

4. While not the subject of Plaintiff's motion, Plaintiff's memorandum of law seeks an additional and broader order "requiring Mr. Rider's [former] counsel ... 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." Plaintiff's Memorandum in Support of Motion for Substitution (hereinafter "Memorandum"), at 1. This request should be rejected.

5. The Court should deny Plaintiff's requests as there is no factual or legal basis for the Court to issue any of the orders sought by Plaintiff.

6. There is no basis to compel counsel "to identify Mr. Rider's successor or representative" because, as counsel has repeatedly advised Plaintiff's counsel via emails of November 19, 2013 and December 26, 2013, they "have no information regarding the status of Mr. Rider's estate." That remains true today. Further, despite Plaintiff's claim to the contrary, former legal counsel are not "in a better position than FEI to obtain this information" (Memorandum at 7) as they have represented Mr. Rider for the purposes of this litigation only.

7. Indeed, Plaintiff's memorandum makes clear that counsel for Plaintiff already has more information on this issue than the deceased Mr. Rider's former counsel by conceding that FEI "has independent knowledge of the identity of Mr. Rider's potential heirs and/or distributees" which it then demonstrates by identifying three individuals whom FEI alleges are the daughters of Mr. Rider. Memorandum at 8-9.

8. Further, the cases cited by Plaintiff do not support any of the relief it has requested. The D.C. Circuit, in *Rende v. Kay*, did not require the decedent's former counsel to take any action; to the contrary, it specifically acknowledged that it could "conceive of cases wherein even the lawyer retained to represent a defendant might know the defendant had died, yet not

readily know where his estate would be administered.” *Rende v. Kay*, 415 F.2d 983, 986 (D.C. Cir 1969). In addition, the *Daskalea* case involved a co-plaintiff whose claims, the Court ruled, would be dismissed if information were not provided relative to “whether there is any other appropriate successor or representative who might seek to be substituted” to pursue the deceased plaintiff’s claims on behalf of his estate. *Daskalea v. Washington Humane Society*, 275 F.R.D. 346, 370 (D.D.C. 2011). If undersigned counsel had the authority to stipulate to the dismissal of Plaintiff’s claims against Mr. Rider, they would.

9. Moreover, there is no legal basis for the requested substitution at this time. The unstated reason for Plaintiff’s substitution motion is that neither Plaintiff nor its counsel propounded any discovery in this case upon Mr. Rider before his death. Leaving aside whether this was negligent, it comes from the same party and counsel who has submitted a \$25 million attorney fee request to this Court based upon their defense of an administrative law case. As Plaintiff well knows, and indeed admits in its memorandum, Mr. Rider did not have any such resources—he died a pauper. Nonetheless, Plaintiff insists that this Court create a Pennsylvania estate for Mr. Rider, and appoint one of his daughters as the estate representative, all to serve as a posthumous discovery tool to make up for the discovery Plaintiff failed to propound in its quest for \$25 million in attorneys’ fees for an administrative law suit over the Endangered Species Act. This is a request that would make Dickens blush for the legal profession.

10. Under Rule 25 of the Federal Rules of Civil Procedure, this Court can only appoint a legal representative of the decedent’s estate, and that status is governed, in this instance, by the law of Mr. Rider’s residence upon his death—Pennsylvania. *In re Baycol Products Litigation*, 616 F.3d 778, 785 (8th Cir.2010) (state law governs who can represent estate, federal law governs procedures for substitution). While the D.C. Circuit has ruled that a distributee of a completely

distributed estate may be a candidate for substitution, *McSurely v. McClellan*, 753 F.2d 88, 99 (D.C. Cir. 1985), that is not remotely the case here because the record contains no evidence of the creation of a Rider estate in Pennsylvania, much less its complete distribution. As undersigned counsel have repeatedly informed Plaintiff's counsel, they do not have information about the creation or status of any such Rider estate.

