

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ANIMAL WELFARE INSTITUTE, et al.,

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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) **Case No: 03-2006 (EGS/JMF)**
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**DEFENDANT FELD ENTERTAINMENT, INC.'S
MOTION FOR SUBSTITUTION OF PLAINTIFF TOM RIDER
AND NOTICE OF HEARING**

Pursuant to Fed. R. Civ. P. 25(a)(1), Defendant Feld Entertainment, Inc. ("FEI"), through counsel, respectfully moves the Court for an order compelling Mr. Rider's counsel to identify and disclose the identity of Mr. Rider's successor or representative; or, in the alternative, an order substituting plaintiff and decedent Tom Rider with his purported heirs/distributees. Substitution is necessary to facilitate the discovery of evidence in the instant case. FEI also seeks an order requiring Mr. Rider's counsel of record to provide a written description to the Court as to what actions, if any, they have taken with respect to the disposition of information that was in Mr. Rider's possession, custody or control at the time of his death that is subject to potential discovery in the instant matter.

A memorandum in support of this motion, exhibits thereto, and a proposed order are submitted herewith. Pursuant to Fed. R. Civ. P. 25(a)(3) a copy of the motion, together with a memorandum and notice of hearing, and the previously filed Notice of Death (ECF No. 669) will be served on all parties and non-parties in accordance with Rules 5 and 4, respectively.

Pursuant to LCvR 7(m), undersigned counsel states that counsel for FEI consulted with counsel for plaintiffs regarding the relief requested by this motion on December 26-27, 2013. Counsel for the Animal Welfare Institute (“AWI”), the Fund For Animals (“FFA”), Born Free USA (“Born Free”), the Humane Society of the United States (“HSUS”), and Tom Rider each indicated that they take no position on this Motion.

Dated: December 30, 2013

Respectfully submitted,

/s/ John M. Simpson

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**UNITED STATES DISTRICT COURT
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ANIMAL WELFARE INSTITUTE, et al.,

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FELD ENTERTAINMENT, INC.,

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Case No: 03-2006 (EGS/JMF)

**MEMORANDUM IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.’S
MOTION FOR SUBSTITUTION OF PLAINTIFF TOM RIDER
AND NOTICE OF HEARING**

Pursuant to Fed. R. Civ. P. 25(a)(1), Defendant Feld Entertainment, Inc. (“FEI”), through counsel, respectfully moves the Court for an order compelling Mr. Rider’s counsel to identify and disclose the identity of Mr. Rider’s successor or representative; or, in the alternative, an order substituting plaintiff and decedent Tom Rider with his purported heirs/distributees. Substitution is necessary to facilitate the preservation, and potential discovery of evidence in the instant case. FEI also seeks an order requiring Mr. Rider’s counsel of record to provide a written description to the Court as to what actions, if any, they have taken with respect to the disposition of information that was in Mr. Rider’s possession, custody or control at the time of his death that is subject to potential discovery in the instant matter.¹

FACTUAL BACKGROUND

Tom Rider is a plaintiff in this case. On March 29, 2013, the Court determined that, having been the victim of thirteen (13) years of “frivolous and vexatious” litigation, FEI is

¹ FEI is filing a contemporaneous motion for substitution in 07-1532 (the “RICO case”) in which Mr. Rider is a defendant.

entitled to recover its attorneys' fees from plaintiffs, including Mr. Rider. March 29, 2013 Mem. Op. (ECF No. 620) at 27. FEI was in the process of preparing its brief in support of its fee petition when Mr. Rider passed away. On information and belief, Mr. Rider had been residing in Pennsylvania at the time of his death.

On November 1, 2013, counsel for Mr. Rider filed a "Notice of the Death of Party Tom Rider". ECF No. 669 (11/01/13) (hereinafter "Notice of Death"). The Notice of Death indicated that Tom Rider passed away on October 1, 2013; however, it failed to provide any additional information such as the identity of the decedent's successor or representative.² On October 25, 2013 counsel for FEI had contacted Matthew Kaiser, Rider's counsel of record, and two additional counsel for Mr. Rider in the RICO Case, and requested that Mr. Rider's counsel "identify the executor or administrator of Mr. Rider's estate or who else may be handling Mr. Rider's affairs so that the proper substitution motion may be submitted under Fed. R. Civ. P. 25(a)(1)."³ Correspondence from J. Simpson to M. Kaiser (10/25/13) at 1 (Ex. 1). FEI's counsel received no response from Mr. Rider's counsel.

