UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	**Case No.: 03-2006 (EGS/JMF)**
v.	)	
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO THE HUMANE SOCIETY OF THE UNITED STATES'S MOTION TO STRIKE

INTRODUCTION

During the course of this litigation, the Humane Society of the United States ("HSUS") monitored and consulted on this case, touted it as part of its own litigation docket, permitted its in-house counsel to act as counsel of record to all plaintiffs, and funneled monies to the individual plaintiff, Tom Rider. Notwithstanding its heavy participation in the litigation, HSUS now would like the Court to excuse it from any liability because it allegedly was "not a party to the case." Oddly, HSUS, while claiming to be a "non-party," has filed a motion to strike – a filing that only a party can make. HSUS acquired and controlled the Fund for Animals ("FFA"), including FFA's interest in this litigation, and after doing so, continued to have HSUS's own in-house attorneys "consult on strategic decisions" in the prosecution of this litigation. Now that the case has gone badly for plaintiffs, HSUS wants to be immune from the consequences of its actions. HSUS cannot have it both ways.

HSUS's Motion to Strike ("HSUS Mot."), Docket Entry ("DE") 598, is procedurally and substantively defective for multiple reasons, including: (1) procedurally, "non-parties" to a case

cannot file motions (absent exceptions inapplicable here), and motions to strike generally are appropriate only for ***pleadings***; (2) HSUS is FFA's successor in interest to this litigation, so that it is bound by any and all judgments entered against FFA; and (3) HSUS's motion is not properly convertible to a summary judgment motion.

The motion seeks to strike references to HSUS in Feld Entertainment, Inc.'s ("FEI") pending motion for entitlement to attorneys' fees. *See* DE 593 (moving for fees because of plaintiffs' and their lawyers' unreasonable, fraudulent, bad faith and vexatious actions in pursuing this litigation based on a fabricated claim of Article III standing to sue, predicated upon deliberately false statements to the courts and anchored by a paid plaintiff with zero credibility who lied at trial).[1] FEI gave HSUS fair warning that it intended to hold HSUS responsible for any attorneys' fee award entered against FFA. DE 593 at 4 n.6. HSUS could have joined in the response that plaintiffs have filed to FEI's motion, DE 599, and, indeed, HSUS identifies nothing that it would say separately that was not said on its behalf in that joint response. Instead, HSUS has chosen to pretend that it is a "non-party" to the case and filed a motion separately. However, the record is clear that, through its control of FFA as well as the participation of its own employees as counsel in this case, HSUS had a hand in the abusive litigation tactics for which FEI seeks compensation. HSUS's motion itself also raises additional factual and legal issues on HSUS's involvement in the case and its corresponding responsibility for fees. Striking HSUS as a subject of FEI's attorneys' fee claim at this point would be improper and premature. HSUS's motion should be denied.

[1] Rider submits no declaration in support of the opposition to FEI's motion for entitlement to fees, and thus makes no effort to defend or even explain his actions.

ARGUMENT

A party may move the District Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "The decision to grant or deny a motion to strike is committed to the trial judge's sound discretion." *FTC v. Cantkier*, 767 F. Supp. 2d 147, 159-60 (D.D.C. 2011). However, "motions to strike, as a general rule, are disfavored." *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib.*, 647 F.2d 200, 201 (D.C. Cir. 1981). Therefore, "[i]n considering a motion to strike, the court will draw all reasonable inferences in the [non-moving party]'s favor and ***resolve all doubts in favor of denying the motion to strike***." *Unique Indus. v. 965207 Alta. Ltd.*, 722 F. Supp. 2d 1, 5 (D.D.C. 2009) (emphasis added).