11. More to the point, Plaintiff asks this Court to reach out across the United States and apply Pennsylvania law to pick one of Mr. Rider's daughters as his substitute in this case. But Rule 25(a)(3) clearly conditions the exercise of personal jurisdiction over a potential substitute upon proper service of process, which has not happened here. *Walters v. Cowpet West Bay Condominium Ass'n*, 2103 WL 2988021, * (D. V.I. June 14, 2013) (denying motion for substitution for lack of personal jurisdiction due to lack of record evidence that proposed substitute was served) (citing *Giles v. Campbell*, 698 F.3d 153, 158 (3rd Cir. 2012)).

12. Other than the random request to appoint a personal representative for Rider, the majority of Plaintiff's motion is directed to conscripting this Court to the task of curing the consequences of Plaintiff's failure to propound discovery on Mr. Rider during his lifetime. FEI contends that "substitution is necessary to facilitate the discovery of evidence in the instant case." Motion at 1. This is an interesting position for FEI to take now, given that at the time of Mr. Rider's death FEI had no outstanding discovery requests to Rider. Of course, FEI took extensive discovery from Mr. Rider in the underlying ESA case, deposed him on videotape for days on end and cross-examined him to great length at the trial of that case as well. Presumably because it already had such extensive information from and about Rider from the underlying ESA case, FEI saw no need to make any discovery requests to Rider in this RICO case before his death - *even though FEI issued such discovery requests to every other defendant in the case.*

13. The discovery rules of the Federal Rules of Civil Procedure are broad, but they were never intended to reach beyond the grave. For example, Plaintiff complains that it needs Mr. Rider to consent to it rummaging through electronic files protected from discovery by the Electronic Communications Privacy Act, 18 U.S.C. § 2701. Plaintiff Mem., at 7. The time to make this request was while Mr. Rider was alive. Instead, Plaintiffs' counsel waited until December 2, 2013, 62 days after Mr. Rider's death, before seeking the production of these allegedly significant documents.

14. FEI goes even further though, and also "seeks an order requiring Mr. Rider's [former] 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." FEI Motion at 1. No other counsel in this case - including FEI's counsel-- - has been ordered to provide a written description to the Court of what they have done to preserve evidence that is subject to potential discovery, even though all of other counsel - including FEI's counsel - are in possession of outstanding discovery requests from other parties..

15. So why should Mr. Rider's counsel be the unilateral subject of such an unprecedented request, especially when there were no outstanding discovery requests to Rider at the time of his death? Because, FEI contends, it "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." Memorandum at 5. FEI's counsel cites and quotes the D.C. Rules of Professional Conduct to establish the proposition that counsel cannot spoliage or discard 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." D.C. Rule 3.4. No one disputes

that rule, but the problem with FEI's argument is that there is absolutely no factual predicate triggering application of the rule. In other words, FEI has not established - nor can it establish - that Rider's former counsel have destroyed any such evidence.

16. In the absence of any factual support for its concern, FEI's counsel makes the unseemly assertion that "[i]t is a fair inference from th[e] correspondence [attached to its motion] 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." Memorandum at 7. In truth, that is not a fair inference at all from the referenced correspondence, which we encourage the Court to read for itself. A much fairer (and correct) inference here is that the lawyers who represented Mr. Rider understand their obligations under the Rules of Professional Conduct and should be presumed to comply with them, in the absence of clear and convincing proof to the contrary. Here there is no proof whatsoever.

17. Plaintiff purports to summon the previously uninvoked powers of the discovery rules by recklessly accusing undersigned counsel of seizing the "opportunity" allegedly afforded by Mr. Rider's death to "destroy" his files in violation of multiple ethical obligations. Memorandum at 6. In other words, rather than accepting the consequences of their own neglect, Plaintiff's counsel seeks to induce this Court to remedy the problem FEI created by inappropriately insinuating that undersigned counsel acted unethically. Such unfounded and unsubstantiated accusations of unethical conduct should be disregarded by the Court.

