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13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

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

17 Plaintiff,

18 v.

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

24 Defendants.

CASE NO.: 11CV1741 LAB (KSC)

**DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION TO
SUBSTITUTE NONPARTIES
FOR DECEDENT RICHARD
MCWILLIAM PURSUANT TO
RULE 25**

Date: August 19, 2013
Time: 11:30 a.m.

Judge: Hon. Larry Alan Burns
Courtroom 14A

Complaint Filed: August 4, 2011

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1 **I. INTRODUCTION**

2 On August 4, 2011, Plaintiff filed this case, entitled *Upper Deck International*
3 *B.V. v. The Upper Deck Company, a California corporation, The Upper Deck*
4 *Company, a Nevada corporation, Richard McWilliam, and Does 1-10* as Case No.
5 3:11-cv-01741-LAB-CAB. Doc. 1. Plaintiff filed an amended complaint, the
6 operative complaint here, on January 3, 2012 (“Complaint”). Doc. 36.

7 Richard McWilliam, an original defendant in this case, died on January 5,
8 2013. Pursuant to Federal Rule of Civil Procedure (“Rule”) 25, Defendants filed a
9 notification of Mr. McWilliam’s death on the record on February 14, 2013 (“Notice
10 of Death”). Doc. 95.

11 On June 12, 2013, *after* the 90-period to substitute a party under Rule 25
12 expired, Defendants filed a Motion to Dismiss Richard McWilliam Under Rule 25
13 (“Motion to Dismiss”). Doc. 101. While Defendants’ Motion to Dismiss was
14 pending, Plaintiff filed a Motion the Substitute Estate for Decedent Defendant
15 Richard McWilliam Pursuant to Rule 25 (“Motion to Substitute”) on June 21, 2013 –
16 127 days after the filing of the Notice of Death and well beyond the 90-day deadline
17 mandated by Rule 25 to substitute a party. Doc. 104. Subsequently, on July 17,
18 2013 – 153 days after the filing of the Notice of Death – Plaintiff filed Supplemental
19 Points and Authorities in Support of Plaintiffs’ [sic] Motion to Substitute
20 (“Supplemental Motion”). Doc. 107.¹ Plaintiff’s Motion to Substitute and
21 Supplemental Motion will be collectively referred to as “Motion.”

22 In accordance with the provisions of Rule 25, Defendants request that
23 Plaintiff’s Motion to Substitute the Estate of Richard Patrick McWilliam; Vivianne
24 B. McWilliam, as trustee of the MPR Revocable Trust; Vivianne B. McWilliam as
25 special administrator of the Estate of Richard Patrick McWilliam; and Successor
26

27 _____
28 ¹ Pursuant to agreement between the parties, Defendants agree to treat Plaintiff’s
Motion to Substitute (Doc. 104) and Supplemental Motion (Doc. 107) as one
motion. Both motions will be addressed in this opposition brief.

1 Does 11-20 for Richard McWilliam be denied, and the Complaint as to Mr.
2 McWilliam be dismissed with prejudice.

3 **II. LEGAL AUTHORITY**

4 Rule 25 provides for the dismissal of an action against a deceased party if a
5 motion for substitution is not made within the ninety-days after service of a
6 statement noting the party's death. Fed. R. Civ. P. 25(a). Rule 25 states:

7 (a) Death

8 (1) Substitution if the Claim is Not Extinguished. If a party dies and
9 the claim is not extinguished, the court may order substitution of the
10 proper party. A motion for substitution may be made by any party or
11 by the decedent's successor or representative. If the motion is not made
12 within 90 days after service of a statement noting the death, the action
by or against the decedent must be dismissed.

13 ...

14 (3) Service. A motion to substitute, together with a notice of hearing,
15 must be served on the parties as provided in Rule 5 and on nonparties
as provided in Rule 4. A statement noting death must be served in the
same manner. Service may be made in any judicial district.

16 *Id.* A "proper party" under Rule 25(a)(1) is the legal representative of the deceased
17 party; e.g., an executor of the deceased's will or an administrator of his or her estate.
18 *Mallonee v. Fahey*, 200 F. 2d 918. 920 (9th Cir. 1952).

