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UPPER DECK INTERNATIONAL B.V.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UPPER DECK INTERNATIONAL B.V.,
a Netherlands corporation,

Plaintiff,

v.

THE UPPER DECK COMPANY, a
California corporation; THE UPPER
DECK COMPANY, a Nevada
Corporation; RICHARD McWILLIAM,
an Individual; and Does 1-10,

Defendants.

Case No. 11CV1741 LAB (KSC)

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS THE
COMPLAINT AND CLAIMS
AGAINST RICHARD MCWILLIAM
UNDER FEDERAL RULE OF CIVIL
PROCEDURE 25**

Date: 08/19/2013
Time: 11:30 A.M.
Hon. Larry Alan Burns
Courtroom 9

Complaint Filed: 08/04/2011

AND RELATED COUNTERCLAIMS.

1 **I. INTRODUCTION**

2 Defendants' motion to dismiss decedent and former defendant, Richard
3 McWilliam, should be denied because (1) UDI filed its motion to substitute within 90
4 days of receiving Defendants' notice of death, excluding the approximately two-
5 month stay in this case; (2) Defendants failed to identify McWilliam's successor(s) to
6 the Court and to Plaintiffs—meaning FRCP Rule 25's 90-day filing period never
7 began; and (3) if the Court determines UDI did not file its motion to substitute before
8 Rule 25's filing period elapsed, it should still deny Defendants' motion in light of the
9 1963 amendments to Rule 25 and a docketing error resulting from excusable neglect
10 under Rule 6(b). Granting this motion would reward Defendants' tactics in
11 repeatedly refusing to identify McWilliam's successor and prejudice UDI's
12 meritorious claims that survive McWilliam's unfortunate death.

13 **II. STATEMENT OF FACTS**

14 Defendant Richard McWilliam died on January 5, 2013. Defendants' counsel
15 then filed a notice of death on behalf of all Defendants on February 13th. Docket #93.
16 However, the notice only stated that McWilliam had died, and failed to identify his
17 successor(s) or the representative(s) of his estate.

18 Upon receiving the notice via ECF, Andrew Elder, the calendaring clerk for
19 UDI's counsel, promptly entered Rule 25's ninety-day deadline to file a motion to
20 substitute into CourtAlert, a computer program Mintz Levin uses to track court
21 deadlines and notify attorneys of upcoming deadlines. Elder Decl., ¶3.

22 Later on February 13th, the Court issued a notice of non-compliance to
23 Defendants because the notice of death contained smaller than 14-point text. Docket
24 #94. Upon seeing the notice of non-compliance, Elder deleted the Rule 25 filing
25 deadline from the CourtAlert calendaring system. Elder Decl., ¶4.

26 Next, Defendants re-filed the notice of death (again failing to identify a
27 successor) on the following day, February 14th, this time using the correct size font.
28 Docket #95. And although he received a notice of Defendants' February 14th filing,

1 Elder mistakenly concluded that the filing was duplicative to Defendants' filing the
2 day before and did not reenter the filing date into CourtAlert. Elder Decl., ¶5. As a
3 result, UDI's counsel was not aware of Rule 25's ninety-day filing deadline—a rule
4 that is only triggered by the death of a party (a relatively rare occurrence). Skale
5 Decl., ¶2.

6 Defendants acknowledged in a Joint Stipulation filed with the court on March
7 29th that McWilliam's "trust and estate issues" would not be clarified until April
8 2013. Docket #97.^{1/}

9 On April 18th, approximately two months after Defendants filed their notice of
10 death, Magistrate Judge Karen Crawford granted a stay in this lawsuit, which lasted
11 until June 19th. Docket #99.

12 During the stay, UDI's counsel asked Defendants' counsel twice to identify
13 McWilliam's successor(s), including the name of McWilliam's estate. Skale Decl.,
14 ¶3. First, UDI's counsel asked who would be overseeing McWilliam's estate on
15 February 1, 2013. Skale Decl., ¶3, Ex. 1. UDI's counsel again asked for this
16 information on February 5, 2013. Skale Decl., ¶4, Ex. 2. Each request was ignored.
17 As it turned out, the estate was not even in California (where Mr. McWilliam's office
18 was and family lived), but instead in Reno, Nevada.

