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No. 66954-1-I

WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

In re Estate of:

MICHAEL J. FITZGERALD, Deceased,

Respondent,

and

MOUNTAIN WEST RESOURCES, INC.,

Appellant.

RESPONSE BRIEF OF THE ESTATE OF MICHAEL J. FITZGERALD

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I. INTRODUCTION

The Superior Court properly concluded that the creditor's claims of Mountain-West Resources, Inc. ("MWR"), against the Estate of Michael J. Fitzgerald (the "Estate") are time-barred pursuant to RCW 11.40.010 and RCW 11.40.051.

The Superior Court's decision (denying a Motion for Revision) was proper because MWR was not a reasonably ascertainable creditor under RCW 11.40.040. In addition, the Court affirmed an unchallenged finding of the Commissioner that MWR received actual notice, providing a wholly alternative basis for concluding that MWR's claims are time-barred under RCW 11.40.051(1)(a).

The determination that MWR was not a "reasonably ascertainable creditor" was based upon statutorily sufficient evidence, submitted by the Personal Representative, as set forth in RCW 11.40.040(3). This evidence created a presumption that MWR was not reasonably ascertainable, rebuttable only by clear, cogent, and convincing evidence. Despite such presumption, MWR failed to put forth any evidence, whatsoever, to rebut the presumption that MWR was not a reasonably ascertainable creditor.

MWR now alleges reversible error based upon the Court's denial of MWR's request for discovery on the procedural issue of whether or not it was a reasonably ascertainable creditor. However, MWR failed to

indicate what evidence would be established by discovery. Given the scope of the Superior Court's authority under TEDRA to resolve matters expeditiously, the Court certainly had authority to deny MWR's request for discovery in this case.

MWR additionally alleges error with respect to the Superior Court's affirmation of the Commissioner's finding that MWR received actual notice to creditors. However, during the Motion for Revision, counsel admitted that MWR's attorney received actual notice, discussed such notice with MWR, and that MWR decided not to bring a claim at that time. MWR did not challenge the actual notice finding in its Motion for Revision even though applicable Local Court Rules require parties to include all claimed errors within the Motion for Revision.

The remaining arguments raised by MWR are not properly before the court, and MWR lacks standing to make such arguments. MWR challenges the dismissal of a matter between Tronox and the Estate. MWR lacks standing to make such argument, as was found by the Commissioner, since MWR was not a party to such action.

For the foregoing reasons, the Estate respectfully requests that the Court affirm the Superior Court's order.

II. COUNTER STATEMENT OF THE CASE

A. Procedural History

In 1999, MWR brought an action against Michael J. Fitzgerald (the “Decedent”), in the Supreme Court of British Columbia. CP 71. The basis of MWR’s claims was that, in 1975, the Decedent allegedly breached his fiduciary duty to MWR while he was President of MWR. CP 56. In March of 2004, the British Columbia court dismissed the case with the judge noting “the fact that [the underlying] events occurred almost 30 years ago” and further stating that MWR “does not have a good arguable case.” CP 73. Of this decision, Judge Shaffer of the Superior Court stated that the ruling “looks very much like a summary judgment ruling to the Court with an extremely low standard of proof.” RP 3/4/11, p. 18.

In 2008, Tronox Worldwide, LLC (“Tronox”), a wholly unrelated party, brought a substantially similar claim against the Decedent, in Nevada, in Case No. CV08-00924 (the “Tronox Claim”). RP 3/4/11, p. 18-19, 29-30. MWR was never a party in the Tronox Claim. RP 1/6/11, P. 6.

The Decedent passed away on August 11, 2009. CP 10. The Decedent’s will was admitted to probate, and his widow, Maria Luisa de la Vega Fitzgerald (hereinafter the “PR”) was confirmed as the Personal Representative on September 25, 2009. CP 11.

A notice to creditors under RCW 11.40.020 was published beginning on October 14, 2009. CP 25-26. In addition, a notice to creditors, under RCW 11.40.020(1)(d) was mailed to Tronox on January 14, 2010. CP 35. Tronox was the only creditor known to the PR at that time. CP 14.

On January 14, 2010, Tronox filed a Petition, in Washington, to substitute the PR as the defendant in the Tronox Claim in Nevada. CP 379-81. Added to this Petition was a creditor's claim, submitted "to comply with the requirements of Revised Code of Washington 11.40.070 to the extent such a claim is still required to be filed" for Tronox to be able to continue its Nevada action. CP 381.¹

On February 14, 2010, four months after the date of first publication of notice to creditors, creditors who were not reasonably ascertainable became time-barred. RCW 11.40.051(1)(b)(i).

On October 15, 2010, the Tronox Claim in Nevada was dismissed, with prejudice, pursuant to a stipulated order of the parties. CP 41-42. The Nevada dismissal was entered by Tronox's attorney and counsel for

¹ Tronox also brought a TEDRA Petition in King County Superior Court for the purpose of ensuring that its claims would comply with Washington law. The Petition sought a finding establishing that no new action would be needed in Washington, and that Nevada would be considered the proper court for purposes of RCW 11.40.100. See TEDRA Petition Regarding Rejection of Creditor's Claim Based on Pre-Death Lawsuit, filed March 17, 2010, by Tronox, in Cause No. 10-4-01651-9, P. 4 et seq., as cited at CP 229, Footnote 35.

the Decedent. CP 41-42. Corollary dismissals were entered in King County Superior Court on October 28, 2010, executed by counsel for the Estate and by Tronox's general counsel. CP. 37-40.

On November 3, 2010, counsel for the Estate received correspondence from MWR's counsel, purporting to bring a claim by MWR against the Estate. CP 75-82. The stated basis for the claim was a secret agreement between MWR and Tronox that purportedly had been executed some two and one-half years earlier. CP 77-78. The November 3, 2010 letter from MWR's attorney attached a copy of the secret agreement, indicating that MWR had agreed to pay all attorney's fees for Tronox relating to claims brought against the Decedent, in exchange for a speculative one-half (1/2) interest in any proceeds received from the Tronox Claim. CP 79-82. The agreement also specifically contemplated the possibility that a claim for malicious prosecution or abuse of process would be asserted against Tronox for bringing claims against the Decedent, and MWR agreed to assume all liability for such damages as well as indemnify and hold harmless Tronox from all such liability. CP 80.

MWR has since explained that it believed its claims against the Estate were being preserved through Tronox's Claim, and for this reason

MWR did not take any prior action to protect its potential interests with respect to the Estate. RP 1/6/11, P. 10, P. 12; RP 3/4/11, P. 14; CP 213.

Following receipt of correspondence from MWR's counsel, on November 3, 2010, counsel for the Estate sent a letter to MWR's counsel, advising that MWR's claims were time-barred. CP 22, CP 109-110.

On November 19, 2010, the PR completed an affidavit regarding reasonable diligence, in compliance with RCW 11.40.040. CP 14-15. This affidavit confirmed that the PR had conducted the review contemplated by statute of the Decedent's correspondence and other documents during the four month period following the date of first publication of Notice to Creditors (through February 14, 2010). *See* CP 14. This affidavit further confirmed that, as a result of having conducted such review, the only creditor discovered was Tronox. CP 14. MWR was not ascertained as a result of the review. CP 14.

On November 22, 2010, the Estate brought a TEDRA Petition, requesting the court to find that any creditors not known to the PR, as of February 14, 2010, were not reasonably ascertainable, and specifically that MWR was not a reasonably ascertainable creditor. CP 23.

On December 6, 2010, MWR brought a Motion to Intervene in the Nevada action between Tronox and the Estate, despite the fact that the

case already had been dismissed with prejudice as of October 15, 2010. MWR's Motion subsequently was denied.²

On December 14, 2010, MWR filed a complaint against the Estate in the U.S. District Court for the District of Wyoming in Case No. 2:10-cv-00265-NDF. This case also has since been dismissed.³

On December 16, 2010, before the Estate's TEDRA Petition was heard, MWR formally asserted claims against the Estate in the aggregate amount of one billion, six hundred fifty million dollars (\$1,650,000,000.00). CP 158-162. At that time, MWR disclosed two (2) claims. *Id.*

The primary claim, in the amount of one billion, five hundred million dollars (\$1,500,000,000.00) was allocable to *Tronox's* dismissed claim (the "Nevada Claim"). This claim alleged fraudulent action by the Decedent with respect to Kerr-McGee Corporation (the predecessor of Tronox). CP 160. This claim did not allege that the Decedent injured MWR. *Id.* Rather, MWR's claim alleges that Tronox's dismissal of

² MWR has asserted that the Nevada claims "have been" the subject of "ongoing litigation" in Nevada. *See* Appellant's Brief, P. 9. However, MWR's Motion to Intervene in Nevada, was denied on March 13, 2011, based upon the lack of an existing suit.

³ MWR has asserted that the Wyoming claims "are" the subject to "ongoing litigation" in Wyoming. *See* Appellant's Brief, P. 9. However, on April 6, 2011, MWR voluntarily dismissed the Wyoming action against the Estate.

Tronox's claims, against the Estate, was entered without MWR's consent.

Id.

The second claim, in the amount of one hundred fifty million dollars (\$150,000,000.00), was allocable to the newly raised Wyoming claim (the "Wyoming Claim"). CP 158-162. The Wyoming Claim had not been included in the Tronox action, and was not disclosed in MWR's prior correspondence to counsel for the Estate, which had originally alerted the Estate to a potential claim from MWR, on November 3, 2010. *See* CP 77-78.

On January 6, 2011, an Order was entered in response to the Estate's Petition finding that MWR could not maintain an action against the Estate, pursuant to RCW 11.40.010 and RCW 11.40.051. CP 204-206, CP 16. The Commissioner specifically found that the PR made a reasonable review under RCW 11.40.040(1), that MWR was not a reasonably ascertainable creditor and, further, that MWR received actual notice, effective January 14, 2010. CP 204-205. The order also stated that any creditors not known to the PR, as of February 14, 2010, are not reasonably ascertainable, and that the only creditor known to the PR was Tronox. CP 205.

Thereafter, MWR brought a Motion for Revision. CP 209.

MWR's Motion for Revision identified five purported errors, summarized as follows: (1) the Commissioner erred by entering an order which could be construed to foreclose MWR's right to pursue claims brought under Nevada Cause Number CV08-00924 (the dismissed Tronox Claim); (2) the Commissioner erred by refusing MWR's request for an opportunity to conduct discovery; (3) the Commissioner erred by disregarding Washington law regarding the ability of a corporation to sign a pleading *pro se*; (4) the Commissioner erred by ignoring MWR's request for mediation; and (5) the commissioner erred in awarding fees to the estate. *See* CP 209-218.

MWR's Motion for Revision was denied on March 4, 2011. CP 235-237. MWR now appeals the denial of its Motion for Revision.

B. Facts Relating to the Steven C. Davis Claim

While the Steven C. Davis ("Davis") claim is not the subject of this appeal, MWR has requested that an April 18, 2011 Order, which pertained to Davis' claim, be vacated. *See* Appellant's Brief, P. 36-38, *see* CP 361-362. Accordingly, the Estate is now in a position where it must provide some background with respect to the Davis matters as well.

On March 28, 2011, counsel for the Estate received a Creditor's Claim from Davis ("Davis). CP 451, CP 461-481. The Estate rejected such claim as being time-barred, based in part on the prior court order,

finding that Tronox was the only reasonably ascertainable creditor of the Estate. CP 437-449.

On April 18, 2011, the court entered an order finding that the claims of Steven C. Davis were time-barred under Washington law, pursuant to RCW 11.40.010 and RCW 11.40.051. CP 361-362.

III. ARGUMENT

A. Standard of Review

Findings of fact are reviewed for substantial evidence. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. *Id.* Conclusions of law are reviewed de novo. *Id.* The trial court's decisions to allow or deny discovery, and to allow or deny a continuance, are reviewable only for abuse of discretion. *See T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006); *see also Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

B. The Superior Court Has Broad Authority to Proceed with Administration of Estate Matters in Any Way that Seems Right and Proper, All to the End that the Matters be Expeditiously Administered

In the context of TEDRA, the court has broad discretion with respect to administration of probate matters. The legislature has expressed

its intent to provide the courts with full and ample power to settle all matters concerning estates. RCW 11.96A.020(1). Explicitly, the statute grants “full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.” RCW 11.96A.020(2). Thus, TEDRA explicitly indicates the legislative intent of granting significant judicial authority, in favor of expeditious administration, consistent with the public policy of providing finality in matters involving trusts and estates.⁴

In this case, the court acted within its authority and discretion to find that MWR did not bring a timely claim, because it was not reasonably ascertainable and was not entitled to further discovery on the issue. In the alternative, the court acted within its authority and discretion to find that MWR did not bring a timely claim because it effectively received notice to creditors.

⁴ Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999 (Jan. 28, 1999), at 3, *available at* <http://www.wsbarppt.com/comments/tedra99.pdf>.

C. The Court Should Affirm the Superior Court's Denial of MWR's Motion for Revision Because Statutorily Sufficient Evidence Was Presented to Establish That MWR Was Not a Reasonably Ascertainable Creditor

1. Introduction – the Statutory Framework Regarding Reasonably Ascertainable Creditors, the PR's Compliance with Requirements, and the Burden on MWR.

If a creditor is not reasonably ascertainable, the creditor must present its claim within four months after the date of first publication of notice to creditors. RCW 11.40.051(1)(b)(i). The date of first publication of notice was October 14, 2009. CP 25-26. Accordingly, if MWR was not reasonably ascertainable, its claims would be time-barred, as such claims were not brought by February 14, 2010.

A reasonably ascertainable creditor of the decedent is one that the personal representative would discover upon exercise of reasonable diligence. RCW 11.40.040(1). The personal representative is deemed to have exercised reasonable diligence upon conducting a reasonable review of the decedent's correspondence, including correspondence received after the date of death, and financial records, including personal financial statements, loan documents, checkbooks, bank statements, and income tax returns, that are in the possession of or reasonably available to the personal representative. *Id.*

If the personal representative conducts the review, the personal representative is presumed to have exercised reasonable diligence to ascertain creditors of the decedent and any creditor not ascertained in the review is presumed not reasonably ascertainable. RCW 11.40.040(2). These presumptions may be rebutted only by clear, cogent, and convincing evidence. *Id.*

The personal representative may evidence the review giving rise to the statutory presumption by filing an affidavit with the court regarding the search conducted. RCW 11.40.040(3). The personal representative may petition the court for an order declaring that the personal representative has made a review and that any creditors not known to the personal representative are not reasonably ascertainable. *Id.*

Here, the PR submitted the affidavit contemplated by RCW 11.40.040, establishing that she conducted a reasonable review of the Decedent's correspondence and other documents during the four month period following the date of first publication of notice to creditors. *See* CP 14. This affidavit further established that, as a result of having conducted such review, the only creditor discovered was Tronox. CP 14. MWR was not ascertained in the review. CP 14. MWR has conceded that this affidavit met the criteria under RCW 11.40.040. *See* Appellant's Brief, P. 12. This evidence put the burden on MWR, to prove by clear, cogent, and

convincing evidence, that it was a reasonably ascertainable creditor. RCW 11.40.040(2).

2. MWR Did Not Challenge the Finding that the PR Conducted a Statutory Due Diligence Review, as Set Forth in RCW 11.40.040.

Commissioner Velategui found that the PR made a reasonable review under RCW 11.40.040(1). CP 204. This finding was supported by the sworn testimony of the PR, submitted pursuant to RCW 11.40.040(3).

MWR failed to identify any error with respect to the finding that the PR conducted the due diligence review in its Motion for Revision. CP 209-218. Moreover, the King County Local Court Rules require a motion for revision to identify the error(s) claimed. *See* KCLCR 7(b)(8)(A).

As stated by Judge Shaffer:

“First of all, there’s no challenge to the showing here by the estate that the [PR] conducted a reasonable review of the decedent’s correspondence and financial records that were either in the possession of or reasonably available to her.” RP 3/4/11, P. 23.

Now, for the first time on appeal, MWR appears to challenge that the PR conducted this review. *See* Appellant’s Brief at P. 33-34 (making an unfounded allegation that the PR “may have been less than fully candid”). Whether or not the PR conducted a due diligence review is not properly before the Court under RAP 2.5(a).