I. THE MOTION SHOULD BE DENIED BECAUSE IT IS PROCEDURALLY IMPROPER

A. If HSUS Is A Non-Party, Then It Cannot File The Instant Motion

HSUS claims that it is a "non-party" to this litigation. *See generally* HSUS Mot. If the Court accepts this claim, then HSUS's "non-party" motion must be denied, because it did not have standing to file the motion in the first place. *See, e.g., Keene Corp. v. Ins. Co. of N. Am.*, 1988 WL 73860, at *2 (D.D.C. Jul. 8, 1988) (non-party movants "have no standing to [file motions] in this case.")[2]; *Dail v. City of Goldsboro*, 2011 U.S. Dist. LEXIS 61731, at *3 (E.D.N.C. June 9, 2011) (denying motion to strike because "as a mere non-party, [movant] has no standing to file pleadings or motions in this lawsuit."); *State Farm Mut. Auto. Ins. Co. v. Red Lion Red. Ctr., Inc.*, 2001 U.S. Dist. LEXIS 24101, at *8 n.2 (E.D. Pa. Oct. 17, 2001) (noting that the Court properly denied a non-party's motion to strike "because as a non-party to the

[2] Non-parties may file motions in certain circumstances inapplicable here, such as motions to intervene (Fed. R. Civ. P. 24), motions for protective order (Fed. R. Civ. P. 26(c)), and motions to quash third party subpoenas (Fed. R. Civ. P. 45).

litigation she lacked standing to file pleadings."). By HSUS's own caption ("Non-Party HSUS's Motion"), its motion is improper and should be denied.[3]

HSUS's actions speak louder than its words. In the context of a pending motion by FEI that seeks attorneys' fees and sanctions for extremely serious misconduct, HSUS surely did not intend to make matters worse with a motion that could only be filed by a real party in interest. Indeed, if HSUS really believed its own argument that it truly is not a party to this case, then it would simply have ignored what FEI said about HSUS in FEI's attorneys' fee motion. However, the very fact that HSUS filed the motion to strike clearly underscores the point that HSUS appreciates the significant risk that its own actions have made it responsible for the attorneys' fees that FEI seeks.

B. FEI's Attorneys' Fees Motion Is Not A Proper Subject For A Motion To Strike

HSUS's motion also is improper because generally only material in a ***pleading*** may be the subject of a motion to strike, and FEI's motion for entitlement to attorneys' fees is not a pleading. "The Court may strike from a ***pleading*** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f) (emphasis added). "Only the following are pleadings: '(1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer.'" *Bond v. ATSI/Jacksonville Job Corps Ctr.*, 811 F. Supp. 2d 417, 421 (D.D.C. 2011); *Great Socialist People's Libyan Arab Jamahiriya v. Miski*, 683 F. Supp. 2d 1, 15 (D.D.C. 2010)

[3] HSUS does not present any authority supporting a non-party's standing to file motions. Its cite to a footnote in *GSS Group Ltd. v. Nat'l Port Auth.*, HSUS Mot. at 1 n.1, refers to the unremarkable "special appearance" doctrine in which a nonresident defendant can appear to contest the court's jurisdiction over it without thereby subjecting itself to the power of the court generally. 2012 U.S. App. LEXIS 10608, at *25 n.7 (D.C. Cir. 2012). This clearly is inapposite and provides no basis for HSUS's "non-party" filing.

("[A] cursory review of the Federal Rules of Civil Procedure informs that non-pleadings … are not subject to motions to strike.").

Because HSUS's seeks to strike material from a ***motion***, not a ***pleading***, its motion is improper and should be denied. *See Bond*, 811 F. Supp. 2d at 421 (denying plaintiff's motion to strike defendants' motion to dismiss "because the federal rules only provide for striking pleadings"); *Brown v. FBI*, 793 F. Supp. 2d 368, 382 (D.D.C. 2011) (denying plaintiff's motion to strike defendants' motion to dismiss because a motion to strike a non-pleading "ha[s] no basis in the Rules of Civil Procedure"); *Hamilton v. Paulson*, 2008 U.S. Dist. LEXIS 80219, at * 2-3, n.1 (D.D.C. Oct. 10, 2008) (denying plaintiff's motion to strike reply brief that plaintiff contended contained inaccuracies because Rule 12(f) only applies to pleadings, "not motions or memoranda of law"); *Modaressi v. Vedadi*, 441 F. Supp. 2d 51, 54 n.2 (D.D.C. 2006) (denying plaintiff's motion to strike defendants' motion to dismiss, noting that such a motion "is improper under the plain language of Rule 12(f)" because "[a] motion to dismiss is not a pleading."); *Naegele v. Albers*, 355 F. Supp. 2d 129, 142 (D.D.C. 2005) (denying plaintiff's motion to strike defendant's response to court order as improper because the "response is not a pleading, as defined in Federal Rule of Civil Procedure 7(a), and motions to strike only apply to pleadings.").[4]

