Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

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 SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

CAK Entertainment, Inc. ("CAK") submits this Memorandum of Law in support of its Motion for Summary Judgment seeking the denial of the application of the Second Special Administrator (the "SSA") of the Estate of Prince Rogers Nelson (the "Estate") for a refund of certain commissions previously earned by and paid to CAK and NorthStar Enterprises Worldwide, Inc. ("NorthStar") (collectively, the "Advisors"), brought pursuant to Minnesota Statute Section 524.3-721 (the "Fee Motion").

INTRODUCTION

It is undisputed that the sole foundational predicate governing the relationship between the Estate and the Advisors is the June 16, 2016 Advisor Agreement pursuant to which the Estate, acting through its then Special Administrator, engaged CAK and NorthStar to advise the Estate with respect to entertainment-related transactions. That comprehensive written agreement contains express provisions requiring the payment to the Advisors of commissions in respect of business opportunities that the Advisors brought (and/or in respect of which the Advisors provided advice) to the Estate, calculated as a fixed percentage of the transactional payments

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

received by the Estate in respect of such transactions. As such, since the outset of this proceeding, CAK has argued that the SSA's Fee Motion cannot be resolved on the basis of vague *post-facto* musings about "reasonableness," but can only be addressed "on the merits" by reference to the express, bargained-for terms of the Advisor Agreement governing the Advisors' compensation and the Estate's obligations in connection therewith. As is further explicated below, those contractual provisions dictate the outcome of the Fee Motion and require its denial, as a matter of law.

Echoing the express findings of the Court of Appeals in its November 25, 2019 Decision, discussed further below, the SSA has finally (though belatedly) acknowledged—as he must—that it is the terms of the Advisor Agreement that both guide and, ultimately, govern the Court's determination of the Fee Motion.[1] While the SSA's apparent "change of heart" and retrenchment regarding the paramount importance of the Advisor Agreement is significant—all of the parties are now in accord that the express terms of the Advisor Agreement are dispositive of the Fee Motion—it is readily apparent that the SSA predicates his supposed newfound appreciation of the dispositive nature of the terms of the Advisor Agreement on an abject mischaracterization and distortion of the plain language of that Agreement, Minn. Stat. § 524.3-721 and well-established Minnesota decisional authority.

Rather than attempting to respond to what CAK anticipates will be the SSA's arguments in that regard, CAK will focus in this Memorandum on the actual language of the Advisor Agreement and the interpretation of those express contractual provisions required by settled

[1] During a June 19, 2020 telephonic conference with the Court, the SSA—apparently recognizing that, in light of the Court of Appeals' emphasis of the central importance of the Advisor Agreement to the present inquiry, he could no longer avoid confronting the actual language of that Agreement—offered this surprising concession, a 180-degree reversal of his previously asserted position.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

Minnesota law. While Minn. Stat. § 524.3-721 may, as the Court of Appeals held, provide an appropriate procedural vehicle for the Estate to seek judicial review of the compensation of a consultant, where, as here, the unambiguous language of the agreement between the Estate and its consultant directly addresses and is dispositive of the parties' respective contractual obligations, "the plain and ordinary meaning of the contract language controls," Linn v. BCBSM, Inc., 905 N.W.2d 497, 504 (Minn. 2018), and "it is not for this court to create or add exceptions to the contract or to remake it on behalf of either of the contracting parties." Telex Corp. v. Data Products Corp., 271 Minn. 288, 294 (Minn. 1965). As will be further explored below, the unambiguous terms of the Advisor Agreement, read in accordance with governing Minnesota law, compel the conclusion that the Advisors have earned, and may retain, the compensation paid to them pursuant to the Advisor Agreement in respect of the UMG transaction, which the Estate subsequently elected, in the unilateral exercise of its own business judgment, to rescind.

As such, as further discussed below, CAK respectfully submits that the SSA's Fee Motion must be denied, as a matter of law.

SUMMARY JUDGMENT ISSUES

1. Whether, in accordance with the unambiguous terms of the parties' Advisor Agreement, CAK is entitled to retain its earned contractual commission on a transaction brought to the Estate by the Advisors notwithstanding the Estate's later decisions to rescind the agreement underlying that transaction and to return to its contractual counterparty more than the Estate had received pursuant to that transaction.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

RECORD SUPPORTING ENTRY OF SUMMARY JUDGMENT IN FAVOR OF CAK[2]

1. The Advisor Agreement dated and effective June 16, 2016 between the Estate, acting through its then Special Administrator Bremer Trust, N.A., and CAK and NorthStar (the "Advisor Agreement"). A copy of the Advisor Agreement is annexed as Exhibit A to the contemporaneously-filed Declaration of Brett T. Perala in Support of CAK's Motion for Summary Judgment, dated July 8, 2020 (the "Perala Decl.").
2. The November 25, 2019 Opinion of the Minnesota Court of Appeals in Appeal Nos. A19-0503 & A19-0507 (the "November 25 Decision"). (A copy of the Court of Appeals' November 25 Decision is appended to the Perala Decl. at Exhibit B.)[3]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Probate Court-Approved Advisor Agreement.

On June 2, 2016, after providing notice to all counsel for the then-potential heirs of the Estate (the "Heirs"), Bremer Trust, the Estate's First Special Administrator ("Bremer" or the "FSA"), moved this Court for an Order authorizing the FSA to employ entertainment industry experts. (6/02/2016 Not. of Mot. and Mot. re: Entertainment Industry Experts.) On June 8, 2016, the Court issued Findings of Fact, Order & Memorandum Authorizing Special

[2] While the recitation of the undisputed facts supporting entry of summary judgment in favor of CAK set forth in the following section of this Memorandum references a number of Court filings, Orders and hearing transcripts related to this proceeding, the two documents listed above comprise the central documentary record supporting the entry of summary judgment in CAK's favor. As such, and on the understanding that the Court has ready access to those other filings in this proceeding, CAK will not separately list here each of those documents or burden the Court with additional copies of the same. Should the Court desire that CAK provide copies of any such materials for its ease of reference, CAK will promptly comply with any request of the Court to that effect.

[3] The Court of Appeals' November 25, 2019 Decision also has been reported at In re Estate of Nelson, 936 N.W.2d 897 (Minn. Ct. App. 2019).

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

Administrator's Employment of Entertainment Industry Experts (the "June 8 Order"). The June 8 Order authorized the FSA "to enter into employment or other contractual relationships with the identified entertainment industry experts," *i.e.*, CAK and NorthStar. (Id.)

On June 16, 2016, the Estate, acting through the FSA, entered into the Advisor Agreement with CAK and NorthStar (collectively, the "Advisors"), pursuant to which CAK agreed to provide the services of music industry expert Charles Koppelman and NorthStar agreed to provide the services of music industry expert L. Londell McMillan to "advise and counsel [the Estate] in all aspects of [the Estate's] business in the Entertainment Industry related to [Prince]," and provide "advisory services" to the Estate to, *inter alia*, "maximally capitaliz[e] upon the [Estate's] intellectual property assets including musical compositions, master recordings, brands, and name, image and likeness, and agreements relating to all of the foregoing." (Id. § 5.) As the Court of Appeals noted, Mr. Koppelman was *not* a party to the Advisor Agreement. (November 25 Decision at p. 22.) Rather, he was an employee and the CEO of CAK who signed the Advisor Agreement solely in that capacity, as CAK's "authorized representative." (Advisor Agreement at p. 6.)