3. MWR Presented No Evidence to Rebut the Statutory Presumption that it was Not a Reasonably Ascertainable Creditor.

Faced with evidence that the PR performed a statutory search of the Decedent's records, and that the PR found nothing to suggest that MWR was a potential creditor, MWR offered no evidence to support a finding that it was a reasonably ascertainable creditor. RP 3/4/11, P. 23. This is in spite of the applicable burden to rebut the statutory presumption in favor of the PR by clear, cogent, and convincing evidence.

The evidence that was before the Superior Court actually supports a finding exactly opposite to what MWR now is arguing with respect to being a reasonably ascertainable creditor. The secret agreement between MWR and Tronox clearly demonstrates that MWR wanted to conceal its involvement with respect to the Tronox Claim. It is unclear why MWR chose to hide behind Tronox, but it clearly did so at its own peril.

Instead of presenting actual evidence that it somehow was a reasonably ascertainable creditor, MWR offered nothing but the conjecture of counsel. MWR suggested in its briefing filed with the court that the PR, being the Decedent's wife, would have known about the MWR action in Canada that was brought in 1999 and dismissed in 2004. CP 122; RP 3/4/11, P. 15. However, as Judge Shaffer noted,

“the dismissal of a lawsuit hardly alerts you that there’s a live claim against the estate. To the contrary, it would tend to put the [PR’s] mind at rest that there is no further outstanding claim. That’s why courts enter dismissals is to end actions.” RP 3/4/11, P. 24.

MWR also suggested that, being the Decedent’s wife, the PR knew about the Tronox action in Nevada. RP 1/6/11, P. 7; RP 3/4/11, P. 15.

However, as Judge Shaffer noted,

“there’s nothing about that fact that would have alerted [the PR] to [MWR’s] claim in the action. The agreement between [MWR] and Tronox wasn’t disclosed till long after the notice to creditors had been issued and the statutory period had run, so the existence of the Nevada action is alone not sufficient to have put her on reasonable notice that [MWR] had an outstanding claim.” RP 3/4/11, P. 24.

Further, the Tronox Claim asserted in Nevada alleged damages only to Tronox. CP 165-181. MWR would benefit only as a result of its secret agreement with Tronox to share proceeds from a successful result. CP 79-82. Knowledge of the Tronox Claim in Nevada would only place the PR on notice that Tronox was a potential creditor, as MWR intentionally had not yet emerged as a creditor or party in the Nevada litigation.

Counsel for MWR indicated below that a MWR investigator spoke to the PR and suggested that this alleged phone call placed the PR on notice that MWR was a creditor. CP 122; RP 3/4/11, P. 16. However, this bald assertion was completely unsupported by any actual evidence put

forth by MWR. RP 3/4/11, P. 24. In response to this unfounded allegation, the PR submitted a declaration stating that she never answered a phone call from anyone identifying themselves as having any connection with MWR. CP 192. Commissioner Velategui found MWR's assertions concerning the alleged telephone call unavailing:

There's nothing from anyone who made the call to say that they actually made the call. And even if they did make the phone call – “Are you the PR?” the person on the phone to the PR. “Yes.” “Oh, well, we're trying to figure out if you know anything about anything.” “No, I don't know. Do you want to talk to my husband? He's deceased.” Or, “He's out in the backyard.” This isn't enough – or, “We claim your husband owes us money.” How about even that? That's not enough. That's not enough to warrant the issuance of, some years later or even after death, a notice that you're a reasonably ascertainable creditor. You're just a phone call, making inquiry, doing an investigation. RP 1/6/11, P. 26-27.

Judge Shaffer agreed:

“...assuming that that a personal investigator at some point called the [PR], there is nothing about that that indicates that she would have been alerted by that phone call to an outstanding claim by [MWR] against the decedent or the estate.” RP 3/4/11, P. 25.

Accordingly, Judge Shaffer properly found that “There really is no evidence to speak of here that indicates that [MWR] was reasonably ascertainable.” RP 3/4/11, P. 23.

4. The Evidence Before the Court Indicated that MWR was Hiding its Interest in the Tronox Litigation.

The only evidence that has been submitted indicates that MWR hid its interest in the Tronox litigation, until after Tronox dismissed its case. *See* RP 1/6/11, P. 11.

As stated by Commissioner Velategui:

“[MWR] was a silent partner in the [Tronox] litigation, apparently. I will characterize it that way.” RP 1/6/11, P. 13.

“[MWR] didn’t seem to want to let [the Decedent] know that they were somehow involved in this litigation. They were hiding their interest, one might say.” RP 1/6/11, P. 11.

The Commissioner’s assessment of this matter was appropriate. MWR did not present the Estate with a copy of the secret agreement between MWR and Tronox until November 3, 2010, immediately after the Tronox matter was dismissed. CP 20-21, CP 74-82. Further, MWR was not named on any documents with respect to the Tronox Claim, at any time. *See* RP 1/6/11, P. 6, CP .

5. MWR Could Not Have Been a Reasonably Ascertainable Creditor, Based Upon the Evidence in the Record.

A review of MWR’s two asserted claims, and a review of the record, indicates that MWR could not have been a reasonably ascertainable creditor under any circumstances.

With respect to the Nevada Claim, critically, MWR has not alleged that the Decedent injured MWR. CP 160-161; CP 120. Instead, MWR alleges that the Decedent injured Tronox, and that Tronox injured MWR by dismissing its own action against the Estate (on October 15, 2010). *See* CP 160-161.

RCW 11.40.010 defines a “creditor” as a “person who has a claim against the decedent.” MWR does not meet the definition with respect to the Nevada Claim as MWR only states facts which may constitute a claim for MWR against Tronox. As both Commissioner Velategui and Judge Shaffer have noted, MWR’s complaint is with Tronox, rather than the Estate. RP 1/6/11, P. 10, P. 30; RP 3/4/11, P. 15. Further, MWR was never assigned a claim from Tronox, but merely received an interest in proceeds, should Tronox prevail in its claims (which are now dismissed). RP 1/6/11, P. 27. Thus, MWR has never had a claim against the Estate, with respect to the Nevada Claim. Accordingly, it cannot be concluded that MWR was a reasonably ascertainable creditor of the Estate, with respect to the Nevada Claim, because MWR still does not even have a claim against the Estate.

With respect to the Wyoming Claim, while MWR does allege that it is the injured party, MWR admits that it was not aware of its own claims until October or November of 2010. MWR has admitted that it did not

bring a claim against the Estate prior to that time because it believed that its interests were being protected through the Tronox litigation. RP 1/6/11, P. 10, P. 12; RP 3/4/11, P. 14; CP 213. Because the Wyoming Claim was never included in the Tronox Claim, it follows that MWR could not have been aware of its Wyoming Claim until after Tronox dismissed its action on October 15, 2010 (otherwise MWR would not have felt that its interests were covered by the Tronox litigation, with a purported \$150,000,000.00 claim outstanding and not included).

Further, the letter sent by MWR's counsel to counsel for the Estate dated November 3, 2010, announcing for the first time that MWR had purported claims to assert against the Estate, and disclosing the existence of its agreement with Tronox, made absolutely no mention of the Wyoming Claim. Accordingly, the record indicates that the Wyoming Claim was merely an afterthought. If MWR was unaware it had such a claim until December of 2010, it defies logic to suggest the PR should have known of the claims before the PR's due diligence review was completed on February 14, 2010.

6. The Denial of MWR's Request for Discovery was Within the Court's Authority and Discretion, As TEDRA Provides Authority to Proceed with Administration of Estate Matters in Any Way that Seems Right and Proper, All to the End that the Matters be Expeditiously Administered.

As previously stated, the legislature has expressed its intent to provide the courts with full and ample power to settle all matters concerning estates. RCW 11.96A.020(1). The statute grants "*full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.*" (emphasis added). RCW 11.96A.020(2).

Here, the court properly exercised its authority in favor of expeditious administration, as authorized by RCW 11.96A.020. MWR had requested the court to refrain from deciding the Estate's TEDRA Petition until MWR had an opportunity to depose the PR and "other relevant individuals." CP 122. Tellingly, however, MWR presented nothing to suggest that discovery would produce any evidence to support a finding that it is a reasonably ascertainable creditor.

As Commissioner Velategui stated, "it appears that the [PR] did a reasonably diligent search, and it's mere speculation and a fishing expedition on the part of [MWR] to try to prove otherwise." RP 1/6/11, P. 28. Thus, the Superior Court considered it to be "right and proper" to

deny MWR's discovery request, in favor of expeditious administration, and acted well within the court's "full power and authority." *See* RCW 11.96A.020.

The public policy is in favor of Estate's being administered swiftly. This probate was commenced on September 25, 2009. CP 11. More than two years later, this probate remains open as a result of the appeals of time-barred creditors. If the Court's decision is overturned, MWR would then engage in a costly and time-consuming "fishing expedition" to attempt to prove that it was reasonably ascertainable, as feared by the Commissioner. Such a result would be exactly what the legislature hoped to avoid.

7. MWR's Request for Discovery under RCW 11.96A.115 is Specifically Inappropriate under the Explicit Statutory Scheme of RCW 11.40.040.

RCW 11.40.040(3) provides instructions for a personal representative to establish reasonable diligence in searching to identify potential creditors of the estate. MWR has admitted that the evidence submitted by the PR met the criteria under RCW 11.40.040. Appellant's Brief, P. 12.

Despite the plain language of the statute, and despite the PR's compliance with the statute, MWR argues that RCW 11.96A.115

“entitled” MWR to discovery on the issue of whether or not MWR was reasonably ascertainable. Appellant’s Brief, P. 31.

However, on its face, RCW 11.96A.115 does not “entitle” a party to discovery. On the contrary, it provides that, in matters governed by RCW Title 11, discovery is “permitted only” in certain situations. Thus, RCW 11.96A.115 is a rule of limitation, meant to limit the scope of permissible discovery in matters involving estates. RCW 11.96A.115 should not be construed as a rule conferring an “entitlement” to discovery.

As in any case, the right to discovery is not absolute. Generally, before advancing to discovery, pleading requirements must be met. *Putnam v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009). The right to discovery is accompanied by rules of statute, court, or decision law such as rules governing service of process or statutes of limitation. *Id.*

In this case, the PR complied with RCW 11.40.040 in every respect, by conducting a reasonable review and evidencing such review in an affidavit. The PR’s affidavit constituted statutorily sufficient evidence for purposes of finding that MWR was not a reasonably ascertainable creditor. Requiring discovery on this issue, where a statute explicitly indicates what evidence is sufficient, and where such evidence was supplied, would be inappropriate. Given the court’s authority to resolve

matters expeditiously, in any way that seems right and proper, and given the court's authority to resolve all issues at the initial hearing, the court's denial of MWR's discovery request should be affirmed. RCW 11.96A.020(2); RCW 11.96A.100(8).

8. MWR's Has Equated the Superior Court's Decision to a Motion for Summary Judgment, But Even Under CR 56(f), MWR Was Not Entitled to Discovery.

MWR has equated the proceedings below to a summary judgment motion, where CR 56(f) provides that, in certain situations, the court may order a continuance to permit discovery. MWR contends:

“The Estate’s Petition functioned as a summary judgment motion, summarily dismissing the claims of claimants who have not put forth all potential evidence to support their claims. Yet even on summary judgment, a party who demonstrates the possibility that they will be able to satisfy their burden if given the opportunity to obtain evidence is given a continuance under CR 56(f).” Appellant’s Brief, P. 29.

However, even setting aside the court’s “full power and authority” to resolve these matters in favor of expeditious administration, MWR would not be entitled to discovery under a CR 56(f) analysis either. On its face, CR 56(f) requires affidavits from the party requesting discovery to state reasons why the party is unable to present facts essential to justify his position. CR 56(f). MWR submitted nothing.

Further, the trial court may deny a motion for a continuance under CR 56(f) when (1) the requesting party does not have a good reason for

the delay in obtaining the evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3) the new evidence would not raise a genuine issue of fact. *Turner v. Kohler*, 54 Wn. App. 688, 692-95, 775 P.2d 474 (1989). The denial of a continuance can be based on any one of the above three prongs. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992). The court reviews the CR 56(f) significance of each piece of requested discovery. *See Mossman v. Rowley*, 154 Wn. App. 735, 229 P.3d 812 (2009). A denial of a CR 56(f) request for continuance is reviewed for an abuse of discretion. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 902, 973 P.2d 1103 (1999).

In its Answer to the TEDRA Petition, MWR requested the court to refrain from deciding the Petition until MWR had an opportunity to depose [the PR] and “other relevant individuals.” CP 122. In its Motion for Revision, when requesting discovery, MWR mentioned an investigator who allegedly spoke to the PR on the phone. CP 214.⁵

⁵ On appeal, MWR expands its request for discovery to include “obtaining further documentation and evidence supporting its reasonable contention that Ms. Fitzgerald was aware of [MWR’s] claims....” Appellant’s Brief, P. 28. However, MWR may not increase the scope of its request on appeal. *Mossman v. Rowley*, 154 Wn.App. 735, 744, 229 P.3d 812 (2009). Further, such request is so general and nonspecific that it also fails to meet the requirement of indicating what evidence would be established.

First, the Court should ignore MWR's general requests regarding "other relevant individuals" because the requesting party must affirmatively indicate what evidence would be established. *See Momah v. Bharti*, 144 Wn. App. 731, 182 P.3d 455, 468 (2008) (Where the requesting party contended that "key witness depositions" had not been taken, the court properly denied a continuance because the requesting party did not adequately explain the nature of the evidence that he believed would be established through discovery).

Second, with respect to its failure to put forth anything from the alleged investigator, MWR did not provide a good reason for the delay in obtaining evidence. Given that the alleged investigator was MWR's own investigator, and that MWR provided no reason for the delay in obtaining an affidavit from such investigator, the trial court could properly deny MWR's request as it pertained to the investigator. Further, MWR never specified whether the alleged investigator's phone call identified MWR in any way, or even whether such alleged call occurred prior to the end of the PR's statutory search for creditors on February 4, 2010. Accordingly, MWR's request also fails because MWR did not demonstrate that any information from the investigator would be favorable to its case. *See Thongchoom v. Graco Children's Products, Inc.*, 117 Wn. App. 299, 309, 71 P.3d 214 (2003).

Finally, with respect to the request to depose the PR, MWR failed to indicate what evidence would be established by discovery, and there is nothing to suggest that any new evidence would be helpful to MWR. The PR has already submitted an affidavit that she conducted the review, set forth by statute, to create the presumption that MWR was not a reasonably ascertainable creditor. There is not a scintilla of evidence to indicate the PR will say anything other than what already has been set out in her affidavit submitted with the court. *See Farmer v. Davis*, 250 P.3d 138, 144 (2011) (Where Farmer sought to depose Mr. and Ms. Davis to determine Mr. Davis' usual abode, but declarations had already been provided by both on the issue, and Farmer offered no explanation of what potentially contradictory evidence he hoped to elicit, the request for discovery was properly denied). *See also Briggs v. Nova Services*, 135 Wn. App. 955, 961-62, 147 P.3d 616 (2006) (Where the requesting party sought to depose persons to find out what they knew, but the requesting party did not show what specific evidence would be located, the trial court properly denied the discovery request). *See also Thongchoom v. Graco Children's Products, Inc.*, 117 Wn. App. 299, 309, 71 P.3d 214 (2003).

MWR's request, in its entirety, fails to indicate what evidence *would* be produced through discovery. A continuance is not justified if the party fails to support the request with an explanation of the evidence to be

obtained through additional discovery. *Molsness v. City of Walla Walla*, 84 Wn.App. 393, 401, 928 P.2d 1108 (1996). Vague, wishful thinking is not enough to justify a continuance. *Id.* In this case, no affidavit or other evidence was submitted setting out what evidence would likely be obtained in discovery, and MWR made absolutely no showing to demonstrate why discovery would be helpful to its cause. As stated by the Commissioner, “it appears that the [PR] did a reasonably diligent search, and it’s mere speculation and a fishing expedition on the part of [MWR] to try to prove otherwise.” RP 1/6/11, P. 28. The Trial Court’s decision was not an abuse of discretion, as MWR’s vague and wishful thinking failed to justify a continuance for discovery.

9. MWR is Attempting to Improperly Heighten the Burden on the PR, and to Increase the Scope of What is Relevant to Reasonably Ascertainable Creditor Status.

