

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION

In the Matter of:

Case Type: Special Administration
Court File No.: 10-PR-16-46
Judge: Kevin W. Eide

Estate of Prince Rogers Nelson,
Decedent.

**UMG RECORDINGS, INC.'S REPLY IN
SUPPORT OF ITS JOINDER IN
COMERICA BANK & TRUST, N.A.'S
MOTION TO APPROVE RESCISSION
OF EXCLUSIVE DISTRIBUTION AND
LICENSE AGREEMENT**

I. INTRODUCTION

UMG Recordings, Inc. (“UMG”) respectfully submits this reply in support of its Joinder in Comerica Bank & Trust, N.A.’s Motion to Approve Rescission of the Exclusive Distribution and License Agreement dated as of January 31, 2017 (the “Motion”). Notwithstanding the efforts by Sharon L. Nelson, Norrine P. Nelson, and John R. Nelson (“Certain Nelson Heirs”) and by L. Londell McMillan (together, the “Opposing Parties”) to oppose rescission, and to protect the commissions earned by Mr. McMillan and Charles Koppelman, the relevant facts presented by Comerica Bank & Trust, N.A. (the “Personal Representative”) remain undisputed: UMG was promised and contracted for [REDACTED] in the January 31, 2017 Exclusive Distribution and License Agreement (the “UMG Agreement”), but before the ink was dry on the UMG Agreement and immediately after a press release announcing the deal was issued, UMG’s competitor Warner Bros. Records, Inc. (“WBR”) asserted that it in fact holds certain of the key rights that had been sold to UMG. UMG repeatedly sought assurances from the only party with authority to speak for the Estate—the Personal Representative—that UMG did in fact receive the key rights for which it bargained, but after careful consideration of WBR’s claims and the UMG Agreement, the Personal Representative determined that it could not

provide those assurances. On the basis of this fundamental failure of consideration, the Personal Representative and UMG have agreed to rescind the UMG Agreement pursuant to the Rescission and Termination Agreement dated as of May 12, 2017 (“Rescission Agreement”).

In their responses, the Opposing Parties suggest that the conflict between WBR’s position and those of Mr. McMillan (supported by the Certain Nelson Heirs), UMG, and the Personal Representative should be resolved through discovery and litigation in this Court. However, this argument misses the mark entirely. First, as a matter of procedure, [REDACTED]

[REDACTED]. See May 17, 2017 Declaration of J. Cassioppi (“Cassioppi Decl.”), Ex. C (UMG Agreement) ¶ 18.3. Second, such a solution would harm the Estate and UMG. It will take years of litigation (during which period UMG and the Estate will not be able [REDACTED]) to resolve WBR’s assertions.¹ Moreover, the value of the rights to a deceased artist’s work diminish over time. UMG did not pay [REDACTED] to acquire disputed title to questionable rights. [REDACTED]

[REDACTED] A cloud has been cast over the UMG Agreement that cannot be lifted by the Personal Representative or any subjective, self-serving contractual interpretations offered by the Opposing Parties.

Remarkably, just yesterday, *Billboard* published an article that reports on a sealed filing containing information that establishes that Prince Rogers Nelson’s six heirs knew, in September 2016, about the conflict between WBR’s existing rights and the rights that Bremer Trust,

¹ [REDACTED]

National Association (“Bremer Trust” or “Special Administrator”) proposed to sell to UMG.² The article quotes a non-public filing in which the six heirs believed Bremer Trust was rushing to finalize the deal, even though there was “no reason to do the recommended deals now” and objected to the [REDACTED] commission that Mr. McMillan and Mr. Koppelman would be receiving. *Id.* As reported by *Billboard*, in that filing, the heirs called the proposed UMG deal the most “egregious” of the seven deals proposed by Bremer Trust, and stated that “[t]he UMG agreement concerns masters that are subject to an existing agreement with Warner Bros. that do not revert to Prince until 2020, not 2018 as stated in the UMG Vault Agreement.” *Id.* The article also reported that the heirs’ September filing stated that by seeking to enter into the UMG Agreement, “[t]he estate will be torturously [sic] interfering with the rights to [WBR’s] existing agreement.” *Id.* What is most disconcerting about these new revelations in the *Billboard* article is that the heirs’ concerns about the conflict between the proposed UMG agreement and WBR’s rights were *never* disclosed to UMG by Bremer Trust, Mr. McMillan, or Mr. Koppelman. There can be no clearer indication that UMG was induced to enter into the UMG Agreement under false pretenses.