Pursuant to the Advisor Agreement, the Estate agreed that the Advisors collectively would be paid a fixed 10% commission on "all Gross Monies" paid to the Estate pursuant to agreements entered into by the Estate in respect of which the Advisors provided advice and counsel. (Id. § 6(a).) By the express terms of the Advisor Agreement, those commissions were deemed to have been "earned" by the Advisors "simultaneously with the payment to" the Estate of the amounts due in respect of such agreements. (Id. § 6(d)(ii).) The term "Gross Monies" is defined in the Advisor Agreement to "include all forms of income, payments [and] compensation

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

. . . received by or on behalf of the Estate or for the Estate's account as a result of the Estate's activities and affairs in and throughout the Entertainment Industry." (Id. § 15(f).)

The Estate further expressly confirmed in the Advisor Agreement that "[t]he parties have given due and careful consideration of and to the percentage amounts, scope and duration of the Commission [payable to the Advisors thereunder] and to the provisions with respect thereto stated herein and expressly agree that to their knowledge they are fair and reasonable in all respects." (Id. § 6(a).)

The UMG Transaction.

The Advisors provided substantial assistance and services to the Estate in obtaining an agreement between the Estate and Universal Music Group ("UMG") concerning the exploitation of certain master recordings featuring the recorded performances of Prince (the "UMG Transaction"). (See 1/23/2019 H'ring Tr. at pp. 32-33; 35-37.) In September of 2016, the FSA submitted seven proposed entertainment transactions to this Court for approval, including the UMG Transaction. Under the proposed UMG Transaction, UMG agreed to make an initial $31,000,000 payment to the Estate for the rights UMG was acquiring. (See Declaration of Erin K.F. Lisle dated September 24, 2018 ("Lisle Decl."), Ex. LL, ¶ 30.) Pursuant to the terms of the Advisor Agreement, upon the closing and funding of the UMG Transaction, the Advisors would thus be entitled to a commission of 10% of that payment, *i.e.*, $3.1 million.

Certain Heirs opposed the UMG Transaction and submitted a memorandum in support of that opposition in which they alleged, *inter alia*, that (1) the UMG Transaction conflicted with rights previously granted to Warner Bros. Records, Inc. ("WBR") in a 2014 agreement between Prince and WBR (the "WBR Agreement"); and (2) the proposed commission payments to the Advisors were excessive and unreasonable. (Lisle Decl., Ex. E at pp. 4, 8-12, 16-20.) On

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

September 30, 2016, notwithstanding the Heirs' expressed concerns and formal objections regarding the WBR Agreement and the Advisors' commission, this Court approved the UMG Transaction, and each of its terms (including the provisions concerning the Advisors' compensation thereunder). (09/30/16 Order Granting in Part the Special Administrator's Motion to Approve Recommended Deals, at pp. 1-2.) In its Order, the Court expressly noted that the proposed transactions before it for consideration were "'short-form' deals and that drafting, and perhaps negotiation, may need to take place before the parties can execute a 'long-form deal.'" (Id. at p. 2, ¶ 2.) The Court further allowed the Heirs to "appoint up to two counsel or entertainment industry experts to" assist Bremer, the Estate's attorneys at the Stinson Leonard Street law firm ("Stinson") and Mr. McMillan in the negotiation of the "long-form" agreements related to the proposals approved by the Court, including the UMG Transaction. (Id. at pp. 2-3, ¶ 5.)

On or about November 10, 2016, the FSA retained the law firm of Meister Seelig & Fein ("Meister Seelig") to assist the Stinson attorneys and Mr. McMillan in connection with the "review and negotiation of the UMG Agreement." (Declaration of Peter J. Gleekel, dated September 4, 2018 ("Gleekel Decl."), at Ex. N at p. 16.) Although Meister Seelig's attorneys ultimately "were responsible [for] . . . finalizing the UMG Agreement" (id.), the Stinson attorneys and Mr. McMillan remained actively involved in the process. (Id.) While CAK actively participated in the negotiation of certain music publishing transactions between the Estate and UMG, CAK and its principal, Mr. Koppelman—who is not an attorney—did not have any significant involvement in the negotiation or drafting of the UMG Agreement. (Id.)

During the period in which UMG and the Estate's attorneys at Meister Seelig and Stinson were drafting the long-form UMG Agreement, counsel to the Heirs continued to raise

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

concerns regarding the "interaction between the Universal deal and existing deals," including the WBR Agreement. (Id. at p. 18.) Despite these concerns, it was the consensus of all of those involved in the negotiations with UMG on behalf of the Estate—including the Stinson and Meister Seelig attorneys—that the Heirs' objections were unfounded and that there was no conflict between the rights being granted to UMG and the rights in which WBR possessed an interest. (Id. at pp. 17-18.) Nevertheless, the Estate's attorneys and Mr. McMillan insisted in their negotiations with UMG that a provision be included in the UMG Agreement providing a dispute resolution mechanism in the event that a third-party (such as WBR) asserted claims that might have prevented the Estate from fully performing under the UMG Agreement. (See id., Ex. C, at ¶ 15.)

On January 31, 2017, Bremer and UMG entered into the UMG Agreement, which granted UMG rights to distribute certain of Prince's master recordings. The Court approved the UMG Agreement on January 31, 2017, again over the objections and concerns raised by the Heirs. (See id. Ex. N at p. 19.) Upon execution of, and as required by, the UMG Agreement, UMG paid approximately $28 million to the Estate (*i.e.*, the contemplated $31 million payment, less the Advisors' Court-approved commission). (Id. at p. 20.) As a concomitant thereto and as provided by the Advisor Agreement, UMG paid directly to the Advisors their 10% contractual commission of $3.1 million, which was allocated equally between CAK and NorthStar. (Id.) That same day, January 31, 2017, also marked the end of both Bremer's term as FSA and the term of the Advisor Agreement (the latter of which the Court had extended in September of 2016 to coincide with Bremer's term as FSA).

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

Rescission of the UMG Agreement.

