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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 SUPPORT OF ITS OPPOSITION TO THE MOTION OF THE SECOND SPECIAL ADMINISTRATOR OF THE ESTATE OF PRINCE ROGERS NELSON FOR SUMMARY JUDGMENT

CAK Entertainment, Inc. ("CAK") submits this Memorandum of Law in support of its Opposition to the Motion of the Second Special Administrator (the "SSA") of the Estate of Prince Rogers Nelson (the "Estate") for Summary Judgment on the SSA's application seeking 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").

PRELIMINARY STATEMENT

As discussed in detail in CAK's Motion for Summary Judgment seeking the denial of the SSA's Fee Motion, filed on July 8, 2020 ("CAK's Motion"), in its November 25, 2019 Opinion addressing the Advisors' appeals from an earlier ruling of this Court (the "November 25 Decision"), the Court of Appeals framed the proper focus of this Court's present inquiry. In that regard, the Court of Appeals repeatedly emphasized that the controlling language of the Advisor Agreement between the Advisors and the Estate (the "Advisor Agreement")—the sole foundational predicate of their relationship—may well "dictate the outcome" of the SSA's Fee

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Motion and compel the denial of that application, as a matter of law. (See November 25 Decision at at p. 13 (observing that this Court's September 30, 2016 Order "impliedly approve[d] the terms of the Advisor Agreement that allows Advisors to collect a ten-percent commission for their services"); id. at p.16 (noting that "the terms of the Advisor Agreement may dictate the outcome of the Estate's motion"); id. (observing that "the terms of the Advisor Agreement may ultimately dictate whether Advisors are entitled to retain their commissions").) Despite the Court of Appeals' focus on the critical significance of the Advisor Agreement to the resolution of the present issues—which the Court of Appeals appears to have offered to assist in guiding this Court's determination of the Fee Motion—remarkably, nowhere in his voluminous submissions in support of his present Motion for Summary Judgment does the SSA even mention the Court of Appeals' potentially dispositive observations in this regard.

Consistent with that glaring omission, the SSA also avoids in his Motion any substantive discussion of the relevant terms of the Advisor Agreement, and instead resorts, at various times, to paraphrasing, misquoting and ignoring the actual contractual language and, in some instances, manufacturing out of whole cloth supposed provisions that simply do not appear in the Agreement at all. And, in yet a further effort to divert this Court's attention from his inability to confront and "explain away" the actual language of the Advisor Agreement, the SSA repeatedly references the supposed, albeit unarticulated, "purpose" of the Agreement and "logical conclusions" that he suggests the Court should delve into to uncover some unexpressed meaning in the language the parties actually selected and incorporated in the Agreement—as though such metaphysical musings might somehow supplant actual contractual obligations.

The reason for the SSA's attempt to obfuscate and deflect the Court's attention from the actual language the parties chose to employ in the Advisor Agreement is readily apparent, *i.e.*,

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those unambiguous contractual provisions, accorded—as settled Minnesota law requires—their "plain and ordinary meaning" (Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346-47 (Minn. 2003)), lead inexorably to only one inescapable conclusion: that the Advisors earned, and may retain, the compensation paid to them pursuant to the Advisor Agreement in respect of the transaction the Estate entered into with Universal Music Group ("UMG"), and later elected to rescind (the "UMG Transaction").

While CAK appreciates the Court's concern, expressed in its March 11, 2019 Order, that, through the Estate's own decisions undertaken in the exercise of its business judgment,[1] the Estate relinquished the value of the UMG Transaction, and, as a concomitant thereto, gave up—although it was under no obligation, contractual or otherwise, to do so—the amount of the Advisors' earned commissions by "refunding" the same to UMG,[2] the Court's concerns cannot override or extinguish contractual obligations voluntarily assumed by the Estate in the Advisor Agreement. Nor may the Court ignore or alter the contractual language the parties chose to employ in that heavily-negotiated Agreement to conform to the Court's sense of equity or to

[1] In his Motion, the SSA argues that this Court's granting of the Estate's motion seeking the rescission of the UMG Transaction "forecloses any credible argument that rescission was simply a business decision of the Estate." (SSA's Mem. at p. 14.) But it would appear self-evident that the Court never would have entertained the possible rescission of the UMG Transaction *sua sponte*, but did so only in response to the Estate's request made in the exercise of its own business judgment.