19 **III. LEGAL ARGUMENT**

20 **A. Plaintiff Has Not Established that Its Claims and Prayer for Relief** 21 **Against Mr. McWilliam Survive His Death.**

22 1. Punitive Damages Are Penal in Nature, Do Not Survive Mr. 23 McWilliam's Death And Must Be Stricken From The Complaint.

24 Generally, statutory claims that are primarily penal in nature do not survive
25 the death of the wrongdoer, while statutory provisions with a remedial purpose may
26 survive. *United States v. Oberlin*, 718 F. 2d 894, 896 (9th Cir. 1983) (affirming
27 *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884) (actions for penalties do not survive
28

1 the death of the plaintiff)). The same is true for remedies that are intended to punish
2 a wrongdoer, like punitive damages. *See* Cal. Code Civ. Proc. § 377.42.

3 Plaintiff, relying on California Code of Civil Procedure section 377.20, argues
4 that the claims against Mr. McWilliam are not extinguished upon his death. Cal.
5 Code Civ. Proc. § 377.20. However, pursuant to Code of Civil Procedure section
6 377.42, a claim for punitive damages is extinguished and not recoverable from the
7 decedent's successor in interest. Cal. Code Civ. Proc. § 377.42 ("In an action or
8 proceeding against a decedent's personal representative or, to the extent provided by
9 statute, against the decedent's successor in interest, on a cause of action against the
10 decedent, all damages are recoverable that might have been recovered against the
11 decedent had the decedent lived except damages recoverable under Section 3294 of
12 the Civil Code or other punitive or exemplary damages.").

13 Defendants therefore respectfully request that any request or prayer for
14 punitive damages against defendant Richard McWilliam be stricken from the
15 Complaint. *See* Doc. 36 at 10:17-19 ("The aforementioned acts of Defendants were
16 willful, oppressive, and/or malicious. Plaintiff is therefore entitled to punitive
17 damages in an amount to be proven at trial, in addition to all other damages and
18 other relief."), 11:17-19 (same), 13:1-3 (same), 13:24-26 ("The aforementioned acts
19 of McWilliam were willful, oppressive, and/or malicious. Plaintiff is therefore
20 entitled to punitive damages in an amount to be proven at trial, in addition to all
21 other damages and other relief."), 14:28 ("For punitive and/or exemplary damages in
22 an amount according to proof."). Further, if this Court is persuaded by Plaintiff's
23 Motion and allows for the substitution of a party or parties in place of Mr.
24 McWilliam, Defendants request that this Court instruct Plaintiff to strike any and all
25 references to punitive or exemplary damages against the substituting party or parties.
26 Cal. Code Civ. Proc. § 377.42.

27

28

1 2. Plaintiff’s Breach of Fiduciary Duty Claim Against Mr.
2 McWilliam Arises Under Dutch Law And Plaintiff Has Not
3 Established that This Claim, Under Dutch Law, Survives Mr.
4 McWilliam’s Death.

5 Whether a claim has been extinguished and is therefore ineligible for
6 substitution under Rule 25(a)(1) is determined by the forum under which the claim
7 arose. *Bracken v. Harris & Zide, LLP*, 219 F.R.D 481, 483 (N.D. Cal. 2004); *see*
8 *also Random v. Brennan*, 437 F. 2d 315, 520 (5th Cir. 1971) (“Under general
9 principles of conflict of law, whether a cause of action survives the death of the
10 defendant is determined by the law of the jurisdiction in which the cause of action
11 arose.”).

12 Plaintiff brought this action pursuant to the Court’s diversity jurisdiction.
13 Doc. 36 ¶ 7. As such, the Court must apply the choice-of-law rules of California, the
14 forum state, to determine the controlling substantive law. *See Hoffman v. Citibank*
15 *(South Dakota) N.A.*, 546 F. 3d 1078, 1082 (9th Cir. 2008).