The PR complied with RCW 11.40.040, which clearly lays out what was required, of the PR, to shift the burden to MWR.

MWR, however, cites *In re Estate of Little*, 127 Wn. App. 915, 925, P.3d 505 (2005) to support the inaccurate proposition that the PR has some heightened burden “to discover reasonably ascertainable creditors.” However, *Estate of Little* dealt with a personal representative’s failure to provide notice to heirs, which is required under RCW 11.28.237. Despite MWR’s citation to the contrary, *Estate of Little* did not deal with

attempting to discover creditors, which is not required under current law.⁶

Second, unlike the heirs in *Estate of Little* (where the heirs did not learn of the decedent's death until 9 years after the decedent's death), MWR knew that the Decedent was dead. RP 1/6/11, P. 13.

But most importantly, in *Estate of Little*, the court reopened the case where there was "no evidence that [the personal representative] was diligent." *Id.* at 925. In that case, while at least one heir was known by the personal representative to exist, none were given required statutory notice. *Id.* at 917-18. In the instant case, however, there was statutorily sufficient evidence of the PR's diligence, and there was no evidence, whatsoever, that the PR was anything less than diligent.

In addition to purporting to heighten the burden on the PR, MWR is also attempting to expand the scope of what constitutes a "reasonably ascertainable" creditor, beyond the documentary review provided in RCW 11.40.040.

⁶ *Estate of Little* briefly mentioned a statutory "obligation" to use diligence in attempting to discover reasonably ascertainable creditors of the deceased. *Estate of Little* at 918, citing former RCW 11.40.012. However, RCW 11.40.012, which previously required a personal representative to discover ascertainable creditors, has been repealed, effective December 31, 1997. The exercise of diligence to discover creditors is now optional, and the legislature has removed the requirement of personal representatives to make inquiries with the deceased's heirs regarding potential creditors. *See* RCW 11.40.040.

MWR argues:

“[I]t is reasonably likely that [the PR] has actual or constructive knowledge of a potential claim by [MWR] *through a source outside of the decedent’s correspondence and financial records* ... [the PR] was married to the decedent during the British Columbia lawsuit between [the Decedent] and [MWR] and during the most recent Nevada litigation.”

Appellant’s Brief, P. 32. (Emphasis added).

There is no legal basis to hold the PR to a heightened standard simply because she happens to be the widow of the Decedent and was aware of the British Columbia litigation that was dismissed back in 2004. No evidence was presented to even suggest the PR had knowledge that MWR was a potential creditor, and no authority has been provided to support the proposition that the statutorily sufficient evidence put forth in this matter is inadequate.

MWR is seeking to conduct discovery without any basis and, in so doing, asking the court to render meaningless the presumption created within RCW 11.40.040(2). MWR’s invitation in this regard should be rejected.

D. In the Alternative, The Court Should Affirm the Superior Court's Denial of MWR's Motion for Revision Because MWR Failed to Challenge the Finding of Actual Notice in its Motion for Revision, and Because MWR Admitted Receipt of Notice

1. The Finding of Actual Notice Provided a Wholly Alternative Basis for Concluding that MWR was time-barred.

The finding of actual notice provided a wholly alternative basis for the Superior Court to find MWR's claims to be time-barred. A finding that MWR was not reasonably ascertainable, *or* a finding that MWR received notice, was sufficient to find MWR to be time-barred pursuant to RCW 11.40.051(1)(b)(i), or 11.40.051(1)(a), respectively.

2. This Appeal is Limited to Issues Identified As Errors in the Motion for Revision, Which Did Not Include the Issue of Actual Notice.

Once the Superior Court makes a decision on revision, the appeal to the appellate court is from the Superior Court's decision, not the commissioner's. *State v. Ramer*, 151 Wn.2d, 106, 113, 86 P.3d 132 (2004). Accordingly, the focus of this review must be limited to the issues which were the subject of the March 4, 2011 Motion for Revision.

The King County Local Court Rules require a motion for revision to identify the error(s) claimed. *See* KCLCR 7(b)(8)(A). With respect to the March 4, 2011 Motion for Revision, five errors were claimed. These limited issues constituted the matter before Judge Shaffer, and should also

properly constitute the maximum scope of this appeal, as the appeal is from the Motion for Revision.

MWR's Motion for Revision identified five purported errors, summarized as follows: (1) the Commissioner erred by entering an order which could be construed to foreclose MWR's right to pursue claims brought under Nevada Cause Number CV08-00924; (2) the Commissioner erred by refusing MWR's request for an opportunity to conduct discovery; (3) the Commissioner erred by disregarding Washington law regarding the ability of a corporation to sign a pleading *pro se*; (4) the Commissioner erred by ignoring MWR's request for mediation; and (5) the commissioner erred in awarding fees to the estate. CP 209-218.

Left unchallenged by MWR was the Commissioner's finding regarding notice. MWR now improperly attempts to challenge the finding of notice, for the first time, on appeal. However, as a general rule, appellate courts will not consider any claim of error which was not raised in the trial court. *See* RAP 2.5(a). Put another way, in reviewing Judge Shaffer's decision on the Motion for Revision, it would be inappropriate to overturn such decision on a basis which was not raised before such Judge.

MWR attempts to sidestep the preservation issue by attributing the finding of actual notice directly to Judge Shaffer and by mischaracterizing the March 4 Order. The March 4, 2011 Order on Revision included a

finding that MWR received actual notice. CP 235. In reality, Judge Shaffer's finding was merely an affirmation of a determination by the Commissioner, which was not identified as an error or challenged in any way by MWR, was not briefed in the Motion for Revision, and was not subject to review in the Motion for Revision.

3. The Finding that MWR Received Notice Was Supported by a Judicial Admission.

MWR asserts that there is no evidence in the record to support a finding that MWR received the notice to creditors. *See* Appellant's Brief, P. 20-21. However, MWR's argument in this regard overlooks the fact that its counsel unequivocally acknowledged that MWR received notice to creditors during argument before both the Commissioner and Judge Shaffer. In oral argument on the Motion for Revision, counsel for MWR stated:

"It's true that an attorney who was representing both [MWR] and Tronox received notice to creditors from the estate. You know, however, at that time [MWR] did not reply, did not respond to that personally because they thought that their claims were being preserved through this agreement with Tronox." RP 3/4/11, P. 14.⁷

See also CP 213 ("[MWR] believed its claims were being preserved through the litigation with Tronox.").

Counsel's statements regarding receipt of notice to creditors and the deliberate decision to refrain from making a claim because of the

⁷ A similar admission was made in the initial hearing. *See* RP 1/6/11, P. 11-12.

mistaken belief Tronox was protecting its interests constitutes a judicial admission. *See United States v. Bentson*, 947 F.2d 1353 at 1356 (9th Cir. 1991) (Where Bentson’s counsel stated in open court that he was not claiming that Benston filed valid tax returns, Bentson could not claim that the government failed to prove he did not file valid tax returns).

4. MWR’s Contention that the Estate Failed to Establish Facts Upon Which Relief Can Be Granted is Inaccurate.

MWR asserts that, under RAP 2.5(a)(2), the Court can review an issue, for the first time on appeal, where there is a failure to establish facts upon which relief can be granted. *See* Appellant’s brief, footnote 3, P. 20-21. However, the Estate did establish facts upon which relief can be granted, in the court’s discretion.

MWR mistakenly cites *In re Dorey’s Estate*, 62 Wn. 2d 152, 154-55, 381 P.2d 626 (1963) for the proposition that compliance with statutory requirements “*regarding notice to creditors* ‘is mandatory’.” *See* Appellant’s Brief, P. 21. However, *In re Dorey’s Estate* did not even deal with the issue of notice to creditors. *Id.* Rather, at issue was the requirement of a claimant to actually present a proper claim as a prerequisite to being entitled to receive payment from the estate. *Id.* In fact, the “sole issue” was “whether the court erred in allowing the

administrator to be reimbursed from the assets of the estate for items of expense for which no creditors' claims were filed." *Id.* at 154.

MWR also cites *Marquam v. Ellis*, 27 Wn. App. 913, 914-15, 621 P.2d 190 (1980), for the proposition that the notice requirements must be strictly construed. In *Marquam*, the court determined that, on the facts presented before such court, the statutory provisions regarding *rejection of a creditor's claim* were not satisfied where the rejection was sent to the claimant's attorney. There, the creditor had already presented a claim, and the statute in question dealt with rejecting such claim. *Id.* at 914. Creditor's claims must include identifying information of the claimant. RCW 11.40.070(1)(a)). Thus, the estate in *Marquam* would have known exactly where to send such notice of rejection, prompting the court to state that following the formalities for a notice of rejection was not burdensome. *See id.* On the facts of the instant case, however, no claim had been submitted by MWR, and the statute at issue entails providing notice to creditors *before* a claim has been submitted under RCW 11.40.070.

Accordingly, despite MWR's contention, neither *Estate of Little* nor *Marquam* stands for the proposition that the requirements for notice to creditors must be strictly construed.

On the contrary, the *Marquam* court noted that, under certain circumstances, evidence of informal notice of rejection of a creditor's claim *is* adequate. *Marquam v. Ellis*, 27 Wn. App. 913, 915, 621 P.2d 190 (1980). In *Mallicott v. Nelson*, 48 Wn.2d 273, 293 P.2d 404 (1956), the court held that an informal notice of rejection of a claim was sufficient under the facts of its case. *Id.* at 275. Accordingly, in certain instances, informal notice is permitted, even in the context of a rejection of a creditor's claim.

And again, under RCW 11.96A.020, the Court had the authority to proceed with administration and settlement in any manner and way that to the court seemed right and proper, all to the end that the matters be expeditiously administered and settled by the Court. In this case, the facts are compelling. MWR hid its interest in the Tronox claim. RP 1/6/11, P. 11. MWR knew that the Decedent was dead. RP 1/6/11, P. 13. In addition, MWR's counsel admitted that an attorney representing MWR and Tronox (and compensated solely by MWR), received such notice and discussed such notice with MWR, and MWR determined not to bring an action at that time. RP 3/4/11, P. 14. MWR was apprised of the opening of the Estate and the necessity to bring a timely claim. However, MWR only brought a claim when (and because) Tronox dismissed its own claim. On these facts, the court appropriately considered it "right and proper" to

conclude that MWR effectively received notice to creditors, for purposes of RCW 11.40.051(1)(a). *See* RCW 11.96A.020.

E. Responses to Additional and Irrelevant Arguments of MWR

The focus of MWR's appeal concerns the finding that MWR's claims were time-barred under Washington law. MWR, however, raises additional issues, which are irrelevant and not properly before the Court. These arguments are addressed below.

1. The Issue Concerning the Tronox Dismissal Is Not Properly Brought Before the Court, and MWR Lacks Standing to Make Such Argument.

MWR has repeatedly raised an issue regarding the Tronox dismissal in Washington. On this issue, Judge Shaffer stated "I'm not going to decide the issue [with respect to Washington], because I don't have to." RP 3/3/11, P. 321. MWR argues that this decision was "clear error, and that "the validity of Tronox's Washington dismissal must be decided if the Court finds that Mountain West's claims are time barred because it affords Mountain West a potential alternative avenue of relief." Appellant's Brief, P. 35.

However, Judge Shaffer was correct that she did not have to reach this issue, for several reasons.

First, this issue is not properly before the Court. The underlying TEDRA Petition (which was the subject of the Motion for Revision) dealt

with whether MWR was a reasonably ascertainable creditor pursuant to RCW 11.40.040, and whether MWR's claims were time-barred under RCW 11.40.051 and RCW 11.40.010. CP 16-CP23. A determination of whether or not Tronox's claim was properly dismissed is not properly within the scope of these proceedings.

Second, Commissioner Velategui properly found that MWR did not have standing to raise this issue. *See* RP 1/6/11, P. 10, P. 29 (“[MWR] wasn't a party to that litigation. What's [MWR's] standing to complain about the fact that [Tronox] and [the Estate] in those suits, for whatever reason, decided to dismiss the cases?” “It's not [MWR's] complaint.”)⁸

MWR contends that this issue must be decided because it affords MWR a potential alternative avenue for relief. But MWR has no right to assert the claims of Tronox. As stated by the Commissioner, the agreement between Tronox and MWR “is just an agreement to pay attorneys' fees and share profits or whatever is collected, not an assignment of a claim or anything else.” RP 1/6/11, P. 27. MWR is not the real party in interest. MWR has no right to pursue the underlying claim of Tronox, has no right to step into the shoes of Tronox, and has no right to reopen the Tronox claim.

⁸ Commissioner Velategui's oral findings were explicitly incorporated as court findings. RP 1/6/11, P. 30. *See also* CP 205, Order H.

Third, even if MWR had standing to make this argument, MWR failed to preserve such argument. MWR failed to identify the Commissioner's finding (that MWR did not have standing to argue Tronox's dismissal was invalid) as an error within its Motion for Revision as was required. *See* LCR 7(b)(8)(A). And, MWR cannot assert error with respect to this finding, for the first time, on appeal. RAP 2.5(a).

Finally, while MWR makes much of the Washington *pro se* dismissal, as previously indicated by the Estate, the Nevada stipulation and order was entered by an attorney, on behalf of MWR. CP 41-42. The Washington dismissal between the Estate and Tronox, which MWR improperly purports to challenge, was essentially irrelevant, as the Washington claims of Tronox were entirely tied to the Nevada matters, and were not "stand alone" actions of Tronox. In Tronox's Petition to substitute the PR as the defendant in the Tronox Claim in Nevada, Tronox included a creditor's claim, for the limited purpose of "[complying] with the requirements of Revised Code of Washington 11.40.070 to the extent such a claim is still required to be filed" in order for Tronox to be able to continue its Nevada action. CP 381.⁹ Accordingly, the Tronox's Washington claims were not "stand alone" claims, but instead deferred to

⁹ *See also* CP 229, citing the TEDRA Petition filed by Tronox in Cause No. 10-4-01651-9 SEA, p.4 et seq.

the Nevada claims, which were, in fact, dismissed by Tronox's counsel.

CP 42.

2. The Court Should Not Reach the April 18, 2011 Order Because MWR Lacks Standing to Make Arguments Regarding the Validity of this Order, And Because Such Order Was Properly Entered Under RAP 7.2(c).

The April 18, 2011 Order did not pertain to MWR. This Order pertained to Steven C. Davis, and MWR has no standing to argue that such Order should be vacated.

Despite the January 6, 2011 Order, which found Tronox to be the only reasonably ascertainable creditor (such order being binding on all creditors under RCW 11.40.040(3)), and despite the denial of MWR's Motion for Revision on March 4, 2011, counsel for the Estate received a time-barred creditor's claim from Davis on March 25, 2011. CP 451, CP 461-481.

As a result of Davis' claim, the Estate properly styled its Motion as a Motion for "Clarification and Confirmation" because the Estate was seeking confirmation of the prior Order's impact with respect to Steven C. Davis.¹⁰

¹⁰ RCW 11.40.040(3) provides for an Order regarding reasonably ascertainable creditors to have impact on all creditors, known and unknown, as notice of the hearing must be given by publication.

The January 6, 2011 Order and March 4, 2011 Order continued to be valid under RAP 7.2(c). In a civil case, unless a decision has been stayed, the trial court has authority to enforce any decision of the trial court, and the Estate had the right to take action premised on the validity of such decision). RAP 7.2(c). As of April 18, 2011, when the Order was entered, neither the January 6, 2011 Order, nor the March 4, 2011 Order, had been stayed.

Not only did the court have the authority to enter the April 18, 2011 Order under RAP 7.2(c), but these new Orders (designated Order I through Order M) were specifically entered with respect to Davis. *See* CP 361-363. Thus, MWR has no standing to argue the validity of such Orders.

MWR attempts to preemptively address the issue of standing by arguing that the Clarification, if not appealed, would leave every provision of the order currently on appeal with effect, even if it was reversed by this Court. Appellant's Brief at P. 37-38. First, the Estate has contended that the Court of Appeals should affirm the lower court. If the Court of Appeals agrees with the Estate, then MWR's concern is entirely moot. Second, even if the March 4, 2011 Order (affirming the January 6, 2011 Order) was reversed on this Appeal, the Estate would certainly agree that the April 18, 2011 Order would not trump the decision of the Court of

Appeals, with respect to MWR, and the Estate would certainly agree that the Court of Appeals could also find that the April 18, 2011 Order shall have no impact on MWR.

