to documents and witnesses." (Id. at pp. 5-6.) Significantly, Judge Cain observed that such "control would certainly not be afforded an attorney representing a party in a lawsuit—but was afforded to Mr. Gleekel and Larson King in their limited role as SSA." (Id.)

Judge Cain further noted that after this Court, in its June 14, 2018 Order, authorized the SSA to "'pursue, on behalf of the Estate, all claims recommended in its reports filed December 15, 2017 and May 15, 2018' subject to a satisfactory fee agreement," the SSA entered into such an agreement with the Estate through its personal representative Comerica. (Id. at p. 7.) Although the Court's June 14, 2018 Order did not require, or even contemplate, that the SSA himself would act as litigation counsel, as Judge Cain further observed, the agreement the SSA entered into with Comerica nonetheless "was an agreement by Larson King to represent the Estate both as court appointed SSA and as counsel in connection with the two (2) possible lawsuits the SSA was appointed to investigate. . . ." (Id., emphasis in original.) As such, prior to July 12, 2018—the date on which this Court approved that fee and retainer agreement—"Larson King and Mr. Gleekel were only the SSA, subject to the limited powers enumerated by the Court, and granted authority they would not be afforded in their role as attorney." (Id.)

In light of the foregoing, Judge Cain authorized CAK and Mr. Koppelman to take Mr. Gleekel's deposition "pertaining to [his] specific role as SSA, and facts obtained by the SSA in [his] investigation and examination in this matter" (subject to the aforementioned limitations), reasoning that the SSA possesses discoverable knowledge and "can give testimony relating to and relevant to the claims that CAK and Koppelman wish to defend against." (Id. at pp. 8, 10.) As Judge Cain thus determined, "[t]o find otherwise, would allow the SSA"—as he was

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attempting to do by refusing to appear for his deposition—to "take cover behind a ruse of 'hide-the-ball'" and to "exploit" his role to "disclaim[] knowledge on the topics the adversary wanted to investigate." (Id. at p. 9.) As a result, Judge Cain observed that "[i]t would be an injustice to require the parties being sued by the Estate to cooperate with the SSA's investigation, and then allow the SSA to hide behind the veil of an opposing attorney after performing duties—albeit at the direction of the Court—that an opposing attorney in any case would not be allowed to perform independently." (Id.)

The SSA's Deposition in the Jobu Action.

In accordance with Judge Cain's November 22 Order, retired Judge Richard B. Solum was engaged to act as Special Master, and, on December 17, 2019, Mr. Gleekel appeared for his deposition in the Jobu Action. As noted above, at the direction of the Special Master, counsel for CAK and Mr. Koppelman limited his examination of the SSA to matters relevant to the Jobu Action, and did not question the SSA regarding the SSA's claim against CAK (and NorthStar) asserted in the present proceeding or the matters summarized in the SSA's December 15, 2017 Report to this Court concerning his investigation and recommendations relevant to this proceeding.

The Subpoena.

In its Scheduling Order and Memorandum dated December 31, 2019, this Court scheduled an evidentiary hearing to be held on April 28 and 30, 2020[6] and directed the parties to mediate their "dispute over the return of funds paid to NorthStar and CAK as commissions received from the terminated Jobu transaction and the rescinded UMG transaction." On March 9, 2020, all parties to both the Jobu Action and this proceeding participated in mediation, but, as

[6] In its Amended Scheduling Order dated May 7, 2020, the Court rescheduled the evidentiary hearing for October 13, 14, and 15, 2020.

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the SSA subsequently advised the Court, they were unsuccessful in resolving their disputes at that time. As such, on or about March 17, 2020, CAK served a number of subpoenas—including subpoenas to Warner Bros. Records ("WBR"), UMG Recordings ("UMG"), Comerica, Fredrikson & Byron, P.A. ("Fredrikson"), and the Subpoena to the SSA at issue here[7]—seeking documentary and deposition discovery relevant to the matters to be addressed at the evidentiary hearing.

CAK's Subpoena issued to the SSA seeks both documentary discovery and Mr. Gleekel's deposition. While the SSA has objected to certain aspects of CAK's Subpoena *duces tecum*, he and CAK's counsel have conferred and resolved the issues relating to the production of documents by the SSA in advance of the evidentiary hearing.