16 In cases involving corporate governance, California courts employ a choice-
17 of-law principle known as the “internal affairs” doctrine. *See e.g. In re Verisign,*
18 *Inc., Derivative Litig.*, 531 F. Supp. 2d 1173, 1214 (N.D. Cal. 2003). As a
19 California court has previously explained, the internal affairs doctrine is:

20
21 [A] conflict of laws principle which recognizes that only one State
22 should have the authority to regulate a corporation's internal affairs-
23 matters peculiar to the relationships among or between the corporation
24 and its current officers, directors, and shareholders-because otherwise a
corporation could be faced with conflicting demands. States normally
look to the State of a business' incorporation for the law that provides
the relevant corporate governance general standard of care.

25 *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal. App. 4th 434, 442
26 (2003) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) and *Atherton v.*
27
28

1 *FDIC*, 519 U.S. 213, 224 (1997)). As applied to director liability, the internal
2 affairs doctrine has been codified in California. *See* Cal. Corp. Code § 2116.

3 It is undisputed that Plaintiff is a Dutch company incorporated under the laws
4 of the Netherlands. As a private company with limited liability, Plaintiff is subject
5 to the rules set forth in the Dutch Civil Code (“DCC”).

6 Consequently, California’s adoption of the internal affairs doctrine requires
7 that this Court apply the substantive laws of Plaintiff’s state of incorporation – the
8 laws of the Netherlands. Thus, Dutch law applies to all causes of action that
9 implicate the company’s internal affairs, including Plaintiff’s claim for breach of
10 fiduciary duty alleged against Mr. McWilliam.

11 Plaintiff has not established that the Breach of Fiduciary Duty claim survived
12 his death under Dutch law; and therefore, has not satisfied Rule 25(a)(1)’s
13 requirement that the “claim is not extinguished.” Fed. R. Civ. P. 25(a)(1).

14 **B. The Content of the Notice of Death was Sufficient.**

15 The contents of the Notice of Death satisfied Rule 25's requirement of
16 notification of the death of the decedent. *Jackson v. Rowlett*, CIV S-04-0741
17 DFLDAD, 2007 WL 397114 (E.D. Cal. Jan. 31, 2007) (Court noted that “Rule 25's
18 sole requirement concerning the content of a suggestion of death on the record is
19 that it must contain ‘a statement of the fact of the death.’”).

20 Although the notice did not identify the successor or representative who may
21 be substituted for the decedent, many courts in the Ninth Circuit do not require such
22 identification. *See Jackson*, 2007 WL 397114, at *1; *Villa v. Heller*, 10CV1885
23 AJB WMC, 2012 WL 5932627, at *2 (S.D. Cal. Nov. 27, 2012) (court found that
24 the notice of suggestion of death which was filed, but did not identify the successor
25 or representative who may be substituted for the decedent, complied with the
26 requirements of Rule 25).

27 In *Jackson*, the court expressly rejected the notion that Rule 25 requires that a
28 statement of death identify the successor or legal representative of the deceased.

1 *Jackson*, 2007 WL 397114, at *1 (citing *Unicorn Tales, Inc. v. Banergee*, 138 F. 3d
2 467, 469 (2d Cir. 1998) (The Second Circuit rejected the D.C. Circuit’s reasoning in
3 *Rende v. Kay*,² and declined to require that a Notice of Death identify the successor
4 or legal representative.)). The court held that Rule 25 “merely requires that the
5 statement of death be served on the involved parties.” *Id.*

6 Defendants filed a Notice of Death with this Court on February 14, 2013,
7 which “both formally suggested the death of a party on the record and effected
8 serve on [all parties] in accordance with Rule 5.” *Summerfield v. Fackrell*, No. CIV
9 2:10-2884 WBS EFB, 2012 WL 113281, at *2 (E.D. Cal. January 12, 2012). The
10 90-day period began to run on February 14, 2013 and expired on May 15, 2013.
11 *See* Fed. R. Civ. P. 5(b)(2)(E) & 5(b)(3) (allowing for service by filing on docket);
12 *see also* Fed. R. Civ. P. 6(d) (allowing for 3 additional days when served under
13 Rule 5(b)(2)(E)). Since no party was properly substituted prior to the lapse of the
14 90-day period, the claims asserted against Mr. McWilliam “must be dismissed”
15 under Rule 25(a)(1).