On February 1, 2017, Comerica Bank & Trust, N.A. ("Comerica") replaced Bremer as the personal representative of the Estate (id. at p. 20), and Comerica subsequently engaged a new entertainment advisor, Troy Carter, and new legal counsel, Fredrikson & Byron, P.A. ("Fredrikson"). (Lisle Decl. Ex. H at p. 7.) On February 10, 2017, WBR wrote to Comerica and claimed certain interests in the recordings that were the subject of the UMG Agreement, and apparently made overtures to the Estate concerning potential litigation. (Id. at p. 5.) Thereafter, purportedly in light of WBR's expressed concerns, UMG demanded that the Estate rescind the UMG Agreement. (Id. at pp. 11-12.) Although Bremer, Mr. McMillan and the attorneys at both Stinson and Meister Seelig—each of whom, with the exception of Bremer, possessed significant entertainment expertise—all had concluded precisely to the contrary, *i.e.*, that there was no "overlap" between the WBR Agreement and the UMG Agreement, Comerica, assisted by Fredrikson—neither of which had extensive, if any, experience in entertainment transactions involving the licensing and distribution of recorded music—capitulated to UMG's demands and, based on Comerica's claim that it could not "unequivocally assure" the Court that the UMG Agreement did not overlap with rights held by WBR, filed an application with the Court seeking the rescission of the UMG Agreement. (Id. at pp. 9, 11 & Ex. C at ¶ 5.)

On July 13, 2017, this Court issued an Order & Memorandum Granting Motion to Approve Rescission of Exclusive Distribution and License Agreement. The Court expressly observed in its Order that "it cannot make a final and binding decision with respect to the interpretation of" the UMG Agreement and the WBR Agreement (7/13/2017 Order & Memo. Granting Mot. to Approve Rescission of Exclusive Distribution and License Agreement at 5), but nonetheless concluded that it "must reluctantly accept" Comerica's noncommittal assertion that

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

it could not "unequivocally assure" that no overlap existed between the two Agreements. (Id.) Although the Court briefly addressed paragraph 1.8 of the UMG Agreement in its Order—*i.e.*, the aforementioned dispute resolution mechanism—the Court similarly concluded that it felt constrained to adopt Comerica's position to avoid potential litigation between the Estate and either or both of UMG and WBR.

In light of the rescission of the UMG Agreement, the Estate returned to UMG the amounts that UMG had paid to the Estate thereunder, *i.e.*, approximately $28 million. Inexplicably, however—and for reasons that neither Comerica nor the SSA has ever explained—the Estate also chose to return to UMG the $3.1 million that UMG had paid directly to the Advisors pursuant to the terms of the Advisor Agreement, *i.e.*, the Estate "returned" to UMG *more* than the Estate had received from UMG in respect of the UMG Transaction. (See 9/30/2016 Order Granting in Part the Special Admin.'s Mot. to Approve Recommended Deals at pp. 2-3; 7/13/2017 Order & Memo. Granting Mot. to Approve Rescission of Exclusive Distribution and License Agreement at pp. 5-6.) In accordance with the express terms of the Advisor Agreement (discussed in detail below), the Advisors, who were never consulted and did not consent to the rescission, earned and thus have retained their contractual commissions in respect of the UMG Transaction.

The Replacement Agreement With Sony.

In June of 2018, the Estate, through its new entertainment advisor, Mr. Carter, announced that it had entered into a replacement agreement with Sony Music Entertainment (a transaction that Mr. Carter obtained for the Estate) concerning rights in the recordings that had been the subject of the now-rescinded UMG Agreement (the "Sony Transaction"). CAK has

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

neither claimed nor sought any commission under the Advisor Agreement in respect of the replacement Sony Transaction.

The Jobu Transaction.

Under the authority granted to them under the Advisor Agreement, the Advisors also consulted with the Estate in connection with the engagement Jobu Presents, LLC ("Jobu") to organize and promote a tribute concert to honor Prince's legacy. Pursuant to the Estate's contract with Jobu (the "Jobu Agreement"), Jobu was required to pay to the Estate a substantial guarantee, in three installments. (Gleekel Decl. Ex. E.) Jobu paid the Estate (principally using funds loaned to Jobu by Mr. Koppelman) the initial installment payment. (Id. Ex. C at p. 17.) CAK elected to forgo its contractual commission in respect of that payment and NorthStar received its allocable share of that commission, *i.e.*, $116,666. (Id. at p. 18.) Jobu subsequently repudiated and failed to fulfill its remaining obligations under the Jobu Agreement and unilaterally terminated that Agreement. (Id. at pp. 19-20.) Despite Jobu's breach and termination of the Jobu Agreement, the Estate elected of its own accord—once again inexplicably—to refund the initial payment it had received from Jobu, despite its clear contractual entitlement to retain the same. (See id. at p. 21.) NorthStar did not return its earned contractual commission on the initial Jobu payment.[4]

[4] Jobu subsequently commenced an action in the District Court entitled Jobu Presents, LLC v. CAK Entertainment, Inc., et al, Court File No. 10-CV-17-368 against Bremer, Mr. Koppelman, CAK, Mr. McMillan and NorthStar regarding the Jobu Agreement and the planned tribute concert (the "Jobu Litigation"). That litigation remains pending in the District Court, before Judge Janet L. Barke Cain. As CAK was not paid any commissions in respect of the terminated Jobu Transaction, and thus there is nothing for CAK to "refund" to the Estate in connection therewith—and as the issues relating to the Jobu Transaction are being addressed in the separate Jobu Litigation—CAK will not separately address that transaction in this Memorandum, but reserves all rights in respect thereof.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

The Fee Motion.

By Order dated August 18, 2017, this Court appointed Peter J. Gleekel and the law firm of Larson King, LLP as the Second Special Administrator of the Estate (the "SSA"). (Lisle Decl., Ex. I at p. 2.) On or about September 4, 2018, the SSA filed his Fee Motion seeking an order pursuant to Minn. Stat. § 524.3-721, requiring the Advisors to refund to the Estate the commissions they had earned in respect of the UMG Transaction and the Jobu Transaction (again, CAK took no commission in respect of the Jobu Transaction).

In ostensible support of his Fee Motion the SSA averred that those commissions—which were fixed by contract, and in the case of the UMG Transaction had been expressly approved by this Court—were "excessive" and unwarranted as the Estate voluntarily had elected to return to its contractual counterparties the monies it had received in respect of those transactions. In his Fee Motion, the SSA—as he has done throughout this proceeding—misrepresents the parties to the Advisor Agreement, misleadingly (and purposefully) conflating CAK with Mr. Koppelman and NorthStar with Mr. McMillan, as though all four were signatories to, or otherwise bound by, the Advisor Agreement. In fact, as noted above—and as the Court of Appeals specifically observed—only CAK and NorthStar were the Estate's counterparties to the Advisor Agreement, *i.e.*, the "Advisors" under that Agreement, and only CAK and NorthStar received commissions pursuant to the Advisor Agreement in respect of the UMG Transaction.

On September 24, 2018, CAK and Mr. Koppelman filed submissions in this Court in which they opposed the Fee Motion[5] on multiple grounds, including, *inter alia*, that the statutory authority upon which the SSA relies in seeking the return of the Advisors' earned commissions

[5] NorthStar and Mr. McMillan also opposed the Fee Motion.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

is inapplicable, *inter alia*, (a) as the amount of those commissions was not discretionary or subject to differing judgments, but was fixed by contractual terms, with the UMG Agreement (and the Advisors' commissions in respect of the UMG Transaction) having been expressly approved by this Court; (b) as the Advisors had earned their commissions pursuant to the unambiguous terms of the Advisor Agreement, and their compensation in respect of the UMG Transaction had been expressly approved by this Court, and, as such, that compensation, by definition, was neither unreasonable nor excessive; and (c) Mr. Koppelman is not a proper subject of the Fee Motion, as CAK, not Mr. Koppelman, was the party to the Advisor Agreement.

