UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07-1532 (EGS/JMF)**
	:	
ANIMAL WELFARE INSTITUTE, et al.	:	
	:	
Defendants.	:	
	:	
	:	

REPLY IN SUPPORT OF FELD ENTERTAINMENT, INC.'S
MOTION FOR SUBSTITUTION OF DEFENDANT TOM RIDER

Peter T. Foley and Terrence G. Reed, counsel of record for Tom Rider in the instant matter and now "former counsel" to Mr. Rider, despite having taken "no position" during the meet and confer process required by Local Rule 7(m) and admittedly having "no authority to speak" on Mr. Rider's behalf, now respond as *amicus curiae*[1] in order to challenge FEI's Motion for Substitution and the relief sought therein.

[1] As a threshold matter, Former Counsel's "*Amicus Curiae* Response" ("Response") is inappropriate and should not be considered. (Matthew Kaiser, Mr. Rider's former counsel in the ESA Case, 03-2006-EGS/JMF (D.D.C.), filed a similarly-worded "*Amicus Curiae* Response"). "An amicus brief, defined as a friend of the court, . . . does not represent the parties but participates only for the benefit of the Court." *Jin v. Ministry of State Sec. et al*., 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (internal quotation omitted). Messrs. Foley and Reed's role in this case was representing a party, Tom Rider. They remain counsel of record in this matter and, even in this filing, are advancing interests of Tom Rider and his potential successors or legal representatives. This fact alone disqualifies Former Counsel from participating as *amicus*. Even if they were not prohibited from participating as *amicus* due to their participation in this case as counsel for a party, they sought no leave of Court to file this so-called *amicus* brief. *Jin*, 557 F. Supp. 2d at 136-137 (it is solely within the court's discretion to determine "the fact, extent and manner of the participation" by the amicus) (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)); *see also Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) ("an amicus who argues facts should rarely be welcomed"); *Sierra Club*, 2007 U.S. Dist. LEXIS 84230, at *10-11 (S.D. Tex. Nov. 14, 2007) (denying leave to file where, *inter alia*, amicus sought to litigate fact issues and its interests and objectives were identical to the party who position it sought to support). Since Former Counsel's *amicus curiae* brief is not properly before the Court, it should be disregarded in its entirety.

Former Counsel's Response aims to "have it both ways". They disclaim any obligation with respect to their deceased client, Mr. Rider, and repeatedly have stated that they have no authority to speak on his behalf or behalf of his estate. However, they then have much to say about why substitution is inappropriate and why they have no obligation to cooperate with FEI's counsel regarding the preservation of Mr. Rider's potentially relevant information or provide all information that is required for a legally sufficient Statement of Death.

FEI's substitution motion is a necessary procedural step to preserve its rights and claims against Mr. Rider following what FEI believed to be Mr. Rider's untimely death. After FEI's counsel was informed of Mr. Rider's death, FEI's counsel promptly engaged in correspondence with Mr. Rider's three attorneys (two in the instant matter and one in 03-2006-EGS/JMF (D.D.C) (the "ESA case")) to receive assurances on the most pressing and time sensitive issue: whether Mr. Rider's potentially discoverable documents would continue to be preserved after his death. What ensued was anything but a straightforward assurance that potentially responsive documents had been properly preserved, and would continue to be preserved, even after Mr. Rider's death. Mr. Rider's counsel never answered that question. In particular, FEI's questions regarding the preservation of Mr. Rider's Hotmail account went (and still are) unanswered. Rather, Mr. Rider's counsel (in both matters) disclaimed any responsibility for Mr. Rider's documents and any obligation to cooperate in discussions regarding preservation of documents that are potentially relevant to this case.

Former Counsel also has advanced an inconsistent position on their authority to participate in this litigation. Despite their staunch denial that they have no remaining obligations to their deceased client and this case, they advance multiple arguments challenging substitution as though they are advancing the interests of Mr. Rider and/or his successors. Former Counsel

should not be heard to disclaim any responsibility for discovery obligations in this action and simultaneously try to derail FEI's attempt to preserve its rights after the death of a defendant.