On November 14, 2013, FEI's counsel sent a follow-up communication to Mr. Rider's attorney of record, Matthew Kaiser, stating the following:

We reiterate our request for you to identify the administrator or executor of Mr. Rider's estate. If neither exists, please identify the person or persons who were the distributee(s) of Mr. Rider's unprobated estate. We request this information so that the proper substitution motion may be submitted under Fed. R.

² The week prior, separate counsel for Mr. Rider in the related RICO Case filed a "Statement of Death Pursuant to F.R.C.P. 25(a)". Case No. 07-1532; ECF No. 180. That filing failed to provide any information identifying Mr. Rider's successor or representative, which prompted FEI's counsel to contact each of Mr. Rider's three (3) attorneys to determine this information.

³ FEI's counsel also stated the following: "[i]n light of the notification of the passing of Mr. Rider, we formally request that you take steps to preserve any information that was in Mr. Rider's possession that relates to the above-captioned matter including maintaining access to all data that was under Mr. Rider's control including electronic mail, bank accounts and social media." Ex. 1 at 1.

Civ. P. 25(a)(1). We would appreciate a response to this e-mail by close of business tomorrow, Friday, November 15, 2013 by either providing the information, or stating that you do not know it so that we may pursue other alternatives.

Correspondence from J. Simpson to M. Kaiser (11/14/13) at 1 (Ex. 2). On November 19, 2013, Mr. Kaiser responded to FEI's counsel, stating: "I'm unaware of any obligation to provide any information to you in response to your prior email. That said, I do not know who the administrator, executor, or personal representative of Tom Rider's estate will be. Nor do I know who might receive assets or distributions from his estate."⁴ Correspondence from M. Kaiser to J. Simpson (11/18/2013) (Ex.3).

ARGUMENT

Federal Rule of Civil Procedure 25(a)(1) states that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party." Fed. R. Civ. P. 25 (a)(1). A substitution motion must be filed within "90 days after service of a statement noting the death". *Id.* While the requirements for substitution are otherwise satisfied and discussed *infra*, as a threshold matter, FEI believes that the 90-day period has not yet been triggered.⁵

I. THE 90-DAY TIME FRAME HAS NOT BEEN TRIGGERED BECAUSE THE NOTICE OF DEATH IS DEFICIENT

A. The Notice of Death Is Invalid Because It Fails To Identify Mr. Rider's Successor or Representative

FEI is filing its Motion for Substitution well within 90 days after the filing of the purported Notice of Death out of an abundance of caution. *See* F.R.C.P. 25(a)(1) (motion must

⁴ Similar inquiries were made to Peter Foley and Terrence Reed, Mr. Rider's counsel of record in the RICO Case. On November 19, 2013, Peter Foley, one of Mr. Rider's attorneys, responded on behalf of himself and Terrence Reed, stating: "we can confirm that we have no knowledge of the status of Mr. Rider's estate." Correspondence from P. Foley to J. Simpson (11/19/2013) (Ex. 4).

⁵ Notwithstanding controlling caselaw regarding the requirements for triggering the 90-day filing obligation, FEI has filed the instant motion at this time in order to foreclose any potential for plaintiffs to argue that FEI has failed to act timely in filing its substitution motion and to avoid protracted or costly motions practice on that issue.

be made within 90 days of service of a statement noting death). FEI does not believe that the 90-day time frame has been triggered because the Notice of Death fails to comply with established requirements. Specifically, it is invalid because it fails to identify a successor or representative of the deceased. *Rende v. Kay*, 415 F.2d 983, 986 (D.C. Cir 1969) (suggestion of death ineffective to trigger the running of the 90-day period as it failed to identify a successor or representative such as an executor or administrator); *see McSurley v. McClellan*, 753 F.2d 88, 98 (D.C. Cir. 1985) (suggestion of death does not trigger the 90-day period unless it identifies the successor who may be substituted as a party); *Daskalea v. Washington Humane Society*, 275 F.R.D. 346, 369 (D.D.C. 2011) (same); *Parker v. Lemanski*, 1989 U.S. Dist. LEXIS 6403, at *2 (D.D.C. May 30, 1989) (same). This is the case even if the parties have actual knowledge of the death through some other means. *Daskalea*, 275 F.R.D. at 270.

