

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION
Case Type: Special Administration

In the Matter of:

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

Estate of Prince Rogers Nelson,
Decedent.

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

REDACTED

INTRODUCTION

It is not surprising that Mr. McMillan and his clients have gone to great lengths to try to preserve the more than [REDACTED] in commissions paid to Mr. McMillan associated with the UMG Agreement. But their criticisms betray a fundamental misunderstanding of the Personal Representative's motion and only highlight the untenable position in which the Personal Representative has been placed as a result of the actions of Mr. McMillan and other former representatives of the Estate. As a fiduciary, the Personal Representative's duty is to safeguard the Estate. Taking a position in writing on the merits of WBR's argument—prior to the Court deciding this motion—could expose the Estate to substantial liability in the event that the Court denies the Motion and the Estate is forced to litigate with UMG and WBR. But even setting that aside, Mr. McMillan and Sharon Nelson, Norrine Nelson, and John Nelson (the "Nelsons") miss the point.

It is irrelevant whether a court, several years from now, would agree with the position advocated by WBR or by Mr. McMillan and the Nelsons. Instead, the Court must decide whether approving the Rescission Agreement is in the best interests of the Estate in light of:

1. WBR's claim that it possesses [REDACTED];
2. Evidence that WBR informed Mr. McMillan, Mr. Koppelman, and the Special Administrator that it claimed [REDACTED] prior to the Estate entering into the UMG Agreement;
3. The fact that counsel for all of the Heirs (including the Nelsons) specifically objected to the UMG Agreement in September 2016 based on [REDACTED];
4. The apparent failure of anyone associated with the Estate to disclose to UMG that a potential dispute could arise with WBR related to [REDACTED];
5. UMG's claim that it was defrauded by former representatives of the Estate in connection with the UMG Agreement and its unequivocal position that it is not interested in renegotiating or otherwise working to resolve this dispute, short of rescission;
6. UMG's assertion that it will initiate litigation against the Estate and its former representatives in California if the Court does not allow the UMG Agreement to be rescinded;
7. The fact that any such litigation will likely also involve WBR, will be extremely costly, and the ultimate outcome is uncertain; and
8. During the pendency of any dispute with UMG, the Estate will be losing substantial revenue due to its inability to enter into one or more new agreements to exploit the Decedent's music.

The Personal Representative respectfully submits that there is only one answer, and that answer is clear. After thoroughly investigating the matter, the Personal Representative has determined that it is in the best interests of the Estate to avoid the time, expense, and risk associated with litigating this dispute, and to focus instead on maximizing value by securing one

or more substitute deals for the benefit of the Estate. The Personal Representative respectfully requests that the Court grant its motion and approve the Rescission Agreement.

ARGUMENT

I. THROUGH ITS INVESTIGATION, THE PERSONAL REPRESENTATIVE DETERMINED THAT RESCISSION IS IN THE BEST INTERESTS OF THE ESTATE.

The Nelsons and Mr. McMillan argue that the Personal Representative has failed to make a sufficient showing in support of rescission by not offering expert opinions and other evidence establishing that there are conflicting rights between WBR and UMG, not disclosing its analysis of the likelihood of success in litigation against UMG and WBR, and generally not taking a stance regarding WBR's claims. These arguments demonstrate that neither the Nelsons nor Mr. McMillan understand the Personal Representative's position as a fiduciary acting for the benefit of the Estate.

If the Personal Representative were to advocate for rescission in the manner that they suggest—by, for example, agreeing with WBR's claims or submitting expert testimony regarding interpretation of the 2014 WBR Agreement—it would risk exposing the Estate to liability. Specifically, in the event that the Court denies rescission, the Personal Representative will have handed UMG and WBR the evidence and admissions needed to prove breaches by the Estate of both the 2014 WBR Agreement and UMG Agreement. To justify rescission of the UMG Agreement, it is neither necessary nor prudent for the Personal Representative to attempt to prove WBR's claims.

Rather, as a fiduciary, it is the Personal Representative's role to investigate claims against the Estate, exercise its independent judgment regarding the Estate's potential exposure as a result of the claims, and make a recommendation to the Court regarding what is in the best interests of the Estate. This is precisely what the Personal Representative has done here. Despite their best

efforts to cast the Personal Representative as a shrinking violet, the record demonstrates that the Personal Representative vigorously protects and defends the rights and assets of the Estate against third parties. Indeed, the Personal Representative is currently prosecuting and defending claims on behalf of the Estate (or the entities it controls) against Roc Nation, LLC, Aspiro AB, Project Panther Ltd., WiMP Music AS, George Ian Boxill, Rogue Music Alliance, Deliverance, LLC, Jobu Presents, LLC, Bruno Bergonzi, Michle Vicino, Warner Chappell Musica Italiana S.r.l., James Brandon, Brianna Nelson, Venita Jackson Leverette, Darcell Gresham Johnson, Loya Janel Wilson, Loyal Gresham III, Orrine Gresham, Rodney Herachio Dixon, Mixed Blood Theater, and others. It would be foolhardy and detrimental to the Estate, however, to litigate all claims at all costs, without first evaluating if litigation is the best or only possible course of action.