ARGUMENT

1. Former Counsel's Position on Preservation Confirms FEI's Concerns

Rather than address the preservation issue framed by FEI's Motion, Former Counsel inappropriately accuses FEI of "negligence" in not propounding discovery prior to Mr. Rider's death. This is merely a smokescreen to obscure what may well be a failure to have preserved potentially relevant data sources, including Mr. Rider's Hotmail account, and magnifies the concerns that developed after Former Counsels' and FEI's counsel's correspondence on the issue. *See* Exs. 1-5. Specifically, Former Counsel appears to be taking the position that unless and until a discovery request is served, a party has no duty to preserve potentially relevant documents. Response ¶ 19 (stating that Former Counsel should not have to preserve documents "that were not the subject of discovery during their client's lifetime"). However, this narrow view of preservation is not the law. "A party is obligated to preserve potentially relevant evidence once he anticipates litigation." *Smith v. Café Asia*, 246 F.R.D. 19, 21 n.1 (D.D.C. 2007) (citing *United Med. Supply Co., Inc. v. U.S.*, 77 Fed. Cl. 257, 258) (2007)) (internal quotations omitted). Failure to do so risks a finding of spoliation and potential sanctions. *See D'Onofrio v. SFX Sports Group, Inc.*, 2010 U.S. Dist. LEXIS 86711, at *13-14 (D.D.C. Aug. 24, 2010). Even if Former Counsel had been unsure about the triggering of a preservation obligation, the Court certainly made that known in its November 7, 2007 Order requiring preservation of any potentially relevant evidence—a point on which Former Counsel's Response is silent. *See* ECF 22 (ordering "all parties . . . to preserve any potentially relevant evidence in the above-captioned case.").

2. Former Counsel Does Not Deny That Mr. Rider's Hotmail Account May Contain Potentially Relevant Information

Former Counsel does not even try to refute the point that Mr. Rider's Hotmail account is a relevant data source for preservation and potential discovery. That Mr. Rider's Hotmail email account may contain information potentially relevant to this case is not merely speculative. Indeed, as outlined in FEI's opening Motion, Mr. Rider's co-defendants advertised to the public on their websites a 2008 press release that included Mr. Rider's name and Hotmail address as a contact point *about the ESA Case*. FEI's Memorandum in Support of Motion for Substitution ("FEI Mem.") (ECF 192) at 5-6. Furthermore, even without such knowledge that Mr. Rider's Hotmail account was being used to communicate about the ESA Case, it is more than likely that, having publicly advertised Mr. Rider's email contact information, donors or other members of the public may have contacted Mr. Rider at this Hotmail address and discussed with him his role in the ESA Case, the lawsuit, fund raising for the lawsuit, or FEI. All of this information is potentially relevant to this case. Each of these topics has not only been previewed in the complaint, thereby putting counsel on notice to preserve document related thereto, but has been rehearsed in the parties' Initial Disclosures (1/28/2011), FEI's discovery plan (2/11/2011) (ECF 62), and the Court's Order providing the categories for discovery (5/19/2013) (ECF 151). All of these dates preceded Mr. Rider's death and served as a reminder of the nature and scope of Mr. Rider's s preservation obligation.

In addition, Mr. Rider actually communicated *about this case* using his Hotmail account. On June 14, 2011, Tom Rider sent an email about this case to FEI's counsel, John Simpson, through Mr. Rider's Hotmail email account.[2] Mr. Simpson promptly telephoned Mr. Stephen

[2] FEI has not attached the email as an exhibit since its contents implicate Fed. R. Evid. 408. However, if directed, FEI can submit it to the Court *in camera*.

Braga (Rider's other former counsel, and current counsel to WAP, MGC, Meyer, Glitzenstein, and Crystal) to inform him of this communication and forwarded Mr. Rider's email to him. Even if Former Counsel had been unaware that co-defendants in this matter had published Mr. Rider's Hotmail address on their websites in a press release advertising the ESA Case (where it remains *to this day*), certainly, as of June 14, 2011—more than three years prior to Mr. Rider's death—they should have been made aware by prior counsel that Mr. Rider was communicating through his Hotmail account *about this case* and taken steps to have that information preserved. Given all of these circumstances, Mr. Rider's lawyers knew or clearly should have known about Mr. Rider's Hotmail account long before the current exchange of correspondence about preservation occurred. Former Counsel had a duty to preserve Mr. Rider's potentially relevant evidence, including his Hotmail account, while Mr. Rider was alive, and that duty did not lapse when Mr. Rider died. FEI Mem. at 6. Former Counsel cite nothing to the contrary. The current statement that nothing has been affirmatively destroyed, made for the first time in the Response (¶ 19), does not answer the question whether preservation of the Hotmail account occurred prior to death or whether preventable loss of evidence has or is about to occur by the Internet Service Provider after death. Former Counsel had a duty to preserve Mr. Rider's potentially relevant evidence, including avoiding the loss of information through email account inactivity or other automated or routine process.[3]