It is striking therefore that the Opposing Parties (who are aligned, as the Certain Nelson Heirs are Mr. McMillan’s clients) still attempt to offer what amounts to a self-serving, alternate narrative designed to protect the commission that Mr. McMillan received. UMG takes no position on whether the fees and commissions paid in connection with the UMG Agreement should be returned to the Estate, but resolution of that issue is separate and apart from the Motion before the Court, which seeks to right the wrong that has been done to UMG and to protect the Estate from lengthy, expensive litigation. As UMG has repeatedly advised the Personal

² Hannah Karp, “Prince Heirs’ Battle Over Vault Begins As Universal Seeks \$31 Million Refund,” *Billboard* (June 8, 2017), available at <http://www.billboard.com/articles/business/7824831/prince-heirs-battle-begins-vault-universal-31-million-refund>

Representative, it did not bargain for an agreement that contains an unresolved and undisclosed conflict at its center. The Court should therefore approve the Personal Representative's Motion and allow the Estate and UMG to move forward unburdened by the time-consuming and costly litigation that UMG will bring against the Estate in the absence of rescission.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. UMG Obtains Certain Key Rights from the Estate, in Reliance on the Special Administrator and Mr. McMillan's Representations.

On January 31, 2017, UMG entered into the UMG Agreement with the Estate and NPG Records, Inc., in which it obtained [REDACTED]

Specifically, as relates to the instant Motion, [REDACTED]

[REDACTED] Cassioppi Decl., Ex. C ¶ 2.1.1. UMG understandably expected to receive exactly these rights set forth in the clear text of the UMG Agreement, and relied on the unequivocal representations made by the Special Administrator and its agents, including Mr. McMillan, that it was in fact obtaining such rights and that such rights did not conflict with the rights granted to third parties under the prior rights agreements entered into by Prince and the Estate.

Specifically, UMG relied on the October 31, 2016 email statement made by Mr. McMillan to UMG that [REDACTED]

[REDACTED]

[REDACTED] *Id.* Ex. B. Indeed, UMG had no choice but to rely on the representations of the Special Administrator and its agents in relation to WBR's rights because the Special Administrator and its agents had informed UMG that they could not share the terms of the WBR agreement due to a strict confidentiality clause. *See id.* Ex. O. Because the Special Administrator said that it could not share the terms of the WBR agreement, UMG insisted that [REDACTED]

[REDACTED]

so that it could avoid the exact type of competing claim that WBR has asserted here. *See id.* Ex. C ¶ 15.1 & Ex. O. The representations and warranties contained in the executed UMG Agreement include, among others, the Estate's representations to UMG that:

- [REDACTED] (*Id.* Ex. C, ¶ 15.1(iii))
- [REDACTED] (*Id.* Ex. C, ¶ 15.1(vi))
- [REDACTED] (*Id.* Ex. C, ¶ 15.1(vi))

Only after the Estate's representatives agreed [REDACTED] [REDACTED] would UMG agree to move forward with the deal. *See id.* Ex. O.

However, as described above, the new revelations contained in the June 8, 2017 *Billboard* article confirm that over a month before Mr. McMillan assured UMG that WBR's license as it relates to [REDACTED], and at the same time Mr. McMillan was providing written representations to UMG as to the availability of the

rights UMG was seeking to obtain, the Estate's representatives knew that they were seeking to do a deal with UMG that included at its core rights that they knew were in conflict and would be disputed. *See supra*, n.2. The Special Administrator and its agents never informed UMG of this highly material fact.³ If UMG was being sold key rights that the Estate knew would be contested, there is no question that it had an obligation to inform UMG. The Special Administrator's and its agents' active concealment of this fact establishes the bad faith at the core of their actions during the negotiation with UMG.