[2] The SSA suggests in his Motion that the Estate was somehow "obligated" to "refund" to UMG the amount of the commissions UMG paid directly to the Advisors in addition to the amounts UMG paid to the Estate. (SSA's Mem. at p. 20 ("Had the Estate only been obligated to pay back to UMG exactly only what it received directly, it may be arguable that the transactions were a wash. . . .") Unsurprisingly, however, the SSA fails to offer any citation to the UMG Agreement, statutory or case law, or any other source to support his averment, as no such obligation existed. The SSA has never offered—and once again fails to do so in his Motion—any explanation for the Estate's bewildering and utterly illogical decision to "refund" to UMG payments that the Estate admittedly had never received in the first instance.

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remedy the Estate's apparent regret in failing to include provisions in the Advisor Agreement that, if they actually appeared in the Agreement, might have compelled a different result.

Stated perhaps most succinctly, the Court is bound by the plain language of the Advisor Agreement and nothing in Minnesota law permits the Court, whether through the procedural expedient of Minn. Stat. § 524.3-721 or otherwise, to "rewrite [the Advisor Agreement] 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). Rather, the Court 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.").

As such, and as further explicated below, the plain and unambiguous terms of the Advisor Agreement require the denial of the SSA's Fee Motion, as a matter of law.

RECORD PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE ESTATE

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 Declaration of Brett T. Perala in Support of CAK's Motion for Summary Judgment, dated, and filed with the Court on, 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'

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November 25 Decision is appended to the Perala Decl. at Exhibit B, and also is reported at In re Estate of Nelson, 936 N.W.2d 897 (Minn. Ct. App. 2019).)

FACTS PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE ESTATE

The material facts precluding the Court's entry of summary judgment in favor of the Estate, and warranting the entry of summary judgment in favor of CAK on the SSA's Fee Motion, are set forth in detail in CAK's Motion. (See CAK's Motion at pp. 4-16.) As those undisputed facts pertain to both the present Motion and CAK's Motion, rather than burden the Court with a duplicative recitation of the same in this Memorandum, CAK incorporates those facts by reference herein and respectfully refers the Court to CAK's Motion for a complete statement of the material facts underlying this matter.

While Minnesota Court Rule 115.03(d)(3) contemplates the recital by a party opposing a summary judgment motion of "any material facts claimed to be in dispute," CAK submits that, as the Fee Motion properly should be resolved solely on the basis of the terms of the Advisor Agreement, *i.e.*, "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), there are no disputed facts that are material to the resolution of the SSA's Fee Motion. CAK's averment in this regard should in no way be construed as acquiescence in the purported factual recitation proffered by the SSA in his present Motion, which it most assuredly is not. Indeed, the SSA significantly misrepresents many of the facts underlying this matter.

By way of illustrative example, the SSA falsely avers that "the Advisors contractually agreed to monetize the Estate's assets" (SSA's Mem. at p. 5)—a purported obligation found nowhere in the Advisor Agreement. The SSA also repeatedly asserts that it was the "Advisors and Bremer [Trust]" alone who negotiated and recommended the UMG Transaction (see id. at p.

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9), omitting any mention of the Estate's attorneys at the Stinson Leonard Street and Meister Seelig firms whom the Estate engaged specifically to perform those very functions. (See Declaration of Peter J. Gleekel, dated September 4, 2018, at Ex. N, p. 16.) In a further illustration of the SSA's misleading presentation of the underlying facts, the SSA also quotes from a self-serving communication from Warner Bros. Records to UMG asserting that the Estate's representatives "ill used" those companies by conveying rights the Estate allegedly did not possess, but the SSA presents that communication as though it had been directed to the Estate's Personal Representative Comerica instead (see SSA's Mem. at p. 10), a mischaracterization apparently intended to buttress the SSA's unconvincing argument that Comerica was fully justified in seeking rescission of the UMG Transaction.

In light of the foregoing and numerous other misstatements and mischaracterizations in the SSA's proffered factual recitation, in the event that the Court should decline to enter summary judgment in CAK's favor, CAK expressly reserves the right to contest the factual basis of the Fee Motion, including at the hearing on the SSA's Fee Motion scheduled for October 13-15, 2020.

