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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: September 26, 2006
Decided: October 11, 2006

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Re: *In re Tele-Communications, Inc. Consol. S'holders Litig.*
Civil Action No. 16470

Dear Counsel:

After carefully examining the arguments set forth by counsel and for the reasons set forth below, I deny plaintiff's motion to substitute the Estate of Kim Magness as a party defendant in place of Kim Magness.

I. BACKGROUND

Mr. Kim Magness, a former director of Tele-Communications, Inc. and named defendant in *In re Tele-Communications, Inc. Consolidated Shareholders Litigation*, died on March 29, 2003. On February 14, 2005, the individual defendants acknowledged actual notice of Magness' death in their brief in support of summary judgment. Plaintiff Douglas Martin then acknowledged actual notice of Magness' death in the summary judgment opposition brief. For the next fifteen

months, however, Martin failed to present any claim to the estate, object to the closing of the estate, or assert any claims against the estate until filing this motion.

Meanwhile, the personal representative of the estate settled all claims brought against the estate, paid the estate's known debts, and settled an audit of the estate's federal estate tax return. On June 29, 2006, fourteen months after plaintiff Martin acknowledged actual notice of Magness's death, the personal representative filed a notice of hearing on petition for final settlement and distribution of the estate and requested that all objections be made on or before July 13, 2006. Martin failed to make any objections, and instead filed this motion to substitute party on July 25, 2006.

II. CONTENTIONS

Martin argues that the claims against Magness are not extinguished by virtue of Magness' death. Further, Court of Chancery Rule 25(a) expressly allows substitution of a party in this instance so long as such request is made within 90 days after the death is suggested upon the record by service of a statement of the fact of death. Since the suggestion of death of Kim Magness was not filed until July 14, 2006, Martin contends that his motion is timely and should be granted.

The estate's personal representative responds stating that substitution would be futile because Colorado law governs and Colorado's nonclaim statute bars any claim Martin may have against the estate. Moreover, Martin has unreasonably delayed in asserting a claim against the estate. Thus, this Court should use its discretion to deny the request for a substitution of party.

III. ANALYSIS

Court of Chancery Rule 25(a) provides that "the Court may order substitution of the proper parties … [where] the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of death …." This rule, however, is permissive and grants this Court discretion to deny a motion to substitute even when the motion is made in compliance with the rule.[1] Thus, where the interests of equity and justice demand it, this Court may deny such a motion.

[1] *Roberts v. Roberts*, 737 A.2d 511, 513 (Del. 1999).

Denial is appropriate based on the facts before me. First, substitution would be futile in this case and would promote unnecessary litigation. Colorado law governs the estate because Magness was domiciled in Colorado before his death and his estate is being administered there.[2] In an effort to promote the efficient settlement of an estate and the distribution of its assets, Colorado law provides an absolute bar against all claims that existed prior to the death of the decedent but that were not asserted against the estate within one year of the decedent's death.[3] Generally, this bar cannot be waived or tolled and is not contingent upon knowledge or notice of the decedent's death absent proof of fraud. Though the Colorado courts realize this rule may sometimes cause hardship to people who have no notice of the death, the Colorado General Assembly has determined that the burden on those claimants is outweighed by the interest in speedy and efficient distribution of estates.[4] Thus, Colorado's nonclaim statute bars plaintiffs' claims in this case since the claims were not presented to the estate prior to March 29, 2004.[5] Since Martin cannot seek damages from the estate of Magness, substitution is futile and would lead to unnecessary litigation.

Finally, even if Colorado law would not bar Martin's claims, I would deny the motion due to Martin's unreasonable and inexcusable delay that undoubtedly would result in unfair prejudice against the estate. While plaintiff has technically complied with Court of Chancery Rule 25(a), plaintiff had, by his own admission, at least fifteen months of actual notice of the death of Magness, notice that the estate was being administered in Colorado, and notice that the estate was about to close. Nevertheless, Martin failed to act. Instead, he waited and allowed the personal representative to settle and pay all known debts, negotiate to pay all estate taxes, and close the estate. Now he seeks to reopen the estate, though he asserts no reason or excuse for over seventeen months of silence and inaction. In these circumstances and in the exercise of my discretion under Rule 25(a), the motion

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[2] *Wilmpfheirmer v. Goldsmith*, 298 A.2d 778, 780 (Del. Ch. 1972).

[3] *See In re Estate of Ongaro*, 998 P.2d 1097, 1102 (Colo. 2000); *see also* Colo. Rev. Stat. § 15-10-803(1)(a)(III).

[4] *See In re Estate of Ongaro*, 998 P.2d at 1102-1005.

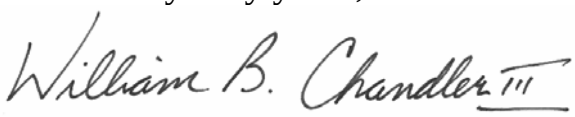
[5] This point is proven by the Colorado court's treatment of the individual defendants' recent attempt to avoid the statutory bar in this case. The individual defendants argued that because their contingent claims for contribution would not arise until the question of liability was decided, the one-year presentment period had not yet commenced. The court rejected this argument and held that the claims were contingent pre-death and were not presented within the time limit; thus, they were barred. There is no question that this claim is pre-death, but was not presented to the estate within one year of Magness' death. Thus, this claim is also time barred.

should be denied because it was unreasonably and inexcusably late and because reopening the estate at this juncture would unfairly prejudice the estate.

For the reasons set forth above, plaintiff's motion to substitute party is denied.

IT IS SO ORDERED.

Very truly yours,



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