Here, and as set forth in its opening memorandum, the Personal Representative thoroughly investigated UMG and WBR's claims of conflicting rights before concluding that litigation is not the best course of action. Contrary to the Nelsons' and Mr. McMillan's assertion, the Personal Representative: (1) met with the Special Administrator on several occasions through counsel to discuss WBR's allegations and exchanged substantial written analysis pursuant to their common interest agreement; (2) consulted with individuals involved in negotiating the 2014 WBR Agreement; (3) consulted with industry experts including Troy Carter regarding the dispute; and (4) and retained and consulted with entertainment counsel. (May 17, 2017 Cassioppi Decl. ¶ 14; Supp. Cassioppi Decl. ¶ 3.) Ultimately, the Personal Representative determined that, under the circumstances, the risks associated with litigating against UMG and WBR far outweigh the costs of rescinding and replacing the UMG Agreement. As detailed in the Personal Representative's opening brief, this decision was based on the Estate's

determination that there is a genuine dispute regarding the scope of rights granted by the 2014 WBR Agreement and the accuracy of representations made to UMG, the Estate's potential exposure to liability [REDACTED], the substantial attorneys' fees and costs required to litigate, and the significant income that the Estate would lose while many of its most valuable assets are shelved pending the outcome of the litigation.

The Nelsons and Mr. McMillan argue that rescission will not necessarily avoid all litigation. The Personal Representative agrees, depending on the instruction of the Court. But litigation resulting from rescission—for example, related to seeking the return of commissions from Mr. McMillan and Mr. Koppelman—presents much less risk to the Estate in terms of the costs, potential exposure, and likelihood of success than litigation with UMG and WBR and, importantly, such litigation would not affect the Estate's ability to exploit Estate assets in the interim. Thus, the specter of some resulting litigation is not a basis on which to deny rescission.

II. THE NELSONS PREVIOUSLY OBJECTED TO THE UMG AGREEMENT

In arguing that the Court should deny rescission, the Nelsons and Mr. McMillan assert that the parties' rights under the 2014 WBR Agreement are unambiguous and that there has been universal agreement among all parties (except WBR) that no overlap exists between the rights granted by the UMG Agreement and the rights held by WBR. This argument is directly contradicted by the Nelsons' prior statements to the Court [REDACTED].

In their Opposition to the instant Motion, the Nelsons make the following representations to the Court:

The plain meaning of [REDACTED]

This is consistent with [REDACTED]

* * *

As the Court is aware, the Heirs sought significant input into the UMG deal at issue and **none of them previously raised any concern for potential conflict with [REDACTED]**.

* * *

[Comerica's recommendation of rescission] is . . . inconsistent with every interpretation of WBR's rights offered in the case to-date by anyone [REDACTED], including Sharon.

(Nelsons' Mem. at 7, 14 (emphases added).)

These representations are simply not accurate. On September 28, 2016, the Nelsons (and all other Heirs) [REDACTED] stated to the Court:

[REDACTED]

[REDACTED]

[REDACTED]

(Supp. Cassioppi Decl. Ex. A, Sept. 28, 2016 Under Seal Mem. in Supp. of Non-Excluded Heirs Opposition to Special Administrator's Motion to Approve Recommended Deals at 11-12 (signed by the Nelsons' attorneys and submitted on behalf of all Heirs) (emphases added).)

Thus, the Nelsons' own submissions to the Court demonstrate that—just nine months ago—they believed [REDACTED]
[REDACTED]—including on the very issue that now forms the basis for UMG's demand for rescission (namely, [REDACTED]).
The Nelsons' submissions also demonstrate that, in light of the potential overlap, they believed [REDACTED]

[REDACTED]. That is exactly what has happened. Simply stated, the Nelsons' current objection to Comerica's recommendation to rescind the UMG Agreement and their contention that WBR's claims are a recent fabrication are contradicted by the record.