ARGUMENT

I. THE TERMS OF THE ADVISOR AGREEMENT GOVERN THE COURT'S RESOLUTION OF THE FEE MOTION.

In his present Motion, the SSA—manifestly unable to articulate a coherent argument supporting the resolution of the Fee Motion in favor of the Estate—purports to adopt two contradictory, indeed, diametrically opposed, positions: first, that—fully consistent with CAK's arguments before this Court since the inception of this proceeding—the terms of the Advisor Agreement control the Court's determination of the Fee Motion (see SSA's Mem. at p. 12 ("there is a unanimity of Agreement [*sic*] among the parties that the Advisor Agreement is

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outcome determinative of the issue");[3] and, second, that the Court nonetheless somehow "has the authority to set a reasonable fee" that the Advisors should be paid in respect of the UMG Transaction notwithstanding (and untethered to) the express provisions governing their compensation set forth in the Advisor Agreement (id. at p. 18). The SSA's attempt to "play both sides of the fence" is not only instructive of his perfectly understandable lack of confidence in his meritless arguments that the terms of the Advisor Agreement support granting his Fee Motion—as discussed in detail below, they plainly do not—but it also runs directly contrary to the express determinations of the Court of Appeals in its November 25 Decision and settled Minnesota law.

In fact, as the Court of Appeals emphasized in its November 25 Decision, and as the SSA now grudgingly (albeit ambivalently) concedes, while Minn. Stat. § 524.3-721 may provide an appropriate procedural vehicle for this Court to address the SSA's Fee Motion, it does *not*—and nothing in Minnesota law is to the contrary—vest the Court with some broad mandate to ignore the parties' contract and substitute its own subjective view of what might constitute a "reasonable fee."

In that regard, in addressing the applicability of Minn. Stat. § 524.3-721 to the present proceeding, the Court of Appeals observed in its November 25 Decision that "[n]othing in the

[3] As noted in CAK's Motion, the SSA's acknowledgement that the terms of the Advisor Agreement should govern the Court's determination of the Fee Motion, which he first communicated to the Court and the parties during the June 19, 2020 telephonic conference, constitutes a rather surprising turnabout from his previously-asserted position. CAK at first believed that the SSA's abrupt reversal reflected the SSA's belated recognition that, in light of the Court of Appeals' emphasis on the central importance of the Advisor Agreement to the present inquiry, he could no longer avoid confronting the actual language of the Agreement. However, as further discussed below, it is now apparent that the SSA actually predicates his supposed newfound appreciation for the terms of the Advisor Agreement on an abject and purposeful distortion and mischaracterization of the express language of that Agreement.

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statute indicates that when the estate is complex, a challenge to the reasonableness of compensation received by a specialized agent must be brought in a plenary action under the rules of civil procedure as suggested by [the] Advisors." (November 25 Decision at p. 12.) Rather, as the Court of Appeals noted, "Minn. Stat. § 524.3-721 provides for a 'quick and efficient' *procedure* for challenging the reasonableness of compensation paid to a specialized agent employed by the estate." (Id., emphasis added.) As noted above, the Court of Appeals then went on to repeatedly emphasize that, while this Court was empowered to address the Fee Motion in a summary proceeding under Minn. Stat. § 524.3-721, as would be the case in a plenary action, the terms of the Advisor Agreement may very well "dictate the outcome" of the proceeding. (See id. at pp. 13, 16.)

The Court of Appeals thus limited its determination regarding Minn. Stat. § 524.3-721 to the statute's use as procedural mechanism to allow an estate to seek judicial review of a consultant's fees through the streamlined process contemplated by the statute. Nowhere in its November 25 Decision did the Court of Appeals suggest, much less hold, as the SSA baselessly avers in his Motion, that the "reasonableness of [the compensation paid to the Advisors] lies in the sound discretion of this Court" or that the Court is somehow empowered under the statute to ignore the actual language of the Advisor Agreement and "set a reasonable fee" to be paid to the Advisors for services they provided pursuant to that Agreement. (SSA's Mem. at p. 18.)

As such, the SSA's suggestion in the final section of his Motion that this Court is empowered to engage in some sort of vaguely defined *quantum meruit* analysis to determine, *post-facto*, the amount of compensation that the Court might now consider "reasonable" to pay to the Advisors is not just contrary to the SSA's own recently embraced position that the language of the Advisor Agreement is "outcome determinative" of the present proceeding, but it also runs

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afoul of both the Court of Appeals' November 25 Decision, and, as further discussed below, well-established Minnesota law. Indeed, not a single one of the factors suggested by the SSA as a possible "framework to guide the Court" (SSA's Mem. at p.18), which are specifically applicable to a court's determination of the appropriate compensation of personal representatives and attorneys for an estate—*e.g.*, "the time and labor required" and "the complexity and novelty of the problems involved"—appears anywhere in the Advisor Agreement. Instead, as discussed in detail below at Section II, the Advisor Agreement contains comprehensive provisions governing the Advisors' compensation, which were heavily-negotiated and bargained for by the parties, each represented by counsel of its own choosing, and then, in respect of the UMG Transaction, expressly approved by the Court, which rejected the objections of certain of the decedent's heirs (the "Heirs") that the Advisors' compensation was "unreasonable" and "excessive." (See 9/30/2016 Order Granting in Part the Special Admin.'s Mot. to Approve Recommended Deals at pp. 1-2.)