B. Immediately After the Deal Is Announced, WBR Asserts It Holds Conflicting Rights, and the Personal Representative Then Confirms a Cloud Exists Over the UMG Agreement.

Following execution of the UMG Agreement, on February 9, 2017, UMG issued a press release announcing the UMG Agreement. *See Cassioppi Decl.*, Ex. D. Just days after this public announcement of the deal, UMG became aware of WBR's claim that it holds preexisting rights that conflict with the rights that the Estate purported to convey exclusively to UMG during the negotiation of, and in, the UMG Agreement. *Id.* Ex. F. UMG promptly sent a letter to the Personal Representative, which had since taken over the administration of the Estate from Bremer Trust. *Id.* Ex. G. UMG alerted the Personal Representative to WBR's conflicting claim of rights, and sought immediate assurances from the Personal Representative that UMG did in fact obtain the rights for which it bargained and paid. *Id.* However, following its review of WBR's prior rights agreements with the Estate and Prince, the Personal Representative informed UMG that it could not provide assurances that there was in fact no overlap between the rights

³ In his Opposition brief, Mr. McMillan claims that Michele Anthony and Mark Cimino of UMG had inquired about WBR's rights in Prince's recordings and had some knowledge of those rights. McMillan's June 6, 2017 Opp., p. 8. Notably, Mr. McMillan does not claim that either Ms. Anthony or Mr. Cimino knew of the actual conflict that WBR claims exists, nor did he ever inform them that the heirs had grave concerns regarding such a potential conflict as early as September 2016, as reported by *Billboard*.

held by WBR and the rights purportedly granted to UMG. *See id.* Ex. L, p. 2. The Personal Representative's inability to provide clear assurances that UMG received the rights it bargained and paid for heightened UMG's serious concerns that it had been misled and likely defrauded by the Estate's Special Administrator and its agents, including Mr. McMillan—who, unlike UMG, did have access to WBR's prior rights agreements.

Given the conflicting rights and the apparent misrepresentations made by the Estate's prior representatives, the Personal Representative has agreed that the most appropriate course of action is a mutual agreement to rescind the UMG Agreement. In the absence of such approval, UMG will file suit for rescission, and will also assert claims for fraud and seek punitive damages [REDACTED]

II. RESPONSE TO OBJECTING PARTIES

A. The Opposing Parties Cannot Lift the Cloud Over the UMG Agreement.

In general, the Opposing Parties contend that the Personal Representative's Motion should be denied because, according to their interpretation of the UMG Agreement and WBR's prior rights agreement, there is no actual conflict between the provisions, and that the Personal Representative has failed to establish that WBR is actually correct in its assertion that a conflict exists. Mr. McMillan in particular believes that he can resolve the conflict that the Personal Representative (which actually speaks for the Estate) and WBR cannot.

The Opposing Parties' self-serving arguments—Mr. McMillan is acting to protect the [REDACTED] commission that he and Mr. Koppelman received for the closing of the UMG Agreement, and presumably to avoid a lawsuit for his potentially fraudulent conduct—fall short. The critical component of the UMG Agreement was that UMG would obtain [REDACTED]

[REDACTED]. The cloud that now exists over those rights, and the litigation that would be required to remove that cloud, deprive UMG of the benefit of its bargain.