[3] Former Counsel objects to certifying for the Court and FEI that it took appropriate preservation steps. Response ¶ 14. Even if Former Counsel's primary objective in filing its "*Amicus Curiae* Response" was to ensure that they would not have to do anything in this litigation going forward, it is perplexing that they saw fit to try to derail substitution with other substantive challenges particularly where, as here, no party to the case (nor a properly served substitute) has made such an argument.

3. Former Counsel's "Negligence" Accusations Are Unfounded

In a transparent effort to divert the Court's attention from the preservation issue, Former Counsel suggest that FEI was "negligent" in not serving discovery requests on Mr. Rider during the 54 day period between the commencement of the discovery period (August 8, 2013) and Mr. Rider's death (October 1, 2013). The discovery cut off in this case is not until August 4, 2014.[4] There certainly is nothing unusual about staggering discovery; indeed Rule 26(d) specifically provides that methods of discovery may be used "in any sequence".

Tellingly, nowhere in Former Counsel's Response do they suggest that Tom Rider's death was anticipated or that FEI had been placed on notice that he was in ill-health or suffering from a terminal condition. Their "negligence" accusation therefore begs the question of what they knew about Mr. Rider's health: did any of Mr. Rider's prior counsel have knowledge of a medical condition that would have suggested his death was imminent? Were they aware that he died at the Golden LivingCenter in Scranton, PA (which appears to be a facility that provides nursing, rehabilitation, assisted living and hospice services), which was first revealed to FEI through the public obituary? *See* Rider Obituary (10/3/2013) (Ex. 6). Was this information known to counsel when they were negotiating a discovery plan and schedule such that issues regarding document preservation by, and the deposition scheduling of, a party who was

[4] Former Counsel make two inaccurate representations regarding discovery in both this case and the ESA Case. First, Former Counsel state that "FEI issued discovery requests to every other defendant in this case." Response ¶ 12 (emphasis omitted). This is false. FEI issued document requests to each of the *organizational* defendants in this case. It has not yet issued discovery requests to *any* of the individual defendants including Katherine Meyer, Eric Glitzenstein, Howard Crystal, Kimberly Ockene, Jonathan Lovvorn and Tom Rider. Second, Former Counsel accuse FEI of failing to propound discovery requests in the fee stage of the ESA Action. Response ¶ 9. However, as the Court already has determined, there is no entitlement to discovery as of right in the fee stage of that case and the Court has yet to allow any discovery to be taken.

Second, Former Counsel misapprehends the scope of discovery obtained from Mr. Rider in the ESA Action. As the Court's 5/9/2013 Order makes clear in enumerating forty-six (46) areas appropriate for discovery *in this case*, their position that FEI had "extensive discovery from Mr. Rider in the underlying ESA Case" is of no moment. Moreover, there was no discovery about Mr. Rider for the period after fact discovery closed in that case on January 30, 2008, which includes several more months, if not years, of payments to Mr. Rider.

apparently in poor health should have been discussed? Given the fact, known to FEI for the first time after Mr. Rider's death that he died at the Golden LivingCenter, was it prudent to leave preservation in his hands or should counsel have intervened? Given the fact that Former Counsel has now accused FEI as being "negligent" for failing to serve discovery requests on Mr. Rider within his lifetime, they have placed directly at issue whether Mr. Rider's death should have been anticipated. In particular, the unique issue of preservation of Mr. Rider's documents while he apparently was ill was never raised by counsel during the Rule 26 conference.

Former Counsels' suggestions that discussions about preservation are somehow off limits is refuted by Fed. R. Civ. P. 26(f)(2), which specifically contemplates the parties' discussion of "any issues about preserving discoverable information."[5] Up until Mr. Rider's death, FEI had proceeded under the assumption that the parties and their counsel were acting in good faith and upholding their respective preservation obligations. However, when Mr. Foley informed FEI's counsel of Mr. Rider's death, which came as a surprise to FEI, rather than leave preservation issues to chance, this unexpected change in circumstances prompted FEI to seek assurances from Former Counsel that Mr. Rider's potentially relevant information—particularly information in electronic format that could be destroyed by automated and routine process unless the custodian takes affirmative action to interrupt that process—would be maintained. *See* Simpson Correspondence (12/18/2013) (raising preservation issue including Rider Hotmail account) (Ex. 7)[6] FEI received no such assurance. *See* Exs. 1; 5.