It is readily apparent that this proceeding does not bear any resemblance to a proceeding to review the reasonableness of a personal representative's or attorney's fees, *i.e.*, agents who are, as a general matter, compensated on an hourly basis and thus plainly may be held to a "reasonableness" standard in respect of, *inter alia*, the number of billable hours they devote to particular tasks. Precisely to the contrary, the Advisor Agreement itself provides the only "framework" for the Court to determine the Advisors' compensation, and those express contractual provisions are thus not subject to differing views or *post-facto* reconsideration of their subjective "reasonableness."

As the Advisors' compensation in respect of the UMG Transaction thus was both expressly provided for in the Advisor Agreement and approved by this Court, the Court,

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respectfully, simply does not possess the authority, whether under Minn. Stat. § 524.3-721 or otherwise, to later conduct some undefined *post-facto* inquiry to "set a reasonable fee." It is indeed axiomatic under governing Minnesota law that this Court is neither authorized nor empowered to substitute its own views for the express contractual terms the parties chose to incorporate in the comprehensive Advisor Agreement. See See Pollock-Halvarson, 576 N.W.2d at 455 ("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.") (internal citations omitted); Telex Corp. v. Data Products Corp., 271 Minn. 288, 294 (Minn. 1965) ("[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.").

The simple reason why the SSA adopts in his Motion two competing and utterly contradictory positions—*i.e.*, that the Court is bound by the terms of the Advisor Agreement but, at the same time, the Court somehow also has discretion to ignore those contractual terms—is manifest: the SSA is afraid to confront the inescapable conclusion that, as the Court of Appeals repeatedly emphasized in its November 25 Decision might well be the case, the terms of the Advisor Agreement "dictate the outcome of the Estate's motion" and compel its denial. (November 25 Decision at p. 16.) As explicated in detail below, the unambiguous terms of the Advisor Agreement, accorded their plain and ordinary meaning, require the denial the Fee Motion, as a matter of law.

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

As it is thus inescapable—and now undisputed by the parties to this proceeding—that the terms of the Advisor Agreement must guide, and ultimately, govern the Court's resolution of the Fee Motion, the Court's analysis properly must both begin and end with consideration of those express contractual provisions. It is well settled that "[t]he 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) (emphasis added). "[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). Moreover, as the SSA notes in his present Motion (albeit in ostensible support of arguments that lack any basis in the actual terms of the Advisor Agreement), "a contract must be construed as a whole and its terms should be read together and harmonized where possible." Johnson Bros. Corp. v. Rapidan Redevelopment Ltd. P'ship, 423 N.W.2d 725, 729 (Minn. Ct. App. 1988). "Thus, absent a clear conflict between provisions, a court should not strive to find one." Id.

Here, the terms of the Advisor Agreement governing the Advisors' compensation are clear and unambiguous, and their "plain and ordinary meaning" and, thus, the parties' contractual intent (Denelsbeck, 666 N.W.2d at 346-47), are readily capable of discernment. When the

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relevant contractual provisions are read together and "construed as a whole" (Johnson Bros. Corp., 423 N.W.2d at 729), they compel but a single conclusion, *i.e.*, that, in accordance with those express, unambiguous terms, the Advisors earned, and may retain their contractual commissions paid to them in respect of the UMG Transaction.

Despite the SSA's recent change of heart and belated acknowledgement that the terms of the Advisor Agreement are "outcome determinative" of the Fee Motion, there is no conflict between (or ambiguity in) the provisions of the Advisor Agreement governing the Advisors' compensation. Indeed, CAK and the SSA both rely in support of their competing positions on the same fundamental provisions of the Advisor Agreement. Whatever conflict may exist thus lies not with the contractual language itself but with the SSA's mischaracterization of those provisions in his submissions to this Court.