16 Plaintiff’s motion to substitute the Estate of Richard Patrick McWilliam;
17 Vivianne B. McWilliam, as trustee of the MPR Revocable Trust; Vivianne B.
18 McWilliam as special administrator of the Estate of Richard Patrick McWilliam;
19 and Successor Does 11-20 for Richard McWilliam must be denied.

20 **C. Defendants Properly Served Notification of Mr. McWilliam’s**
21 **Death on the Record, in Compliance with Rule 5.**

22 To trigger the start of the ninety-day period, the suggesting party must
23 formally submit a suggestion of death for the record as well as serve other parties in
24 accordance with Rule 5(b), which requires service to the other party’s attorney or
25

26 _____
27 ² Plaintiff relies heavily on *Rende v. Kay*, 415 F.2d 983 (D.C. Cir. 1969) in support
28 of its position that the suggestion of death must include the name of the executor of
the estate. But *Rende* is an out-of circuit case, not binding upon this court, and has
been expressly rejected by sister-circuits. *See* Motion at 2-3; *see also Unicorn*
Tales, 138 F. 3d at 469.

1 under the other forms listed in 5(b)(2) if it is not represented by an attorney. *Barlow*,
2 30 F. 3d 231, 233 (9th Cir. 1994); Fed. R. Civ. P. 5(b).

3 Defendants filed a suggestion of death on February 14, 2013. Doc. 95. All
4 parties to this action, including Plaintiff, are represented by an attorney. As such,
5 under Rule 5(b), each party's attorney was served. Accordingly, Defendants have
6 met the procedural requirements for the filing of the Notice of Death on all parties.

7 **D. Plaintiff's Motion was Untimely.**

8 Rule 25(a) states: "If a party dies and the claim is not extinguished, the court
9 may order substitution of the proper party. A motion for substitution may be made
10 by any party or by the decedent's successor or representative. If the motion is not
11 made within 90 days after service of a statement noting the death, the action by or
12 against the decedent **must** be dismissed." Fed. R. Civ. Pro. 25(a) (emphasis added).
13 As the court in *Hofheimer v. McIntee*, 179 F. 2d 789, 791 (7th Cir. 1950), explained:

14
15 Rule 25(a) operates both as a statute of limitations upon revivor and as
16 a mandate to the court to dismiss an action not revived within the
17 (time) period... It directs the court to dismiss the action if substitution
18 has not been made within that time. That is action required of the
19 court..."

20 Mr. McWilliam died on January 5, 2013. On February 14, 2013, Defendants filed
21 upon the record a formal suggestion of death and served notice of the same to all
22 parties in this action. Doc. 95. Pursuant to Rule 25(a), any motion for substitution
23 must have been made within 90 days, which passed on May 15, 2013. As such,
24 because Plaintiff chose not to file any Motion for Substitution within the 90-day
25 deadline, the complaint and claims against Mr. McWilliam "must be dismissed."
26 Rule 25(a)(1); *see also Hofheimer*, 179 F. 2d at 791.

1 1. The Temporary “Stay” in this Case Does Not Toll the Running
2 of the 90-Day Period Under Rule 25.

3 Plaintiff argues that its Motion was timely because “[t]he April 18 stay in this
4 case was just lifted on June 19, the day before this motion was filed.” Motion at
5 1:20-21. Plaintiff claims that this “stay” somehow precluded its ability to file the
6 instant motion at an earlier time. This is not true.

7 On April 17, 2013, the Honorable Magistrate Judge Karen S. Crawford issued
8 an Order Granting The Parties’ Joint Motions to Continue Deadlines Pending the
9 Outcome of Settlement Discussions (“April 17 Order”). Doc. 99. Within the April
10 17 Order, the Court specifically stated that “[a]ll pending deadlines in the
11 Scheduling Orders filed July 27, 2012 and October 25, 2012 are temporarily vacated
12 and *discovery is temporarily stayed* pending the outcome of the Settlement
13 Conference to be held as soon as possible.” *Id.* (emphasis added). In short, Plaintiff
14 is incorrectly interpreting the scope of the April 17 Order. The time period between
15 April 18 and June 19, therefore, should not be tolled and Plaintiff’s Motion is
16 untimely.