However, even if the Court enters a reversal with respect to MWR, such decision should not serve to overturn a properly entered Order finding that Davis was not a reasonably ascertainable creditor and that Davis' claim is time-barred. CP 362.

MWR has argued that the language of the April 18, 2011 Order, (stating that the order was binding "on all creditors, including, but not limited to Steven C. Davis") "necessarily also purported to include Mountain West." *See* Appellant's Brief, P. 36; *see* CP 361. This argument is misleading, as MWR was already bound by the January 6, 2011 and March 4, 2011, without any need for Clarification and Confirmation as to MWR. Thus, the April 18, 2011 had no implications, whatsoever, for MWR, and MWR lacks standing to challenge such Order.

If MWR were successful at having the April 18, 2011 Order vacated, there would be no benefit for MWR. Rather, the benefit would be to Davis. *See* CP 361-363.

As an aside, MWR also incorrectly contends that the January 6, 2011 Order was revised and superseded. Appellant's Brief, P. 36.

However, the Motion for Revision was, in fact, denied. RP 3/4/11, P. 30, CP 236.¹¹

IV. CONCLUSION

The Estate respectfully requests that the court affirm the trial court's March 4 Order, denying MWR's Motion for Revision. MWR was found to be a time-barred creditor based upon two separate statutory provisions: (1) because MWR was found not to be reasonably ascertainable, it was time-barred under RCW 11.40.051(1)(b)(i), and (2) because MWR received notice, it was time-barred under RCW 11.40.051(1)(a). An affirmation of either such basis would be entirely sufficient to find MWR time-barred under RCW 11.40.051, and to find that MWR could not maintain an action against the Decedent, under RCW 11.40.010.

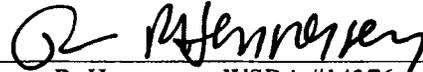
The Washington Legislature has clearly mandated that it wants to end the specter of endless probate litigation. Accordingly, the trial court is

¹¹ MWR's counsel has made much of the minor and moot clarification entered with respect to the denial of the Motion for Revision (arguing that "material changes" were made). *See* Appellant's Brief, P. 6. MWR was requesting the Court to affirmatively allow MWR to "pursue Tronox's claims in the event the Nevada court grants the pending motion to intervene." CP 212. The Court agreed with the Estate that the Washington statute of limitations should apply to all claims brought by MWR against the Estate, wherever brought. RP 3/4/11, P. 11-12, 25-26 ("It seems to me that the reference to the statutory provisions here makes clear that the commissioner's ruling was pursuant to our statute."). The Court, however, was willing to clarify that Nevada could make its own decisions. RP 3/4/11, P. 11-12, 25-26. This issue is now entirely moot, however, as the Motion to Intervene has since been denied by the Nevada Court.

empowered to proceed with “administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.” Here, the trial court appropriately exercised its statutory authority, and the denial of MWR’s Motion for Revision should be affirmed.

Respectfully submitted this 16th day of December, 2011.

SMITH & HENNESSEY, PLLC



James R. Hennessey, WSBA #14376
Attorneys for The Estate of Michael J.
Fitzgerald

MONAHAN & BIAGI PLLC



Jordan S. Klein, WSBA #41184
Attorneys for The Estate of Michael J.
Fitzgerald

APPENDIX A

EXPO 1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

In re Estate of)
)
) Case No. 09-4-04947-2 SEA
Michael J. Fitzgerald,)
) ORDER RE: REASONABLY
) ASCERTAINABLE CREDITORS
Deceased.)
) (RCW 11.40.040, 11.96A.080)
)

Maria Luisa de la Vega Fitzgerald ("petitioner"), has filed a TEDRA Petition for Order Re: Reasonably Ascertainable Creditors and the court being fully advised in the premises, finds as follows:

1. **Reasonable Review.** The personal representative has made a reasonable review under RCW 11.40.040(1).
2. **Reasonably Ascertainable Creditors.** The only creditor known to the personal representative, as of February 14, 2010, was Tronox Worldwide, LLC. Tronox received actual notice, pursuant to RCW 11.40.020.
3. **Mountain West Not Reasonably Ascertainable.** Mountain-West Resources Inc. ("Mountain West") was not a reasonably ascertainable creditor.
4. **Mountain West Received Actual Notice.** Mountain West received actual notice, effective January 14, 2010.

ORDER RE: REASONABLY
ASCERTAINABLE CREDITORS - 1

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701 Fifth Avenue, Suite 2800
Seattle, WA 98104
Phone (206) 587-5700 Fax (206) 587-5710

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5. Mountain West Did Not Bring a Timely Claim. Mountain West did not bring a timely claim under RCW 11.40.051, and Mountain West may not maintain any action against the decedent, pursuant to RCW 11.40.010 and RCW 11.40.051.
6. Notice of Hearing under 11.96A.110. Mountain West received proper notice of the pending matter under RCW 11.96A.110.

6 **IT IS ORDERED:**

- 7 A. The personal representative has made a reasonable review under RCW 11.40.040(1);
8 and
9 B. Any creditors not known to the personal representative, as of February 14, 2010, are
10 not reasonably ascertainable; and
11 C. The only creditor known to the personal representative, as of February 14, 2010, was
12 Tronox Worldwide, LLC; and
13 D. Mountain-West Resources Inc. was not a reasonably ascertainable creditor; and
14 E. Mountain-West Resources Inc. received actual notice, effective January 14, 2010; and
15 F. Mountain-West Resources Inc. may not maintain any action against the decedent,
16 pursuant to RCW 11.40.010 and RCW 11.40.051; and
17 G. Pursuant to RCW 11.96A.150, Petitioner is hereby entitled to an award of its
18 attorney's fees and costs, from Mountain-West Resources Inc., as a result of having to
19 bring this Petition before the court. Allowable fees and costs will be determined
20 pursuant to a petition to be submitted by Petitioner at a later date; and

21 H. Oral expenses in INCORPORATED
22 AS COURT FINDINGS —

23
24 Dated

25 1/6/11

26 [Signature]
Judge/Commissioner

ORDER RE: REASONABLY ASCERTAINABLE CREDITORS - 2

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Presented by:
Monahan & Biagi, P.L.L.C.

Jordan S. Klein
Jordan S. Klein, WSBA No. 41184
Attorneys for Personal Representative

**ORDER RE: REASONABLY
ASCERTAINABLE CREDITORS - 3**

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APPENDIX B

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FILED
KING COUNTY, WASHINGTON

MAR 04 2010

SUPERIOR COURT CLERK
BY Victor E. Blomberg
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

In re Estate of)
)
) Case No. 09-4-04947-2 SEA
Michael J. Fitzgerald,)
) ORDER RE: MOTION FOR REVISION
Deceased.)
)
)

The court being fully advised in the premises, finds as follows:

1. **Reasonable Review.** The personal representative has made a reasonable review under RCW 11.40.040(1).
2. **Reasonably Ascertainable Creditors.** The only creditor known to the personal representative, as of February 14, 2010, was Tronox Worldwide, LLC. Tronox received actual notice, pursuant to RCW 11.40.020.
3. **Mountain West Not Reasonably Ascertainable.** Mountain-West Resources Inc. ("Mountain West") was not a reasonably ascertainable creditor as defined by RCW 11.40.040.
4. **Mountain West Received Actual Notice.** Mountain West received actual notice to creditors, effective January 14, 2010.

ORDER RE: MOTION
FOR REVISION - 1

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Seattle, WA 98104
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5. Mountain West Did Not Bring a Timely Claim. Mountain West did not bring a timely claim under RCW 11.40.051, and Mountain West may not maintain any action against the decedent, pursuant to RCW 11.40.010 and RCW 11.40.051.

6. Notice of Hearing under 11.96A.110. Mountain West received proper notice of the Petition for Order Re: Reasonably Ascertainable Creditors pursuant to RCW 11.96A.110.

IT IS ORDERED:

A. That the Motion for Revision, submitted by Mountain-West Resources Inc., is denied; and

B. That the Commissioner's ~~findings, rulings, and orders are affirmed and upheld, in their entirety, and~~ *order "F" is clarified to state that Mountain-West Resources Inc. may not maintain an action against the Estate, under Washington law, pursuant to RCW 11.40.010 and RCW 11.40.051*

C. Pursuant to RCW 11.96A.150, the Estate of Michael J. Fitzgerald is hereby entitled to an additional award of its attorney's fees and costs, from Mountain-West Resources Inc., in responding to the Motion for Revision. Allowable fees and costs will be determined pursuant to a petition to be submitted by Petitioner at a later date; and

D. _____; and

E. _____; and

F. _____

Dated March 4, 2011


The Honorable Catherine Shaffer

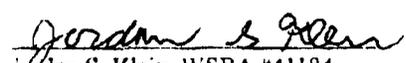
ORDER RE: MOTION
FOR REVISION - 2

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Presented by:
Monahan & Biagi, P.L.L.C.
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Seattle, WA 98104

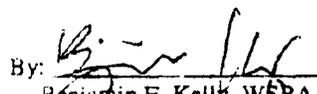
Smith & Hennessey, PLLC


Jordan S. Klein, WSBA #41184
Attorneys for the
Estate of Michael J. Fitzgerald


James R. Hennessey, WSBA #14376
Attorneys for the
Estate of Michael J. Fitzgerald

APPROVED AS TO FORM:
NOTICE OF PRESENTATION WAIVED

CABLE LANGENBACH KINERK & BAUER LLP

By: 
Benjamin E. Kelly, WSBA #39560
Attorneys for Claimant Mountain-West Resources Inc.

ORDER RE: MOTION
FOR REVISION - 3

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APPENDIX C

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SEATTLE, WA

Motion for Clarification and Confirmation Re:
Order Re: Reasonably Ascertainable Creditors
Noted with Oral Argument
April 18, 2011 10:30 AM

EXPO 1

~~Handwritten signature and date~~

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re Estate of

Michael J. Fitzgerald,

Deceased.

NO. 09-4-04947-2 SEA

ORDER RE: MOTION FOR
CLARIFICATION
AND CONFIRMATION

~~[PROPOSED]~~

~~Handwritten signature~~

The court being fully advised in the premises, finds as follows:

1. **Notice by Publication.** The January 6, 2011 Order was properly entered, pursuant to RCW 11.40.040(3), and notice specified under RCW 11.96A.110 was given by publication.
2. **Application of Order to Steven C. Davis and Other Creditors.** The January 6, 2011 Order is binding on all creditors, including, but not limited to, Steven C. Davis.
3. **Steven C. Davis Failed to Bring a Timely Claim.** Steven C. Davis failed to bring a timely claim under RCW 11.40.051, by February 14, 2010, and Steven C. Davis may not maintain an action against the decedent, pursuant to RCW 11.40.010 and RCW 11.40.051.

ORDER RE: MOTION FOR CLARIFICATION
AND CONFIRMATION - 1

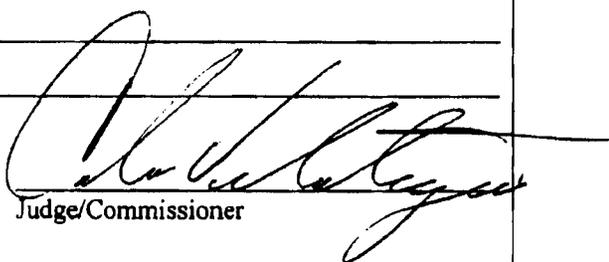
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- 4. **Notice of Hearing.** Steven C. Davis received proper notice of the April 18, 2011 hearing.
- 5. **Steven C. Davis Was Not a Reasonably Ascertainable Creditor.** Steven C. Davis was not a reasonably ascertainable creditor of the Estate, under RCW 11.40.040.
- 6. **Steven C. Davis Had Actual Notice of the Probate Proceedings.** For purposes of RCW 11.40.051(1)(a), Steven C. Davis is deemed to have had actual notice.

IT IS ORDERED: That the January 6, 2011 Order is hereby clarified, confirmed, and added to, as follows:

- I. The claims of Steven C. Davis, against the Estate, are specifically time-barred, under Washington law, pursuant to RCW 11.40.010 and RCW 11.40.051.
- J. Pursuant to RCW 11.96A.150, Petitioner is hereby entitled to an award of its attorney's fees and costs, from Steven C. Davis, for its Motion for Clarification, and for reviewing and rejecting Mr. Davis' Creditor's Claims. Allowable fees and costs will be determined pursuant to a Motion, to be submitted by the Estate at a later date; and
- K. There is good cause to deny Mediation, pursuant to RCW 11.96A.300(1)(b) and RCW 11.96A.300(3); and
- L. Steven C. Davis was not a reasonably ascertainable creditor of the Estate, under RCW 11.40.040; and
- M. For purposes of RCW 11.40.051(1)(a), Steven C. Davis is deemed to have had actual notice; and
- N. _____

Dated 4/18/11



 Judge/Commissioner

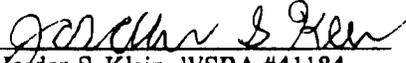
ORDER RE: MOTION FOR CLARIFICATION
 AND CONFIRMATION - 2

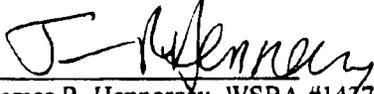
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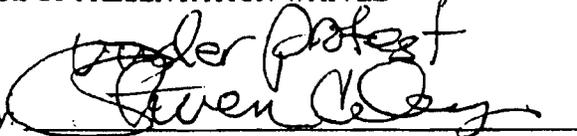
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Jordan S. Klein, WSBA #41184
Attorneys for the
Estate of Michael J. Fitzgerald


James R. Hennessey, WSBA #14376
Attorneys for the
Estate of Michael J. Fitzgerald

APPROVED AS TO FORM;
NOTICE OF PRESENTATION WAIVED


By: Steven C. Davis

ORDER RE: MOTION FOR CLARIFICATION
AND CONFIRMATION - 3

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Estate of:)	
)	
MICHAEL J. FITZGERALD,)	No. 09-4-04947-2 SEA
)	
Deceased.)	Appeal No. 66954-1-I
)	

HEARING

January 6, 2011

Commissioner Carlos Velategui Presiding

CERTIFIED COPY

Transcribed by: Shanna Barr, CETD
 Reed Jackson Watkins
 206.624.3005

A P P E A R A N C E S

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On Behalf of Respondent:

JORDAN S. KLEIN
Monahan & Biagi PLLC
701 Fifth Avenue
Suite 2800
Seattle, Washington 98104

JAMES R. HENNESSEY
Smith & Hennessey PLLC
316 Occidental Avenue South
Suite 500
Seattle, Washington 98104

On Behalf of Appellant:

BENJAMIN E. KELLY
Cable Langenbach Kinerk & Bauer LLP
1000 Second Avenue
Suite 23500
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January 6, 2011

THE COURT: Fitzgerald.

MR. HENNESSEY: Good morning, Your Honor.

MR. KELLY: Good morning, Your Honor.

THE COURT: I've read the working papers. So let's see. Who is the petitioner?

MR. KLEIN: The petitioner is the personal representative of the estate of Michael J. Fitzgerald.

THE COURT: And you are?

MR. KLEIN: Jordan Klein representing petitioner.

MR. HENNESSEY: I'm Jim Hennessey, also here on behalf of the petitioner.

MR. KELLY: Benjamin Kelly here on behalf of the respondent, Mountain West.

THE COURT: And what is the respondent's claim against the estate?

MR. KELLY: Well, they have a couple of claims, Your Honor. Now they've recently filed a litigation in Wyoming involving some uranium claims. The deceased spent most of his working life working for Mountain West Resources and/or Tronox. They did litigate at one point in Canada; however, it was a different set of facts and circumstances. It involved claims called the S.J. claims

1 at a time during the '70s. The claims that are being
2 litigated -- were being litigated in Nevada at the time
3 that Mr. Fitzgerald passed away involved the Polaris
4 (phonetic) claims and actions that took place in the '60s.
5 So there isn't, in fact, res judicata.

6 So during the time that he was working for these
7 companies, Mr. Fitzgerald secreted away money claims in
8 breach of his fiduciary duties, defrauded his actions, and
9 hid, concealed what he had done, so it didn't come to
10 light until 2006, I believe. So that's the basis of the
11 claims, Your Honor.