19 It was not until June 12th that Defendants' counsel responded via email, stating
20 that the name of the estate was "the estate of Richard Patrick McWilliam." Skale
21 Decl., ¶4, Ex. 3. Again, Defendants did not provide UDI the name of the estate's
22 representative. Skale Decl., ¶4. Yet on the same day UDI received this information
23 and a week before Judge Crawford lifted the stay, Defendants filed their motion to
24 dismiss McWilliam, arguing Rule 25 precluded Defendants from substituting
25 McWilliam's successors as defendants. Docket #101.

26
27 ^{1/} In a February letter to Judge Crawford, Defendants mentioned a probate case
28 involving the MPR Trust. But the letter did not identify the name of the trustee.
In fact, it confirmed that Defendants did not know who was the trustee. In
addition, the letter failed to identify (or discuss) the administrator of McWilliam's
estate.

1 Despite significant developments in the MPR Revocable Trust probate case
2 over the next few months, including the appointment of Ms. McWilliam as the
3 trustee, Defendants never updated UDI. Skale Decl., ¶5.

4 On June 20th—the day after the stay was lifted and less than ninety days after
5 Defendants filed the notice of death, excluding the duration of the stay—UDI filed its
6 motion to substitute based on the limited, incomplete information it did receive from
7 Defendants’ counsel.

8 In early July, and without Defendants’ assistance, UDI tracked down the
9 docket of a separate probate case pending in Reno, Nevada relating to the distribution
10 of McWilliam’s assets. From records obtained from that court, Defendants learned
11 that the court appointed Vivianne as the Trustee of the MPR Revocable Trust, to
12 which, according to McWilliam’s will, the balance of his estate reverts, following
13 certain distributions. Docket #107, Ex. 4. UDI’s counsel tried to confirm the identity
14 of the administrator of the estate with Defendants’ counsel on July 17th and again
15 during a meet-and-confer conference on July 26th, but never received a response.
16 Skale Decl., ¶5, Ex. 4.

17 To assist the court by providing it with complete information and to allow
18 Defendants a full opportunity to respond to this new information in their reply brief,
19 UDI filed a supplemental brief on July 17th. Docket #107. Now that UDI is aware of
20 their identities, the brief identifies the proper new defendants: Vivianne McWilliam
21 as Special Administrator of the Estate of Richard Patrick McWilliam; Vivianne
22 McWilliam as the Trustee of the MPR Revocable Trust; and accounts for any
23 unknown distributees by also seeking to substitute Successor Does 11-20. *See Akhtar*
24 *v. Mesa*, 2013 U.S. Dist. LEXIS 87726, at *8 (E.D. Cal. June 20, 2013).

25 **III. DEFENDANTS’ MOTION TO DISMISS SHOULD BE DENIED**

26 **A. UDI’s Claims Against McWilliam Survive**

27 The Court should not dismiss Richard McWilliam from this lawsuit because
28 UDI’s claims against McWilliam survive his death. State substantive law governs

1 substitution in the event a party dies during a lawsuit. *Robertson v. Wegmann*, 436
2 U.S. 584 (1978). The Court should therefore apply Cal. Civ. Proc. section 377.20,
3 which preserves claims against a decedent’s successors, absent a specific
4 contradictory statute. Here, no statute extinguishes UDI’s claims against McWilliam
5 and nothing precludes the Court from ordering substitution of the proper party under
6 Rule 25.

7 **B. UDI Filed the Motion to Substitute Within 90 Days**

8 UDI’s motion to substitute was timely. Excluding the duration of the stay—
9 which lasted from April 18th to June 19th—UDI filed its motion within ninety days of
10 Defendants’ February 13th/February 14th notice of death. Accordingly, the inquiry
11 should end there; the motion to dismiss should be denied and the motion to substitute
12 should be granted.