18. Rattling his saber even without proof, FEI's counsel complains of the "deafening silence" from the undersigned, former counsel to the decedent, and argues that "the D.C. Rules of Professional Conduct . . . do not provide license to destroy a client's files even after the termination of a representation." FEI Memorandum at 6. "Silence" proves nothing, and FEI's

counsel's baseless suggestion that Rider's counsel may have "destroy[ed their] client's files" is wholly unwarranted. In the underlying ESA case, this Court once offered the following admonition to counsel:

Judge Sullivan and I have grown tired of telling the lawyers in this case to stop impugning each others' professional integrity. That direction has again fallen on deaf ears. Accusing one's opponent of unprofessional conduct in attempting to purposefully assist a witness's destruction of evidence is not legal argument.

ESA Action No. 326 at 5. It is not sound legal argument in this RICO case either.¹

19. The reality of the situation is that the undersigned counsel have, of course, not destroyed any evidence in this matter and their silence, up to now, on this issue, reflects the fact that they are no longer authorized to speak for Mr. Rider. What Plaintiff characterizes as a "straightforward" request for an "assurance" in this regard was in fact an unwarranted demand that Rider's former counsel take steps to obtain, preserve and eventually produce documents that were not the subject of discovery during their client's lifetime. Counsel requested that Plaintiff's counsel provide case authority to support such an extraordinary request and none has been provided, either at that time or in conjunction with the filing of Plaintiff's motion. *See* Motion, Exh. 5.

20. Rule 25 conveys a measure of discretion in this Court to order substitution or not, as it sees fit. *See* Fed.R.Civ. Pro. 25 ("the court may order . . ."). Nothing in the Advisory Committee Notes detailing the development and adoption of Rule 25, and nothing in the caselaw decided under Rule 25, identifies its purpose as being to facilitate discovery, which is the basis for FEI's motion. There are no letters rogatory to the dead. So there is no warrant for exercising the Court's discretion to order substitution on that ground.

¹ *See* D.C. Bar Voluntary Standards for Civility, General Principle No. 5 ("We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel.")

21. Some of the Rule's history and jurisprudence identifies facilitating a source of recovery as a purpose of the rule. FEI has abandoned that rationale in the case of the penniless Tom Rider. See FEI Memo at 5 ("FEI is under no illusion that Mr. Rider's estate will be plentiful or have adequate funds to contribute meaningfully to a money judgment in this case.") So there is no warrant for exercising the Court's discretion to order substitution on that ground either.

22. At the time of Rider's death, FEI had no outstanding discovery requests to him. So there is also nothing left uncompleted as a result of Rider's death, which might now require a substitution order to be completed. To the extent that FEI seeks discovery from Rider's remaining property, of course, that discovery can be accomplished as efficiently through the use of third-party subpoena as through dragging a previously uninvolved third-party into this morass in Rider's place.

23. Finally, Plaintiff asks this Court to rule on the survivability of its claims against Mr. Rider on an *ex parte* basis—that is, before the deceased even has a proper representative, much less before Plaintiff properly brings a suitable representative within the personal jurisdiction of this Court. This Court should not adjudicate the rights of a decedent, or his potential estate, *ex parte*, and Plaintiff should not be asking this Court to do so. While undersigned counsel respectfully disagree with Plaintiff's position on the survivability of its claims against Mr. Rider, see, e.g., *Confederation Life Ins. Co. v. Goodman*, 842 F. Supp.2d 836, 838 (E.D. Pa. 1994) (RICO claims do not survive), they no longer represent Mr. Rider, and hence they cannot speak for him on the matter.

24. Accordingly, undersigned counsel respectfully suggest that this Court lacks personal jurisdiction to consider the motion for substitution and, therefore, for this and all of the foregoing reasons, the motion for substitution and FEI's other requests for relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 16th day of January, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and sent a copy via e-mail to the following:

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