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[5] *See also* The Sedona Conference, § 1 (Preservation) at https://thesedonaconference.org/node/4305 (detailing preservation best practices and noting that courts may be called upon to address preservation issues at multiple times during the litigation).

[6] Former Counsel has not explained whether, in assisting Mr. Rider with his preservation obligation, they took possession of Mr. Rider's documents for safe-keeping or merely instructed him to save his documents. Given that Mr. Rider, as a defendant, has been implicated by the allegations of wrongdoing, and has been described by his own counsel in the ESA Case as "unsophisticated", the risk of placing compliance with preservation in his own hands may indeed have been ill-advised. *Cf. Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)

Without intervention, Mr. Rider's death may well lead to the destruction of potentially relevant electronic documents. That Former Counsel has not affirmatively "destroyed" documents – a statement which Former Counsel now makes for the first time in its Response (¶ 19) – does not address the key issue of whether Mr. Rider's information was properly preserved before his death and will continue to be preserved after his death. If documents were being properly preserved prior to Mr. Rider's death, it should not have been difficult for Former Counsel to confirm that preservation would be maintained after death. *See Walters v. Cowans*, 1987 U.S. Dist. LEXIS 14115, at *5 (N.D. Ill. Apr. 28, 1987) (rejecting notion that death of client absolved counsel of all client duties; "[a]s [defendant's] attorney of record, he continues to have obligations placed upon attorneys under the federal rules.").[7]

4. Third Party Subpoenas Will Not Be Effective To Obtain Mr. Rider's Documents

Former Counsel's argument that FEI should simply utilize a third party subpoena to obtain the Hotmail documents is flatly contrary to the Electronic Communications Privacy Act ("ECPA"). The ECPA does not, as Former Counsel imply, prevent Mr. Rider's emails from

("counsel must take affirmative steps to monitor compliance so that all sources of information are identified and searched"). Depending upon Mr. Rider's physical or mental condition at the time, the difficulty of adequately complying with a preservation hold may have been magnified when Mr. Rider was admitted into a facility. *See* Rider Obituary (10/3/2013) (Mr. Rider's obituary indicating that he resided at the Golden LivingCenter, a patient facility in Scranton, PA, prior to his death) (Ex. 6).

[7] Former Counsel's claim that FEI's citation to the Rules of Professional Conduct is an *ad hominem* attack on counsel and a misplaced effort to impugn their integrity is baseless. Response ¶ 18 & n.1. The fact remains that certain duties imposed by the Rules of Professional Responsibility on counsel survive the death of the client, which include the duty to preserve the client's property and the duty not to prejudice the client's legal interests; duties that, combined, readily impose a duty not to stand by while preventable loss of the client's evidence occurs. FEI Mem. at 6. Former Counsel may not agree with FEI's argument (although they have made no effort to respond to it on the merits), but citing to these Rules is not an *ad hominem* attack. Given Former Counsel's studious silence on these issues prior to the filing of this Motion, they cannot be heard to complain now that FEI has been forced to raise the question whether they have in fact complied with these ethical obligations. Indeed, notably absent from Former Counsel's correspondence is any confirmation that documents have not been destroyed—a position that was advanced for the first time in their Response (¶ 19).

being subject to civil discovery. Response ¶ 13.[8] As FEI outlined in its opening brief, it protects the Internet Service Provider (Microsoft) from having to produce an accountholder's emails in response to a civil document subpoena. FEI's Mem. at 7. Further, an accountholder, or the next of kin if that person is deceased or incapacitated, can provide consent for the emails to be made available in litigation; hence the need for substitution. *Id.* Therefore, suggesting that FEI has another easier method to obtain Mr. Rider's Hotmail emails through a third party subpoena is not accurate.