12 THE COURT: Came to light in 2006?

13 MR. KELLY: I'm not certain, Your Honor. I believe --
14 well, the Nevada litigation started in 2008. It was
15 within the statute of limitations, Your Honor.

16 THE COURT: But the Nevada litigation is over, isn't
17 it?

18 MR. KELLY: It's not over, Your Honor. There was a
19 dismissal that we're contending was improper because it
20 was signed --

21 THE COURT: Well, it's over. You're trying to vacate
22 it or something, maybe?

23 MR. KELLY: Well, there is a pending motion in front of
24 the Nevada court that has --

25 THE COURT: Can't intervene in a dismissed case.

1 MR. KELLY: Well, the motion has been accepted and the
2 hearing has not been set, so it is -- and I don't have the
3 Nevada pleading --

4 THE COURT: So what is it that Mr. Fitzgerald is
5 alleged to do and when did he do it?

6 MR. KELLY: During the '60s and '70s, the time -- he
7 worked for Mountain West Resources from, I believe, 1969
8 or 1970 to 1995, and there were certain mining claims that
9 he learned -- in his position with Mountain West, he
10 learned of them, and his duty -- because he learned of
11 them -- you know, as an employee of Mountain West, it was
12 his duty to share those with the company. However, he
13 didn't, setting up various sort of companies with friends
14 of his and sort of cronies of his and then transferring
15 the claims to them, but retained an interest for himself.
16 So he became fabulously wealthy off these claims without
17 ever disclosing to Mountain West that he had learned of
18 them, had an interest in them, and retained an interest in
19 them.

20 THE COURT: And when did Mountain West discover this?

21 MR. KELLY: Mountain West discovered these claims --
22 and I don't have a date -- it's in my tongue -- but I
23 believe it was sometime in 2006 or 2007, Your Honor. So
24 Mountain West --

25 THE COURT: And what did they do about it when they

1 discovered it?

2 MR. KELLY: Well, they entered an agreement with
3 Tronox, a litigation agreement -- I think you have a copy
4 of it -- in 2008. Essentially a contract giving the
5 parties different rights in the litigation.

6 THE COURT: And did -- and Tronox filed suit?

7 MR. KELLY: Tronox did file suit, Your Honor.

8 THE COURT: And they filed suit in their name and the
9 name of Mountain West or just in their name?

10 MR. KELLY: Mountain West was not named in the suit,
11 Your Honor.

12 THE COURT: And was there anything in the suit that
13 claimed that Mountain West was also injured as a result of
14 the claims they were complaining of?

15 MR. KELLY: Mountain West was not named at all in the
16 suit, Your Honor.

17 THE COURT: So how would anyone know, then, that
18 Mountain West might be a reasonably ascertainable
19 creditor?

20 MR. KELLY: Well, Your Honor, it's -- Mountain West
21 believes that because the personal representative of the
22 estate was Mr. Fitzgerald's wife --

23 THE COURT: Yeah.

24 MR. KELLY: -- she's been aware of this ongoing
25 litigation at different times.

1 THE COURT: Which litigation?

2 MR. KELLY: All the litigations, Your Honor.

3 THE COURT: But which litigation, I asked,
4 specifically. The Tronox litigation?

5 MR. KELLY: The Tronox litigation. And Mountain West
6 believes that she was aware of Mountain West's interest in
7 the Tronox litigation as well.

8 THE COURT: Why would she be aware of that?

9 MR. KELLY: Well, Your Honor, they were -- at the time
10 the litigation was ongoing, they were continuing to
11 investigate claims because --

12 THE COURT: Who was investigating?

13 MR. KELLY: Mountain West was continuing to investigate
14 these claims. So because a number of different instances
15 of these fraudulent activities had come to light, Mountain
16 West was continuing to research if there were other ones
17 that they had not yet become aware of.

18 THE COURT: And that was in 2006 and '7; is that right?

19 MR. KELLY: Your Honor, that was after Tronox -- that
20 was in 2008 continuing through 2009, and continuing with
21 Mr. Fitzgerald's death.

22 THE COURT: So --

23 MR. KELLY: Okay.

24 THE COURT: So Mountain West was investigating
25 Mr. Fitzgerald during 2008 and 2009?

1 MR. KELLY: Yes, Your Honor. And including --

2 THE COURT: When did they know he died?

3 MR. KELLY: I think they were aware of his death at the
4 time that he died. I believe it was April of 2009.

5 Is that correct?

6 THE COURT: I'm having a great deal of difficulty,
7 Counsel. That's why I'm not letting petitioners go first.
8 I'm trying to figure out why I shouldn't just deny this
9 and dismiss it.

10 MR. KELLY: Your Honor, I believe that --

11 THE COURT: You can't file a lawsuit for purposes of
12 going on a fishing expedition to see if you can find out
13 if the wife knew something.

14 MR. KELLY: Your Honor, I -- well, the lawsuit was not
15 filed for the purpose of finding if the wife knew
16 something. But because there are procedural barriers,
17 they have to find out what she knew, and we're requesting
18 an opportunity to --

19 THE COURT: To find out what she knew? You have to
20 have known what she knew. You can't file litigation to
21 take her deposition to find out what she knew. You have
22 to tell me she knew and why she knew, and that's why I'm
23 asking you. What in the Tronox litigation would have --
24 assuming it wasn't even dismissed -- would have put anyone
25 on notice that Mountain West had some interest in that

1 litigation?

2 MR. KELLY: Well, Your Honor, there was an
3 investigation. An investigator called the house. I
4 believe she spoke to Ms. Fitzgerald during his
5 investigation, so that might have put her on notice.

6 THE COURT: Of what? Somebody calls and asks you
7 information about your husband and Tronox. Why would that
8 lead you to believe that that person has an independent
9 claim? That's just someone fishing for information.
10 We'll ignore the fact that she denies she ever got the
11 phone call. But just assuming the phone call happened,
12 just somebody calling up to do -- to find out information.

13 MR. KELLY: Yes, Your Honor. But it's somebody with a
14 long history of having asserted claims.

15 THE COURT: Who asserted the claims?

16 MR. KELLY: Mountain West had asserted claims in
17 Canada.

18 THE COURT: Against her?

19 MR. KELLY: Against her husband, Your Honor.

20 THE COURT: Yeah.

21 MR. KELLY: The decedent.

22 THE COURT: But there were no claims filed.

23 MR. KELLY: Well, Your Honor --

24 THE COURT: How would she know that they're a creditor
25 other than there's someone who was unhappy with her

1 husband? You don't have to send out notices to people who
2 are unhappy with the decedent.

3 MR. KELLY: Mountain West believed that they had
4 preserved their claims through this agreement with Tronox,
5 so...

6 THE COURT: Preserved what claim?

7 MR. KELLY: Their interest in the litigat- -- the
8 Tronox litigation.

9 THE COURT: They let it get dismissed.

10 MR. KELLY: Well --

11 THE COURT: Their complaint is with Tronox.

12 MR. KELLY: Well, I agree there is a breach of contract
13 issue, Your Honor, but there are also these issues that
14 the dismissal was not proper because of --

15 THE COURT: Which dismissal?

16 MR. KELLY: Well, both in King County and in Nevada as
17 well. I mean, the general rule that's been accepted in
18 Washington and --

19 THE COURT: But your client wasn't a party, though, to
20 that litigation. What's your client's standing to
21 complain about the fact that the plaintiff and the
22 defendant in those suits for whatever reason decided to
23 dismiss the cases?

24 MR. KELLY: Well, they had acquired an interest in the
25 claim, Your Honor, and --

1 THE COURT: A public interest? Did they make that
2 interest known in the litigation in King County and in the
3 litigation in whatever other state it was you keep
4 mentioning?

5 MR. KELLY: Nevada, Your Honor.

6 THE COURT: Nevada.

7 MR. KELLY: I am not aware --

8 THE COURT: Okay.

9 MR. KELLY: -- of whether they did or not.

10 THE COURT: That's what I'm afraid of is --

11 MR. KELLY: Yeah.

12 THE COURT: -- your client didn't seem to want to let
13 Mr. Fitzgerald know that they were somehow involved in
14 this litigation. They were hiding their interest, one
15 might say.

16 MR. KELLY: Well, I think their interest was pretty
17 open, Your Honor, from my understanding of it, although
18 they weren't, as you recognize, named in the complaint or
19 in the litigation.

20 THE COURT: "Comes now Tronox on behalf of itself and
21 Mountain West and complains as follows"? No. That didn't
22 appear anywhere, did it?

23 MR. KELLY: You're correct. It did not. Your Honor,
24 I --

25 THE COURT: I also understand that some lawyer at the

1 time was also a lawyer for Mountain West and for Tronox.

2 MR. KELLY: I believe that is correct.

3 THE COURT: And he got a copy of the death notice and
4 the notice to creditors.

5 MR. KELLY: Yeah. And --

6 THE COURT: And what did he tell Mountain West about
7 that notice?

8 MR. KELLY: I believe that they felt their position was
9 secured by this agreement with Tronox, and so --

10 THE COURT: They didn't have to respond to the notice?

11 MR. KELLY: The -- they were never notified,
12 Your Honor.

13 THE COURT: Well, the lawyer knew about it.

14 MR. KELLY: The estate notified -- sent a notice of
15 creditors' claim -- notice of creditors' claims to Tronox,
16 Your Honor, but not to Mountain West, and Tronox --

17 THE COURT: Well, actually, Tronox is a partner with
18 Mountain West, aren't they? They got the notice.

19 MR. KELLY: And they --

20 THE COURT: So Mountain West charged with that notice?

21 MR. KELLY: And they responded to that notice. So
22 under --

23 THE COURT: To -- how?

24 MR. KELLY: They filed a creditor's claim, Your Honor,
25 which was denied.

1 THE COURT: Within four months?

2 MR. KELLY: Within four months. Absolutely,
3 Your Honor. On --

4 THE COURT: Within four months of what?

5 MR. KELLY: Within four months of receiving notice,
6 Your Honor. The estate mailed a copy of the notice of
7 creditors to Tronox on January 14th, 2010. On the same
8 day, in fact, Tronox filed their creditor's claim.

9 THE COURT: Oh. Tronox filed.

10 MR. KELLY: Yes, Your Honor.

11 THE COURT: What about Mountain West?

12 MR. KELLY: They did not file. They did not receive
13 notice or file a creditor's claim.

14 THE COURT: But their lawyer got a copy of the notice
15 through Tronox. Tronox and Mountain West were partners.
16 Mountain West was a silent partner in the litigation,
17 apparently. They -- I'll characterize it that way. And
18 now it's complaining that someone who didn't know it was a
19 silent partner didn't know to send them a notice
20 concerning the death of the decedent. Your clients also
21 knew he was dead because they were doing an investigation.

22 MR. KELLY: They were aware of his passing, Your Honor.

23 THE COURT: Did they not think to hire some lawyer to
24 tell them about probate law and --

25 MR. KELLY: I cannot speak to what --

1 THE COURT: -- dead defendants?

2 MR. KELLY: -- they did and what they did not do at
3 that time.

4 THE COURT: So your client is Mountain West. Are they
5 a Washington corporation?

6 MR. KELLY: They're a Canadian corporation in
7 Vancouver, British Columbia, Your Honor.

8 THE COURT: So these lawyers got -- I'm looking at this
9 litigation's going to go back 30 years and thinking the
10 attorneys' fees are going to be a couple hundred thousand
11 dollars.

12 MR. KELLY: They could be significant, Your Honor.

13 THE COURT: Yeah.

14 MR. KELLY: It sounds like.

15 THE COURT: So your client as an out-of-state defendant
16 would have to post a bond to secure all the attorneys'
17 fees that might be payable to the defendant should they
18 succeed. They're -- that doesn't bother them at all?
19 They're big-time?

20 MR. KELLY: They haven't seemed to have balked at the
21 risk of attorneys' fees in the past, Your Honor.

22 THE COURT: Okay. But fees and a bond are two
23 different things.

24 MR. KELLY: True. True.

25 THE COURT: So I'll let you make a brief argument. You

1 kind of have a sense about what I know about the case.

2 And then I'll let you respond to their argument now
3 that I've sort of clarified in my own mind where I think
4 you're coming from.

5 MR. KLEIN: Absolutely, Your Honor. First and
6 foremost, I just wanted to clarify that Mountain West had
7 previously sued the decedent in British Columbia and that
8 that action was dismissed with prejudice by order of the
9 court in 2004. That happened prior to the time that --

10 THE COURT: And was the complaint then that he
11 squirreled away all of these --

12 MR. KLEIN: Yes, that was the complaint.

13 THE COURT: You used the -- I guess in the movies on TV
14 they marked their claims with piles of rocks.

15 MR. KELLY: I believe it's not that different,
16 Your Honor, in real life, from my understanding of it.

17 THE COURT: And squirreled them away with his buddies
18 and retained a formal interest.

19 MR. KLEIN: That was the allegation in --

20 THE COURT: Nice move.

21 MR. KLEIN: -- British Columbia as well.

22 THE COURT: Nice move. But in the Canadian litigation,
23 they waited too long. That's what the judge said?

24 MR. KLEIN: No. It was essentially the Canadian
25 equivalent of a summary judgment decision where

1 the justice-garcon stated that they did not have a good
2 and arguable claim and that they could not succeed on the
3 merits. That's what was decided in British Columbia. And
4 thereafter, a few years later, Mountain West apparently
5 used Tronox to bring their claim for them.

6 THE COURT: Well, was he working for Mountain West at
7 the time that they sued him in 2004?

8 MR. KLEIN: No.

9 THE COURT: Oh.

10 MR. KLEIN: No.

11 THE COURT: So they knew, at least in 2004, that they
12 had this potential claim?

13 MR. KELLY: May I address you, Your Honor?

14 THE COURT: Yeah.

15 MR. KELLY: They knew -- they learned of different
16 claims at different times, Your Honor, so I believe these
17 activities, as I said, went over decades of work, and
18 there were these claims called the Polaris claims. There
19 are uranium claims in Wyoming. There were the S.J.
20 claims, which were at the heart of the British Columbia
21 litigation.

22 THE COURT: These are tort claims, right? Is that --

23 MR. KELLY: Fraud. Yes, Your Honor.

24 THE COURT: Fraud? 2004. And they filed that case
25 when? Oh, in 2004, as well?

1 MR. KLEIN: Oh, well before. I don't recall the exact
2 date, but that litigation dragged on for years. I had
3 seen the decision that --

4 THE COURT: So it was dismissed in 2004?

5 MR. KLEIN: Absolutely. With prejudice.

6 THE COURT: When was it started?

7 MR. KELLY: 1999, I believe.

8 THE COURT: So starting in 1999 they knew that he was,
9 in their mind, anyway, a thief.

10 MR. KELLY: Yes, Your Honor.

11 THE COURT: So once they knew he was a thief, the
12 statute starts the run. 1999.

13 MR. KELLY: Well, it's a --

14 THE COURT: 2009 is ten years.

15 MR. KELLY: Yes, Your Honor, but as new claims come to
16 light, I believe, under different facts and circumstances,
17 there --

18 THE COURT: But they knew he was a thief, and they knew
19 he was stealing these things. They would have filed
20 against him then. Wouldn't they have to? Because he
21 wasn't working for them when they sued him, so they would
22 have to look for all the stuff he sold at one time. The
23 courts don't want to see them coming in every -- seriatim
24 every couple years. They must have told the judge that
25 there is possibly more; we want to do some discovery.

1 MR. KELLY: I'm not aware of what happened in that
2 litigation, Your Honor.

3 THE COURT: Okay.

4 Go ahead. Finish your argument.

5 MR. KLEIN: Well, I think we've pretty much covered the
6 bulk of it at this point, Your Honor. In terms of actual
7 notice, I believe it's also interesting that because of
8 this agreement Mountain West would have paid all
9 attorneys' fees on behalf of Tronox, and, as a result,
10 when notice was actually received by Mr. Cox on behalf of
11 Tronox, that Mountain West would have paid the attorneys'
12 fees of their Washington counsel at that time to
13 essentially try to make the claims for Tronox good in the
14 state of Washington.