This Court's March 11, 2019 Order.

On March 11, 2019, this Court issued its Order and Memorandum on the SSA's Fee Motion, granting the Estate's application in significant part (the "March 11 Order"). In the March 11 Order, the Court held that Minn. Stat. § 524.3-721 did in fact empower the Court to "determine whether [the Advisors'] compensation was unreasonable or excessive, and should be refunded to the Estate." (03/11/19 Order & Memorandum on Second Special Administrator's Return of Fees, at p. 4.) On the basis of that determination, the March 11 Order directed CAK "(providing the services of Charles Koppelman), including its officers, directors, shareholders, employees, agents, assigns and successors"—all of whom the Court collectively defined as "CAK"—to "refund to the Estate all compensation received as a result of the terminated Jobu transaction and the rescinded UMG transaction" on a provisional basis by depositing the funds in escrow. (Id. at p. 1.)[6] The March 11 Order additionally directed the parties to "cooperate in

[6] The Order issued the same directive to NorthStar (providing the services of L. Londell McMillan), including its officers, directors, shareholders, employees, agents, assigns and successors"—a grouping that the Court similarly defined collectively as "NorthStar." (Id.)

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

establishing a schedule for any necessary discovery and setting the matter on for an evidentiary hearing to establish what, if any, compensation the Advisors are entitled to from [the UMG transaction]." (Id. at p. 2.)

The November 25, 2019 Decision of the Court of Appeals.

On March 28, 2019, CAK and Mr. Koppelman filed a Notice of Appeal of the March 11 Order.[7] On November 25, 2019, the Court of Appeals issued an Opinion (the "November 25 Decision") in which it held that Minn. Stat. § 524.3-721 is an appropriate procedural mechanism for the SSA to seek review of the commissions paid to the Advisors in respect of the UMG and Jobu Transactions. (November 25 Decision at pp. 9-11.) Notably, however, the Court of Appeals also observed that "CAK is correct that the district court's September 30, 2016 order approved the UMG agreement," and that "the order also impliedly approves the terms of the Advisor Agreement that allows Advisors to collect a ten-percent commission for their services." (Id. at p. 13.)

While thus recognizing that the "controlling language" of the Advisor Agreement may well compel the denial of the SSA's Fee Motion on "the merits," the Court of Appeals stopped short of offering its interpretation of those contractual provisions or establishing the procedures (let alone articulating the parameters) that would govern this Court's resolution of the Fee Motion, finding such an inquiry "premature" and "beyond the scope of [its] review," which was limited to "the narrow issue . . . concern[ing] the district court's authority to resolve the Estate's motion under Minn. Stat. § 524.3-721." (Id. at pp. 14-15.)

After making that observation, the Court of Appeals nonetheless twice more made specific reference to the potentially dispositive nature of the Advisor Agreement. In that regard,

[7] NorthStar and Mr. McMillan also filed a Notice of Appeal of the March 11 Order.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

the Court of Appeals first noted that "the fact that *the terms of the Advisor Agreement may dictate the outcome of the Estate's motion* does not deprive the district court of the authority to address the Estate's Motion under Minn. Stat. § 524.3-721." (Id., at p. 16, emphasis added.) Emphasizing the central importance of the Advisor Agreement to the present inquiry, the Court of Appeals repeated that identical observation two sentences later in its Decision, again observing that "*the terms of the Advisor Agreement may ultimately dictate whether Advisors are entitled to retain their commissions*." (Id., emphasis added.)

Continuing to focus on the critical significance of the Advisor Agreement to the resolution of the present issues, the Court of Appeals further observed that the "Advisors' assertion that the district court failed to consider the Advisor Agreement in making its decision [in the March 11 Order] is premature" as "[t]he district court's order acknowledged the Advisor Agreement, but ultimately did not decide the merits of the Estate's [Fee] motion." (Id.) Indeed, the Court of Appeals noted, "[t]he district court specifically stated that it would not make 'a final determination as to the Estate's entitlement to a refund of the Advisor fees' without full 'consideration of the provisions of the Advisor Agreement.'" (Id. at pp. 15-16.)

While thus adopting this Court's reasoning that Minn. Stat. § 524.3-721 provides an appropriate procedural vehicle for the Court's consideration of the SSA's Fee Motion, the Court of Appeals went out of its way to repeatedly emphasize that the resolution of the Fee Motion may very well be—and, as discussed below, manifestly is—dictated by the controlling and unambiguous language of the Advisor Agreement.

The Court of Appeals continued in its November 25 Decision by adopting the Advisors' arguments that (1) the March 11 Order (which the Court of Appeals held constituted an injunction) was overbroad and unsupported by the requisite factual findings under Dahlberg

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

Bros., Inc. v. Ford Motor Co., 137 N.W.3d 314 (Minn. 1965); and (2) as CAK and NorthStar were the Estate's sole contractual counterparties to the Advisor Agreement, Mr. Koppelman and Mr. McMillan presumptively were not personally liable for the obligations of those entities or on the Estate's asserted claims, *i.e.*, they are not proper subjects of the SSA's Fee Motion.[8]

The Court of Appeals thus reversed the March 11 Order in part, remanding the matter to this Court for further proceedings consistent with the Court of Appeals' determinations.

ARGUMENT

I. THE APPLICABLE STANDARD ON SUMMARY JUDGMENT.

"Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law." Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 345 (Minn. 2003) (citing Minn. R. Civ. P. 56.03). "Interpretation of a contract is a question of law appropriate for summary judgment." Madsen v. Spectro Alloys Corp., No. C7-98-225, 1998 Minn. App. LEXIS 771, at *3 (Minn. Ct. App. July 7, 1998) (citing Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 (Minn. 1978)). "If . . . terms of the contract may be given their

[8] In so concluding, the Court of Appeals accepted the Advisors' argument "that the [March 11 Order] is erroneous because (1) McMillan and Koppelman, as agents for Advisors, cannot be held liable with respect to contracts entered into by Advisors, and (2) Advisors' officers, directors, shareholders, employees, agents, assigns and successors also may not be held personally liable for commissions ordered to be refunded by Advisors." (Id. at p. 22.) The Court of Appeals continued by noting "[t]he general rule . . . that an officer of a corporation is not liable to its creditors for corporate debts" (id. (citation omitted)), and that "[w]here an agent, acting for a disclosed principal, enters into a contract with third persons for and on account of his principal and in [the principal's] name, the contract is that of the principal and does not give rise to any contractual obligation running to the agent." (Id. (citations omitted).) The Court of Appeals thus held that, as "both McMillan and Koppelman signed the Advisor Agreement as 'Authorized Representative' of Advisors," *i.e.*, "as agents for their disclosed principals, McMillan and Koppelman are presumptively not liable for the corporate debts of their respective companies." (Id. (citation omitted).)