17 2. Plaintiff’s Reliance on Non-Binding and Factually
18 Distinguishable Legal Authorities is Misplaced.

19 Plaintiff repeatedly cautions this Court from “rigid” application of Rule 25 by
20 citing to a District Court opinion in the Columbia Circuit that is over 40 years old.
21 *See e.g.* Motion at 1:5-6. Plaintiff, however, fails to mention that the *Rende* court
22 quotes the Committee Notes, which states: “If a party or the representative of the
23 deceased party desires to limit the time within which another may make the motion
24 [to substitute], he may do so by suggesting the death upon the record.” *Rende*, 415
25 F. 2d at 985. Defendants filed of the Notice of Death because they wanted to limit
26 the timeframe in which Plaintiff could move to substitute Mr. McWilliam – a
27 legitimate purpose that was expressly contemplated by Rule 25’s Advisory
28 Committee. And, as discussed below, in order to avoid Rule 25’s “rigid”

1 application, Plaintiff had a remedy, which it chose not to invoke. *Williams v. Baron*,
2 No. 2:03-cv-20044, 2009 WL 331371, at *2 (E.D. Cal. Feb. 10, 2009) (“Although
3 Rule 25 states that an action ‘must’ be dismissed if a motion to substitute is not
4 brought within ninety days, this has been held not to preclude a Rule 6(b) motion to
5 enlarge this timeframe.”). In other words, courts have provided a solution to “dispel
6 unwarranted rigidity” and allow more flexibility in substitution. Motion at 2:8-9.
7 Plaintiff opted not to go that route and Defendants should not be punished for
8 Plaintiff’s strategic decisions. This Court should not allow Plaintiff another bite at
9 the apple.

10 *Rende* is factually distinguishable. *Rende* was an action for injuries sustained
11 by a minor who was struck by an automobile driven by defendant Alfred S. Kay.
12 *Rende*, 415 F. 2d at 984. During the course of the litigation, defendant Kay died. *Id.*
13 A few days after his death, on September 1, 1967, his attorney³ filed a suggestion of
14 death in the District Court giving notice to plaintiff’s attorney. *Id.* Later, defendant’s
15 attorney moved, in his own name, to dismiss the action under Rule 25(a)(1) on the
16 grounds that plaintiffs failed to move to substitute a proper party for the deceased
17 within 90 days of the suggestion of death. *Id.* The court dismissed the action with
18 prejudice, which plaintiffs appealed. *Id.*

19 On appeal, the D.C. Circuit found that defendant’s attorney, who was retained
20 to “represent” defendant as his counsel, was not a “representative of the deceased
21 party” within Rule 25; therefore, the suggestion of death made by the attorney was
22 ineffective to trigger the running of the 90-day period. *Id.* at 986-987. Stated
23 differently, the court held that because the attorney for defendant was “not a person
24 who could be made a party, and is not a ‘representative of the deceased party’” his
25 suggestion of death was ineffective to trigger the 90-day period. *Id.*

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28 ³ The court defined its use of the term “defendant’s attorney” to “identify the lawyer
who had been retained by deceased to defend the action.” *Rende*, 415 F. 2d at 984.

1 In contrast, here, Defendants – parties to this action – filed and served the
2 Notice of Death on all parties and their attorneys of record. Doc. 95. The *Rende*
3 court explicitly stated that “[d]ifferent considerations would be involved if the
4 movant were a ‘party’ instead of someone acting for the deceased defendant.” *Id.* at
5 986, fn. 4. The Ninth Circuit has not imposed a requirement that the Notice of
6 Death identify a nonparty that may be substituted when, as here, it was filed by the
7 surviving defendants, rather than the decedent’s representative or successor. *See*
8 *Scott v. Vasquez*, No. CV 02-05296 GAF (AJW), 2009 WL 4907031 at *6-7 (C.D.
9 Cal. 2009); *see also In re Cardoza*, 111 B.R. 906, 909 (S.D. 1990) (notice of death
10 must include the identity of the estate representative only when the notice is filed by
11 the representative; that rule does not apply when another party to the action files and
12 serves the notice). In short, *Rende* is inapplicable here.