15 THE COURT: Okay. I got it.

16 Your turn.

17 MR. HENNESSEY: Well, I was just going to add one
18 variation on the point that was just made, that the
19 agreement that's been referenced several times between
20 Tronox and Mountain West does not provide a claim. There
21 was no assignment of a claim. All it does is provide an
22 interest in the proceeds that may be recovered by Tronox
23 that gave Mountain West the right to a portion of those
24 proceeds, but there's no --

25 THE COURT: Mountain West was funding it, so the quid

1 pro quo is we get a share of --

2 MR. HENNESSEY: Exactly.

3 THE COURT: -- whatever you get back.

4 MR. HENNESSEY: And that was the agreement. No claim.

5 THE COURT: Who was he working for? Mountain West?
6 Who did he work for in the past? Mountain West or Tronox?

7 MR. KELLY: Both, Your Honor.

8 THE COURT: Oh.

9 MR. KELLY: He worked for Tronox, I believe it was in
10 the '60s, perhaps. And Mountain West from the early '70s,
11 or 1969 up through 1995, I believe.

12 THE COURT: And then in 1999 he got sued for being a
13 thief?

14 MR. KELLY: That's my understanding, Your Honor.

15 THE COURT: But apparently the judge didn't think that
16 they had a claim.

17 MR. KELLY: That's what it appears from the Canadian
18 litigation.

19 THE COURT: Okay. You can respond to their argument.

20 MR. KELLY: Well, I think we've touched on res
21 judicata, Your Honor. I believe the Canadian litigation
22 involved different facts and circumstances. And under
23 TEDRA, Your Honor, the -- Mountain West has requested that
24 a hearing not be held on the merits today and that time be
25 provided to afford Mountain West to support its claims

1 more fully.

2 Mountain West has also filed a notice of mediation. My
3 understanding is that TEDRA is fairly permissive with
4 these types of motions to ask the Court to provide the
5 responding party time to prove its claims. The estate
6 here has sort of suggested that we should not be afforded
7 that time, but it hasn't really supported a reason why
8 that is the case. And I believe that the estate's main
9 objective here is to close up shop and distribute the
10 assets, even though they're aware of this motion in Nevada
11 which may reopen the Nevada case. And they're aware of
12 the procedural deficiencies in their -- in the dismissals,
13 which I -- are -- under pretty clear law were not valid.
14 So I think the estate is trying to essentially shortcut
15 the possibility that this will be reopened even though
16 there's a very real possibility that it will.

17 THE COURT: The dismissal that you complained of
18 procedurally has to do with the litigants signing the
19 order of dismissal as opposed to its lawyer; is that
20 correct? Or am I confusing two different --

21 MR. KELLY: That is correct, Your Honor. It was signed
22 by the corporation Tronox pro se, which is against the
23 laws of the state of Washington. Moreover, it was signed
24 at a time when Tronox was represented by an attorney. He
25 had submitted a withdrawal the day before, but the

1 withdrawal was not effective for ten days, Your Honor.

2 MR. KLEIN: Your Honor, if I may, that attorney had
3 consented to his client entering into that agreement.

4 MR. KELLY: That's hearsay, Your Honor.

5 MR. KLEIN: And the -- and further to that point, that
6 does not give Mountain West any standing to make some
7 charges.

8 THE COURT: That's an agreement. Who signed the order
9 of dismissal?

10 MR. HENNESSEY: General counsel for Tronox.

11 THE COURT: Oh.

12 MR. KELLY: That's not -- there's not --

13 THE COURT: Who signed on behalf of whoever was getting
14 sued?

15 MR. HENNESSEY: General counsel --

16 MR. KELLY: (Inaudible).

17 MR. HENNESSEY: Or no. That would be the estate. The
18 estate's attorney signed it.

19 THE COURT: Oh. Not the lawyer who was withdrawing?

20 MR. KELLY: No --

21 MR. KLEIN: No lawyer withdrew on the side of the
22 estate.

23 THE COURT: Oh. So the estate was also a party to the
24 litigation. Right. It was against the estate?

25 MR. HENNESSEY: Correct.

1 THE COURT: Well, who is the lawyer who gave the notice
2 of intent to withdraw?

3 MR. KLEIN: That was prior Washington counsel of, I
4 believe, Mountain West and Tronox.

5 THE COURT: Oh.

6 MR. KLEIN: Who did consent to their client entering
7 into the stipulation as pro se.

8 THE COURT: And who was their client?

9 MR. KELLY: There's no evidence of that.

10 THE COURT: Who was their client?

11 MR. KLEIN: Their -- who was?

12 MR. HENNESSEY: He appeared on behalf of Tronox.

13 THE COURT: Oh. So he got out. Told his client that
14 you can go ahead and sign an agreement, and then was it
15 the attorney for the estate who presented the order of
16 dismissal?

17 MR. KLEIN: Yes, Your Honor.

18 THE COURT: And did someone from Tronox sign the order
19 of dismissal as well?

20 MR. KLEIN: Yes, Your Honor. That's -- that should all
21 be in the exhibits to our petition.

22 THE COURT: I know. Yes. If you think I have time to
23 read the exhibits...

24 MR. HENNESSEY: General counsel signed on behalf of the
25 entity.

1 THE COURT: Which entity?

2 MR. HENNESSEY: Tronox.

3 THE COURT: Tronox. And who signed -- oh. General
4 counsel signed -- so they had private counsel in
5 Washington, and they also had general counsel?

6 MR. HENNESSEY: Correct.

7 THE COURT: So is general counsel a Washington lawyer?

8 MR. HENNESSEY: No.

9 THE COURT: No?

10 MR. KELLY: General --

11 THE COURT: Did he have a pro hac vice order?

12 MR. HENNESSEY: I don't believe so. Your Honor, may
13 I --

14 THE COURT: I --

15 MR. HENNESSEY: -- just throw one --

16 THE COURT: Somehow I have a sense that I just don't
17 see where your client gets to go with it anyway.

18 Go ahead.

19 MR. HENNESSEY: Well, even if this agreement or the
20 order of dismissal was found to be improper, it won't
21 create a claim on behalf of Mountain West. Mountain West
22 does not have a claim flowing from that prior litigation.
23 The claim was owned by Tronox a hundred percent.

24 MR. KELLY: Your Honor, Mountain West has filed a
25 notice of creditors' claim within the statutory time frame

1 for a reasonably ascertainable creditor who was not
2 provided notice. And the state is free to deny that
3 claim, certainly, but then the merits need to be
4 determined.

5 THE COURT: How is --

6 MR. KELLY: The estate is trying to deny the claim.

7 THE COURT: How is that he's wrong on that point?

8 MR. KLEIN: Because they're not reasonably
9 ascertainable. That's the point of this, and statutory
10 sufficient evidence has been submitted --

11 MR. KELLY: It was --

12 MR. KLEIN: -- by the personal representative in an
13 affidavit, which is provided for in RCW Title 11,
14 Chapter 40, Section 40, and it is their burden to show by
15 clear, cogent, and convincing evidence otherwise. They've
16 submitted no evidence to that point whatsoever.

17 MR. KELLY: Your Honor, if I may, there is a
18 presumption, and the estate is asking that Mountain West
19 not be afforded the opportunity to rebut that presumption
20 under RCW -- you know, under 100, Subsection 8, they can
21 request the Court give them time to rebut the presumption,
22 and that's exactly what they're doing.

23 MR. KLEIN: Further, what is required in the personal
24 representative review of due diligence is a documentary
25 review. And presumably, if there were any documents

1 coming that would have shown Mountain West have any claim,
2 Mountain West would have those documents. They do not.
3 That's why we do not have them before us. What they're
4 hoping for is to do an expedition to depose our client in
5 the hope that she perjured herself in an affidavit.

6 THE COURT: So was Mountain West part of the litigation
7 in Canada?

8 MR. KLEIN: Mountain West was the only plaintiff in
9 Canada, to my knowledge. They had their case brought
10 before the Canadian court.

11 THE COURT: Your client has done you no favors,
12 Counsel.

13 MR. KELLY: They've put me in a tough spot, Your Honor.

14 THE COURT: Yeah.

15 MR. KELLY: I agree.

16 THE COURT: Yeah. And this is a TEDRA proceeding, and
17 under TEDRA the statute contemplates a procedure by which
18 the court will hear the initial hearing at the end of two
19 weeks and determine at that point in time whether the case
20 will go forward to trial or to mediation or what. It --
21 typically when I do presentations on this, I advise
22 counsel that the statute is kind of draconian. Respondents
23 frequently come roaring into court, you know, with much
24 wailing and gnashing of teeth saying, "How do I prepare
25 for a case in two weeks?" And my response frequently is,

1 "Well, you don't have to. We always give you a little bit
2 of time, and maybe we have you come back and decide what
3 to do."

4 I'm trying to figure out here how it is, and what
5 showing Mountain West has made, that would indicate that
6 they are in or were in, ever, a reasonably ascertainable
7 creditor. They lost the suit in 2004. They've been going
8 on since 1999 in Canada. I assume they had plenty of time
9 to do discovery about potential subterfuges by
10 Mr. Fitzgerald, which they apparently were unable to catch
11 up with and apparently unable to convince the judge up
12 there that they had a case that they could continue to
13 pursue. Then they participate in litigation in whatever
14 other state that is. Nevada.

15 MR. KELLY: Nevada, Your Honor.

16 THE COURT: Where they essentially are an undisclosed
17 plaintiff, a silent partner in the litigation, and
18 apparently not announcing that -- their interest in the
19 litigation to anybody. So even if the PR of this estate
20 had picked up all that Tronox litigation, they would have
21 seen nothing about Mountain West.

22 Mountain West alleges it made a phone call. The spouse
23 denies they made a phone call. There's nothing from
24 anyone who made the phone call to say that they actually
25 made that phone call. And even if they did make the phone

1 call -- "Are you the PR?" the person says on the phone to
2 the PR. "Yes." "Oh, well, we're trying to figure out if
3 you know anything about anything." "No, I don't know. Do
4 you want to talk to my husband? He's deceased." Or,
5 "He's out in the backyard." This isn't enough -- this
6 isn't -- or, "We claim your husband owes us money." How
7 about even that? That's not enough. That's not enough to
8 warrant the issuance of, some numbers of years later or
9 even after death, a notice because you're a reasonably
10 ascertainable creditor. You're just a phone call, making
11 inquiry; doing an investigation.

12 You have an investigator and apparently Washington
13 counsel, and the client knows that Mr. Fitzgerald died and
14 files no claim. And, in fact, the lawyer who represented
15 Tronox was also, apparently, representing Mountain West in
16 some fashion, either disclosed or undisclosed, but it's
17 not denied that that lawyer got the notice to creditors
18 addressed to Tronox.

19 Tronox was the claimant and Tronox was the only one who
20 apparently alleged they had a claim. There was no --
21 there's no indicia in the paperwork that Mountain West
22 might have a claim. And as counsel points out to me, that
23 the agreement is just an agreement to pay attorneys' fees
24 and share profits or whatever is collected, not an
25 assignment of a claim or anything else.

1 I simply see no basis upon which I can find that
2 Mountain West would be a reasonably ascertainable
3 creditor. That's number one.

4 Number two, it seems to me that they have botched at
5 every step of the way an attempt to preserve any claim
6 that they might have had by waiting so long.

7 Number three, it appears that the PR did a reasonably
8 diligent search, and it's mere speculation and a fishing
9 expedition on the part of Mountain West to try to prove
10 otherwise.

11 As counsel complained in their paperwork, there's not
12 even a name of the investigator who's alleged to have made
13 the phone call or any declaration from him about the
14 contents of that phone call.

15 So that's -- this is a "Hail Mary" in the last quarter
16 in the last seconds, and I see that Mountain West simply
17 is trying to avoid what happened to it in Canada and
18 dismayed that Tronox dumped their case and dismayed that
19 when Mr. Fitzgerald died they didn't do something about
20 it. They had investigators, they had lawyers, they knew
21 he was dead. Waited way too long.

22 Assuming that I was wrong in all that and decided to
23 send it to trial, as counsel point out Mountain West is
24 not shy about attorneys' fees, and the statutes relating
25 to bringing of litigation by out-of-state plaintiffs

1 against in-state residents is -- talks about a sort of a
2 bond that's kind of useless in today's market. But the
3 case law that interpreted that statute says the Court can
4 set it at what the real expenses might be, and I see two,
5 three hundred thousand dollars here at the drop of a hat.
6 Because somehow I have the sense that the dollar value of
7 these claims that were allegedly hidden away is a few
8 million bucks at least, maybe hundreds of millions, in
9 which case the litigation might require a bond in the
10 amount of a million bucks or more. I mean, counsel would
11 have to sit down and figure out what the litigation and
12 discovery was going to cost, and then come in and tell me.
13 And I will tell you that I am not shy when it comes to
14 setting bonds in the slightest because I know that what
15 happens is no bond, usually no fees. And the reason for
16 that statute is we're not going to require Washington
17 residents to go up and fight in Canada to get their money,
18 so...

19 But I don't see that Mountain West has convinced me
20 that there was any impropriety in the dismissal of a
21 claim. Even if someone signed it who wasn't authorized to
22 sign it, it's a done deal. Corporation ratified it by
23 acquiescence even if it's no good. Maybe they're guilty
24 of the unlawful practice of law for signing it, but big
25 deal. It's not Mountain West's complaint.

1 Mountain West, unfortunately, determined to be a silent
2 partner in litigation, and, if you will, the general
3 partner blew them off and dismissed the case. They can
4 sue Tronox, get their money, assuming they can prove it
5 and assuming they even have a claim left. Tronox probably
6 had no claim, so there you go.

7 So you guys prepare -- you -- prepare an order in a
8 form that you prefer. Bring it to me for signature. So
9 what's your preference?

10 MR. KLEIN: There is already an order.

11 THE COURT: You're happy with this order? I sign this
12 order? Is that it?

13 MR. KLEIN: Yes, Your Honor.

14 THE COURT: "Order, Re: Reasonably ascertainable
15 creditors." Which one is yours?

16 MR. KELLY: It's -- may we enter an order --

17 MR. KLEIN: The one on your right is --

18 MR. KELLY: May we work out some findings, Your Honor,
19 based upon your recitations and enter that?

20 THE COURT: Well, you know, the Court's oral opinion is
21 there, and the Court will simply incorporate its oral
22 opinion, because I think I made myself clear. So I
23 interlineated that the oral opinion is incorporated, and
24 that's my findings. There you go.

25 MR. HENNESSEY: Thank you, Your Honor.

1 THE COURT: Thank you, gentlemen.
2 MR. KLEIN: Thank you, Your Honor.
3 MR. KELLY: Thank you, Your Honor.
4 (Proceedings concluded.)

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C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF SNOHOMISH)

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this *5th* day of *July* 2011.

Mary
NOTARY PUBLIC in and for
the State of Washington,
residing at Lynnwood.
My commission expires 4-27-14.



C E R T I F I C A T E

STATE OF WASHINGTON)

)

COUNTY OF SNOHOMISH)

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APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Estate of:)

MICHAEL J. FITZGERALD,)

Deceased.)

) No. 09-4-04947-2 SEA

) Appeal No. 66954-1-I

HEARING

March 4, 2011

The Honorable Catherine Shaffer Presiding

CERTIFIED COPY

Transcribed by: Shanna Barr, CETD
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206.624.3005

A P P E A R A N C E S

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1 -oOo-

2 March 4, 2011

3

4 THE COURT: Thank you. Good morning. Be seated.

5 MR. HENNESSEY: Good morning, Your Honor.

6 THE COURT: All right, everybody. I've read everything
7 that was before the commissioner, as well as the briefing
8 on this motion for revision.

9 I'm told by my bailiff that we have an intervener named
10 Steve Davis in court. I asked my bailiff to check the
11 court file, and apparently a motion to intervene was filed
12 on February 22nd, but not served on the court, not
13 calendared with a note for motion, not set for a decision,
14 and not decided, and therefore, I'm not going to be
15 hearing from Mr. Davis today.

16 You're not a party in this case. You haven't been
17 granted intervention.

18 I will hear from the parties on the revision motion,
19 and I'm suggesting that we allocate ten minutes per side
20 for argument. I'll hear, obviously, first from Mr. Kelly,
21 and the estate -- whomever is speaking for the estate will
22 have ten minutes to respond.

23 Mr. Kelly, if you want to reserve time for rebuttal,
24 please tell me how much up front of your ten minutes. Go
25 right ahead.