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

plain and ordinary meaning, construction of the contract is a matter for the court and summary judgment may be appropriate." Bank Midwest v. Lipetzky, 674 N.W.2d 176, 179 (Minn. 2004)

"The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997). "[W]hen a contract is unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent." Knudsen v. Transp. Leasing/Contract, Inc., 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). As such, "[i]f the wording of the contract is clear and unambiguous, the reviewing court cannot go beyond the language of the contract in interpreting it." S O Designs United States v. Rollerblade, 620 N.W.2d 48, 53 (Minn. Ct. App. 2000).

"[A] contract is not necessarily ambiguous simply because the parties advance differing interpretations of it." Ross v. Minneapolis, 408 N.W.2d 910, 914 (Minn. Ct. App. 1987); see also Denelsbeck, 666 N.W.2d at 347 ("this dispute between the parties is not due to the contract being ambiguous, but rather is due to differing interpretations of the" parties' respective contractual obligations). Rather, contractual terms must be "assigned [their] plain meaning," and Courts cannot "go beyond the language of a contract. Even though the result may appear harsh, the clear language of the contract controls." Hysitron, Inc. v. Frederickson, No. C2-02-865, 2002 Minn. App. LEXIS 1327, at *13 (Minn. Ct. App. Dec. 3, 2002); see also Denelsbeck, 666 N.W.2d at 346-47 ("If a contract is unambiguous, then the language must be given its plain and ordinary meaning and will be enforced by the courts even if the results are harsh."); Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 67 (Minn. 1979) ("The language found in a contract is to be given its plain and ordinary meaning."). Moreover, "any interpretation which would

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

render a provision meaningless should be avoided on the assumption that the parties intended the language used by them to have some effect." Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co., 266 Minn. 426, 436 (Minn. 1963).

Minnesota Courts "have long recognized the right of parties to freely contract, and will enforce legal rights according to contract terms." Dyrdal v. Golden Nuggets, Inc., 689 N.W.2d 779, 784 (Minn. 2004). "People have a right to make legal contracts and to expect the courts to honor and give binding effect to their agreements. So important and unfettered is the right to contract that courts have no authority to invalidate unwise or improvident agreements or to rewrite them so as to achieve a fairer bargain for one party or another." Pollock-Halvarson v. McGuire, 576 N.W.2d 451, 455 (Minn. Ct. App. 1998) (internal citations omitted). "[I]t is not for this court to create or add exceptions to the contract or to remake it on behalf of either of the contracting parties. It is not ordinarily the function of courts to rewrite, modify, or set aside contract provisions fully considered and agreed upon between the parties." Telex Corp. v. Data Products Corp., 271 Minn. 288, 294 (Minn. 1965).

As discussed in detail below, the express terms of the Advisor Agreement, accorded their "plain and ordinary meaning" (Denelsbeck, 666 N.W.2d at 346-47), lead to the ineluctable conclusion that the Advisors earned their contractual commissions on the UMG Transaction, and there is no basis under the Advisor Agreement to compel them to return those commissions. As such, for the reasons more fully explicated below, the SSA's Fee Motion properly should be denied in its entirety, as a matter of law.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

II. UNDER THE EXPRESS TERMS OF THE ADVISOR AGREEMENT, ACCORDED THEIR PLAIN AND ORDINARY MEANING, THE ADVISORS EARNED, AND MAY RETAIN, THEIR CONTRACTUAL COMMISSIONS PAID TO THEM IN RESPECT OF THE UMG TRANSACTION.

It is axiomatic that where "the relationship between [the parties] is contractual . . . the duties owed by each party are defined by the contract." Commonwealth Land Title Ins. Co. v. Historic Ivy Tower, LLC, 2012 WL 867761, at *6 (Minn. Dist. Ct. Dec. 10, 2012). The Advisors were not parties to the rescinded UMG Agreement; rather their relationship with the Estate was predicated solely on and governed exclusively by the Court-approved Advisor Agreement. Pursuant to the terms of the Advisor Agreement, the Estate engaged CAK and NorthStar to "advise and counsel [the Estate] in all aspects of [the Estate's] business in the Entertainment Industry related to [Prince]" to, *inter alia*, "maximally capitaliz[e] upon the [Estate's] intellectual property assets including musical compositions [and] master recordings . . . and agreements relating to" such assets. (Advisor Agreement § 5.)

As such, the Advisors undertook pursuant to the Advisor Agreement to solicit business opportunities involving the Estate's assets, and to present such opportunities to the Estate for the Estate's consideration, analysis and evaluation. One such business opportunity the Advisors solicited and presented to the Estate for its consideration was the UMG Transaction, *i.e.*, the subject of the SSA's Fee Motion.

Instructively in the present context, the Advisor Agreement did *not* obligate the Advisors to provide legal advice to the Estate in connection with those business opportunities, or, for that matter, even contemplate that they would do so. Rather, the Estate hired its own legal counsel at Stinson and (in connection with the UMG Transaction) Meister Seelig to provide those services.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

As the Advisor Agreement was the foundational—indeed, sole—predicate of the relationship between the Advisors and the Estate, consistent with the Court of Appeals' observations in its November 25 Decision, the primary focus of this Court's consideration of the Fee Motion must be whether, pursuant to the express terms of the Advisor Agreement, the Advisors are entitled to retain, or are compelled to return, the commissions they inarguably earned in connection with the UMG Transaction, in light of the Estate's subsequent unilateral business decision to rescind the agreement underlying that transaction and, inexplicably, to return to UMG *more* than UMG had paid to the Estate in connection therewith. As the Court of Appeals presciently observed might well be the case, those unambiguous contractual terms, given their "plain and ordinary meaning" (Denelsbeck, 666 N.W.2d at 346-47), in fact "dictate whether Advisors are entitled to retain their commissions" and thus likewise "dictate the outcome of the Estate's [Fee Motion]." (November 25 Decision at p. 16.)

The Advisor Agreement provides that the Advisors are entitled to a fixed ten percent commission on all Gross Monies[9] received by the Estate in connection with Commissionable Contracts.[10] Pursuant to the plain language of paragraph 6(d)(ii) of the Advisor Agreement, those commissions "*shall be deemed to have [been] earned . . . simultaneously with the*

[9] The Advisor Agreement defines "Gross Monies" to "include all forms of income, payments, compensation, emoluments and/or any other thing of value given to the Estate in lieu of compensation, for Entertainment Industry services and affairs. . . ." (Advisor Agreement ¶ 6(c).)

[10] As used in the Advisor Agreement, the term "Commissionable Contract" means "written contracts, amendments, extensions, additions, substitutions, replacements and modifications . . . for sponsorship, endorsement, licensing of rights owned or controlled by [Bremer] related to [Prince] and the Estate, or the acquisition, disposition or sale of rights owned or controlled by [Bremer] related to [Prince] and the Estate, or the rendering of services in the Entertainment Industry in connection with [Prince] or the Estate, regardless of when rendered, that are entered into during the term or substantially negotiated during the Term and executed within one hundred and twenty (120) days after the term expires." (Advisor Agreement ¶ 6(a).)