Nor can HSUS satisfy the Rule 12(f) standard. HSUS does not claim, much less demonstrate, that FEI's motion contains the requisite "redundant, immaterial, impertinent, or scandalous matter," that could be stricken. HSUS apparently disagrees with some of the content of FEI's motion, but this is not a proper basis to grant even a properly filed motion to strike. *See*

[4] Where a non-party improperly attempts to file something without permission, the Court has inherent authority to strike that filing from the docket. *See* Order (08-23-07), DE 175.

Naegele, 355 F. Supp. 2d at 142 ("even a proper motion to strike is a drastic remedy and generally disfavored by courts.").[5]

II. THE MOTION SHOULD BE DENIED BECAUSE HSUS IS, AND WILL BE, BOUND BY ANY DECISION IN THIS CASE

HSUS's motion is substantively deficient as well. HSUS advances one argument: because HSUS is not a formal party to the litigation, the Court supposedly lacks authority to assess attorneys' fees against it. HSUS Mot. at 1-4. This ends HSUS's analysis. HSUS's claim of "non-party" status is incorrect as a matter of law, and ignores the factual history of this case.

Further, and more troubling, HSUS couples its overly simplistic analysis with a brazenly incorrect statement of fact to the Court, claiming that "HSUS played ***no role whatsoever*** in the development or ***prosecution of this case***," HSUS Mot. at 4 n.4 (emphasis added). This statement is simply untrue as demonstrated by, *inter alia*, two declarations filed by HSUS attorneys in this case ***on the same day*** that HSUS filed the instant motion. DE 599-36, 599-37. Jonathon R. Lovvorn, HSUS's Senior Vice President for Animal Protection Litigation and a former partner in Meyer, Glitzenstein & Crystal ("MGC") who had been counsel of record for plaintiffs in this case since 2001, declared under oath that, after he became employed by HSUS in 2005, he "maintained [his] appearance in the ESA case and monitored it" and "was ***consulted on most major strategy decisions***." DE 599-36, ¶¶ 4, 6, 8 (emphasis added).

Similarly, Kimberly D. Ockene, another former MGC partner and counsel for plaintiffs since September 2003, who also became employed by HSUS as an in-house attorney in October 2008, declared under oath that, "at the direction of [her] [HSUS] supervisor," she "remained counsel of record in the ESA case" so that she could "monitor" it, and was "notified of

[5] Finally, even if the Court were to consider HSUS's motion to strike instead as an opposition to FEI's motion, *see Bond*, 811 F. Supp. 2d at 421, it still must be denied as procedurally improper. The Court ordered plaintiffs to "file a single, consolidated response" to FEI's motion. Minute Order (02-10-12). The splintered briefing that HSUS's motion represents violates the spirit, if not the actual text, of this Court's Order.

developments and ***consulted on strategic decisions***." DE 599-37, ¶¶ 5, 19 (emphasis added). These two attorneys were not just counsel for FFA in their capacities as in-house HSUS attorneys; they were counsel of record for ***all plaintiffs*** in this case, from the respective times they went to work for HSUS through June 12, 2012, when they formally withdrew. *See* No. 03-2006 (Docket Sheet); DE 601. Furthermore, during the 2008 contempt hearing, three years ***after*** he had gone to work for HSUS, Mr. Lovvorn made the following representation to the Court in order, among other things, to support the claim of privilege that had been made for communications between him and the other lawyers and plaintiffs: "I am counsel of record to all the Plaintiffs in this case." Tr. of Hearing at 145:12 (05-30-08), Ex. 1 hereto.

A corporate entity whose own in-house lawyers, one of whom is a senior vice president, represent all the plaintiffs in a case and are consulted on "strategic decisions" obviously has a "role" in the "prosecution" of that case. HSUS's claim of "no role whatsoever" is another blatant falsehood that can be added to the list of false statements that the Court already has found to have occurred in this case. *See* DE 559 at 36-41 (Findings of Fact ("FOF") 55, 60-73). Given that the subject of FEI's motion concerns representations of fact that this Court explicitly found were "not truthful," *id*., FOF 60, it is astounding that HSUS would predicate its "motion to strike" on yet another untrue statement.