1 MR. KELLY: Thank you, Your Honor. I would like to
2 reserve two or three minutes for rebuttal, please,
3 Your Honor.

4 THE COURT: That's fine. Go right ahead.

5 MR. KELLY: Thank you. Your Honor, I think most of the
6 arguments are kind of laid out in the pleadings, and I
7 just want to kind of give a little more substantive
8 background again why we're here and kind of put into
9 context what the hearing is that we're trying to revise.

10 The decedent, Mr. Fitzgerald, worked for Tronox and
11 Mountain West for the better part of his life, 40-some
12 years, starting in the '60s up through 1995 when he left
13 his employment with Mountain West. During that time, he
14 was -- he rose to the CEO, to head of Mountain West, and
15 took mining claims that were -- properly belonged to
16 Mountain West, and I think literally like taking a piece
17 of paper, secreting them out of the office, giving them to
18 his friends, and then reserving a right in the royalties
19 to those claims. Some of these mines that he secreted
20 away and defrauded the company became huge, valuable gold
21 mines. So that's kind of what all the fuss is about. I
22 mean, we're talking, you know, exorbitant sums of money.
23 And his actions didn't come to light until long after he'd
24 left the employment, when it was -- I guess when these
25 mines got so successful that he couldn't hide it anymore.

1 I'm not sure.

2 So that's kind of the background, and that's -- there's
3 a lot at stake here, Your Honor. And I understand there
4 have been some bumps and hurdles along the way as far as
5 trying to ferret out from Mountain West what their best
6 course of action is against the decedent and -- but here
7 we are today.

8 On November 22nd, the estate, under the TEDRA, under
9 Chapter 11, filed the -- their petition trying to
10 ascertain that there were no more reasonably ascertainable
11 creditors. They did the somewhat unusual step of naming
12 Mountain West in that. I think typically you just kind of
13 try to get a declaration "There isn't anyone there." That
14 hearing and that petition that they set came under, you
15 know, 11.0 -- 40.041, 040, and it was to determine solely,
16 simply that there were no more reasonably ascertainable
17 creditors. It's not a hearing on the merits of a Nevada
18 action. It's not a hearing on the merits of a Wyoming
19 action.

20 And a just quick point on the Wyoming. I did not mean
21 to mislead the court or anything by not focusing on the
22 Wyoming action, but there is references to it all over the
23 materials that you've reviewed, and it certainly was
24 not --

25 THE COURT: Including the complaint.

1 MR. KELLY: Including the complaint. Exactly.

2 It's Mountain West's position, Your Honor, that a court
3 commissioner hearing a petition under 11.40.040 cannot
4 determine for a Nevada court, cannot determine for a
5 Wyoming court whether or not the actions there can be
6 maintained. Even if in Wyoming, say, Washington applies
7 or Washington law should apply or Washington law
8 forecloses an action ultimately, it's not the
9 commissioner's role at that hearing to make that
10 determination for the court.

11 Now, the wrinkle in Nevada, of course, is that the
12 estate admits it was aware of the Nevada action. The
13 action was ongoing at the time of the decedent's death.
14 The -- Tronox, the named party at that time, you know,
15 filed their creditor's claim. They did all the steps to
16 preserve the action.

17 THE COURT: What's your relationship with Tronox other
18 than endeavoring to share the outcome of that litigation?
19 What's the legal relationship with Tronox?

20 MR. KELLY: The legal relationship with Tronox --

21 THE COURT: Other than the agreement pertaining to --

22 MR. KELLY: Other than the agreements.

23 THE COURT: -- a Nevada lawsuit, yes.

24 MR. KELLY: The agreement is the extent of a legal
25 relationship, Your Honor.

1 THE COURT: Okay.

2 MR. KELLY: There was an attorney. They shared
3 representation.

4 THE COURT: Right. I'm just wondering if there's
5 something else that connected Tronox with your client, but
6 apparently not.

7 MR. KELLY: Yeah. No. Just Mr. Fitzgerald, Your Honor.

8 THE COURT: Okay.

9 MR. KELLY: I mean, just his employment and his -- he
10 took actions, apparently, defrauding Tronox as well.

11 THE COURT: Okay.

12 MR. KELLY: So because the estate acknowledges they're
13 aware of the Nevada action, I don't believe it's properly
14 within, again, an 11.40.040 action that says: Hey, it's
15 been four months. We can't have any more creditors that
16 weren't ascertainable. So whether or not -- again, you
17 know, whether or not Mountain West is substantively
18 allowed to intervene in Nevada, that's a different
19 question and not before the commissioner at the hearing.

20 And I just -- I quickly want to touch on attorneys'
21 fees. You know, the estate says that they were forced to
22 bring this action. If you look at a docket, there were no
23 pleadings filed in King County by Mountain West before the
24 estate brought its TEDRA petition. There was no
25 communication between Washington attorneys with the estate

1 and Mountain West. The estate did, I believe -- I believe
2 that Mountain West filed a motion to intervene initially
3 in Nevada prior to the estate's filing a TEDRA petition,
4 so that might be what they're referring to. But, again,
5 they didn't file anything in Nevada that I'm aware of.
6 They chose to bring this action here, which is, you know,
7 voluntary under the statute. And there was no finding
8 that fees, you know, were -- there was no finding of a
9 good faith reason for fees.

10 And then, finally, as far as the -- you know,
11 Chapter 11 contemplates -- basically, as the commissioner
12 said in his oral ruling, people race down to court, and
13 then they're typically given some time to find some
14 substantive background to their claims. On both that, and
15 on the Mountain West's request for mediation, the
16 commissioner was silent on that. You know, I believe the
17 paper was (inaudible). The State's position is that this
18 is not a mediatable issue. You know, I believe that what
19 they're really saying is they're not willing to mediate
20 it. And perhaps mediation wouldn't be constructive or
21 productive, but that's very different than something not
22 being able to mediate, you know. Personal representatives
23 are entitled under the statute to resolve claims before or
24 after they become due, and I think mediation could be
25 fruitful. And, again, the commissioner didn't find a good

1 reason not to allow mediation.

2 I'll reserve a couple minutes.

3 THE COURT: Thank you. You have more than that, okay.

4 MR. KELLY: Oh.

5 THE COURT: You only used about six minutes.

6 MR. KELLY: Okay.

7 THE COURT: All right.

8 MR. KELLY: Thank you.

9 THE COURT: Go right ahead. And I'm happy to hear
10 their response.

11 MR. KLEIN: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. KLEIN: My name is Jordan Klein.

14 THE COURT: Is it Klein or --

15 MR. KLEIN: Klein.

16 THE COURT: Okay. I got it. Just (inaudible) here.
17 Go right ahead.

18 MR. KLEIN: Your Honor, as Mountain West's counsel
19 explained, the estate brought a petition for order
20 regarding reasonably ascertainable creditors.

21 Essentially, the background to this case is that
22 Mountain West previously brought an action against the
23 decedent in Canada. That action was brought in 1999.

24 THE COURT: I know. I read all the pleadings for that,
25 too. I really have read everything that you folks put in

1 front of the commissioner, as well as your briefing.

2 MR. KLEIN: Okay. So is there a specific issue you
3 would like to focus on?

4 THE COURT: Attorneys' fees, both below and on appeal.
5 Authority for attorneys' fees, both below and on this
6 revision.

7 MR. KLEIN: Well, in terms of attorneys' fees, it's
8 clear that there's discretion to grant such fees. And the
9 November 3rd, 2010, correspondence from --

10 THE COURT: And your authority for the discretion to
11 grant is the statute? What's your --

12 MR. KLEIN: Yes.

13 THE COURT: Okay.

14 MR. KLEIN: Yes. I believe it's 11.96A.150.

15 THE COURT: Okay.

16 MR. KLEIN: There was a November 3rd, 2010, letter sent
17 by Mountain West's counsel in Utah asserting a claim
18 against the decedent after the -- immediately following
19 the Chernok's (phonetic) dismissals with prejudice. That
20 letter was a great deal of the cause for the estate's
21 bringing this petition.

22 THE COURT: Okay. And what's my discretion to grant
23 attorneys' fees on revision, if any?

24 MR. KLEIN: I do not have the statute in front of me
25 currently, but I imagine it would be the same, 11.96A.150.

1 I would imagine that that would also govern.

2 THE COURT: Okay. Go right ahead.

3 MR. KLEIN: In terms of Mountain West's argument that
4 the commissioner exceeded its authority, the estate does
5 not believe that any authority was exceeded. The order
6 specifically states that Mountain West was not a
7 reasonably ascertainable creditor, that Mountain West
8 received actual notice, and therefore Mountain West may
9 not maintain any action against the decedent pursuant to
10 RCW 11.40.010 and RCW 11.40.050. That interpretation is
11 made under Washington law, and the court has the authority
12 to make a determination with regard to when a claimant can
13 maintain an action against a Washington decedent.

14 There is obviously no order in regards to a Nevada
15 motion, which we did not ask the court to decide, and we
16 think that this is certainly an appropriate ruling under
17 the statute.

18 THE COURT: Mr. Klein, let me walk you through what
19 bothers me about this. I don't disagree with you that the
20 commissioner has power under the Washington statute to
21 order that Mountain West not maintain any action against
22 the estate, okay. But the language of your order is more
23 sweeping than that. It refers to any action at all
24 against the decedent. And assuming that there is still a
25 live case in Nevada, for purposes of argument --

1 MR. KLEIN: Um-hum.

2 THE COURT: -- okay, even though the case has been
3 dismissed, and assuming that the court is actually going
4 to rule on a motion filed in a dismissed case after the
5 case has been dismissed, I don't think that there's
6 anything that Washington can do to prevent that, is there?

7 MR. KLEIN: No, not necessarily, although I do believe
8 that Washington law should apply. For the sake of
9 argument, in the event that a claimant brings a claim in
10 any jurisdiction against a Washington estate, Washington
11 law should apply.

12 THE COURT: Right. But if I rule that Mountain West
13 may not maintain any action against the estate pursuant to
14 the Washington statute --

15 MR. KLEIN: Um-hum.

16 THE COURT: -- for failure to file within the claims
17 period, then it's up to a Nevada court, perhaps, to decide
18 whether or not the estate is a party in the case before
19 it, correct, or whether it's somebody else?

20 MR. KLEIN: I imagine so.

21 THE COURT: Okay. Go ahead.

22 MR. KLEIN: Well, I don't think that there's all that
23 much more to this issue. Mountain West has requested the
24 opportunity to conduct discovery on the issue of whether
25 or not they were reasonably ascertainable. The estate

1 feels that that issue is entirely moot because the finding
2 of actual notice leads to the same legal conclusion that
3 all claims had to be brought by February 14th, 2010. In
4 addition, there's no legal authority to conduct discovery
5 on this procedural issue.

6 THE COURT: And your contention is no claim has been
7 brought as of February 14, 2010?

8 MR. KLEIN: By Mountain West.

9 THE COURT: Right. Okay.

10 MR. KLEIN: The request for mediation is likewise
11 without merit, as the subject of the petition is entirely
12 procedural and mediation would not be able to resolve that
13 issue.

14 In terms of the underlying issues before the
15 commissioner, I don't believe that there was any issue
16 about whether or not Mountain West was reasonably
17 ascertainable. There was absolutely no evidence presented
18 that they were reasonably ascertainable, despite the
19 clear, cogent, and convincing presumption in favor of the
20 estate upon the filing of the affidavit. And as
21 previously stated, the actual noticed matter was not
22 challenged. So essentially, there doesn't seem to be any
23 basis for revising the commissioner's order.

24 THE COURT: Thank you. Okay.

25 MR. KLEIN: Thank you, Your Honor.

1 THE COURT: I will hear from you in response,
2 Mr. Kelly. You've got at least four minutes to argue.

3 MR. KELLY: Okay. Thank you, Your Honor.

4 Hearing -- on Mr. Klein's argument, I just want to
5 circle and touch again, and sort of my theme for today,
6 essentially, is what is within an 11.40.040 hearing, and I
7 think that you had some of the same concerns that I have
8 voiced.

9 You know, to the estate's arguments about little
10 evidence was presented by Mountain West, that's true that
11 we were not able to come up with much ahead of the
12 estate's petition. However, up and until the 11/3 letter
13 that Mr. Klein references -- I believe that dismissals
14 were entered just a few days before that.

15 THE COURT: Um-hum.

16 MR. KELLY: So up and to that time, up until the very
17 end of October or early November of the past year,
18 Mountain West believed that their claims were being
19 preserved. It's true that an attorney who was
20 representing both Mountain West and Tronox received notice
21 to creditors from the estate. You know, however, at that
22 time Mountain West did not reply, did not respond to that
23 personally because they thought that their claims were
24 being preserved through this agreement with Tronox. There
25 are, of course, you know --

1 THE COURT: Why wouldn't your remedy be against Tronox,
2 then?

3 MR. KELLY: I believe there may be some breach of
4 contract concerns that -- we'll be exploring that.

5 THE COURT: Okay.

6 MR. KELLY: Mountain West will be exploring,
7 Your Honor.

8 With the amount at stake, and with the sort of strained
9 relationship and the sort of last minute unknowing of
10 needing to strike out on their own, Mountain West -- you
11 know, I think that some of the equitable concerns under
12 Chapter 11 do come into play here. There's -- they have
13 very strong evidence, substantive evidence of the fraud
14 perpetrated on their company by Mr. Fitzgerald. They have
15 continued to scramble and try to gather evidence that the
16 personal representative knew about Mountain West's claims.
17 The personal representative is Mr. Fitzgerald's wife. She
18 was his wife for several years, including, I believe,
19 during the -- when the Canadian action was commenced,
20 while the Nevada action was ongoing. Mountain West
21 believes that they will be able to show, given the
22 chance --

23 THE COURT: So she wasn't around for the breaches of
24 fiduciary duty that you're alleging?

25 MR. KELLY: I don't believe that she was married in the

1 '60s and '70s, Your Honor, correct.

2 THE COURT: Okay.

3 MR. KELLY: But she was around for the investigation
4 and the litigation that stemmed from that, and Mountain
5 West believes that they will be able to show that she was
6 aware that they had claims, not solely based upon the
7 Canadian claims, but that new evidence had come to light
8 with their continued investigations.

9 The estate has made much of the fact that I did not
10 present the name of the investigator in my original
11 pleadings. I just didn't think it was germane. I can --
12 Dale Wunderlich (phonetic) is the investigator. I mean,
13 it's -- but there is evidence there. They believe that
14 they can find it given some time to do that. You know,
15 the holidays interrupted a little bit.

16 But we once again ask that -- the order, as you
17 recognize, is overly broad and should be revised to be
18 trimmed down, and equitable concerns say that it should be
19 relooked at and given -- Mountain West should be given
20 time to try to assert themselves against the estate and
21 win back some of these billions of dollars that
22 Mr. Fitzgerald took from them.

23 Thank you very much.

24 THE COURT: All right. Let me tell you all what I take
25 from what's been presented to me because, as you all know,

1 my review is de novo, although I will tell everybody that
2 this court has huge respect for Commissioner Velategui and
3 his expertise in TEDRA matters. It's, in fact, true, to
4 this court's knowledge, that Commissioner Velategui was
5 instrumental in drafting the amendments to the recent
6 version of TEDRA. That's how deep his expertise is.
7 Nonetheless, putting aside whatever Commissioner Velategui
8 had to say here, let me turn to the information before me.

9 This is quite a history. We have seen litigation over
10 the claims that Mountain West is bringing here for at
11 least seven years and in at least three states and in at
12 least two countries. Moreover, the claims date back
13 decades. They are dusty with age.

14 Mr. Fitzgerald, the decedent in this case, was an
15 employee and apparently an officer of Mountain West
16 Resources from the late '60s until at least 1995. The
17 allegation from Mountain West is that in his employment or
18 in his capacity as an officer that Mr. Fitzgerald learned
19 of mining claims, secreted those claims, set up companies
20 with friends and associates to transfer those claims, kept
21 an interest for himself, and profited richly from at least
22 some of the claims, without sharing any of those with
23 Mountain West.