In that regard, while the SSA alludes superficially in his present Motion to certain of the provisions of the Advisor Agreement relating to the Advisors' compensation, he fails to address in his Motion *all* of the relevant terms of the Agreement. Compounding that (no doubt purposeful) omission, rather than quote and substantively address the actual language of the Advisor Agreement that the SSA acknowledges is pertinent to the Court's determination of the Fee Motion, the SSA instead (again no doubt purposefully) misquotes those provisions, and in some instances, invents terms that simply do not appear anywhere in the Advisor Agreement. Indeed, the central foundational predicate of the SSA's present Motion, *i.e.*, that the Advisors' commissions were only payable to them in respect of "contract[s] that resulted in monetary benefit" that was retained by the Estate (SSA's Mem. at p. 13), is, as discussed below, based on an abject distortion and misquotation of the plain terms of the Advisor Agreement.

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To demonstrate the stark contrast between the actual terms of the Advisor Agreement and the SSA's misleading presentation of those terms to this Court, CAK will address below both what the Advisor Agreement actually provides with respect to the payment to the Advisors of their contractual commissions and the mischaracterization by the SSA of that controlling contractual language.

A. <u>The Advisor Agreement Provides that the Advisors' Compensation is to be Calculated as a Fixed Ten Percent Commission on "Payments" "Received By" the Estate.</u>

As its title suggests, paragraph 6 of the Advisor Agreement, entitled "Compensation," governs the compensation payable to the Advisors for their services. Specifically, paragraph 6(a) of the Advisor Agreement provides that the Advisors are entitled to a fixed ten percent commission on all Gross Monies received by the Estate in connection with Commissionable Contracts, as those terms are defined in the Advisor Agreement. Paragraph 6(c) of the Advisor Agreement expressly defines "Gross Monies" as follows:

> "Gross Monies" as used herein shall 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, including, without limitation, salaries, advances, fees, royalties, bonuses, gifts, shares of receipts or profits, stock and stock options (provided Advisor pays its pro-rata share of costs of such stock), ***received by*** or credited to the Estate or applied for the Estate's benefit directly or indirectly (i.e., to any corporation, partnership, or other entity in which the Estate has an interest), regardless of by whom procured, ***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.

(Emphasis added.)

In his present Motion, the SSA "cherry picks" from this provision the words "value given to the Estate" and, focusing monolithically on that unremarkable phrase—which expands rather

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than cabins the range of transactions on which the Advisors will be entitled to receive their commissions—taken entirely out of context and in isolation, argues that amounts received by the Estate may not be deemed "Gross Monies" (and thus subject to commission by the Advisors) unless the Estate retains for some undefined and indefinite period of time a monetary benefit from the underlying transaction, *i.e.*, "a thing of value." (SSA's Mem. at p. 13.)[4] But that is simply not what the Agreement provides. Rather, a simple reading of the words that come before and after the phrase that the SSA misleadingly plucks from the contractual definition of "Gross Monies" confirms that the phrase "thing of value given to the Estate" expands the definition of "Gross Monies" to include non-monetary consideration such as "gifts, shares or receipts or profits, stocks and stock options" given to the Estate "in lieu of compensation." The spurious nature of the SSA's sham interpretation of the "Gross Monies" provision is underscored by the fact that he ignores that Gross Monies specifically includes, *inter alia*, "payments" to the Estate; and, as if that were not enough, he then ignores the provision's use of the conjunction "and/or" (before the reference to "any other thing of value") to indicate the inclusive (rather than exclusive) nature of the types of consideration that are considered "Gross Monies." Moreover, and as the SSA also ignores, the contractual definition twice underscores that, in order to qualify

[4] The SSA similarly mischaracterizes the term "Commissionable Contract" as "requir[ing] the existence of a contract that resulted in monetary benefit realized by the Estate." (SSA's Mem. at p. 13.) But the definition of the term Commissionable Contract contains no such requirement. Rather, 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).)

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as "Gross Monies"—which are commissionable by the Advisors—the subject payment or other compensation need only be "received" by the Estate—*not* "received and retained," as the SSA would have the Court believe. Indeed, there is not a single provision of the Advisor Agreement that requires the ultimate retention by the Estate of "Gross Monies" it receives as a condition of the Advisors' entitlement to a commission. As further discussed below, it is undisputed that the Estate "received" a "payment" from UMG under and in respect of the UMG Agreement, and thus, in accordance with the unambiguous language of paragraph 6(a) of the Advisor Agreement, the Advisors' commissions were properly calculated and paid to the Advisors on the basis of those "Gross Monies."