13 **C. UDI’s Motion to Substitute Was Proper Because Defendants’ Notice**
14 **of Death was Insufficient to Trigger Rule 25’s Ninety-Day Period**

15 Even ignoring the stay in this case, the notice of death was insufficient to begin
16 Rule 25’s ninety-day period because it did not identify McWilliam’s successors or
17 representatives. *Rende v. Kay*, 415 F.2d 983, 984 (D.C. Cir. 1969) (“We reverse on
18 the ground that the suggestion of death, which was neither filed by nor identified a
19 successor of the representative of the deceased, such as an executor or administrator,
20 was ineffective to trigger the running of the 90-day period provided by the Rule.”);
21 *United States v. Walker River Irrigation Dist.*, 2011 U.S. Dist. LEXIS 98642, at *22
22 (D. Nev. Aug. 25, 2011) (“‘Service of a statement noting the death’ means the filing
23 on the record in the applicable subproceeding(s) and service of a statement that
24 identifies the successor(s) to the estate who may be substituted for the decedent.”)
25 (quoting FRCP Rule 25). Here, the notice of death was not filed by a third party to
26 the lawsuit, but instead by Defendants’ counsel on behalf of all Defendants—
27 including McWilliam—meaning the rule discussed in *Rende* and *Walker River*
28 unequivocally applies here.

1 Moreover, there is a practical issue here. By refusing to identify the successor
2 to the estate to both the Court and opposing counsel, Defendants made substitution
3 impractical. Plaintiffs could not substitute an unknown party. And a plaintiff should
4 not be expected to spend time and resources locating probate cases involving the
5 estate and identifying the administrator. Expecting UDI to find this information
6 when it was likely at Defendants' fingertips is not only unfair, it is impractical.
7 Hence, Rule 25 has been properly interpreted to require the party noticing the death
8 to identify the successor to begin any 90-day period. By not identifying the
9 successor, when Defendants could have easily done so, Defendants did not gain the
10 benefit of that clock starting to run. And Defendants should similarly not be able to
11 rely on their February 14th notice of death, when they admitted more than six weeks
12 later in a stipulation that McWilliam's probate issues would not be resolved until
13 April 2013. Docket #97. If Defendants did not know who the proper parties were in
14 late March (presumably because the probate cases had not yet been resolved), then
15 certainly UDI should not be expected to identify these individuals.

16 **D. Granting Defendants' Motion Would Reward Their Gamesmanship**
17 **and Prejudice UDI's Meritorious Claims**

18 Courts were prescient in predicting the gamesmanship Rule 25 would spawn if
19 strictly interpreted. *Rende* identified a situation, very much like the scenario detailed
20 above, in which a plaintiff "did not know whether probate of the will might be
21 contested, or who would be appointed representative of the estate." 415 F.2d at 986.
22 The court predicted this could lead to a situation (as it did here) in which
23 "defendant's attorney would place on plaintiff the burden" in identifying the proper
24 representative or even instituting proceedings to appoint a representative ad litem,
25 solely for the purpose of identifying an individual to be substituted for the decedent.
26 *Ibid.* Rejecting this result, *Rende* notes that "[t]he 90 day period was not intended to
27 act as a bar to otherwise meritorious actions." *Ibid.* (citing *Staggers v. Otto Gerdau*
28

1 Co., 359 F.2d 292, 2906 (2d Cir. 1966). UDI's meritorious claims should similarly
2 not be dismissed.

3 **E. Defendants Never Identified the Proper Parties to be Substituted**

4 "Generally, the deceased's legal representative (e.g., executor or administrator)
5 is the property party to be substituted." *Sequoia Prop. & Equip. P'ship v. US*, 2002
6 U.S. Dist. LEXIS 15872, at *7 (E.D. Cal. June 3, 2002). More specifically, the
7 administrator of an estate is the "proper party" to be substituted under Rule 25.
8 *Hawkins v. Thomas*, 20121 U.S. Dist. LEXIS 74891, at *17 (C.D. Cal. Mar. 14,
9 2012). Likewise, the trustee of a trust is the property party to be substituted in her
10 capacity as trustee. *Bracken v. Harris & Zide, L.L.P.*, 219 F.R.D. 481, 485 (N.D. Cal.
11 2004). So without the name of the administrator of McWilliam's estate or the trustee
12 of the MPR Revocable Trust (which Defendants did not provide to UDI), UDI was
13 unable to identify the proper parties before filing its motion to substitute, further
14 warranting the denial of Defendants' motion. And once discovered, UDI
15 supplemented its motion to identify the administrator and trustee.