III. UMG'S DEMAND FOR RESCISSION IS A DIRECT RESULT OF MR. MCMILLAN'S OCTOBER 31, 2016 REPRESENTATION TO UMG.

In his Affidavit and brief, Mr. McMillan represents that there was no dispute regarding overlapping rights when the Special Administrator negotiated the UMG Agreement and that any claim of fraud is baseless. The record, however, indicates that the Estate faces a real risk of liability as a result of information that was known to Mr. McMillan about WBR's asserted rights and not disclosed to UMG while the parties were negotiating the UMG Agreement.

In his Opposition brief, Mr. McMillan states:

Several of the heirs' counsel objected to the UMG deal but not based on any claim of conflict with WBR's rights after June 30, 2018.

(McMillan Mem. at 10.) As discussed above, Mr. McMillan is wrong. All of the heirs—including Mr. McMillan's clients— [REDACTED]

Next, Mr. McMillan states:

At no time did WBR ever indicate that the Estate would be prohibited from entering into an agreement with another recording company for [REDACTED].

(McMillan Aff. ¶ 12.) This statement is also not accurate. The record indicates that Mr. McMillan and Mr. Koppelman were aware that WBR claimed [REDACTED]

[REDACTED]. In a September 22 letter to the Special Administrator, WBR wrote:

[REDACTED]

[REDACTED]

(Supp. Cassioppi Decl. Ex. B, Sept. 27, 2016 Under Seal Aff. of Craig Ordal, Ex. A.) Then, on October 18, 2016, WBR wrote directly to Mr. McMillan and Mr. Koppelman , stating [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (May 17, 2017 Cassioppi Decl. Ex. J.) Despite having notice that WBR was claiming [REDACTED], on October 31, 2016, Mr. McMillan wrote to UMG that [REDACTED], with no mention that WBR and the Heirs believed that WBR's rights [REDACTED]. (May 17, 2017 Cassioppi Decl. Ex. B.)

This failure to disclose to UMG that WBR was asserting [REDACTED] is the reason UMG is claiming it was defrauded and why UMG is insisting on rescission. In detailing the basis for its position, UMG specifically quoted Mr. McMillan's October 31, 2016 statement and alleged that the Special Administrator and its advisors intentionally and falsely represented

[REDACTED]

[REDACTED]

[REDACTED] (May 17, 2017 Cassioppi Decl. Ex. O at 3.)

Regardless of the ultimate merits of UMG's fraud claim, the associated risks to the Estate compel the conclusion that the Court should approve rescission of the UMG Agreement.

IV. THE SUBSTANTIAL UNCERTAINTY REGARDING WBR'S ASSERTED RIGHTS WEIGHS HEAVILY IN FAVOR OF RESCISSION.

Despite the Nelsons' and Mr. McMillan's assertion otherwise, there is a genuine dispute regarding the intended scope of the 2014 WBR Agreement that cannot be resolved absent rescission or costly and uncertain litigation.

Mr. McMillan, however, states that there is only one possible interpretation of the 2014 WBR Agreement, asserting that [REDACTED]

[REDACTED] In support, he cites his own affidavit and the affidavit of Virgil Roberts. (McMillan Aff. ¶ 5; Roberts Aff. ¶ 9.) Setting aside the fact that Mr. Roberts does not appear to have reviewed the 2014 WBR Agreement, their assertion that [REDACTED] [REDACTED] is not accurate.

See, e.g., Donald Passman, *All You Need to Know About the Music Business*, 219 (9th ed. 2015) (explaining that, with declining sales of physical records, distributors that engage in "pressing and distribution" deals will generally "only handle [] physical records if they also get the exclusive right to distribute [] digital records." (Supp. Cassioppi Decl. Ex. C.)). This is not to say that a California or New York court may not ultimately agree with Mr. McMillan and Mr. Robert's interpretation of [REDACTED] the 2014 WBR Agreement, but it highlights the risk that a court may also disagree with their interpretation, which would mean that, when it entered into the UMG Agreement, the Estate not only made inaccurate representations to UMG, it violated the 2014 WBR Agreement.

Mr. McMillan also argues that [REDACTED] [REDACTED] based on his mistaken assertion that [REDACTED] [REDACTED]. (McMillan Mem. at 21.) WBR addressed this argument in its March 27, 2017 letter to the Personal Representative:

[REDACTED]

(May 17, 2017 Cassioppi Decl. Ex. J at 2.) Since filing the present motion, the Personal Representative has learned that in June 2016, WBR provided Mr. McMillan with copies of all prior agreements between WBR and the Decedent, including the agreements that [REDACTED]

[REDACTED] (See May 8, 2017 Siltan Aff. Ex. A.)

Yet, Mr. McMillan does not mention these prior agreements or allege that he engaged in any analysis of [REDACTED] before he represented to UMG on October 31, 2016 that [REDACTED].