B. <u>The Advisor Agreement Provides that the Advisors Earned Their Commissions "Simultaneously With" the Receipt by the Estate of the Underlying Transactional Payments.</u>

Pursuant to the plain language of paragraph 6(d)(ii) of the Advisor Agreement, the Advisors' commissions "*shall be deemed to have [been] earned . . . simultaneously with the 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" when 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 undisputed receipt by the Estate of UMG's payment under the UMG Agreement.

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In the face of this unambiguous contractual language, the SSA deflects, arguing that, based on the SSA's own distorted characterization of paragraphs 6(a) and 6(c) of the Advisor Agreement, the term "earned" cannot possibly mean what CAK says it means. (See SSA's Mem. at pp. 16-17.) But, not only, as discussed above, is the SSA's proffered construction of paragraphs 6(a) and 6(c) predicated on an abject misrepresentation of the actual contract language, but the Court need not rely on any definition of "earn" advanced by CAK (or, for that matter, the SSA) to ascertain and confirm the parties' intent, based on the contractual language they employed. Rather, in accordance with settled Minnesota law, the Court must simply look to the "plain and ordinary meaning" of that word. Denelsbeck, 666 N.W.2d at 346-47.

As discussed in detail in CAK's Motion, "[i]n 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). Black's Law Dictionary defines "earn" as follows: "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).[5] As courts that have turned to that definition uniformly have found, to "earn" compensation 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

[5] 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.").

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necessarily receives, the fruits of that labor. See, *e.g.*, 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); In re Idearc Inc., 442 B.R. 513, 520 (Bankr. N.D. Tex. 2010).

As noted in CAK's Motion, the foregoing authority is fully consistent with analogous Minnesota judicial decisions governing the commissions earned by real estate brokers, which are not dependent either on the ultimate consummation of the transaction on which the commission was based or the receipt or retention by the broker's counterparty of any monetary value as a result of the transaction. See, *e.g.*, Nelson v. Rosenblum Co., 182 N.W.2d 666, 667 (Minn. 1970); ERA Town & Country Realty, Inc. v. TEVAC, Inc., 376 N.W.2d 526, 528 (Minn. Ct. App. 1985). Indeed, brokers are entitled to retain their earned commissions even where, as here, the underlying transaction on which the commission was predicated is later rescinded. See Century 21-Birdsell Realty, Inc. v. Hiebel, 379 N.W.2d 201, 205 (Minn. Ct. App. 1985) (The "subsequent rescission of the purchase agreement is not a defense to the agent's demand for the commission.").

This authority also disposes of the SSA's meritless argument in the Fee Motion—an argument the SSA repeats in his present 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; SSA's Motion at p. 13.) 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 was based may have been

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abandoned or rescinded.[6] 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.

C. The Advisor Agreement Provides that the Advisors' Commissions Are Not Revocable.

In further confirmation of the conclusion that the Advisors "earned" and may retain their contractual commissions in respect of the UMG Agreement, paragraph 6(a) of the Advisor Agreement additionally provides that "[t]he interest and compensation set forth in this Agreement which shall be paid to [the] Advisor[s] shall be a continuing interest and *shall not be revocable by the Administrator* unless modified" pursuant to written amendment entered into by the parties, as contemplated by paragraph 3 of the Advisor Agreement. There is nothing ambiguous or unclear about this contractual provision, which unequivocally confirms that the Estate cannot unilaterally revoke the Advisors' commissions. It would have been a simple matter for the Estate and the Advisors to have included in the Advisor Agreement (whether initially or in an amendment made in the context of the hearing seeking the approval of the UMG Transaction) a provision that would relieve the Estate of its contractual obligation to pay the Advisors their earned commissions in respect of a rescinded transaction—an eminently foreseeable eventuality, particularly in light of the concerns repeatedly raised by the Heirs prior

[6] The SSA's own citation in his present Motion to Graves v. Wayman, 859 N.W.2d 791, 799 (Minn. 2015) confirms this is so. In that decision, the Minnesota Supreme Court confirmed that, when a contract is rescinded, only "[t]he *parties* are returned to their pre-contract positions to the extent possible." The Advisors were not parties to the rescinded UMG Agreement, and the cited decisional authority allowing brokers to retain commissions on agreements that were later rescinded disposes of the SSA's strained argument to the contrary.

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to the Estate's entry into the UMG Agreement regarding the possible overlap between rights possessed by WBR and the rights the Estate was conveying to UMG. (See Declaration of Peter J. Gleekel, dated September 4, 2018, at Ex. N, p. 16.) Instructively—indeed, dispositively—the Estate and the Advisors did not include any such provision in the Advisor Agreement, or amend the terms of the Agreement to address that issue. Rather, the parties confirmed through the plain and unambiguous language of the Advisor Agreement their manifest intent that the Advisors' commissions, including those in respect of the UMG Transaction, are not "revocable" by the Estate, and that is dispositive of the issue. Knudsen, 672 N.W.2d at 223 ("[C]lear, plain, and unambiguous terms are conclusive of [the parties' contractual] intent.").