In *Rende*, a suggestion of death was filed that failed to identify a successor or representative of the deceased, such as an executor or administrator. While the district court determined that it was not the burden of the decedent's attorney to provide this information, the D.C. Circuit reversed, stating that Rule 25 cannot fairly be construed to make a suggestion of death that fails to identify the successor or representative operative to trigger the 90-day period. 415 F.2d at 985-86. The Court reasoned that failing to interpret Rule 25 in that manner would "open the door to a tactical maneuver to place upon the plaintiff the burden of locating the representative of the estate within 90 days." *Id.* at 986.⁶ Nor did the court in *Rende* place the burden on the party seeking substitution to "institut[e] machinery in order to produce some representative of the estate ad litem". *Id.*; *see also Daskalea*, 275 F.R.D. at 270 (decedent's attorney ordered to use best efforts to locate decedent's successor). The same analysis should

⁶ The D.C. Circuit noted that the 1963 amendments to Rule 25(a)(1), which is the version still in effect today, were intended to "dispel unwarranted rigidity and allow more flexibility in substitution". *Rende*, 415 F.2d at 986; *see also McSurley*, 753 F.2d at 98.

follow here. The 90-day period should not begin to run until a valid statement of death, noting Mr. Rider's successor or representative, is filed.

B. Substitution is Necessary to Ensure Preservation and Production of Mr. Rider's Documents and Information

FEI is under no illusion that Mr. Rider's estate will be plentiful or have adequate funds to contribute meaningfully to an attorneys' fee award in this case. However, one of the primary reasons that FEI seeks substitution is to facilitate the preservation and production of Mr. Rider's documents and information that may be discoverable. Plaintiffs' have filed a motion requesting discovery in order to respond to FEI's fee petition. ECF No. 673. While FEI does not believe that fee discovery is warranted or that plaintiffs' have made a sufficient showing of need for the same, *see generally* ECF No. 677, should the Court determine that fee discovery is necessary, it should be mutual, and FEI should not be prejudiced by the destruction or spoliation of similar information from Mr. Rider.⁷ As noted in its opposition to plaintiffs' request for fee discovery, courts have noted that in the rare instance in which fee discovery is permitted it can be reciprocal, where, as here the fee opponent has challenged the reasonableness of the fees sought. ECF No. 677 (citing *Heller v. Dist. Of Columbia*, 832 F. Supp. 2d 32, 46 (D.D.C. 2011); *New York v. Microsoft Corp.*, 2003 U.S. Dist. LEXIS, at *9 (D.D.C. May 12, 2003); *Mattel, Inc. v. MGC Entm't Inc.*, 2011 U.S. Dist. LEXIS 85998, at *28 n.7 (C.D. Cal. Aug. 4, 2011)). Because plaintiffs have injected a need for fee discovery into this litigation, it is reasonable that Mr. Rider's relationship with each of his counsel on these very topics will also be the subject of discovery. As such, issues regarding the preservation and potential production of Mr. Rider's documents are of paramount concern to FEI.

⁷ Plaintiffs broadly-framed discovery requests seek many categories of information including, but not limited to: communications between attorney and client about billing and strategy of the litigation, retainer agreements, the client's perception about case staffing and tasks performed, and the like. ECF No. 677 at 9-12; 23-25.

While the deficient Notice of Death may well allow FEI to sit back and wait until Mr. Rider's counsel amends the filing to make it valid or await other information that would lead FEI to Mr. Rider's successor or legal representative, FEI may be prejudiced by the passage of time. FEI cannot allow documents and information potentially relevant to this case to be spoliated or discarded while it awaits Mr. Rider's successor or representative to be identified. Such potential data sources include, but are not limited to, Mr. Rider's banking accounts, paper files, e-mail, social media accounts, home computer, laptop, personal data assistant or phone. Despite raising the preservation issue with Mr. Rider's counsel, FEI has received no assurances that adequate steps have been taken to preserve Mr. Rider's information.