The reason why HSUS ***did*** have a "role" in the "prosecution" of this case and why Lovvorn and Ockene stayed involved as counsel for plaintiffs even though they were employed full time by HSUS is clear. As a result of its "corporate combination" with FFA effective January 1, 2005, HSUS had become the successor in interest to FFA in this litigation, thereby making HSUS bound by any judgment of this Court against FFA. Since it would be bound by any outcome here, HSUS had a strong incentive to make certain that its lawyers continued to be

involved in this case and that HSUS's views were taken into account with respect to the plaintiffs' "strategic decisions."

HSUS's status as a successor in interest, and therefore a party to this case, arises for at least three reasons: (1) the terms of the Asset Acquisition Agreement between HSUS and FFA make HSUS responsible for FFA's liabilities; (2) under Fed. R. Civ. P. 25(c), transferees in interest become bound by judgments, even when not officially substituted as parties to the case; and (3) "non-parties" can be bound by judgments when there is sufficient privity between the non-party and a party to the case, such as exists between HSUS and FFA. That HSUS, the moving party bearing the burden, did not even address these arguments demonstrates the weakness of its position, and why its motion should be denied.[6]

A. HSUS Assumed FFA's Liabilities Pursuant To The Asset Acquisition Agreement

Regardless of whether the Asset Acquisition Agreement effected a "merger" or a "corporate combination" between HSUS and FFA, the express terms of that Agreement make HSUS responsible for FFA's liabilities. As of January 1, 2005, HSUS assumed "all lawful liabilities and obligations" of FFA, "of whatever type or kind, including without limitation contingent liabilities whether known or unknown and whether asserted or unasserted." DX 68, attached hereto as Ex. 2, at § 1.3.[7] Liability for attorneys' fees in a civil lawsuit as determined

[6] All of these points are logically encompassed within the scope of what HSUS is trying to do and should have been addressed in HSUS's opening memorandum. Indeed, despite its current attempt to feign ignorance, HSUS has been on notice since at least February 2007, that FEI took the position that HSUS was liable for FFA's actions because FFA and HSUS had merged, thereby obliterating any real distinction between the two entities. *See, e.g.*, DE 121-5, ¶ 24. Consequently, the Court should not permit HSUS to "sandbag" the process by addressing these matters for the first time in a reply. Moreover, FEI's issuance of a Rule 45 subpoena to HSUS proves nothing helpful to HSUS here. FEI only did that after FFA wrongfully took the position that it need not produce documents in the possession of HSUS employees, which would have been a complete subterfuge, since, at that time (June 2007), all FFA employees were HSUS employees and all FFA documents were totally under the control of HSUS. Moreover, in its motion to compel, FEI set out the facts then known to it demonstrating that HSUS was, in effect, already a party to this case, including the merger with FFA, the fact that HSUS had managed the case on behalf of FFA and had raised money for Rider and the fact that Mr. Lovvorn, an HSUS employee, served as counsel for all plaintiffs. DE 192 at 1-4. FEI's motion to compel was granted in substantial part. DE 231.

by a judgment of a federal court clearly falls within the scope of this assumption of liability. Moreover, even though HSUS's undertaking broadly covers any contingent liability whether known or unknown, or asserted or unasserted, FEI's claim against plaintiffs for attorneys' fees had been asserted and therefore was known to both FFA and HSUS before this undertaking took effect. *See* Answer at 14 (10-08-03), DE 4.

