



May 16, 2017

**VIA EFS**

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The Honorable Kevin W. Eide  
Carver County Justice Center  
604 East Fourth Street  
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**Re: *In re the Estate of Prince Rogers Nelson*  
Court File No. 10-PR-16-46**

Judge Eide:

Per the Court's order, I write on behalf of Mr. Omarr Baker and Ms. Tyka Nelson in response to the letter dated May 11, 2017 from Alan I. Silvers and Robin Ann Williams, counsel of record for Mr. L. Londell McMillan (the "McMillan Letter"). Justin Bruntjen, counsel for Mr. Alfred Jackson, has represented to me that his client supports this letter. Mr. McMillan's letter addresses two issues: (1) the "Alfred Jackson and NorthStar Agreement" attached as Exhibit 5 to my affidavit filed with the Court on May 3, 2017 (the "Agreement"), and (2) a *Billboard* article dated May 11, 2017. This letter addresses the first issue, which relates to a document attached to my affidavit. Mr. Baker and Ms. Nelson take no position regarding the second issue raised in the McMillan Letter.

Mr. McMillan contends the Agreement's confidentiality provision precludes any party from providing the Agreement to the Court, whether publicly or under seal. (McMillan Letter at 1.) I attached the Agreement to my affidavit filed on Wednesday, May 3, 2017. Two days later, Ms. Williams emailed me and demanded I remove the Agreement from the public filing.<sup>1</sup> I respectfully declined. At the hearing regarding the motions to quash on Wednesday, May 10, 2017, Mr. McMillan's counsel requested and the Court granted the request to file letter briefs addressing the confidentiality issue. The below is Mr. Baker and Ms. Nelson's response to the McMillan Letter.

As a preliminary matter, Minnesota law governs the Agreement (see ¶ 10(d)), and yet, in his letter Mr. McMillan failed to cite to *any* Minnesota authority in support of his position. Respectfully, I direct Your Honor to the standard governing this dispute, which the Court has already discussed in its orders. Considering the unique nature of this probate proceeding, there were considerable filings under seal. However, the Court has rightly stated its "concern that the public has access to documents in this file that should be properly filed as a public document." (See Order Regarding the Filing of Certain Documents Under Seal, filed Jan. 23, 2017, the "Seal Order.") Pursuant to the Seal Order, "[a]ll documents to be filed in this case **shall be presumed public** unless the Court orders that an entire document be filed under seal or that an entire document be filed under

<sup>1</sup> In his letter, Mr. McMillan represented to the Court that my affidavit and the attached Agreement were filed on May 5, 2017. This is incorrect. I filed my affidavit in support of Omarr Baker, Alfred Jackson, and Tyka Nelson's Memorandum in Opposition to the Motions to Quash the Subpoena Duces Tecum to L. Londell McMillan with the Court on May 3, 2017 at 3:44 p.m.

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seal.” (*Id.* at 4.) See also *Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983); *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197 (Minn. 1986). Following its previous orders, and as set forth below, the Court should deny Mr. McMillan’s request “to remove the Agreement from the Court record.” (McMillan Letter at 2.)

First, Mr. Baker and Ms. Nelson are not signatories to the Agreement. Therefore, they are not bound by the confidentiality provision and have no duty to keep the Agreement confidential. The Court’s orders, the Minnesota Rules of Civil Procedure, and the Minnesota Rules of Public Access to Judicial Records do not preclude their public filing of the Agreement. The Court has indicated its “strong preference” for sealing “only those portions [of] a document that reference confidential business transactions, privileged information, or [documents that] otherwise should be filed under seal.” (Seal Order at 4-5.) Following the Court’s “strong preference” for public disclosure and the standard outlined in *Schumacher*, Mr. Baker and Ms. Nelson filed the Agreement publicly.

Second, the Agreement fails to define what information is considered confidential and precluded from disclosure. (See Agreement, ¶ 8(a).) The Agreement only references “material terms,” without defining those terms (*Id.*) Even if Mr. Baker and Ms. Nelson were to parse out what Mr. McMillan intended to be the “material terms,” the Agreement neither defines nor identifies any confidential information. Mr. McMillan cannot point to any specific confidential information in the document, and therefore there is no reason the Agreement cannot be made public. Minnesota courts have only found a common law duty not to disclose confidential information for certain relationships (see, e.g., *Northwest Airlines v. American Airlines*, 853 F. Supp. 1110, 1117-18 (D. Minn. 1994) (holding that employees have a common law duty not to “wrongfully use confidential information or trade secrets obtained from an employer”)); however, there is no duty not to disclose confidential information among Mr. McMillan, Mr. Baker, and Ms. Nelson. As stated, Mr. McMillan cannot point to any confidential information in the Agreement and Mr. Baker and Ms. Nelson owe no duty of confidentiality to Mr. McMillan.