13 The other authorities Plaintiff relies on are equally unavailing. In *Drummer v.*
14 *Lummis*, 2007 WL 4623623 (D. Nev. Dec. 26, 2007), the court relied on three cases
15 from other jurisdictions in support of its holding that a suggestion of death must
16 identify the successor or representative who may be substituted for the decedent.
17 *See Smith v. Planas*, 151 F.R.D. 547, 549 (S.D.N.Y.1993); *Kessler v. Se.*
18 *Permanente Med. Group of N.C., P.A.*, 165 F.R.D. 54, 56 (E.D.N.C.1995); *Rende v.*
19 *Kay*, 415 F. 2d 983, 985 (D.C.Cir.1969). Similarly, in *U.S. v. Walker River*
20 *Irrigation District*, 2011 U.S. Dist. LEXIS 98642, at *21-22 (D. Nev. April 23,
21 2012) the court only refers to non-binding sources in support of the proposition that
22 statement of death should identify the successor(s) to the estate who may be
23 substituted for the decedent. *See McSurely v. McClellan*, 753 F. 2d 983 985-986
24 (D.C. Cir. 1985); *Rende*, 415 F. 2d at 985-986; *Kessler v. Southeast Permanente*
25 *Med. Group of NC, P.A.*, 165 F.R.D. 54, 65 (E.D.N.C. 1995). But, as detailed
26 above, Ninth Circuit precedent does require that the suggestion of death identify a
27 person who may be substituted. *Jackson*, 2007 WL 397114, at *1.

28

1 3. Plaintiff Filed Its Motion Only *After* Defendants Were Ordered
2 to Disclose to Plaintiff’s Counsel that No Substitution Had Been Made
3 And *After* Defendants Affirmatively Moved to Dismiss Mr.
4 McWilliam Under Rule 25.

5 Here is a brief timeline of relevant dates:

- 6
- 7 • January 5, 2013 – Mr. McWilliam passed away.
 - 8 • February 14, 2013 – Defendants filed a Notice of Death on the record
9 and submitted a settlement conference brief to Judge Crawford, copying
10 Plaintiff’s counsel, regarding probate issues in Nevada concerning Mr.
11 McWilliam’s estate.
 - 12 • June 11, 2013 – The parties appeared at a settlement conference before
13 Judge Crawford. Doc. 102. At this conference, Judge Crawford
14 ordered defense counsel to explain to counsel for Plaintiff why a
15 representative for Mr. McWilliam was not physically present at the
16 conference.
 - 17 • June 12, 2013 – Defendants filed a Motion to Dismiss Party Richard
18 McWilliam Under Federal Rule of Civil Procedure 25. Doc. 101.
 - 19 • June 21, 2013 – Plaintiff filed a Motion to Substitute Party (Substitute
20 Estate for Decedent Defendant Richard McWilliam Pursuant to Rule
21 25). Doc. 104.
 - 22 • July 17, 2013 – Plaintiff filed a Motion to Supplement. Doc. 107.

23 As noted above, Plaintiff filed its Motion to Substitute 127 days after the
24 filing of the Notice of Death and its Supplemental Motion 153 days after the filing
25 of the Notice of Death – both well beyond the 90-day deadline mandated by Rule 25
26 to substitute a party. Defendants believe that even more time would have passed
27 between the Notice of Death and Plaintiff’s current Motion had Defendants’ counsel
28 not been ordered by the honorable magistrate to inform counsel for Plaintiff that
 Plaintiff had neglected to timely file a motion to substitute under Rule 25. Plaintiff
 now, at the eleventh hour, scrambled to bring this Motion *after* defense counsel
 disclosed that it had not been filed yet and *after* Defendants affirmatively moved to
 dismiss Mr. McWilliam from this action on June 12, 2013. Doc 101.