HSUS states that "FEI's claim to attorneys' fees against FFA appears to be based largely on the theory that FFA made payments that were allegedly unlawful." HSUS Mot. at 4 n.4. If the payments were unlawful, HSUS continues, then FFA breached one of its warranties to HSUS, may therefore have "fraudulently induced" HSUS into the Agreement, thereby allegedly letting HSUS off the hook on its assumption of liability. *Id.* This argument ignores the heart of FEI's attorneys' fees motion: that the pursuit of a claim that is frivolous, unreasonable, or without foundation warrants an assessment of attorneys' fees. The wrong that FEI complains of is not just the fact that FFA made a few payments to Rider that HSUS thinks it can side-step with a facile "fraudulent inducement" argument. Among other things, FFA and the other plaintiffs and their counsel lied to the courts about the facts critical to Rider's standing, paid him to be their stand-in, wrongly obstructed FEI's inquiry into those payments, and then produced him as the key witness at trial only to have his testimony totally rejected by the finder of fact on the basis of information known to plaintiffs and counsel from the outset of the case – a deliberate course of conduct that continued for years after the "corporate combination" between HSUS and

[7] The Asset Acquisition Agreement enumerated the liabilities that were excluded from HSUS's general assumption of all of FFA's liabilities – those arising out of FFA's interests in the Black Beauty Ranch, the Wildlife Rehabilitation Center, and its land in Colebrook, Connecticut, Ex. 2 at § 1.4, none of which is applicable here. The Asset Acquisition Agreement was admitted into evidence at the trial of this case as DX 68 without any objection by plaintiffs. *See* Pls. Am. Objections and Responses to Def. Am. Pre-Trial Statement, DE 394-2 at 28 (01-12-09); Def. Final Tr. Ex. List, DE 484-3 at 16.

FFA took effect. As the successor in interest to FFA, HSUS inherited the attorneys' fee (and whatever other) liability that flows from those misdeeds.

HSUS's current effort to throw its own affiliate under the bus by focusing solely on the payments and suggesting that HSUS somehow was the "victim" of a "fraud" is ridiculous. Who supposedly "defrauded" HSUS – Markarian? Markarian was the head of FFA, the point of contact for FFA in this case and the one who authorized FFA to pay Rider. *See* DE 559 at 27-31 (FOF 33-40). But, at the same time, after the "corporate combination," HSUS promoted Markarian to a high rank within HSUS – Executive Vice President (Tr. of Hearing at 50:13 (03-06-08), excerpts attached hereto as Ex. 3 (Markarian)), and now Chief Program and Policy Officer, DE 599-34, ¶ 3 – and kept him in such high positions with full knowledge of FEI's claim that the payments he authorized were illegal bribes, *see* DE 121-5. So, it is difficult to see how HSUS either was "defrauded" or, in any event, did not ratify the "fraud" by keeping Markarian on the job. More importantly, this strained argument shows that HSUS knows that absent some extreme circumstance such as "fraud" by FFA, the Agreement makes HSUS fully liable for FFA's liabilities, including the ones at the base of FEI's pending motion.

HSUS's injection of the payments' legality into its motion to strike is curious for another reason. The payments at issue, *i.e.*, what FEI contends were bribes paid to Tom Rider, were made by FFA ***and*** by HSUS itself both before and after the effective date of the "corporate combination." *See* No. 07-1532 (D.D.C.), First Am. Compl. ¶¶ 156-168 (02-16-10), DE 25. Thus, after January 1, 2005, HSUS knowingly continued making the same payments that it now suggests would form the basis for "fraudulent inducement" on FFA's part if the payments turn out to be unlawful. This raises a major issue of fact as to the inquiry, if any, that HSUS made into the legality of such payments before it decided to continue making them. It will be no

defense to a bribery claim that HSUS continued bribing the witness on the strength of a "no-bribe" representation by FFA, particularly when HSUS's counsel, Jonathan Lovvorn was participating in the case and rendering legal advice as counsel of record to all of the organizational plaintiffs. In any event, the plain language of the Agreement HSUS signed makes it liable for a judgment for attorneys' fees. HSUS cites nothing to the contrary.