5. Former Counsel Is In The Best Position to Determine Mr. Rider's Successor or Legal Representative

Former Counsel does not argue with the fact that the Statement of Death is ineffective because it fails to identify Mr. Rider's successor or legal representative. However, Former Counsel objects to rectifying this deficiency by supplying that information to the Court, stating that FEI's counsel "already has more information on this issue" than Former Counsel. Response ¶ 7. FEI fails to see how, practically speaking, this can be true. First, on the day of Mr. Rider's death, Mr. Foley contacted FEI's counsel to relay that information. Foley Correspondence (10/1/2013) (Ex. 8). Presumably, he learned that information from someone close to Mr. Rider or with knowledge of his medical situation, who may be a successor, legal representative, next of kin or, at a minimum, someone with contacts to such a person, and therefore, someone as to whom Former Counsel has readier access than FEI.[9] FEI is not privy to such information.

[8] Former Counsel's own citation to the ECPA (18 U.S.C. § 2701) includes a provision that clearly states that a user of an internet service may access his or her own information "with respect to a communication of or intended for that user"). Id. § 2701(c).

[9] Two separate obituaries were published for Mr. Rider on the internet and in the Scranton Times. The first, dated October 3, 2013, contained a reference that Mr. Rider had been residing in the Golden LivingCenter facility in Pennsylvania prior to his death. Ex. 6. The second, dated October 8, 2013, removed any reference to the Golden LivingCenter, and added references to Mr. Rider's career as an advocate speaking out against the circus. Rider Revised Obituary (10/8/2013) (Ex. 9). FEI does not know who authored either the first or second obituary, but it would follow that someone close to Mr. Rider, perhaps a potential successor or legal representative, may have

Second, documents produced in the ESA Case identified by name, for example, two of Rider's three daughters, including last known addresses. *See, e.g.,* DX55, No. 03-2006 (ECF 458-8) at TR00457-TR00459. Such documents were available to prior and Former Counsel representing Mr. Rider. Moreover, Former Counsel would be hard-pressed to argue that they are not in a better position to reach out and contact Mr. Rider's daughters than opposing counsel. *See Schlansky v. Murphy*, 1993 U.S. App. LEXIS 11813 (6th Cir. May 11, 1993) (unpublished) ("emphasizing] that the decedent's attorney should take reasonable steps to protect his late client's interests, such as by endeavoring to contact the decedent's representative and informing him of the pending action.").

6. Former Counsel Cannot Both Advocate for A Party In This Case and Disclaim Any Responsibility To Their Client

Despite Former Counsel's insistence that they no longer have any authority to participate in this litigation, Response ¶¶ 1, 23 & Exs. 3 & 5, they now set forth an argument that no other party in this case has advanced: that substitution in this case is improper and, moreover, the court has no jurisdiction to determine the issue.[10] Former Counsel's selective invocation of their authority to participate in litigation is troubling. *See Walters*, 1987 U.S. Dist. LEXIS 14115, at *4 (finding that taking action on behalf of a deceased client after death was inconsistent with the argument that client's death terminated lawyer's authority to take any action on client's behalf). Since the death of Mr. Rider, Former Counsel have remained counsel of record, have filed a Statement of Death in this case, and now have submitted a Response that advances arguments challenging the merits of the substitution motion as though they represented Mr. Rider or his

authored them. As Former Counsel was informed of Mr. Rider's death it stands to reason that they also may know who had a role in drafting Mr. Rider's obituaries.

[10] It is well settled that an *amicus curiae* has no standing to raise arguments not pressed by the parties. *See, e.g., Knetsch v. United States*, 364 U.S. 361, 370 (1960); *Common Cause v. Bolger*, 512 F. Supp. 26, 35 (D.D.C. 1980). No party in this case has objected to the substitution of Mr. Rider and therefore Former Counsel should not be heard to do so in their self-described role as "*amici*".

successors or legal representatives. Either Former Counsel are "in the case" and should fulfill their preservation duties and ensure that potentially relevant emails do not get destroyed due to inactivity or they are "out of the case" and therefore should not be heard to advance a position on any party's behalf.

7. Rule 25 Should Be Liberally Construed to Effectuate the Procedural Goal of Substitution

Even if Former Counsel had standing to argue a party's position on substitution, their arguments are not well-founded. First, without citation to any authority, Former Counsel argue that Rule 25 should not be used to facilitate discovery. Response ¶ 20. Former Counsel fail to explain why the necessity of discovery, a fixture of civil litigation, would preclude a plaintiff from availing itself of Rule 25. Rule 25 contains no such limitations on its use. Indeed, Rule 25 should be construed liberally. *McSurley v. McClellan*, 753 F.2d 88, 98-99 (D.C. Cir. 1985) (purpose of Rule 25 amendments was to liberalize the Rule and allow flexibility in the substitution of parties). Here, although FEI has indicated that the preservation of Mr. Rider's potentially relevant information is the most pressing issue necessitating substitution, it is not the only reason. If Former Counsel are correct in disclaiming any information about Mr. Rider's estate, then they cannot guarantee that there would never be any possibility of a monetary recovery. It may not ultimately bear fruit, but FEI is not required to foreclose that option at this time.