As to CAK's deposition Subpoena to the SSA, CAK seeks the SSA's testimony in respect of a number of identified topics, *all* of which—as reflected in the SSA's December 15, 2017 Report to this Court—were subjects of the SSA's investigation upon which he predicated that Report and the recommendations embodied therein, and, as further discussed below, *all* of which are relevant to the evidentiary hearing before this Court, now scheduled to commence on October 13, 2020. On May 21, 2020, the SSA filed his present Motion seeking to quash CAK's Subpoena insofar as it seeks Mr. Gleekel's deposition.[8]

[7] In his Motion, the SSA—as he has throughout this proceeding— misleadingly conflates CAK and its principal, Mr. Koppelman, averring that both CAK and Mr. Koppelman issued the Subpoena to the SSA, which the SSA mischaracterizes throughout the Motion as "Koppelman/CAK's subpoena." In fact, as the Court of Appeals has confirmed (but as the SSA purposefully ignores), Mr. Koppelman may not be held personally liable for financial obligations of CAK—and it was CAK alone that issued the Subpoena to the SSA.

[8] On May 22, 2020, both UMG and WBR filed motions to quash CAK's subpoenas served upon them, in their entirety; and, that same day, Comerica and Fredrikson filed objections to CAK's subpoenas to those entities. As noted below and in the separate submission filed by CAK contemporaneously with this Memorandum, CAK's counsel has conferred with counsel for

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ARGUMENT

I. THE SSA DOES NOT OFFER IN HIS MOTION ANY COGNIZABLE BASIS FOR THIS COURT TO DEPART FROM JUDGE CAIN'S DETERMINATION AND INSULATE THE SSA FROM DISCOVERY IN RESPECT OF HIS OWN INVESTIGATION INTO THE MATTERS AT ISSUE IN THIS PROCEEDING.

Not only does the SSA, remarkably, fail in his Motion even to mention Judge Cain's November 22 Order—much less the Jobu Motion, in which the SSA unsuccessfully proffered virtually identical (and equally unpersuasive) arguments as those incorporated in his present Motion—but he has not offered any reason in his Motion why this Court properly should depart from Judge Cain's well-reasoned analysis and determination of the issue in the Jobu Action and insulate the SSA from deposition in respect of his own investigation into the matters at issue in this proceeding. It is beyond any legitimate dispute that Mr. Gleekel possesses highly relevant, discoverable information concerning that investigation, and he has not articulated any cognizable basis on which he properly may avoid discovery in respect of those matters. As such, CAK respectfully submits that this Court should, consistent with Judge Cain's determination in the Jobu Action, deny the SSA's Motion and direct him to appear for his deposition in accordance with the Subpoena.

A. CAK Seeks Mr. Gleekel's Deposition as SSA, Not as Opposing Counsel.

As an initial matter, the SSA incorrectly avers in his Motion that CAK "did not notice the deposition of Peter J. Gleekel *in his capacity* as Second Special Administrator; the subpoena is addressed to Mr. Gleekel personally." (Motion at p. 2 n.2.) In fact, as is evident on the face of

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UMG, WBR, Comerica and Fredrikson (Comerica is represented by the Fredrikson firm) in an effort to resolve UMG's and WBR's motions to quash and Comerica's/Fredrikson's objections without the need for further intervention of the Court. As set forth in CAK's submission, the issues surrounding the Comerica and Fredrikson subpoenas have been resolved and, while the issues regarding the UMG and WBR subpoenas have been substantially narrowed, certain discrete issues remain unresolved and will require the Court's attention.

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the Subpoena, it is directed to Mr. Gleekel specifically in his capacity as SSA. (See Subpoena at p. 10, instructing that the Subpoena is "directed to the SSA"). As further discussed below, it is indeed self-evident that it is Mr. Gleekel's activities as SSA and the knowledge that he acquired through his investigation as SSA into the claim asserted against CAK (and NorthStar) in this proceeding that are relevant to the matters that will be presented to the Court at the upcoming evidentiary hearing and thus are of interest to CAK in seeking Mr. Gleekel's deposition. Stated another way, CAK plainly has no interest in deposing Mr. Gleekel about his personal or professional activities or endeavors other than his investigation, prior to his appointment as counsel, of the matters relevant to this proceeding.