The Certain Nelson Heirs also argue that the rescission of the UMG Agreement risks “damag[ing]” the Estate (June 6, 2017 Opp., pp. 14-17), but, as explained by the Personal Representative’s Motion, the unwinding of the UMG Agreement actually will leave the Estate in a better position than it is now, for several reasons. For instance, as long as this dispute is pending, UMG has no ability to [REDACTED] in light of WBR’s conflicting claim of ownership. The Estate would lose out on [REDACTED] during this time. Therefore, as noted by the Personal Representative, resolving this matter through litigation “would essentially shelve many of the Estate’s most valuable intellectual property assets for the foreseeable future.” Motion at 14. In addition, the approval of the Rescission Agreement will return the rights licensed to UMG under the UMG Agreement to the Estate. This occurrence will allow the Personal Representative to maximize the value of the Estate’s assets by negotiating new licensing and distribution deals. To the extent the Personal Representative is not able to achieve the same consideration it obtained from UMG, that will be because it has fewer rights to sell than were sold to UMG.

Finally, the Opposing Parties criticize the Personal Representative for failing to present a “proposed alternative” to the UMG Agreement (*see* Certain Nelson Heirs’ June 6, 2017 Opp., p. 17; *see also* McMillan’s June 6, 2017 Opp., p. 28). But the Estate cannot be expected to re-market the rights purportedly granted to UMG Agreement before the Rescission Agreement is approved by this Court. Until that happens, the Rescission Agreement is not effective.

B. If Rescission Is Not Achieved by the Motion, UMG Will File Suit Against the Estate and Its Prior Representatives.

If the Personal Representative is unable to obtain rescission in this forum, UMG will file suit in order to obtain rescission of the UMG Agreement on the grounds that UMG was fraudulently induced to enter into the UMG Agreement or, at minimum, on the grounds that the parties were mistaken concerning the extent of WBR's existing rights in [REDACTED] at the time the UMG Agreement was executed.⁴ In connection with a claim for rescission, UMG would also assert other claims against the Estate's prior representatives, who appear to have fraudulently induced UMG to execute the UMG Agreement under false pretenses in order to earn their commission before time ran out. While UMG is confident that it would prevail on its claim for rescission, it would prefer to resolve this dispute without litigation. Indeed, as noted by the Personal Representative, the mutual rescission of the UMG Agreement avoids the cost and uncertainty that time-consuming litigation of these issues would inevitably bring. Motion at 13-14.⁵

Following approval of the Rescission Agreement, the Estate will return the consideration paid by UMG under the UMG Agreement and the UMG Agreement will be considered void *ab*

⁴ Under the application of California law [REDACTED] mutual mistake is grounds for rescission of the parties' contract. See Cal. Civ. Code §§ 1566-1567, 1689(b)(1); *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879, 884 (1975) ("a mutual mistake, whether of fact or law, which affects an essential element of the contract and is harmful to one of the parties is subject to rescission by the party harmed").

⁵ Even CAK Entertainment, Inc. ("CAK") acknowledges in its Limited Objection that, "if the Personal Representative believes it is in the best interests of the Estate to rescind the UMG Agreement and avoid the costs and risk of litigation, then that is its decision to make." See CAK's June 6, 2017 Limited Objection, p. 5. Similarly, Bremer Trust also "defers to the Personal Representative's business judgment regarding what course of action may be in the best interest of the Estate regarding [UMG]'s demand for rescission." See June 1, 2017 Letter; see also May 23, 2017 Letter.

initio, returning the parties to their position prior to the execution of the UMG Agreement. *See* Cassioppi Decl. Ex. U ¶ 1(a)-(b).⁶

IV. CONCLUSION

For the reasons set forth herein, UMG respectfully requests that the Court grant the Personal Representative's Motion and approve the Rescission Agreement.

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Dated: June 9, 2017

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⁶ CAK and Mr. McMillan argue that if the Motion is granted, the UMG Agreement should not be considered void *ab initio*. *See* CAK's June 6, 2017 Limited Objection, pp. 5-7; McMillan's June 6, 2017 Opp., pp. 29-31. However, rescission is a remedy that is meant to put the parties to a contract in the position they were in before the contract, *i.e.*, the status quo ante. *See DuBeck v. California Physicians' Serv.*, 234 Cal. App. 4th 1254, 1264 (2015) ("Rescission extinguishes a contract, rendering it void *ab initio*, as if it never existed."). How that impacts third parties' rights vis-à-vis the Estate is not the subject of this Motion.