B. Under Rule 25(c) HSUS Is A Transferee In Interest Bound By The Judgment

"A 'transfer of interest' in a corporate context occurs when one corporation becomes the successor to another by merger or other acquisition of the interest the original corporate party had in the lawsuit." *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir. 1993). When such a merger or acquisition takes place after the original party is engaged in litigation, Fed. R. Civ. P. 25(c) applies. 7C Wright & Miller, *Federal Practice and Procedure*, § 1958 at 692 (3d ed.).[8] Under that rule, "the action may be continued by … the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." Fed. R. Civ. P. 25(c). Rule 25(c) "does not require anything be done after an interest has been transferred." 7C Wright & Miller, § 1958 at 696. Thus, even without official substitution, the successor in interest will be bound by a judgment entered in the litigation. *Luxliner*, 13 F.3d at 72 (Rule 25(c) "permits automatic continuation of a lawsuit against an original corporate party, although the outcome will bind the successor corporation"); 7C Wright

[8] *See also Explosives Corp. of Am. v. Garlam Enter. Corp.*, 817 F.2d 894, 907 (1st Cir. 1987) ("Federal Rule of Civil Procedure 17(a) requires that 'every action shall be prosecuted in the name of the real party in interest.' Rule 25(c) is, in effect, the continuation of Rule 17. Subdivision (c) of Rule 25 deals with transfer of interest during the course of the action. The situation with which it is concerned may be compared and contrasted to that obtaining where a transfer of interest such as by an assignment takes place *prior* to the commencement of the action. In the latter situation Rule 17 controls and requires that the action shall be prosecuted in the name of the real party. But where the transfer of interest takes place *during the course of the action*, Rule 25(c) controls and provides that the action may be continued by or against the original party whose interest has been transferred, unless the court, upon motion, directs that the person to whom the interest has been transferred be substituted in the action, or joined with the original party.") (citing 3B J. Moore, & J. Kennedy, *Moore's Federal Practice* § 25.08 at 25-77, 78 (1987)) (original emphases).

& Miller § 1958 at 696 ("the judgment will be binding on the successor of interest even though the successor is not named.").[9] This rule also authorizes the addition of a party. *Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 480 n.2 (D.C. Cir. 1996) (affirming District Court's grant of Rule 25(c) motion to join additional party when the original party retained an interest in the subject of the litigation). The FFA/HSUS "corporate combination" was effective January 1, 2005, after this litigation, with FFA an original plaintiff, had commenced. Therefore, as FFA's successor in interest, Rule 25(c) applies and any judgment against FFA will bind HSUS.

In determining whether a corporation is a transferee of interest "a district court's mission is one of applying law to facts." *Luxliner*, 13 F.3d at 72. The law of both the District of Columbia and New York (the law which governs the Asset Acquisition Agreement, Ex. 2 at § 11.9) makes clear that after a merger, the resulting corporation is responsible for the liabilities of the underlying corporations. D.C. Code § 29-409.07(4) ("All liabilities of each domestic or foreign nonprofit corporation or eligible entity that is merged into the survivor shall be vested in the survivor"); N.Y. Not-For-Profit Corp. Law § 905(b)(3) ("The surviving or consolidated corporation shall assume and be liable for all liabilities, obligations and penalties of each of the constituent corporations"). HSUS and FFA have referred to their combination as a merger, both publicly and internally. *See* DE 192-2 (combined HSUS/FFA press release stating that "the ***merger*** will formally occur on January 1, 2005," that the result will be a singular "new entity," and that D.C. will be the base of operations for that "combined organization.") (emphasis added); DE 192-22, p.4 (FFA board minutes noting Michael Markarian (President of FFA and Executive

[9] Though the law is clear that under Rule 25(c) nothing had to be done to add HSUS as a party given that it is FFA's successor in interest, should the Court determine that a Rule 25(c) motion to add HSUS would facilitate the enforcement of the judgment, FEI will file such a motion after the judgment is entered. *See Explosives Corp. of Am.*, 817 F.2d at 907 ("Substitution may be ordered after judgment has been rendered in the district court for the purpose of subsequent proceedings to enforce judgment."); 7C Wright & Miller § 1958 at 704 ("Since Rule 25(c) is wholly permissive there is no time limit on moving to substitute under its provisions.").