1 On June 11, 2013, the parties appeared at a Settlement Conference before
2 Judge Crawford. Declaration of Craig M. Nicholas (“Nicholas Decl.”) ¶ 7. At the
3 conference, Defendants brought representatives with full settlement authority on
4 behalf of The Upper Deck Company, a California corporation and The Upper Deck
5 Company, a Nevada corporation – the only defendants in the case. Defendants did
6 not bring Mr. McWilliam (because of his unfortunate passing) nor a representative
7 of Mr. McWilliam (because no one – neither a successor or representative of Mr.
8 McWilliam nor any party – moved to substitute in a new party in place of Mr.
9 McWilliam). *Id.* at ¶ 8.

10 During the conference, it was conveyed to defense counsel that Plaintiff asked
11 Judge Crawford why a representative for Mr. McWilliam was not physically present.
12 *Id.* Counsel for Defendants explained the reasoning above to Judge Crawford. *Id.*
13 Consequently, after considering Defendants’ explanation, Judge Crawford ordered
14 defense counsel to disclose to counsel for Plaintiff that a representative for Mr.
15 McWilliam was not present at the conference because Mr. McWilliam is not a party
16 to the action and no nonparty had been substituted into the case in place of Mr.
17 McWilliam. *Id.* at ¶ 9. If defense counsel had not been ordered to do so,
18 Defendants believe that this case would continue *without* a substituting party for Mr.
19 McWilliam.

20 Defendants’ position is supported by the fact that Plaintiff’s initial Motion to
21 Substitute attempted to substitute an incorrect party: The Estate of Richard Patrick
22 McWilliam. It was not until approximately three-weeks later did Plaintiff
23 investigate and research who the “proper party” should be. *See* Doc. 107 (Motion to
24 Supplement).

25 Plaintiff’s Supplemental Motion explains that “[w]ithin the last 10 days, UDI
26 learned the [new] information about Richard McWilliam’s estate, without the
27 assistance of defendants, which significantly impacts UDI’s pending Motion to
28 Substitute.” *Id.* at 1:5-8. Conspicuously absent from Plaintiff’s briefing is any

1 explanation as to why Plaintiff could not uncover this information (i.e. who the
2 proper substituting party for Mr. McWilliam should be) before “the last 10 days.” In
3 fact, in support of Plaintiff’s Supplemental Motion, Plaintiff’s lodge exhibits that
4 were publicly filed in Nevada dated as early as February 11, 2013. Doc. 107-3.
5 These documents were and have been readily available to Plaintiff upon a reasonable
6 search or investigation since their respective filing dates.

7 Even further, on February 14, 2013, the very same day Defendants filed the
8 Notice of Death on the record, Defendants submitted a settlement conference brief to
9 the chambers of Judge Crawford, which detailed probate issues surrounding the
10 MPR Revocable Trust and Mr. McWilliam’s estate. Nicholas Decl. at ¶ 3. That
11 same day, a copy of this brief was sent to Plaintiff’s counsel. *Id.* In the brief,
12 Defendants explained that Mrs. Vivianne McWilliam, Mr. McWilliam’s widow,
13 initiated legal proceedings in the County of Washoe, Nevada to resolve issues
14 regarding the MPR Revocable Trust and Mr. McWilliam’s estate – the same actions
15 that Plaintiff attaches filings from in support of its Supplemental Motion. *Id.* at ¶ 4.
16 Consequently, Plaintiff and its counsel have known since the date the Notice of
17 Death was filed on the record about the probate proceedings occurring in Nevada.
18 The suggestion by Plaintiff that Defendants did not “assist” in providing Plaintiff
19 with information regarding Mr. McWilliam’s estate is simply not true.

20 In sum, it is disingenuous for Plaintiff to suggest or imply that any delay on
21 Plaintiff’s part in discovering this information was caused by Defendants. *See*
22 Supplemental Motion at 1:6-8 (“Within the last ten days, UDI learned the following
23 information about Richard McWilliam’s estate, without the assistance of
24 defendants, which significantly impacts UDI’s pending Motion to Substitute”); *see*
25 *also* Supplemental Motion at 3:3-5 (“Because UDI did not previously receive this
26 information from Defendants’ counsel (either in a notification of death or
27 otherwise, despite specifically asking), the motion to substitute and its supplemental
28 points and authorities are timely”). From the outset, Defendants and their counsel

1 have been more than forthcoming to Plaintiff regarding the parallel probate
2 proceedings in Nevada. As such, Plaintiff's failure in filing the appropriate motion
3 seeking to substitute a party is at the fault of no one but itself.