D. The Advisor Agreement Provides that Advisors Are Entitled to Retain Their Earned Contractual Commissions Notwithstanding a Later Substitution or Replacement of the Transaction on Which Those Commissions Were Based.

In yet further confirmation of the parties' clear contractual intent that the Advisors may retain their earned commissions paid to them in respect of the ultimately rescinded UMG Transaction, the Advisor Agreement provides precisely that, *i.e.*, the Agreement confirms that the Advisors' "entitlement to" their contractual commissions (which, as noted above, are not revocable by the Estate) "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

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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.

In arguing in his present Motion that the foregoing contractual provision does not apply where a contract has been rescinded because the word "rescinded" is not expressly included in that provision, the SSA once again misquotes the actual language of the Advisor Agreement. In fact, the list in paragraph 6(a) of various scenarios under which the Advisors' "entitlement to" their commissions will not be disturbed (*e.g.*, "amendments, extensions, additions, substitutions, replacements and modifications" of or to the underlying transaction agreement) is, by the express terms of that provision, not exhaustive, as that list is preceded by the words "including without limitation." (See Advisor Agreement § 6(a).) As such, contrary to the SSA's argument in his Motion, the doctrine of *expressio unius est exlcusio alterius* plainly has no application to that provision. See, *e.g.*, Peterson v. City of Minneapolis, 878 N.W.2d 521, 524-25 (Minn. Ct. App. 2016) (declining to apply the canon of *expressio unius est exclusio alterius* "because of the introductory word, 'including,' which by definition is not exclusive. . . . Caselaw advises that the word 'includes' or 'including' should be read as inclusive, not exclusive. It is a term of enlargement, not restriction."); St. Paul Mercury Ins. Co. v. Lexington Ins. Co., 78 F.3d 202, 206-07 (5th Cir. 1996) ("[W]e are not convinced that the rule of *expressio unius est exclusio alterius* applies in the instant case, as the challenged list of provisions in [the] contract is

prefaced by the word 'including,' which is generally given an *expansive* reading, even without the additional if not redundant language of 'without limitation.'") (emphasis in original).

As noted in CAK's Motion, the scenario expressly contemplated by the foregoing language of paragraph 6(a) is in fact precisely what occurred here: the Estate chose to abandon the UMG Agreement and then entered into a replacement agreement with Sony in respect of the same subject matter of the UMG Agreement. Instructively, the Advisors never sought to commission the replacement Sony Agreement, scrupulously complying with the limitations in the Advisor Agreement.

It is 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, 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.)[7]

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The relevant provisions of the Advisor Agreement, when "read together and harmonized" (Johnson Bros. Corp., 423 N.W.2d at 729), plainly do not reveal some unarticulated purpose or

[7] This conclusion also disposes of the SSA's argument that a "rescission is not of like kind to an amendment, extension, addition, replacement, or modification" because the Estate realizes some monetary benefit in the latter circumstances. (SSA's Mem. at p. 15.) Here, the Estate indisputably did realize a monetary benefit from the replacement Sony transaction.

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intent to deprive the Advisors of their earned contractual commissions on a contract the Estate later elects to rescind. Rather, the only conclusions that can be drawn from the plain language of the Advisor Agreement are that the Advisors "earned" their commissions in respect of the UMG Transaction "simultaneously with" the receipt by the Estate of the "payment" from UMG under the UMG Agreement (Advisor Agreement §§ 6(c), 6(d)(ii)); those commissions are "not revocable" (id. § 6(a)); and the Estate's decision to rescind and "substitute" or "replace" the UMG Agreement with the Sony Agreement cannot deprive the Advisors of their "entitlement to" their "earned" contractual commissions (id.).

It is apparent from a reading of the Advisor Agreement that the heavily-negotiated, comprehensive and Court-approved Agreement does not contain *any* language that even suggests, let alone requires, that the Advisors must return their earned commissions if the Estate decides to reverse the transaction upon which such commissions were paid. To demonstrate and confirm this conclusion, CAK challenges the SSA in his Reply to point to *any* provision of the Advisor Agreement that provides that commissions earned by and paid to the Advisors must be returned or refunded to the Estate under any circumstance, let alone when the transaction in respect of which those commissions were earned and paid was later rescinded. CAK is confident in proffering this challenge to the SSA, as it is indisputable that no such provision exists in the Advisor Agreement.