Moreover, "[a] motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ('the court may order') it may be denied by the court in the exercise of a sound discretion if made long after the death -- as can occur if the suggestion of death is not made or is delayed -- and circumstances have arisen rendering it unfair to allow substitution." Fed. R. Civ. P. 25(a) advisory committee's

note (1963 amendment). *See also In re Baycol Prods. Litig.*, 616 F.3d 778, 783 (8th Cir. 2010) (Rule 25(a) motions should be "freely granted"); *Wilson v. Feldman*, 1991 U.S. Dist. LEXIS 12874, at *6 (D.D.C. Sept. 18, 1991) ("Rule 25(a)(1) should be interpreted liberally and not 'as a bar to otherwise meritorious actions'"); WRIGHT MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1955 ("There appears to be only one reported case under the amended rule in which substitution has been denied when the motion was made within the 90-day period.").

Former Counsel evidently concede that FEI's Motion is timely, as they make no arguments to the contrary. Nor do they argue that the motion for substitution is somehow unfair or prejudicial. Indeed, in light of their self-described "*amicus curiae*" status and the insistence that they have no authority to advocate on behalf of Mr. Rider, his estate, or any of the individuals identified by FEI for substitution, it would be difficult to see how they could advance such an argument. *See* Response ¶ 23 ("undersigned counsel . . . no longer represent Mr. Rider and hence they cannot speak for him on the matter"). Instead, Former Counsel suggest that Mr. Rider's financial state (describing him as "penniless" and "a pauper"), without any evidentiary support, precludes substitution. As a threshold matter, it is difficult to believe how Former Counsel can advance the patently contradictory argument that they have no information about Mr. Rider's estate, would-be successors or legal representatives (Response ¶¶ 6-8 & Exs. 3, 5), but yet at the same time assert that his estate is "penniless". Response ¶ 21.[11] FEI has not had the opportunity to discover any of this information and, until it has such an opportunity, should

[11] *See Hardy v. Kaszycki & Sons Contractors, Inc.*, 842 F. Supp. 713, 716 (S.D.N.Y. 1993) (rejecting surviving spouse's efforts to thwart substitution by representing her husband's estate had no assets and noting that decedent's estate had two insurance policies).

not be prejudiced by denial of its substitution motion and termination of its valid claims against Mr. Rider's successor or legal representative.

8. Service Pursuant To Fed. R. Civ. P. 4 Satisfies Personal Jurisdiction

Second, Former Counsel's argument that the Court lacks personal jurisdiction over Mr. Rider's daughters is incorrect.[12] Former Counsel suggest that service on a non-party who lives outside the judicial district in which this case is pending is somehow inappropriate. Response ¶¶11, 24. Former Counsel cites no authority for this position. However, it is clear that the Court gains personal jurisdiction over a non-party upon service of process pursuant to Fed. R. Civ. P. 4. *See Giles v. Campbell*, 698 F.3d 153, 158 (3d Cir. 2012) (cited by Rider's Former Counsel); *Ransom v. Brennan*, 437 F.2d 513, 517-10 (5th Cir. 1971); *see also Robinson v. Advanced Decoy Research*, 2008 U.S. Dist. LEXIS 39705, at *5 (S.D. Cal. May 15, 2008) ("The Plaintiff's death does not automatically terminate the court's jurisdiction"). As Rule 4 indicates, a person may be served in any judicial district in the United States.[13]

Since the filing of FEI's Motion for Substitution (which indicated that service would be made upon parties and non-parties pursuant to Rules 5 and 4, respectively), Tracie Rider has been personally served with the Motion and accompanying memorandum and exhibits and the Statement of Death on January 8, 2014. Affidavit of Service of Tracie Rider (Ex. 10). Attempts to serve Tammy Rider are ongoing. Therefore, as of the date of this filing, the Court already has obtained personal jurisdiction over one of the suggested substitutes.