Similarly, CAK does not (as the SSA also incorrectly avers in his Motion) seek Mr. Gleekel's deposition as an attorney for the Estate, *i.e.*, as "opposing counsel." Rather, as was true in the Jobu Action, CAK seeks to depose Mr. Gleekel only insofar as he acted as the Court-appointed SSA vested by this Court with broad investigatory powers, including "the power and authority to gather facts and evidence from individual witnesses and obtain documents . . . consistent with the powers of a general personal representative" (August 21, 2017 Order Appointing Special Administrator at p. 3, ¶ 1(c); February 2, 2018 Order Expanding Authority of the Second Special Administrator at p. 3, ¶ 1(c))—authority that, as Judge Cain observed, "would certainly not be afforded an attorney representing a party in a lawsuit—but was afforded to Mr. Gleekel . . . in [his] limited role as SSA." (November 22 Order at pp. 5-6.)

As such, Mr. Gleekel's self-serving (and highly misleading) characterization of himself as no more than "opposing counsel" (Motion at pp. 1, 5-8; see also Motion at p. 7 ("Mr. Gleekel is and always has been an attorney for the Estate in his capacity as the SSA")) disregards the multiple roles Mr. Gleekel has occupied at various times—*i.e.*, first as investigator (vested by the

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Court with authority far beyond that of an attorney for the Estate) tasked with, *inter alia*, determining whether claims should be pursued in respect of the matters identified in the Court's August 21, 2017 and February 2, 2018 Orders; then as the representative of the Estate appointed by the Court to oversee the pursuit of such claims; and finally as the attorney litigating the very claims that he recommended be pursued by the Estate. Likewise, Mr. Gleekel's facile reduction of his Court-appointed status solely to that of "opposing counsel" utterly ignores Judge Cain's express determination in her November 22 Order that it was not until July 12, 2018—well after Mr. Gleekel had conducted his dual investigations and submitted his Reports to this Court recommending the pursuit of claims in both matters—that this Court approved Mr. Gleekel "as the attorney for the Estate." (November 22 Order at pp. 4.) Thus, "as of July 12, 2018, Mr. Gleekel [was] both attorney for the Estate/SSA and the SSA. Prior to that date, Mr. Gleekel [was] the SSA, subject to the limited powers enumerated by the Court, and granted authority [he] would not be afforded in [his] role as attorney." (Id. at 7, emphasis in original.)

As Judge Cain thus determined, Mr. Gleekel may not properly avoid his deposition concerning his activities and the knowledge he acquired *as SSA*. Mr. Gleekel fails to offer any reason in his Motion why this Court should not reach the same conclusion.[9] His silence in that regard is not just telling; it properly should result in the denial of his meritless Motion. But even

[9] One must wonder why Mr. Gleekel thought it appropriate in his Motion to ignore entirely Judge Cain's November 22 Order, as though that Order had never been entered. Plainly, an Order of another Judge of this Court entered in a related proceeding only some six months ago addressing precisely the same issue on a substantively identical motion brought by Mr. Gleekel himself should, at the very least, be considered informative as to the matter *sub judice*. As discussed below, Mr. Gleekel's failure even to mention the November 22 Order is not only instructive of the lack of merit of his present Motion, but it properly should result in an Order of this Court directing the SSA to reimburse CAK for the fees incurred in opposing the SSA's Motion and apprising this Court of Judge Cain's prior ruling, which CAK respectfully submits properly should be dispositive of the matter.

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if Judge Cain had not already ruled on the precise issue raised by the SSA's Motion, the undisputed facts, if not common sense, would compel the same result.

In that regard, as the SSA acknowledges in his Motion, this Court appointed Mr. Gleekel (and Larson King) to that role in light of the Court's determination that "[t]he Personal Representative [*i.e.*, Comerica] cannot or should not act to investigate the circumstances" of that transaction due to "its Common Interest Agreement with the former Special Administrator [*i.e.*, Bremer Trust, N.A.]." (August 21, 2017 Order Appointing Second Special Administrator at p. 1.) While it may be that Mr. Gleekel is an attorney, that "status" is, of course, not a requirement for appointment as an administrator of an estate. Indeed, neither the Personal Representative, Comerica, nor the First Special Administrator, Bremer Trust, are attorneys. Rather, those Court-appointed representatives each engaged counsel, *i.e.*, Fredrikson and Stinson Leonard Street, LLP, respectively, to act as their attorneys.