Finally, Mr. McMillan argues that “if WBR truly felt that the [2014 WBR] Agreement [REDACTED], there would have been no need for it to seek to specify such rights in the proposed amendment” to the 2014 WBR Agreement that WBR and the Special Administrator negotiated in 2016. (McMillan Mem. at 22-23.)¹ The Personal Representative raised this precise argument with WBR, and WBR responded in its March 27 letter. Specifically, WBR asserted that it already holds [REDACTED] [REDACTED] under the 2014 WBR Agreement and was negotiating with the Estate during 2016 to acquire [REDACTED]

¹ The Estate ultimately entered into a publishing agreement with UMPG. The Court [REDACTED]

[REDACTED] (See Sept. 30 Order at 3-5.)

review the 2014 WBR Agreement, UMG may decide it does not wish to rescind after all. The Personal Representative initially shared that hope and requested that WBR agree to waive the confidentiality provision in the 2014 WBR Agreement so that the agreement could be shared with UMG. (May 17, 2017 Cassioppi Decl. Ex. I.) WBR declined. (*Id.* Ex. J.)

Since then, however, the Personal Representative has grown concerned that, [REDACTED]

[REDACTED]
[REDACTED]. Mr. McMillan made a specific representation to UMG about [REDACTED]:

For clarity, [REDACTED]
[REDACTED].

(*Id.* Ex. B), (emphasis added).) The 2014 WBR Agreement, however, [REDACTED]

[REDACTED]:

[REDACTED]
(*Id.* Ex. A at 4.)

Given that [REDACTED] the 2014 WBR Agreement does not [REDACTED]
[REDACTED], the Personal Representative was and remains concerned that the specific language of the 2014 WBR Agreement [REDACTED].

Mr. McMillan also mistakenly asserts that the Personal Representative failed to address [REDACTED] of the UMG Agreement, [REDACTED]. (McMillan Mem. at 23.) As detailed in the April 26, 2017 letter from the Personal Representative's counsel to UMG's counsel, the Personal Representative [REDACTED]
[REDACTED]

[REDACTED]. (May 17, 2017 Cassioppi Decl. Ex. Q.) UMG, however, immediately rejected the Personal Representative's offer and continued to demand rescission based on UMG's argument that it had been defrauded. (*Id.* Ex. R.)

VI. DISCOVERY WOULD ONLY FURTHER PROLONG THIS DISPUTE AND RISKS DAMAGING THE ESTATE.

The purpose of the Nelsons and Mr. McMillan's requests for discovery is unclear. The Personal Representative has already investigated WBR's claims of conflicting rights and has determined that under the circumstances, rescission, rather than litigation, is in the best interests of the Estate. Permitting the Heirs or Mr. McMillan to seek discovery from WBR and UMG would only serve to prolong this dispute and imperil the agreement between UMG and the Personal Representative to withhold engaging in litigation while this motion remains pending. Indeed, rather than subject themselves to discovery in this Court, either or both of UMG or WBR may instead decide to commence litigation in California or New York, [REDACTED]

[REDACTED].

Finally, and most importantly, the Estate is not currently generating any income on any of the intellectual property rights licensed to UMG under the UMG Agreement. Further delays associated with discovery will lengthen the time before the Estate is able to secure one or more alternative deals to exploit those rights.

VII. THE COURT HAS ALREADY DECIDED TO ADDRESS THE LEGAL EFFECT OF THE DISPUTE WITH UMG AND WBR ON MR. MCMILLAN, MR. KOPPELMAN, AND THE SPECIAL ADMINISTRATOR IN A SUBSEQUENT PROCEEDING.

Finally, Mr. McMillan and Mr. Koppelman have requested that the Court clarify that, if it grants rescission, such an order would not be dispositive of any rights or defenses that they may possess. The Personal Representative has not requested that any order granting rescission have a

dispositive effect on the rights of Mr. McMillan, Mr. Koppelman, or any other party associated with the Estate. Consistent with the Court's guidance during the conference call with the parties on May 26, 2017, it is the Personal Representative's understanding that the Court will consider the legal effect of the dispute with UMG and WBR on Mr. McMillan, Mr. Koppelman, and the Special Administrator as part of a subsequent proceeding. The Personal Representative agrees that such an approach is reasonable and makes sense under the circumstances.

CONCLUSION

For the reasons set forth above and in the Personal Representative's Memorandum in Support of Motion to Rescind Exclusive Distribution and License Agreement, the Personal Representative respectfully requests that the Court approve the rescission of the UMG Agreement.

Dated: June 9, 2017

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