Vice President of HSUS)'s "[t]wo year review of FFA & HSUS since ***merger***") (emphasis added). Applying the law to the facts of the self-proclaimed "merger," HSUS is the transferee in interest, making it automatically bound by a judgment against FFA.[10]

Even if the FFA/HSUS combination was not a "merger," but, as HSUS claims, merely an "asset acquisition," HSUS is still the transferee in interest for Rule 25(c) purposes if it qualifies under any of the four well-recognized exceptions to the rule of no successor liability in an asset acquisition. Successor liability arises in such circumstances when (1) there was an express or implied agreement to assume FFA's debts and obligations; (2) the transaction was fraudulent; (3) there was a *de facto* combination or merger of the companies; or (4) the purchasing company (HSUS) was a mere continuation of the selling company (FFA). *R.C.M. Exec. Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 635-36 (S.D.N.Y. 1995); *see also Luxliner*, 13 F.3d at 73-75 (discussing *de facto* merger and continuation in Rule 25(c) context). While any of these exceptions alone suffices to make a non-party a transferee in interest, here, at least the first and third apply, and HSUS's own motion suggests that the second may be applicable as well.

The Asset Acquisition Agreement by itself establishes the first exception. HSUS expressly agreed to assume FFA's liabilities. Ex. 2 at § 1.3 ("HSUS shall assume, defend, discharge, and perform as and when due, all lawful liabilities and obligations of the Fund … of whatever type or kind, including without limitation contingent liabilities whether known or unknown and whether asserted or unasserted, including, but not limited to" a list of items). HSUS is therefore a transferee in interest and as such, will be bound, pursuant to Rule 25(c), by any judgment entered in this case against FFA.

[10] Calling the transaction a "merger" in the joint press release was neither an accident nor an uninformed use of the term. The Asset Acquisition Agreement provided that "[n]o press release related to this Agreement … shall be issued … without the joint approval of HSUS and Fund, given through their respective presidents." Ex. 2 at § 10.3. Thus, "merger" was terminology approved at the highest levels of both organizations.

HSUS is also a Rule 25(c) transferee in interest through the *de facto* merger doctrine.

> A *de facto* merger occurs where one corporation is absorbed by another, but without compliance with the statutory requirements for a merger. … 'To find that a *de facto* merger has occurred there must be a continuity of the selling corporation, evidenced by the ***same management, personnel, assets and physical location***; a continuity of stockholders, accomplished by paying for the acquired corporation with shares of stock[11]; a dissolution of the selling corporation, ***and the assumption of liabilities by the purchaser***.' … Such a merger makes the surviving corporation liable for the claims against the predecessor corporation.

Arnold Graphics Ind., Inc. v. Ind. Agent Ctr., Inc., 775 F.2d 38, 42 (2d Cir. 1985) (emphasis added) (citing *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 838 (S.D.N.Y. 1977)). "Not all of these factors are needed to demonstrate a merger; rather, these factors are only indicators that tend to show a *de facto* merger." *Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529, 1535 (S.D.N.Y. 1985) (internal quotation omitted).

The record in this case shows that after the "corporate combination," FFA and HSUS have almost identical (1) management, (2) personnel, and (3) assets. *See* (1) FFA 990s for 2008 and 2009, attached hereto as Ex. 4, at pp. 32, 33 and Ex. 5, at pp. 36, 37, showing substantial, if not complete, overlap in boards of directors between FFA and HSUS, as well as the fact that all FFA officers are HSUS employees; (2) Ex. 3 at 56:11-58:9 (Markarian) (after merger, FFA had no paid employees; HSUS employs and pays all persons working for FFA); *id*. at 57:22-58:14 (after the combination, FFA had no fundraising, no public relations, and no legal departments; HSUS employees perform all such functions); (3) Ex. 2 at § 1.1 (with minimal exceptions, FFA transferred to HSUS "all of its assets, including but not limited to all of its real and personal property, tangible and intangible, of any type or kind and wheresoever situated"). Further, as to the "same location" factor, the base of the "combined organization" is Washington, D.C. DE

[11] Since neither FFA nor HSUS has stock, the stock/shareholder part of the *de facto* merger test is not relevant.

192-2. Though FFA maintains a New York address, this is leased and operated by HSUS. *See* Ex. 2 at § 1.5(c). Finally, as noted above, the Asset Acquisition Agreement contains an express assumption of liabilities. *See id.* at § 1.3. Given HSUS's near complete envelopment of FFA as a result of the Asset Acquisition Agreement, the FFA/HSUS combination, even if not a technical merger, was a *de facto* one, making HSUS a transferee in interest for Rule 25(c) purposes.