Nothing in this Court's August 17, 2017 Order or its subsequent February 2, 2018 or June 14, 2018 Orders, which, respectively, expanded the SSA's authority and approved the SSA's pursuit of the claims recommended in his dual Reports to the Court, required that Mr. Gleekel be an attorney or that he act as counsel for the Estate—in effect, representing himself—in this proceeding. Indeed, as noted above, the Court determined that Comerica should not perform the duties assigned to the SSA not because Comerica was not an attorney, but because of the restrictions imposed on Comerica under its common interest agreement with Bremer Trust. In fact, both of the Estate's two prior representatives, Comerica and Bremer Trust, had engaged counsel to represent them. Mr. Gleekel, as SSA, plainly could have done the same. Instead, for reasons that, while perhaps short-sighted, appear rather obvious, Mr. Gleekel elected to not only

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act in the role of SSA, but to act as counsel, and to then, in effect, represent himself in the Court proceedings that he commenced.

Mr. Gleekel's decision to contemporaneously occupy the dual roles of SSA and litigation counsel to the SSA cannot properly be used as both a sword to attack CAK and as a shield to insulate him from discovery on the very claim that he investigated as SSA. Through its Subpoena directed to Mr. Gleekel, CAK properly seeks his deposition solely *as SSA*—the role in which he investigated the facts underlying the present proceeding—*not* in his capacity as "opposing counsel." While Mr. Gleekel argues that it may be improper, as a general matter, to depose opposing counsel, he has not articulated any objection—and none exists—to the deposition of an SSA who investigated claims that are later asserted in a Court proceeding. As Judge Cain aptly observed, Mr. Gleekel should not be permitted "to hide behind the veil of an opposing attorney after performing duties—albeit at the direction of the Court—that an opposing attorney in any case would not be allowed to perform independently." (November 22 Order at p. 9.) And concomitantly, and fully consistent with Judge Cain's determination—a determination that the SSA does not even mention, let alone attempt in his Motion to challenge or distinguish—CAK should not be denied discovery in respect of the SSA's investigation into the matters relevant to this proceeding simply because Mr. Gleekel elected, in his discretion, to perform the roles of both investigator and litigant.

B. The SSA Possesses Discoverable, Non-Privileged Information Concerning Each of The Topics Set forth in CAK's Subpoena.

Perhaps recognizing that this Court might become aware of Judge Cain's prior ruling on precisely the same issue (notwithstanding the SSA's inexplicable failure to disclose it), and that Judge Cain's ruling and the undisputed factual and procedural background of this matter compel the conclusion that he cannot properly avoid his deposition in this proceeding, the SSA devotes

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nearly half of his Motion to arguing that the deposition topics set forth in CAK's Subpoena somehow "impose an undue burden" on him. (Motion at pp. 12-18.) According to the SSA, those deposition topics supposedly "burden" him *not* because they might require extensive preparation or further investigation (they plainly do not), but instead because Mr. Gleekel may not possess relevant first-hand knowledge (or other parties or third-parties may possess greater knowledge) of those matters, or—rather inconsistently—because the knowledge he does possess concerning those matters somehow is protected attorney work product. The SSA's largely hypothetical arguments in this regard do not provide cognizable grounds for him to avoid his deposition in this proceeding.

The SSA also argues that certain components of the deposition topics set forth in CAK's Subpoena are, or may be, "irrelevant" to the Court's ultimate determination of the parties' dispute. While it is true that, as the SSA notes in its Motion, in its April 20, 2020 Scheduling Order this Court offered certain preliminary rulings concerning the parties' expected evidentiary burdens, the Court expressly characterized those observations as "preliminary" and invited the parties to seek review of the same—an opportunity in respect of which CAK intends to avail itself (CAK will be filing, contemporaneously with this submission, a motion addressing different areas of inquiry it believes are centrally relevant to the Court's determination of the SSA's claim that the Estate should be reimbursed for commissions paid to CAK and NorthStar pursuant to the terms of the Advisor Agreement). Moreover, while treating the Court's preliminary rulings as though they were both final and exhaustive (notwithstanding the Court's express statements to the contrary), the SSA nonetheless has not offered in his Motion any basis for his assertion that any of the topics set forth in the Subpoena (which CAK served

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approximately a month before the Court's April 20 Order) are somehow "irrelevant." As further discussed below, they plainly are not.