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, which could have been accomplished with a single, concise sentence. The Estate's apparent regret that it failed to do so cannot provide a basis for it, *post-facto*, to now insert such a nonexistent provision into the parties' Agreement and thereby deprive the Advisors of their contractual—and Court-

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approved—commission. 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 the face of the clear and unambiguous contractual language permitting the Advisors to retain their earned contractual commissions, and the glaring absence of any provision requiring the return of commissions earned on a subsequently rescinded transaction, the SSA resorts in his Motion to supposed divinations of the unarticulated "object" and "purpose" of the Advisor Agreement as a whole—as though the SSA's unsupported *ipse dixit* about what the Advisor Agreement *should* provide somehow supplants the actual contract language. Even then, however, the SSA continues in his by now familiar pattern of misquoting and mischaracterizing the express terms of the Advisor Agreement.

By way of illustrative example, the SSA avers that "the Advisor Agreement recited and acknowledged the object" and purpose of that Agreement "was to 'preserve and protect the assets of the Estate.'" (SSA's Mem. at p. 12.) But that is simply not what the Agreement actually provides. Rather, the Advisor Agreement, in setting the context of the Agreement, recites that it was the existing duty (*i.e.*, not one created by the Advisor Agreement) of the Estate's then Special Administrator, Bremer Trust, to preserve the Estate's assets. (See Advisor Agreement, thirteenth WHEREAS clause: "WHEREAS, in furtherance of *its* duty to preserve and protect the assets of the Estate, Administrator now wishes to enter into this Agreement with Advisor on behalf of the Estate." (emphasis added)). The Advisors never assumed any such

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duty, and their "object" in entering into the Advisor Agreement plainly was not the same as that of Bremer, their arms-length contractual counterparty. As such, the SSA's groundless ruminations on the unarticulated "purpose" of the Advisor Agreement, based on nonexistent contractual provisions, are of no moment in the present context.

Those distractions aside, it is, as discussed above, well settled under Minnesota law that the "clear, plain, and unambiguous terms [of a contract] are conclusive of [the parties'] intent," Knudsen, 672 N.W.2d at 223, and "the reviewing court [thus] 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). As such, the unambiguous, bargained-for terms of the Advisor Agreement—underscored by this Court's approval of the Advisors' compensation in respect of the UMG Transaction—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 decision to rescind that agreement and replace it with the Sony Agreement. And conversely, the absence of *any* provision in the Advisor Agreement requiring the Advisors to return their earned commissions to the Estate under any circumstances, much less in the event of the rescission of the underlying transaction, forecloses, as a matter of law, a determination that the Advisors must refund their commissions to the Estate.

As there thus "are no genuine issues of material fact" with respect to the unambiguous language of the Advisor Agreement, the Court properly should deny the SSA's present Motion and, as a concomitant thereto, enter summary judgment in favor of CAK denying the SSA's Fee

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Motion. Denelsbeck, 666 N.W.2d at 347, 350 (affirming grant of summary judgment on the basis of unambiguous contract terms).[8]

CONCLUSION

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

Dated: July 17, 2020

Respectfully Submitted,

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[8] While it is CAK's considered view, as articulated in this Opposition and in CAK's Motion, fully supported by the actual language of the Advisor Agreement, that summary judgment should be entered in its favor on the SSA's Fee Motion, if, for some reason, the Court disagrees, there still is no basis to enter summary judgment in the SSA's favor. It is well settled that where, as here, the parties to a contract have cross-moved for summary judgment based on the contract's language, the Court's rejection of one party's position does not compel the conclusion that the other party's proffered construction of the parties' agreement must be adopted by the Court. See Commerce Bank v. W. Bend Mut. Ins. Co., 870 N.W.2d 770, 775 (Minn. 2015). Here, as discussed above, there is a compelling basis, predicated on the actual language of the Advisor Agreement, to grant CAK's Motion. In stark contrast, there is not a single contractual provision that supports the SSA's position or that would justify the entry of summary judgment in his favor. As such, CAK respectfully submits that this Court must either enter summary judgment in its favor or, if the Court perceives some ambiguity in the Advisor Agreement (and CAK submits there is none), deny both parties' motions and permit these issues to be resolved—albeit solely on the basis of the Advisor Agreement and the parties' contractual intent—at a contested hearing.