16 **F. Notwithstanding When It Was Filed, Good Cause Warrants**
17 **Allowing UDI's Motion to Substitute and Denying Defendants'**
18 **Motion to Dismiss**

19 As noted, the 90-day period never fully ran because of the intervening stay in
20 this case. Putting that aside, the 90-day period did not begin because Defendants'
21 notice under Rule 25 was incomplete. But two additional factors justify denying
22 Defendants' motion to dismiss. First, Rule 25 was amended in 1963 "to dispel
23 unwarranted rigidity and allow more flexibility in substitution." *Rende*, 415 F.2d at
24 986; *Roscoe v. Roscoe*, 379 F.2d 94, 99 (D.C. Cir. 1967) ("It was intended that liberal
25 effect be given to the 1963 amendment."). In their moving papers, the only support
26 Defendants offer for their archaic interpretation of Rule 25 is a case decided in 1950,
27 well before the 1963 amendment. *See* MTD, p. 2.

28 Second, good cause warrants an extension of UDI's deadline to file a motion to
substitute for excusable neglect under FRCP Rule 6(b)(1)(B). Here, counsel's

1 calendaring clerk incorrectly believed that the Court rejected Defendants' notice of
 2 death upon seeing the Court's notice of non-compliance and removed the Rule 25
 3 deadline from the litigation calendar. Elder Decl., ¶4. Then, the clerk did not reenter
 4 the deadline when Defendants filed a second notice of death a day later. Elder Decl.,
 5 ¶5. This resulted in UDI's counsel being unaware of the 90-day period. [Skale Decl.]
 6 Courts have routinely held that docketing and calendaring errors constitute excusable
 7 neglect. *Rothman v. S/S President Taft*, 1994 U.S. Dist. LEXIS 21391, at *5 (N.D.
 8 Cal. 1994) (court allowed untimely filing due to calendaring error as excusable
 9 neglect under Rule 6(b)); *Jun-En Enter. v. Lin*, 2013 U.S. Dist. LEXIS 59559, at *5
 10 (C.D. Cal. Apr. 25, 2013) (failing to calendar opposition date constituted excusable
 11 neglect). In fact, the 1963 Amendment to Rule 25 specifically contemplates an
 12 extension of the ninety-day filing deadline for excusable neglect under Rule 6(b). *See*
 13 FRCP Rule 25, Notes of Advisory Committee on 1963 amendments to Rules.

14 **IV. CONCLUSION**

15 Because UDI has meritorious claims against McWilliam's successors, the
 16 Court should not dismiss these successors from this lawsuit. Doing so would
 17 prejudice UDI, encourage others to file a notice of death without information
 18 concerning a successor, and contravene the spirit of Rule 25 as amended. For these
 19 reasons and in light of Defendants' failure to identify the proper parties to be
 20 substituted, the Court should deny Defendants' motion to dismiss and grant UDI's
 21 motion to substitute.

22 Dated: August 5, 2013

MINTZ LEVIN COHN FERRIS GLOVSKY
 AND POPEO PC

24 By s/Andrew D. Skale

25 Andrew D. Skale, Esq.
 26 Eric J. Eastham, Esq.

27 Attorneys for Plaintiff/Counterclaim-
 Defendant
 28 UPPER DECK INTERNATIONAL
 B.V.

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 5, 2013, I filed a copy of the following document:

PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS THE COMPLAINT AND CLAIMS AGAINST RICHARD MCWILLIAM UNDER FEDERAL RULE OF CIVIL PROCEDURE 25

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- **Alex M. Tomasevic** atomasevic@nblaw.org, klinzman@nblaw.org, rshelton@nblaw.org
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Executed on August 5, 2013, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/ _____
Andrew D. Skale, Esq.

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