The SSA acknowledges that—in his capacity as SSA—he conducted an investigation concerning the facts underlying the claim that he later asserted against CAK (and NorthStar) in this proceeding. That investigation included—as the SSA's December 15, 2017 Report to the Court confirms—inquiry concerning *every one* of the topics identified in CAK's Subpoena: the negotiation and terms of the rescinded UMG Agreement and the 2014 Agreement between Prince (and his related entities) and WBR; WBR's assertions of rights in or to recordings that were the subject of the UMG Agreement; the decision to seek rescission of the UMG Agreement; the Estate's decision to return to UMG amounts paid to the Estate as well to CAK and NorthStar under the UMG Agreement; and both Fredrikson's and, self-evidently, his own investigations concerning the foregoing. These matters go directly to the heart of the Estate's claim against CAK, and thus hardly can be considered "irrelevant."

Moreover, the Court should not credit Mr. Gleekel's claims that he does not possess any relevant information, as that conclusion—which is in any event absurd in light of Mr. Gleekel's role as investigator—simply is not for him to determine. "A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge." Ribeiro v. Baby Trend, Inc., No. 8:12CV204, 2016 U.S. Dist. LEXIS 139783, at *4 (D. Neb. Oct. 7, 2016). In any event, Mr. Gleekel unquestionably does possess discoverable factual information concerning the investigation he undertook and the claim he asserted. That the SSA may not have been appointed to that role until after certain (or even all) of the events occurred underlying the negotiation and subsequent rescission of the UMG Agreement plainly does not compel the

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conclusion that Mr. Gleekel possesses no discoverable information. Precisely to the contrary, there can be no legitimate dispute that Mr. Gleekel has knowledge concerning his own investigation and other activities performed in his capacity as SSA. Consistent with Judge Cain's determination in the Jobu Action, CAK is entitled to discovery concerning those matters.

In that regard—without limitation of CAK's right to pursue other relevant avenues of deposition testimony from the SSA, but only by way of illustrative example—CAK has the right to inquire of the SSA, *inter alia*, whom he interviewed during the course of his investigation; what questions he asked of those witnesses; what answers those witnesses provided to the SSA's inquiries; whether those witnesses identified other witnesses whom the SSA declined to interview; whether the SSA recorded or otherwise documented his witness interviews; what documents or other materials the SSA requested and/or received from witnesses in connection with his investigation; and whether the SSA offered any warnings or made any promises or other overtures to those witnesses in connection with their responses to his questions (*e.g.*, that the Estate would not pursue claims against them, or conversely, that the Estate may pursue claims against them). CAK similarly is entitled to discovery concerning the SSA's relevant, non-privileged dealings and interactions with other representatives of the Estate, the decedent's heirs and other interested parties.

That the SSA protests that he has no firsthand knowledge of the matters that were the subject of his investigation and that he gained knowledge concerning those matters in the course of that investigation is of no moment. As Judge Cain determined in respect of the Jobu Action, since the SSA acted both as the investigator of the claim asserted against CAK and the party asserting that claim on behalf of the Estate, the SSA cannot legitimately dispute that he possesses knowledge concerning both that very investigation and that very claim. That other third-parties

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may also possess knowledge of those matters, even first-hand knowledge, also does not relieve the SSA of his discovery obligations. Nothing in the Minnesota Rules of Civil Procedure prevents a party from seeking discovery from multiple parties or third-parties. As such, the SSA's bare assertion that others may (or may not) possess more information about certain topics does not provide any cognizable basis for him to avoid his deposition.

Building on the faulty premise, adopted to suit his present purposes in the litigation, that, despite his status as SSA, Mr. Gleekel occupies only the role of "opposing counsel" in respect of CAK's Subpoena, Mr. Gleekel also argues in the Motion that even if he does possess relevant information concerning the topics identified in the Subpoena, that information necessarily is attorney work product. As Judge Cain expressly determined in rejecting the SSA's identical arguments in the Jobu Motion, the SSA's assertions in that regard are likewise meritless.