Third, even if he intended the Agreement to be confidential as to Mr. Alfred Jackson, Mr. McMillan cannot demonstrate that he himself kept the Agreement confidential. (See Affidavit of Bruce Alonzo Jackson, filed May 16, 2017.) Mr. McMillan faxed multiple copies of the Agreement to Mr. Bruce Jackson. (*Id.*) Mr. McMillan did not inform Mr. Bruce Jackson of the confidentiality provision, nor did Mr. McMillan ask him to keep the Agreement confidential. (*Id.*) Mr. McMillan also told him that the terms of the Agreement were identical to those in the agreements signed with Sharon, John, and Norrine Nelson. (*Id.*) Mr. McMillan cannot demonstrate to the Court that he took any steps to keep the Agreement confidential, before or after the May 10, 2017 hearing. To compound this matter, Mr. McMillan’s counsel waited *two days* before contacting me regarding the public filing of the Agreement. In a case of this size and notoriety, this delay was substantial. The Agreement was publicly available for two full days via the Court filings, and continues to be publicly available to this day. This Court in the past has found that information once part of the public record for a period of time cannot later be deemed confidential.

What is more, Mr. McMillan has pointed to no press addressing the Agreement. Had Mr. McMillan truly felt the Agreement’s public disclosure was damaging, he would have immediately sought its removal, and he continues to have alternative remedies to remove it. Minnesota law requires that a party seeking trade-secret protection must demonstrate that it took **reasonable efforts to protect the secrecy of that information**. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 899–901 (Minn. 1983). “Although absolute secrecy is not required, the confidential measures must be reasonable under the circumstances.” *Lasermaster Corp. v. Sentinel Imaging*, 931 F. Supp. 628, 636 (D. Minn. 1996); see also *Surgidev Corp. v. Eye Technology, Inc.*, 648 F.

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Supp. 661, 663, 693–94 (D. Minn. 1986), *aff'd* 828 F.2d 452 (8th Cir. 1987); *nClosures Inc. v. Block & Co.*, 770 F.3d 598, 602 (7th Cir. 2014) (courts "will enforce [confidentiality] agreements only when the information sought to be protected is actually confidential and reasonable efforts were made to keep it confidential") (citing *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 947 (7th Cir. 1994)). In order to enforce the confidentiality provision in the Agreement, the Court must find at a minimum that Mr. McMillan "took reasonable steps to keep [his] proprietary information confidential." *Id.* Absent identifying in his letter the purportedly confidential information, Mr. McMillan has waived any right he may have had to keep the Agreement confidential.

Fourth, it is unclear from the Agreement whether this matter is even properly before the Court. The Agreement contains an arbitration clause which states "[t]he parties to this agreement hereby agree to confidential and legally binding mediation and/or arbitration in the State of Minnesota." (See Agreement, ¶ 7.) The Agreement further states that "[s]uch mediation and or arbitration [is] to be heard by a three (3) person panel and otherwise be in accordance with the rules promulgated by the American Arbitration Association for commercial disputes . . ." (*Id.*) However, the Agreement is not consistent as to whether arbitration is appropriate. The separation clause states that "a court of competent jurisdiction" may hold a provision of the Agreement invalid. (See Agreement, ¶ 10(c).) The Agreement fails to specify *what provisions* of the Agreement are arbitrable, and Paragraphs 7 and 10(c) appear to conflict as to whether an arbitration panel or a court can resolve disputes regarding the Agreement. It is possible that Mr. McMillan, the drafter of the Agreement, intended this dispute regarding confidentiality to be arbitrated rather than heard before the Court. If that is true, Mr. Baker and Ms. Nelson are not aware of any arbitration taking place.

Finally, Mr. McMillan cannot demonstrate any harm he has suffered because of the public filing of the Agreement. A party asserting breach of contract—as Mr. McMillan appears to be doing—must also prove damages. *Border State Bank of Greenbush v. Bagley Livestock Exch, Inc.*, 690 N.W.2d 326, 336 (Minn. Ct. App. 2004) ("Liability for breach of contract requires proof that damages resulted from or were caused by the breach"). Mr. McMillan has not in his letter suggested that he suffered any monetary damage, and he has not identified any set of facts that might in the future cause him damages. Damages that are remote, speculative, or conjectural are not recoverable as a matter of law. *Busch v. Busch Constr. Co.*, 262 N.W.2d 377, 379 (Minn. 1977).

For the foregoing reasons, the Court should deny Mr. McMillan's request to remove the Agreement from the Court record. Thank you for your time and consideration.

Sincerely,

COZEN O'CONNOR

s/ Thomas P. Kane

Thomas P. Kane

cc: Alan I. Silver  
Robin Ann Williams  
Justin Bruntjen  
Randall Sayers