In particular, FEI is aware that Mr. Rider maintained an email account through which he communicated about this case and the related RICO case from: tomeasyrider06@hotmail.com. Additionally, at least two of Mr. Rider's co-defendants (Born Free USA and The Fund for Animals) have published this email address as a contact point for Mr. Rider on their respective websites.⁸ FEI is concerned that steps have not been taken to preserve, among other things, Mr. Rider's email account and that an inactive account may be subject to deletion or closing by Microsoft, the Internet Service Provider (ISP), if no one takes any action.

This concern is magnified by the recent response FEI received to a straightforward request to Mr. Rider's counsel of record, which again sought assurances that Mr. Rider's data is being adequately preserved post-death. Mr. Kaiser provided no such assurance that the data was being preserved. Instead, he reiterated his belief that he has no obligation to do anything related to this matter. Correspondence from M. Kaiser to J. Simpson (12/27/13) (Ex. 5).

⁸ See <http://www.bornfreeusa.org/press.php?p=1658&more=1>;
http://www.blackbeautyranh.org/media_room/press-releases/2008/stop_cruel_chaining_and_confinement.html.

The D.C. Rules of Professional Conduct, however, do not provide license to destroy a client's files even after the termination of a representation and impose an ethical responsibility to do what is "reasonably practicable to protect a client's interests." D.C. Rule 1.16(b); *see also* D.C. Bar Op. 283 ("a lawyer has an ethical obligation to current and former clients to prevent the premature or inappropriate destruction of client files"; "a lawyer should use care not to destroy any document which the lawyer has a legal obligation to preserve"); *see also* D.C. Rule 3.4 (a lawyer shall not destroy evidence "if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding.").

It is a fair inference from Mr. Kaiser's correspondence that Mr. Rider's death may have been seized upon as an excuse for allowing potentially discoverable information to be destroyed or to become otherwise unavailable to the prejudice of FEI. If proper steps had been taken before Mr. Rider's death to preserve potentially discoverable information, including his electronic mail, and if action had been taken to continue those measures after Mr. Rider's death, it would have been a simple matter for counsel to have said so.⁹ The silence on this point, therefore, is deafening.

C. Mr. Rider's Counsel Should Be Required to Identify the Decedent's Successor or Representative

As the D.C. Circuit recognized in *Rende*, "no injustice results from the requirement that a suggestion of death identify the representative or successor of an estate." *Id.* Mr. Rider's counsel is certainly in a better position than FEI to obtain this information and amend the Notice of Death. Moreover, the identification of an appropriate representative or successor is necessary

⁹ The D.C. Rules of Professional Conduct do not absolve an attorney from continuing to preserve documents and information that may be potentially discoverable simply because a client dies. *See also* D.C. Bar. Op. 119 at 4-5 (citing former DR 102(A)(5)) (attorney prohibited from destroying documents he or she knows are potential evidence in litigation); *cf.* D.C. Rule 8.4(d) ("It is professional misconduct for a lawyer to: (d) [e]ngage in conduct that seriously interferes with the administration of justice.").

to facilitate the preservation and production of Mr. Rider's potentially discoverable information. Importantly, FEI cannot obtain discovery of Mr. Rider's electronic communications from an internet service provider (such as Microsoft) through third party discovery. *See* Electronic Communications Privacy Act, 18 U.S.C. §§ 2701-2703 (2000) ("ECPA") (often known as the Stored Communications Act); *see also In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606 (E.D. Va. 2008) (civil discovery subpoena is not a disclosure exception under the plain and unambiguous language of the ECPA). However, the ECPA does permit communications to be disclosed with legal consent. 18 U.S.C. § 2702(b)(3) (contents of email communications may be divulged with lawful consent); *see also* http://answers.microsoft.com/en-us/outlook_com/forum/oaccount-omyinfo/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6 (Microsoft "Next of Kin" procedure, which enables deceased or incapacitated person's next of kin to preserve and provide consent to obtain e-mail on a Hotmail account). Accordingly, FEI requests that the Court order Mr. Rider's counsel to identify his representative or successor and amend or supplement the Notice of Death to reflect the same. Substitution of Mr. Rider's successor or representative is necessary to preserve and afford access to potentially discoverable information.