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

payment to Administrator or Administrator's affiliates [i.e., Bremer] of Gross Monies" generated by the transactions upon which the Advisors' commissions are predicated. Pursuant to this unambiguous language—agreed to by the Estate and approved by this Court—the Advisors' commissions are "earned" once the underlying transactional payment is received by the Estate—*i.e.*, "*simultaneously with*" the Estate's receipt of that payment—*not* "subject to" or "conditional upon" the Estate's later use or retention of those funds. As such, under the express terms of the Advisor Agreement, the conclusion is inescapable that the Advisors earned their commission in respect of the UMG Transaction *simultaneously with* the receipt by the Estate of UMG's payment under the UMG Agreement.

The foregoing contractual language is manifestly unambiguous, *i.e.*, "the parties' intentions as expressed in the four corners of the instrument" are readily capable of discernment. Knudsen, 672 N.W.2d at 223 ("[C]lear, plain, and unambiguous terms are conclusive of [the parties' contractual] intent."). Indeed, to ascertain and confirm that intent, one must simply look to the "plain and ordinary meaning" of the word "earn." Denelsbeck, 666 N.W.2d at 346-47.

"In discerning the plain ordinary meaning of a word or phrase, [Courts] consider the common dictionary definition of the word or phrase." State v. Brown, 792 N.W.2d 815, 822 (Minn. 2011); see also Media Rare, Inc. v. Foley Grp., Inc., No. A05-375, 2005 Minn. App. Unpub. LEXIS 424, at *9 (Nov. 1, 2005) ("[I]t is appropriate to look to a dictionary to define a word's plain and ordinary meaning.").[11] As such, in considering the plain meaning of the word

[11] Consistent with the foregoing authority, in its November 25 Decision, the Court of Appeals alluded to the definitions of the terms "special agent" and "specialize" set forth in Black's Law Dictionary to support its determination that Minn. Stat. § 524.3-721 provides an appropriate procedural vehicle for the Estate to seek review of the Advisors' compensation. (See November 25 Decision at pp. 8-9.)

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

"earn" as used in contractual or statutory provisions, Courts of both this and other jurisdictions repeatedly have turned to the definition set forth in Black's Law Dictionary: "1. To acquire by labor, service, or performance. 2. To do something that entitles one to a reward or result, *whether it is received or not*." Black's Law Dictionary (7th Ed.), p. 525 (emphasis added). See, *e.g.*, Stuart v. Midwest/Northern, Inc., C6-01-714, 2001 Minn. App. LEXIS 1347, at *7 (Minn. Ct. App. Dec. 18, 2001); Awuah v. Coverall N. Am., Inc., 460 Mass. 484, 492, 952 N.E.2d 890, 896 (Mass. 2011); Kern v. Loomis, No. 82A05-0602-CV-66, 2006 Ind. App. Unpub. LEXIS 655, at *10 (Ind. Ct. App. Dec. 11, 2006); Hernandez v. United Builders Serv., No. 1:18-cv-02019-RM-SKC, 2019 U.S. Dist. LEXIS 172891, at *22-23 (D. Colo. Aug. 19, 2019); In re Idearc Inc., 442 B.R. 513, 520 (Bankr. N.D. Tex. 2010); Gates v. State Auto. Mut. Ins. Co., 196 S.W.3d 761, 766 (Tenn. Ct. App. 2005).

Other dictionaries offer similar, if not virtually identical, definitions of the word. See, *e.g.*, Merriam-Webster Dictionary (defining "earn" as "to receive as return for effort and especially for work done or services rendered"); American Heritage Dictionary of the English Language (defining "earn" as "1. To receive in return for services or labor. 2. To gain or acquire as a result of one's efforts or behavior.").

As the above courts uniformly have found, to "earn" compensation thus requires only that the party engaged to provide services completes the labor or performance contemplated by the contract, *not* that that the other party retains, or even necessarily receives, the fruits of that labor. See, *e.g.*, Awuah, 460 Mass. at 492 ("The word 'earn' is not statutorily defined, but its plain and ordinary meaning is '[t]o acquire by labor, service, or performance,' or '[t]o do something that entitles one to a reward or result, whether it is received or not.' Black's Law Dictionary 584 (9th ed. 2009). Where an employee has completed the labor, service, or performance required of him,

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

therefore, according to common parlance and understanding he has 'earned' his wage."); Kern, 2006 Ind. App. Unpub. LEXIS 655, at *10 ("Black's Law Dictionary defines 'earn' as '1. To acquire by labor, service, or performance. 2. To do something that entitles one to a reward or result, whether it is received or not.' . . . . While the parties could certainly have included a definition of 'earns' in the Contract that would require Dr. Loomis to receive income before it is 'earned,' the plain meaning of 'earn' does not require that the compensation actually be received.") (emphasis in original); In re Idearc Inc., 442 B.R. at 520 ("The fact that an employer disputes an employee's legal entitlement to a wage does not mean that the wage was not yet 'earned,' or would only be 'earned' when the employer finally acknowledged its obligation to pay the wage. While the Bankruptcy Code does not define the term 'earn,' Black's Law Dictionary defines it as '[t]o acquire by labor, service, or performance . . . [t]o do something that entitles one to a reward or result, whether it is received or not.'").

The foregoing authority is fully consistent with analogous Minnesota judicial decisions governing the commissions earned by real estate brokers. See, *e.g.*, Nelson v. Rosenblum Co., 182 N.W.2d 666, 667 (Minn. 1970) (broker entitled to commission where broker performed under listing agreement, notwithstanding subsequent breach of separate purchase agreement); ERA Town & Country Realty, Inc. v. TEVAC, Inc., 376 N.W.2d 526, 528 (Minn. Ct. App. 1985) (real estate broker entitled to commission where broker produced willing and able buyer, despite the fact that sale did not occur); see also Knopf v. Olson, No. C7-95-601, 1995 WL 497275, at *2 (Minn. Ct. App. 1995) (where agreement was rescinded, real estate broker that "was not party to the [rescinded] contract, cannot be held responsible for restoring the *status*

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

quo").[12] In such circumstances, as here, the commission is earned when the agent "has completed the labor, service, or performance required of" it (Awuah, 460 Mass. at 492), and is not affected by subsequent events, including rescission of the underlying transaction upon which the commission was based.

Instructively, the heavily-negotiated, comprehensive and Court-approved Advisor Agreement does not contain *any* language that suggests, let alone requires, that the Advisors must return their "earned" commissions if the Estate later decides to reverse the transactions upon which the earned commissions were payable. It would have been a simple matter for the Estate, ably represented by counsel of its own choosing, to have included such a provision in the Advisor Agreement. Its apparent *post-facto* distress that it failed to do so cannot provide a basis to *sub silentio* insert such a nonexistent provision into the parties' Agreement and thereby deprive the Advisors of their contractual—and Court-approved—commissions. See Am. Bank v. Coating Specialties, Inc., 787 N.W.2d 202, 205 (Minn. Ct. App. 2010) ("[A] party that fails to include a term in a contract is bound by the agreement and cannot use extrinsic evidence to alter unambiguous contract language."); Gilbertson v. Williams Dingmann, 894 N.W.2d 148, 153 (Minn. 2017) (Defendant "had an opportunity to object to the terms of the [contract], but it did not; it is now bound by the terms of the agreement.").