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. As such, the *attorney* work product doctrine by definition has no application. But, even if Mr. Gleekel was acting as an attorney for the Estate rather than as SSA when he conducted his investigation (and, as Judge Cain concluded, he plainly was not), testimony concerning the facts and circumstances of that investigation and his interactions with witnesses and others is not work product. Under Minnesota law, attorney work product is limited to *written materials* prepared by an attorney that reflect his "mental impressions, trial strategy, and legal theories in preparing a case for trial. However, materials prepared in anticipation of litigation that do not contain opinions, conclusions, legal theories, or mental impressions of counsel are not work product." Dennie v. Metro. Med. Ctr., 387 N.W.2d 401, 406 (Minn. 1986) (citations omitted); see also Leininger v. Swadner, 279 Minn. 251, 257, 156

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N.W.2d 254, 259 (Minn. 1968) ("It is clear . . . that the prohibition against discovery of the work product of a lawyer is limited to 'writings.'").

Plainly, inquiry concerning Mr. Gleekel's activities *as SSA* in conducting his supposed investigation will not necessarily require him to divulge his "mental impressions, trial strategy, and legal theories in preparing a case for trial." But even if it did (and even if such activities had been conducted in Mr. Gleekel's role as an attorney for the Estate rather than as SSA), the testimony elicited by such questions would not be privileged because that inquiry does not seek to discover the content of Mr. Gleekel's confidential writings, *i.e.*, his work product. And, in any event, even if a deposition topic might encompass information that falls within the contours of the work product doctrine, that fact alone is insufficient to support an order barring all questions on the topic, let alone the deposition in its entirety. A party may not "*completely* avoid a deposition by claiming the protections of" privilege; rather, "Minnesota Rule of Civil Procedure 30.04(a) provides that objections to questioning be stated during the deposition and a deponent may be directed not to answer when necessary to preserve a privilege." In re Application of Petitioner Mahtani, No. 27-CV-17-11589, 2017 Minn. Dist. LEXIS 7, *8, 45 Media L. Rep. 2408 (Minn. Dist. Ct., Sept. 25, 2017) (emphasis in original); see also Am. Home Assurance Co. v. Greater Omaha Packing Co., No. 8:11CV270, 2013 U.S. Dist. LEXIS 129638, at *5-6 (D. Neb. Sep. 11, 2013) ("[I]t is more appropriate for the parties to make their objections when questions implicating privileged information are asked at the deposition."); United States v. Hodgson, 492 F.2d 1175, 1177 (10th Cir. 1974) ("[Parties] must normally raise the privilege as to each record sought and each question asked."). The SSA's attempt to exert unilateral control not only over what questions he may be asked at deposition, but even whether the deposition

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may occur at all lacks any basis in the law and, fully consistent with Judge Cain's determination of the identical issue in the Jobu Action, should be rejected by the Court.

CONCLUSION

The SSA's failure to apprise this Court of Judge Cain's November 22 Order, *i.e.*, an Order of another Judge of this Court entered only six months ago in a related action, addressing precisely the *same* issue raised by the SSA's Motion and involving the *same* parties, is not just instructive of the SSA's litigation strategy and his meritless attempt to avoid his discovery obligations; it properly should require the SSA to reimburse CAK for its fees in opposing the SSA's Motion. See, *e.g.*, Minn. R. Prof'l Conduct 3.3 (requiring disclosure of "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client"). CAK respectfully submits that, consistent with Judge Cain's prior ruling, the Court should deny the SSA's Motion and direct Mr. Gleekel to appear for his deposition in accordance with the Subpoena, and, as a concomitant thereto, enter an Order directing the SSA to reimburse CAK for the fees and costs incurred in opposing the SSA's Motion.

Dated: June 5, 2020

BERENS & MILLER, P.A.

s/Erin K. F. Lisle
Barbara Podlucky Berens (#209778)
Erin K. F. Lisle (#238168)
Carrie L. Zochert (#291778)
80 South 8th Street
3720 IDS Center
Minneapolis, MN 55402
(612) 349-6171
bberens@berensmiller.com
elisle@berensmiller.com
czochert@berensmiller.com

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John J. Rosenberg (*pro hac vice*)
Brett T. Perala (*pro hac vice*)
Rosenberg, Giger & Perala P.C.
1330 Avenue of the Americas, Suite 1800
New York, NY 10019
(646) 494-5000

Attorneys for CAK Entertainment, Inc.