24 Originally there was a suit against the decedent in the
25 Supreme Court of British Columbia for breach of fiduciary

1 duty. This was brought in the early part of the current
2 decade. Actually, the previous decade. And I raise this
3 because, although the factual allegations are not
4 absolutely identical to the factual allegations in the
5 Nevada and Wyoming cases, it does appear from the detail
6 provided in the Canadian court's ruling that at least by
7 that time Mountain West was on notice that Mr. Fitzgerald
8 had engaged in nefarious activities with regard to it. So
9 Mountain West appears to have known about its claim for at
10 least a -- seven to eight years at this point, and
11 probably longer, given whenever it is that the Canadian
12 case was filed.

13 In March of 2004, the Canadian case was dismissed. The
14 ruling looks very much like a summary judgment ruling to
15 the Court with an extremely low standard of proof. The
16 Court acknowledged essentially if there was any kind of
17 colorable claim or colorable evidence that Mountain West
18 could bring that the suit would have continued, but there
19 was absolutely no evidence presented before the Canadian
20 court that Mr. Fitzgerald owed Mountain West a fiduciary
21 duty. And moreover, even at that point, which was quite a
22 long time ago, the court ruled that Mountain West hadn't
23 brought its claim within the statutory limitations period
24 in Canada, which was six years.

25 In 2008, Tronox Worldwide, which doesn't appear to have

1 any relationship with Mountain West, as Mountain West's
2 counsel has conceded to me this morning, other than a
3 revenue sharing relationship that I'll get to in a moment,
4 but otherwise no connection, Tronox brought an action
5 against the decedent for breach of fiduciary duty in
6 Nevada and in Washington. I'm still not clear at this
7 point on what it is that Mr. Fitzgerald's relationship was
8 with Tronox, but I don't think it really matters for
9 purposes of this ruling.

10 During the time that the lawsuit was underway,
11 Mr. Fitzgerald died. This is significant because Mountain
12 West was keenly aware of the Nevada litigation. Mountain
13 West apparently was the provider of funds to maintain that
14 litigation and had entered into an agreement with Tronox
15 that it would share in any proceeds obtained from that
16 litigation. So it's plain that Mountain West was aware
17 that Mr. Fitzgerald had died. Nonetheless, Mountain West
18 did not make any claim or make itself known to
19 Mr. Fitzgerald 's estate. And again, we're talking about
20 quite a while ago at this point, because 2008 was -- and
21 the period of Mr. Fitzgerald's death was at least two,
22 perhaps three years ago at this point. I'm not clear on
23 his date of death.

24 In September of 2009, the King County Superior Court
25 appointed Mr. Fitzgerald's wife as personal representative

1 of the decedent's estate, and she arranged for a notice to
2 creditors to be published in the "Seattle Daily Journal of
3 Commerce" in October of 2009 on three separate occasions.
4 She also filed the notice of creditors with the court and
5 mailed the notice, as well, on January 14th, 2010, to
6 WDSHS.

7 It's not clear whether Mountain West made any efforts
8 to check in the area where Mr. Fitzgerald had died to see
9 if, in fact, a notice had been filed with the court or
10 whether there was any notice of creditor -- to creditors
11 extant.

12 And meanwhile, in Nevada in late 2010, on October 15th
13 of 2010, Tronox entered into an arrangement with the
14 estate, which appears to have gone into the Nevada action
15 in place of Mr. Fitzgerald, and the claims of the Nevada
16 action were dismissed with prejudice. And then on
17 October 27, 2010, Tronox's counsel withdrew.

18 I will add parenthetically here that the Court is a
19 little bit mystified about the argument in the pleadings
20 here about whether or not Tronox was able to act pro se
21 because it appears that at the time that the stipulation
22 was signed that it was signed by counsel. But that hardly
23 matters because I'm not the Nevada court, and I'm not
24 going to opine on the effectiveness of a stipulation and a
25 dismissal with prejudice. It appears that case is dead in

1 Nevada.

2 On November 3rd, 2010, Mountain West for the first time
3 contacted the estate's counsel in the present matter to
4 assert its claims against the estate and to notify the
5 estate of an agreement it had entered into with Tronox.
6 The agreement was that the parties would share net
7 proceeds from the Nevada action against the decedent and
8 that Mountain West would advance all necessary costs and
9 expenses incurred in the litigation, and it was an
10 agreement that Mountain West would be solely responsible
11 for an award of attorneys' fees, malicious prosecution, or
12 abuse of process against the parties prosecuting the
13 action against the estate.

14 The -- Mountain West further notified the estate that
15 it planned to intervene in the litigation between Tronox
16 and the defendant in Nevada. And apparently it has filed
17 a motion to intervene, although it's not clear to me, and
18 there is no information on this record, about whether the
19 motion has been calendered with the Nevada court or
20 whether the Nevada court is ever likely to take notice of
21 a motion filed in a dismissed case. I don't know.

22 On November 22nd, 2010, knowing that Mountain West was,
23 in fact, pursuing a claim against the estate and
24 attempting to bring a claim in the Nevada action that had
25 been dismissed, the personal representative filed her

1 TEDRA petition with this court to declare that she had
2 made a review of the estate and any creditors known to the
3 estate were not reasonably ascertainable. She identified
4 Tronox as the sole reasonably ascertainable creditor, for
5 the obvious reason that Tronox was known to be involved in
6 litigation with the decedent at the time of his death, and
7 she further asserted in her petition that Mountain West's
8 claim was barred because it wasn't an ascertainable
9 creditor and had failed to file a claim within four months
10 of the original notice of creditors as RCW 11.40.051
11 requires.

12 Mountain West filed its response on December 15th,
13 2010. It denied that Tronox had any right to enter into a
14 stipulation with the estate. It argued that Tronox had
15 improperly signed the stipulation. It asserted that the
16 personal representative likely would have known about
17 Mountain West's interest in the estate because of the
18 Nevada litigation. And it denied that it was an
19 unascertainable creditor and said its claims were not time
20 barred.

21 The commissioner, as we all know, ruled in favor of the
22 estate on multiple grounds and authorized attorneys' fees,
23 as I think everybody agrees he had discretion to do.

24 There are multiple issues raised here, and let me begin
25 with the critical one, which I also think is dispositive

1 here, although I'm going to talk about all the claims
2 before me.

3 The first issue before me is whether or not Mountain
4 West's suit here is time barred. Mountain West asserts
5 that it was a reasonably ascertainable creditor; that is
6 to say that it was a creditor who a personal
7 representative would uncover upon due diligence. That's
8 the definition under RCW 11.40.040. Due diligence is
9 deemed to have been exercised when the representative
10 conducts a reasonable review of the decedent's
11 correspondence and financial records that are either in
12 the possession of or reasonably available to the personal
13 representative. Any creditor that is not uncovered during
14 the PR's review is presumed not to be reasonably
15 ascertainable within the meaning of the statute, unless
16 there is a rebuttal of the presumption through clear and
17 convincing evidence to the contrary.

18 There really is no evidence to speak of here that
19 indicates that Mountain West was reasonably ascertainable.
20 First of all, there's no challenge to the showing here by
21 the estate that the personal representative conducted a
22 reasonable review of the decedent's correspondence and
23 financial records that were either in the possession of or
24 reasonably available to her.

25 I don't disagree with Mountain West that the personal

1 representative should be deemed to have known about the
2 Nevada action, but there's nothing about that fact that
3 would have alerted her to Mountain West's claim in the
4 action. The agreement between Mountain West and Tronox
5 wasn't disclosed till long after the notice to creditors
6 had been issued and the statutory period had run, so the
7 existence of the Nevada action is alone not sufficient to
8 have put her on reasonable notice that Mountain West had
9 an outstanding claim. Nor is the previously dismissed
10 Canadian action a basis to put her on notice. She may
11 have been around for that, but, frankly, the dismissal of
12 a lawsuit hardly alerts you that there's a live claim
13 against the estate. To the contrary, it would tend to put
14 the PR's mind at rest that there is no further outstanding
15 claim. That's why courts enter dismissals is to end
16 actions.

17 So there's really nothing in this record except the
18 assertion, which was not supported by documentation below,
19 but only by way of an allegation by counsel, that a
20 investigator had contacted the personal representative by
21 calling her. That allegation has been repeated to me, and
22 I've been given the name of the investigator on -- in this
23 argument, although, again, we have nothing on the record
24 from the investigator.

25 Even assuming that's true, even assuming that a

1 personal investigator at some point called the personal
2 representative, there is nothing about that that indicates
3 that she would have been alerted by that phone call to an
4 outstanding claim by Mountain West against the decedent or
5 the estate.

6 Certainly, I don't see a showing through clear and
7 convincing evidence that's sufficient to overcome the
8 presumption that having conducted the review that she did,
9 that Mountain West is presumed not to have been reasonably
10 ascertainable within the meaning of the statute. That
11 showing just hasn't been made here, and, frankly, that is
12 the end in terms of the viability of this suit. As soon
13 as Mountain West is determined not to have been a
14 reasonably ascertainable creditor that didn't make itself
15 known till long, long after the four-month limitations
16 period had run, then this case is subject to an order
17 granting the TEDRA -- granting the petition filed by the
18 estate because Mountain West's claim is time barred.

19 Let me turn to the other issues raised before me.
20 Mountain West also contends that the commissioner's order
21 is too broad in stating Mountain West may not maintain any
22 action against the decedent pursuant to the two statutory
23 provisions. It seems to me that the reference to the
24 statutory provisions here makes it clear that the
25 commissioner's ruling was pursuant to our statute that

1 Mountain West may not maintain any action against the
2 estate. But to the extent that the parties think that the
3 reference to the statute isn't sufficiently clear, I'm
4 happy to amend the commissioner's order to that effect, to
5 state that Mountain West may not maintain any action
6 against this estate.

7 In terms of what effect that has in Nevada, that's for
8 the Nevada court to figure out. If the Nevada court
9 thinks it has a live lawsuit in front of it, and if the
10 Nevada court thinks that it has an obligation to decide a
11 motion to intervene that may or may not ever have been
12 calendared in front of it, then I'm sure the Nevada court
13 can figure out whether or not the Washington order has any
14 preclusive effect in its court. I'm not going to reach
15 out and decide this for a Nevada court. It's up to a
16 Nevada judge to decide this issue.

17 With regard to a request for discovery, requests for
18 discovery are warranted even on a short time track when
19 there is no obvious procedural bar to the claim being
20 brought. But here there is an obvious procedural bar, and
21 for that reason it's not improper to refuse a request for
22 discovery. Essentially, when it appears that the claim
23 cannot be brought, it does not matter how meritorious the
24 underlying claim might be. So it may well be that
25 Mr. Fitzgerald is a giant thief, just like the

1 commissioner said. I don't know, okay. It may be that
2 were there ever a lawsuit, that Mountain West could prove
3 that till the cows came home. But Mountain West can't get
4 past the fact that it's barred under the Washington TEDRA
5 statute from bringing this claim at all, regardless of
6 whatever foundation it may have for it; ergo, there's no
7 point in requiring discovery. In fact, that would run
8 contrary to the whole purpose of the statute in allowing
9 an estate to put an end to the hunt for creditors after a
10 certain amount of time.

11 With regard to whether or not the commissioner
12 wrongfully disregarded Washington law regarding the
13 ability of Tronox to sign a pleading pro se, again, to the
14 extent that I looked at this, it looks as though the
15 Tronox stipulation was signed by an attorney. But this,
16 again, is an issue that the Court doesn't need to reach.
17 Any defects in the dismissal of the Nevada lawsuit are for
18 a Nevada court, not this court, to decide. So whether
19 Tronox did something pro se in Nevada is for a Nevada
20 court to decide, and I simply decline to reach this issue.

21 With regard to the request for mediation, again, there
22 is no point to ordering mediation and ordering
23 participation in mediation when a claim is clearly barred
24 under the time limits set forth in the statute, and for
25 that reason, it's my view the commissioner did not err in

1 declining to order mediation.

2 Shall I -- if I were to put it differently and put it
3 in the language of the statute, under RCW 11.96A.300,
4 Sub 3, I would say that there is clearly good cause not to
5 order mediation in this case, which is the fact that the
6 claim is time barred under our statute.

7 Lastly, let me turn to the issue about attorneys' fees
8 because that is a live issue, as far as I'm concerned, on
9 this motion for revision as well. The argument is that
10 the commissioner erred when he awarded the defendant
11 attorneys' fees because, according to Mountain West, if,
12 in fact, it, Mountain West, was not a reasonably
13 ascertainable creditor, then the estate didn't have to
14 file -- or rather, the PR did not have to file the TEDRA
15 petition. And, moreover, Mountain West says that because
16 the commissioner didn't give a reason as to exactly why it
17 was that the PR had to file a TEDRA petition, that it was
18 manifestly unreasonable to award fees. Finally, Mountain
19 West says that if the estate through the PR filed the
20 TEDRA petition in anticipation of Mountain West's claim,
21 then the petition was a procedural shortcut to prevent
22 Mountain West from having its day in court.

23 The difficulty with all of these arguments is that the
24 record clearly establishes that the estate attempted to
25 point out to Mountain West that its claims were time

1 barred, and did so as soon as Mountain West indicated that
2 it was interested in bringing a request to intervene in
3 the Nevada litigation. Mountain West, rather than backing
4 off at that point, made it clear that it was moving
5 forward with its claims. That left the estate with no
6 choice but to file the TEDRA petition. The only reason to
7 file a TEDRA petition was Mountain West. Tronox was out
8 of the picture. It's Mountain West's behavior here in
9 asserting a claim that was plainly time barred under
10 Washington TEDRA law that required the PR and the estate
11 to expend attorneys' fees to bring this petition; ergo, it
12 was manifestly appropriate for the commissioner to order
13 attorneys' fees, and it is also appropriate, I believe,
14 for this court to order attorneys' fees on this revision
15 for the same reason.

16 Let me say one last thing here. Nobody talked about
17 res judicata here, and I'm not going to reach out and
18 decide it either. But let me point out to you that
19 Washington law on this subject is pretty clear, and it's
20 pretty consistent with other states. Res judicata bars
21 claims that could have been brought when they are
22 identical in subject matter, cause of action, persons and
23 parties, and the quality of the persons for or against
24 whom the claim is made.

25 The Nevada and Canadian actions appear to have raised

1 the same claims that Mountain West would like to assert in
2 this claim in this case. Not only does the Court see
3 obvious potential issues with those claims, not on the
4 merits, but on statute of limitations grounds and laches
5 grounds to the extent that these claims sound in equity,
6 but in addition to that, there is a clear res judicata
7 issue hanging out there. I point this out because I know
8 that the responsible and professional counsel before me do
9 not want to bring claims that are clearly frivolous under
10 established, recognized principles of law.

11 I'll sign an order denying the request for revision,
12 except in the respect I stated with regard to the phrasing
13 of claims against the estate versus claims against the
14 decedent, and I will award attorneys' fees, both by
15 permitting the fees awarded below and by granting
16 attorneys' fees on this revision, to the estate.

17 And Counsel, I want you to pull your order together, if
18 you can. If that's not feasible, I want an order to be
19 submitted to the Court by the end of next week.

20 Thanks, everybody.

21 MR. HENNESSEY: Your Honor?

22 THE COURT: Question?

23 MR. HENNESSEY: Excuse me, Your Honor. Jim Hennessey
24 on behalf of the estate.

25 But by way of clarification with respect to the fourth

1 issue you raised -- that being the dismissal signed by
2 Tronox pro se -- I don't want to put words in Mr. Kelly's
3 mouth with respect to their argument, but I believe the
4 arguments made in the briefing before the Court was that
5 there were two stipulations --

6 THE COURT: I know.

7 MR. HENNESSEY: -- and orders of dismissal, one in
8 Nevada, one in Washington. The one in Nevada there are no
9 arguments about. The counsel for Tronox signed that one
10 properly, or at least there -- no argument has been made
11 that it was improper. It's here in Washington where the
12 argument has been made that the in-house attorney for
13 Tronox signed it, and they're claiming that is improper.

14 THE COURT: Right. And I'm not going to reach out and
15 decide it because I don't have to.

16 MR. HENNESSEY: Okay. I just wanted --

17 THE COURT: I'm not going to decide the issue for
18 Nevada, I'm not going to decide the issue for here,
19 because I don't have to.

20 MR. HENNESSEY: Great. Thank you.

21 THE COURT: Okay. Thanks everybody.

22 THE CLERK: Please rise.

23 (Proceedings concluded.)

24

25

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