II. THE REMAINING SUBSTITUTION REQUIREMENTS OF RULE 25 ARE SATISFIED

Despite the fact that the Notice of Death is deficient as a matter of law, FEI can otherwise satisfy the requirements of Rule 25(a) and has independent knowledge of the identity of Mr. Rider's potential heirs and/or distributees. Substituting these individuals for Tom Rider at this time will facilitate the preservation and production of responsive documents and protect FEI from prejudice due to spoliated or discarded information that is potentially relevant to this case. For example, since FEI cannot perform such a function on its own, a substituted distributee is

necessary for purposes of interfacing with Microsoft to implement the process of preserving the information in Mr. Rider's Hotmail account. *See supra* Section I(C).

A. The Claims Against Mr. Rider Were Not Extinguished Upon His Death

There can be no dispute that at the time of Mr. Rider's death he was a plaintiff in this case. On information and belief, Mr. Rider was residing in Pennsylvania at the time of his death. The Pennsylvania statute on "survival action" provides: "All causes of action or proceedings, real or personal, shall survive the death of the plaintiff or the defendant, or death of one or more joint plaintiffs or defendants." 42 Pa. Cons. Stat. § 8302; *see also* D.C. Code § 12-101 (2013) ("On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased. The requirement that the claims against Mr. Rider survived his death is therefore satisfied.

B. A Proper Party for Substitution May Be An Executor, Administrator or Legal Representative

Despite the fact that the Notice of Death was invalid as it failed to identify Mr. Rider's successor or legal representative, the Court could substitute a variety of individuals for Mr. Rider. In addition to a legal "representative," the addition of the word "successor" to the Rule "means that a proper party need not necessarily be the appointed executor or administrator of the deceased party's estate." A distributee of Mr. Rider's estate would also be a proper party for substitution. *See Sinito v. U.S. Department of Justice*, 176 F.3d 512, 516 (D.C. Cir. 1999); *see also McSurley*, 753 F.2d at 99 ("the distributee of a distributed estate is a "proper party" for substitution under Rule 25(a)(1)).

FEI is not aware of any person being appointed as the administrator of Mr. Rider's estate to date; nor does FEI have any knowledge of whether Mr. Rider had a valid will. Given the fact

that three (3) of his attorneys did not provide information as to a valid will, it is likely that Mr. Rider died intestate. On information and belief, Mr. Rider died in the state of Pennsylvania. The Pennsylvania statutes on intestate succession provide that when a person dies intestate, if there is no surviving spouse, the entire estate shall pass to the decedent's issue, or children. 21 Pa. Const. Stat. § 2103 (2013). Based on documents obtained in connection with the ESA Case and other publicly available information, FEI is aware that Mr. Rider had three (3) daughters:

Tracie Rider
Last Known Address:
406 Taft Street, Washington, IL 61571

Tammy Rider
Last Known Address:
19 Thorne Street, 1st Floor, Carbondale, PA 18407

Christina Rider
No Known Address

Accordingly, as any one of these three (3) individuals would be Mr. Rider's most likely distributees or heirs and therefore are his likely successors or legal representatives, FEI requests that the Court substitute these three (3) individuals for Mr. Rider. Alternatively, FEI requests that the Court direct Mr. Rider's counsel to determine which of Mr. Rider's three daughters should be the proper party for substitution.

CONCLUSION

For the foregoing reasons, defendant FEI respectfully requests that the Court order Tom Rider's counsel of record to disclose Mr. Rider's successor or legal representative to the Court and that the disclosed individual be substituted in the place of Tom Rider. Alternatively, FEI requests that the Court enter an order substituting Tracie Rider, Tammy Rider, and Christina Rider each as party plaintiffs in the place of Mr. Rider. FEI also requests that the Court direct counsel for Mr. Rider to provide a written description to the Court as to what actions, if any, they

have taken with respect to the disposition of information that was in Mr. Rider's possession, custody or control at the time of his death that is subject to potential discovery in the instant matter.

NOTICE OF HEARING

Pursuant to Fed. R. Civ. P. 25(a)(3), FEI includes a request for a notice of hearing on the motion.

Dated: December 30, 2013

Respectfully submitted,

/s/ John M. Simpson

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