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[12] Presumably, Former Counsel is implying that Mr. Rider's daughters needed to be served with the substitution motion prior to its filing. Rule 25, however, contains no such requirement.

[13] Former Counsel cites to *Walters v. Cowpet West Bay Condominium Ass'n*, 2013 U.S. Dist. LEXIS 83752, at *20-21 (D.V.I. June 14, 2013) for the proposition that personal jurisdiction was not obtained over the proposed substitute because no attempt was made to serve the individual pursuant to Rule 4, which is not the case here. However, even in *Walters*, the Court granted the plaintiffs two weeks leave to comply with the service requirement.

9. Former Counsel's Additional Challenges to Substitution Are Unavailing

Former Counsel challenge both the survivability of the causes of action pending against Mr. Rider as well as this Court's ability to substitute a successor or legal representative. Response ¶¶ 10, 23. Plaintiff cites *Confederation Life Ins. Co. v. Goodman,* 842 F. Supp. 836 (E.D. Pa. 1994) for the proposition that a RICO claim does not survive the death of a defendant. What Former Counsel failed to bring to the Court's attention is that *Confederation Life*, and the split of authority on this question, was expressly discussed in *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1122 (D.D.C. 1996), and Judge Green rejected it and determined that the RICO statute itself illustrates Congress's general intent that the provisions of RICO "shall be liberally construed to effects its remedial purpose." *Id.*[14]

Finally, Former Counsel suggest that the application of state law will somehow preclude this Court from ruling on the substitution motion. Response ¶¶ 10, 23.[15] However, it is far from uncommon for a federal court to determine a substitution motion and apply the state law regarding a potential successor or legal representative. *See, e.g., In re Baycol Products Litig.*, 616 F.3d at 785-88 (applying state law to determine proper party for substitution). Former Counsel has not argued that Pennsylvania succession laws do not apply nor have they contested FEI's argument that, under Pennsylvania law, Mr. Rider's daughters would be his likely successors or legal representatives. Moreover, consistent with the amendments to Rule 25(a), the D.C. Circuit's decisions in *Rende* and *McSurley* previously cited by FEI (Mem. at 3-4), and the *In re Baycol Products Litigation* case cited by Former Counsel, a proper party for substitution

[14] Even if RICO's survivability were at issue, counsel is silent on the survivability of the other causes of actions against Mr. Rider and therefore concede the point that the additional claims survive his death.

[15] Former Counsel suggest that the Court cannot rule on this Motion on an "*ex parte*" basis. Response ¶ 23. Nothing prohibited Tracie Rider, who was properly served on January 8, 2014, from responding to this Motion for Substitution. Since Ms. Rider was properly served, and since Former Counsel disclaims any representation of Ms. Rider, or any other potential substitute for Mr. Rider, Former Counsel has no standing to oppose substitution.

need not be only an executor or primary beneficiary of an already distributed estate. *See In re Baycol Products Litig.*, 616 F.2d at 784-85; *see also Hardy*, 842 F.Supp. at 716-17 (rejecting claim that widow who was not a representative of the decedent's estate was not a proper party for substitution; it was undisputed that the widow was at least the primary (even if not the sole) distributee of the husband's estate and therefore a proper party for substitution). Having identified likely distributees of Mr. Rider's estate (including Tracie Rider who has been personally served) there is no valid argument against substitution in these circumstances.

CONCLUSION

Former Counsel cannot be heard to complain about the merits of substitution and simultaneously disclaim any responsibility for ensuring that obligations to their deceased client, Mr. Rider, are upheld post-death. As Former Counsel has seen fit to avail themselves of participating the litigation after the death of Mr. Rider (both by filing a Statement of Death and now arguing against substitution) they should be ordered to facilitate what should be a fairly routine process of ensuring that preservation of information, and the chain of custody or "safekeeping" of same be done. Further, they are in the best position to determine the appropriate successor or legal representative. In any event, Former Counsel should not be permitted to further stonewall FEI's efforts to properly avail itself of Rule 25 and preserve its claims against Tom Rider going forward. Accordingly, FEI respectfully requests that the Court grant the relief requested.

Dated: January 27, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 27th day of January, 2014, the foregoing was served on all counsel of record via ECF notice. Service by postage prepaid, first class mail, was served on:

Tracie Rider
406 Taft Street
Washington, IL 61571

/s/ John M. Simpson