In fact—and in stark contrast to the absence of any contractual provision requiring the return of the Advisors' commissions—the Advisor Agreement expressly provides that the

[12] This authority also disposes of the SSA's meritless argument in the Fee Motion that the Advisors somehow are not entitled to their earned contractual commissions because a rescinded contract is "a contract that never existed." (Fee Motion at p. 15.) Plainly, as the authority cited above confirms, that principle applies only to the parties to the rescinded contract, *not* to third parties such as advisors, agents, or brokers who are entitled to retain earned commissions notwithstanding that the transaction on which those commissions were based may have been abandoned or rescinded.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

Advisors are entitled to retain their commissions from the UMG Transaction, *i.e.*, the Agreement confirms that that the Advisors' "entitlement to" their contractual commissions "shall continue . . . for the duration of [the] Commissionable Contract, including without limitation, amendments, extensions, additions, substitutions, replacements and modifications that occur after the end of the Term" of the Advisor Agreement. (Advisor Agreement § 6(a).) The Advisor Agreement further provides that, "[n]otwithstanding the foregoing, to the extent that the duration of a Commissionable Contract is extended, amended, replaced, modified or substituted under materially different arrangement and structure after the expiration of the Term [of the Advisor Agreement], then [the Advisors] shall not be entitled to Commission on the Gross Monies earned under such new agreement." (Id.) Pursuant to these express, unambiguous terms of the Advisor Agreement, the Advisors are entitled to their commissions on a Commissionable Contract, such as the UMG Agreement, notwithstanding that the Estate might later choose to, *inter alia*, substitute or replace that Agreement. However, if a "replacement" agreement entered into after the term of the Advisor Agreement is "materially different [in] arrangement or structure," the Advisors cannot claim a commission in respect of the "replacement" contract.

That is in fact precisely what occurred here: the Estate chose to rescind the UMG Agreement and then entered into a replacement agreement with Sony in respect of the same subject matter of the UMG Agreement. Instructively, scrupulously complying with the limitations in the Advisor Agreement, the Advisors never sought to commission the replacement Sony Agreement.

It is virtually self-evident that, had the Estate elected to rescind and "replace" the UMG Transaction with the Sony Transaction years after entering into the UMG Agreement, the Advisors, though contractually precluded from commissioning the Sony Agreement, plainly

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

could not be compelled to disgorge the commissions they had earned in respect of the prior UMG Transaction. That the Estate happened to make that business decision sooner does not somehow compel a different result; whether the "replacement" occurred days, months or years later, the Advisors "earned" their commissions on the UMG Transaction when UMG made the payment required by the UMG Agreement and their "entitlement to" retain their commission on the UMG Transaction remains the same. (Id.)

Stated most succinctly, perhaps, the express, unambiguous, bargained-for terms of the Advisor Agreement—underscored by the fact that this Court previously and expressly found the Advisors' commission in respect of the UMG Transaction to be "reasonable"—compel the conclusion, as a matter of law, that the Advisors earned, and thus may retain, their commissions on the UMG Transaction, irrespective of the Estate's later decisions to rescind that agreement and replace it with the Sony Agreement. As there thus "are no genuine issues of material fact" with respect to the unambiguous language of the Advisor Agreement, the Court properly should enter summary judgment in favor of CAK and deny the SSA's Fee Motion. Denelsbeck, 666 N.W.2d at 347, 350 (affirming grant of summary judgment on the basis of unambiguous contract terms).

III. MINN. STAT. § 524.3-721 DOES NOT EMPOWER THE COURT TO ALTER OR IGNORE THE PARTIES' AGREED-UPON CONTRACTUAL OBLIGATIONS.

As demonstrated above, the unambiguous terms of the Advisor Agreement, accorded their plain and ordinary meaning and viewed in light of the undisputed facts, are entirely dispositive of the inquiry central to the SSA's Fee Motion, *i.e.*, whether the Advisors earned and may retain their contractual commissions paid to them in respect of the UMG Transaction. Notwithstanding this unassailable conclusion, as noted above, the SSA has argued (and likely will again) that, as Minn. Stat. § 524.3-721 contemplates judicial review of the "reasonableness"

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

of the compensation paid to an agent of the Estate, this Court may simply disregard what the Advisor Agreement actually provides with respect to the Advisors' compensation and determine based on extrinsic facts or the Court's own perceptions and equitable predilections whether or not that compensation was "excessive." Building on that faulty premise, the SSA has argued, albeit once again without citation to the actual terms of the Advisor Agreement, that because the Estate decided to forgo the "benefits" of the UMG Transaction, the Advisors' commissions *ipso facto* should be deemed excessive and subject to refund to the Estate. (See Fee Motion at p. 15 (avoiding the actual contractual language and arguing that "[t]he clear and unambiguous intent of the Advisor Agreement was some economic benefit to the Estate as a necessary precondition to the right to a commission."). The SSA's argument in this regard is not only reflective of an abject misreading of the Advisor Agreement, but it is directly contrary to settled Minnesota law, the prior Orders of this Court and the November 25 Decision of the Court of Appeals.

As an initial matter, even setting aside (at least for the moment) that the Estate made a voluntary business decision—without any determination having been made on whether a conflict actually existed between the rights claimed by UMG and WBR in the recordings at issue and notwithstanding the inclusion in the UMG Agreement of a provision that would have protected the Estate in the event of such an actual conflict—not only to rescind the UMG Transaction, but, inexplicably, to also "refund" to UMG the commissions that UMG had paid directly to the Advisors in respect of that transaction, even though the Estate had never received those funds,[13] the SSA's position that the Advisors' commissions are somehow contingent on the Estate's

[13] The SSA has in fact never offered *any* explanation for the Estate's bewildering and manifestly irrational decision in this regard, and it plainly would be inequitable to hold the Advisors responsible for that puzzling decision, providing an entirely separate and independent basis for the denial of the SSA's Fee Motion.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

retention of a "benefit" from the underlying transaction is both utterly illogical and, more importantly, unsupported by the actual language of the Advisor Agreement. Indeed, if taken to its logical end, the SSA's argument would compel the conclusion that the Estate may, at *any* time and for *any* reason, decide to terminate or rescind a transaction pursuant to which the Advisors had earned a contractually mandated commission, and in such circumstances, the Advisors would be required to disgorge their earned commissions because the Estate, as a result of its own decision, could then suggest that it did not "benefit" from that transaction. The express terms of the Advisor Agreement—which cabin this Court's inquiry and to which this Court must accord their "plain and ordinary meaning," Denelsbeck, 666 N.W.2d at 346-47—simply do not permit such a result, whereby one party could defeat the clear rights of its contractual counterparty through the simple expedient of later rescinding a previously concluded transaction. W. Nat'l Mut. Ins. Co. v. Minn. Workers' Comp. Insurers Ass'n, No. C5-98-1244, 1999 Minn. App. LEXIS 148, at *9 (Minn. Ct. App. Feb. 16, 1999) (Courts "should interpret the agreement to give meaning to all its provisions and will not construe its terms so as to lead to an absurd result.").