4 **E. Plaintiff Has Not Moved to Extend the 90-Day Period Prescribed**
5 **by Rule 25(a)(1) Pursuant to Rule 6(b); Therefore, This Court Should**
6 **Not Consider Plaintiff's Pending Motion.**

7 The proper avenue for Plaintiff to have chosen if it did not have the name of
8 the executor of the estate was to file a motion for extension of time to file the motion
9 for substitution under Rule 6(b). Under Rule 6(b), the ninety-day period prescribed
10 by Rule 25(a)(1) for filing a motion for substitution can be extended by the court "on
11 motion made after the time has expired if the party failed to act because of excusable
12 neglect." Fed. R. Civ. P. 6(b); *see also* Fed. R. Civ. P. 25 Advisory Committee's
13 Note ("The motion [for substitution] may not be made later than 90 days after the
14 service of the statement unless the period is extended pursuant to Rule 6(b), as
15 amended.").

16 Plaintiff chose not to do this, ignored the 90 day deadline, and filed a motion
17 for substitution on June 21, 2013 – more than one month after the expiration of the
18 deadline and 128 days after Defendants filed the Notice of Death. To date, Plaintiff
19 has not sought leave from this Court under Rule 6(b); therefore, this Court should
20 not consider Plaintiff's Motion or Supplemental Motion because it is not properly
21 before this Court. For this reason, Plaintiff's motion to substitute the estate in as
22 defendant, as well as the additional parties listed in Plaintiff's Supplemental Motion,
23 in place of decedent Richard McWilliam must be denied.

24 **F. There is No Evidence Before the Court that Plaintiff Served**
25 **Nonparties the Motion or Supplemental Motion.**

26 Rule 25 states that "a motion to substitute, together with a notice of hearing,
27 must be served on the parties as provided in Rule 5 and on nonparties as provided in
28 Rule 4." Fed. R. Civ. P. 25(a)(3). To Defendants knowledge, Plaintiff has not

1 served any of the nonparties it seeks to substitute into this action – The Estate of
2 Richard Patrick McWilliam; Vivianne B. McWilliam, as trustee of the MPR
3 Revocable Trust; Vivianne B. McWilliam as special administrator of the Estate of
4 Richard Patrick McWilliam; or Successor Does 11-20 for Defendant Richard
5 McWilliam – with its Motion to Substitute or Supplemental Motion as provided
6 under Rule 4. *Id.*; *see also* Fed. R. Civ. P. 4. As such, this Court should deny
7 Plaintiff’s Motion for failure to satisfy the requirements under Rule 25. *See e.g. In*
8 *re MGM Mirage Securities Litigation*, 282 F.R.D. 600, 603-604 (D. Nev. June 14,
9 2012).

10 **IV. CONCLUSION**

11 Defendants’ service of the Notice of Death on February 14, 2013 was
12 sufficient to trigger the 90-day period for filing a motion for substitution. That
13 period has expired, and no motion for substitution was timely filed. Based upon the
14 foregoing, Defendants respectfully request this Court deny Plaintiff’s motion to
15 substitute the Estate of Richard McWilliam in place of decedent Richard
16 McWilliam, and dismiss with prejudice the claims brought by Plaintiff against
17 Richard McWilliam. For the same reasons, Defendants also respectfully request that
18 this Court deny Plaintiff’s requests in its Supplemental Motion to substitute (1)
19 Vivianne B. McWilliam, as trustee of the MPR Revocable Trust; (2) Vivianne B.
20 McWilliam as special administrator of the Estate of Richard Patrick McWilliam; and
21 (3) Successor Does 11-20 for decedent Richard McWilliam.

22
23 Dated: August 5, 2013

NICHOLAS & BUTLER, LLP

s/ Mei-Ying Imanaka

24
25
26 _____
27 Craig M. Nicholas
28 Alex Tomasevic
Mei-Ying M. Imanaka
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