Moreover, while the Court of Appeals may have determined that Minn. Stat. § 524.3-721 provides an appropriate procedural mechanism through which the Estate may pursue its present Fee Motion, nothing in the Court of Appeals' November 25 Decision—for, for that matter, Minnesota law—authorizes this Court to disregard the express contractual terms that govern the parties' relationship and the payment to the Advisors of their contractual commissions for services performed pursuant to the Advisor Agreement. In fact, precisely to the contrary, as previously noted, the Court of Appeals went out of its way to repeatedly emphasize in its November 25 Decision (and, it is submitted, thereby frame the proper focus of this Court's present inquiry) that "the terms of the Advisor Agreement may ultimately dictate whether

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

Advisors are entitled to retain their commissions" and thus likewise "dictate the outcome of" the Estate's Fee Motion. (November 25 Decision at p. 16.)

The Court of Appeals' prescient observations are fully consistent with the decisional authority cited above that confirms that the Court cannot ignore or rewrite a contract to avoid what it might deem to be a "harsh" outcome or to achieve what it believes is a "fairer bargain" for one of the contracting parties. This overriding precept is echoed and buttressed by the policy underlying the settled law prohibiting legislation that has the effect of impairing or vitiating private contract rights and obligations. Indeed, both the United States and Minnesota Constitutions contain provisions that prohibit laws that impair the obligation of contracts. See U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); Minn. Const. art. I, § 11 ("No . . . law impairing the obligation of contracts shall be passed."). This cardinal prohibition, enshrined in Minnesota law for well over a century, is absolute. See State ex rel. Attorney Gen. v. Young, 29 Minn. 474, 546-47, 9 N.W. 737, 751 (1881) ("One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation.") (quoting Planters' Bank v. Sharp, 47 U.S. 301 (1848)); see also Gretsch v. Vantium Capital, Inc., 846 N.W.2d 424, 435 (Minn. 2014) (stating that a law "impairs the obligations of a contract when it renders those obligations invalid or releases or extinguishes them" and noting that "retroactive impairment" is prohibited). Without suggesting that those constitutional prohibitions are directly applicable to the present case, they certainly underscore the fundamental policy that neither judicial nor legislative directives can abrogate a party's contractual rights or obligations. It would thus appear axiomatic that this Court simply is not empowered under Minn. Stat. § 524.3-721 to either ignore or alter, *post-facto*, the obligations

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

that the Estate willingly assumed in the Advisor Agreement, nor does the statute vest the Court with discretion to reduce the amount of the Advisors' compensation in respect of the UMG Transaction in contravention of the contract language. See id.

Moreover, it is certainly instructive (if not dispositive) in the context of an inquiry under Minn. Stat. § 524.3-721 that the Advisors did *not* determine their own compensation in respect of the Advisor Agreement; nor did their compensation depend on some discretionary performance criteria within the Advisors' control (compare, *e.g.*, the number of hours an attorney decides to spend completing an assignment for which he is being paid at a contractual hourly rate). Rather, the Advisors' compensation was expressly established in the Advisor Agreement itself—an agreement that the Estate entered into with the approval of this Court. As the Advisors' contractual commissions thus had been bargained-for and agreed to by the Estate (acting through its FSA), and, perhaps most significantly, in the case of the UMG Transaction, reviewed and approved by this Court and then unquestionably earned and paid on the basis of a Court-approved transaction, the *post-facto* assessment of the "reasonableness" of those fees based on subjective judgments is simply of no moment, as the Advisors' entitlement to be paid and to retain their commissions has already been contractually and judicially established.[14]

Accordingly, and notwithstanding that Minn. Stat. § 524.3-721 may provide a procedural vehicle whereby the SSA may seek review of the Advisors' compensation, where, as here, the governing contractual language is both unambiguous and squarely addresses and resolves the

[14] As noted above, in respect of the Advisors' commission for the UMG Transaction, this Court, in the face of the Heirs' expressed concerns regarding a potential conflict between the UMG Agreement and the WBR Agreement, expressly rejected the objection of certain Heirs that the commission was unreasonable or excessive, and thereby entered a judicial determination of the issue. (9/30/2016 Order Granting in Part the Special Admin.'s Mot. to Approve Recommended Deals at pp. 1-2.)

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

question central to the Estate's Fee Motion, it is that language that must control. Most simply stated, the Court is bound to give effect to the parties' contractual intent as expressed in the four corners of their agreement even though the implementation of the parties' contractual language might lead to a harsh result or the Court believes that it could fashion a "fairer bargain." Pollock-Halvarson, 576 N.W.2d at 455 ("[C]ourts have no authority to invalidate unwise or improvident agreements or to rewrite them so as to achieve a fairer bargain for one party or another."); see also Hysitron, Inc., 2002 Minn. App. LEXIS 1327, at *13 ("Even though the result may appear harsh, the clear language of the contract controls."); Denelsbeck, 666 N.W.2d at 346-47 ("If a contract is unambiguous, then the language must be given its plain and ordinary meaning and will be enforced by the courts even if the results are harsh."). Nor is there anything in the procedural framework of Minn. Stat. § 524.3-721 that permits the Court to ignore that settled authority simply because the present contractual dispute happens to arise in the context of an Estate proceeding.

As the unambiguous language of the Advisor Agreement thus not only governs in the present context, but in fact compels only one conclusion, *i.e.*, that the Advisors may retain the commissions that they earned simultaneously with the Estate's receipt of the transactional payment generated by the UMG Transaction, the SSA's Fee Motion must be denied, as a matter of law.

CONCLUSION

For the foregoing reasons, CAK Entertainment, Inc. respectfully requests that the Court enter summary judgment in its favor on the SSA's Fee Motion, and, as a concomitant thereto, deny the Fee Motion, in its entirety, as a matter of law.

Filed in District Court
State of Minnesota
7/8/2020 4:54 PM

Dated: July 8, 2020

Respectfully Submitted,

CAK ENTERTAINMENT, INC.

/s/ Erin K. F. Lisle
BERENS & MILLER, P.A.
Barbara P. Berens, #209788
Erin K. Fogarty Lisle, #238168
3720 IDS Center - 80 South Eighth Street
Minneapolis, MN 55402

ROSENBERG, GIGER & PERALA P.C.
John J. Rosenberg, (*pro hac vice*)
Brett T. Perala, (*pro hac vice*)
1330 Avenue of the Americas, Suite 1800
New York, NY 10019

Attorneys for CAK Entertainment, Inc.