As discussed above, HSUS itself suggests that the "fraudulent transaction" exception could also apply. HSUS Mot. at 4 n.4. (noting that as part of Asset Acquisition Agreement, FFA represented to HSUS that none of its employees had made any illegal payments, and presenting issue of whether the Agreement is enforceable given that "'[i]t is well-settled in New York that where a party is fraudulently induced to enter into a contract, the contract is voidable.'") (quoting *Bazzano v. L'Oreal*, No. 93-cv-7121, 1996 WL 254873 at *3 (S.D.N.Y. May 14, 1996)). If the Agreement was a fraudulent transaction, knowingly designed to immunize HSUS from FFA's liabilities resulting from its illegal payments, while making FFA itself judgment-proof, then it would constitute a fraud on a potential judgment creditor (FEI) which would trigger yet another basis on which to find that HSUS is bound under Rule 25(c) for any judgment entered against FFA.[12]

Whether pursuant to (1) the admissions that both HSUS and FFA made that their "corporate combination" was a "merger;" (2) the express assumption of liabilities that HSUS undertook in the Asset Acquisition Agreement; (3) the doctrine of *de facto* merger; or (4) because the Asset Acquisition Agreement was a "fraudulent transaction" designed to evade FFA's creditors, HSUS stands as a transferee interest under Rule 25(c). As such a transferee in

[12] That a purported asset acquisition agreement between two public charities would have "no-bribery" warranties is unusual to say the least and presumably would have been unnecessary unless one of the parties was concerned that the other party had bribed someone. By calling attention to this provision of the Agreement and actually suggesting that FFA's "no bribes" warranty was false, HSUS merely reinforces the point that the Rider payments were unlawful and were, at a minimum, suspected by HSUS to be unlawful at the time it acquired its interests in FFA.

interest, HSUS is a party to this litigation as a matter of law. Consequently, there is no basis for "striking" any statement that FEI made about HSUS in FEI's attorneys' fee motion.

C. HSUS Is Bound By Principles Of Res Judicata And/Or Collateral Estoppel

HSUS sole argument rests on the grand pronouncement that "[t]he United States Supreme Court has declared in no uncertain terms that it is a 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" HSUS Mot. at 2 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1969)). FEI does not disagree with this, or the numerous other cases HSUS cites for the proposition that "strangers" are not bound by judgments between parties. *See* HSUS Mot. at 2-4. But this does not end the analysis; it is just step one. Step two makes it clear that HSUS is not a "stranger" to this case at all.

HSUS's exegesis ignores the other half of the "Anglo-American principle" that non-parties generally are not bound, namely the "[s]everal exceptions" recognized by the Supreme Court that "temper this basic rule." *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008). Indeed, even *Hansberry v. Lee*, the main case HSUS cites as the basis for the entirety of its argument, recognized an exception to the general rule where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest … ." 311 U.S. at 41. A purported "non-party" who is not, in fact, a "stranger" to the litigation can be bound just as certainly as those who are formally parties to the case. Three of these "non-stranger" exceptions are relevant here: (1) when a pre-existing substantive legal relationship exists between a party and non-party; (2) when a non-party was adequately represented by someone with the same interests who was a party to the earlier suit; or (3) when

the non-party assumed control over the litigation. *Taylor*, 553 U.S. at 893-895.[13] Any of these exceptions, standing alone, is enough to bind a non-party to a judgment completely in accord with due process. *U.S. ex rel. Kennard v. Comstock Res., Inc.*, 2009 U.S. Dist. LEXIS 24753, at *26 (E.D. Tex. Mar. 23, 2009).[14] Far from being a "stranger" here, HSUS legally assumed FFA's assets and liabilities (as well as all of its employees and substantive departments), its Executive Vice President served as FFA's representative in this case, its in-house attorneys were counsel of record in this case and participated in the handling of this case, it advertised the litigation on its website as a current matter (and still does, *see* HSUS current docket, (http://www.humanesociety.org/news/resources/docket/ringling_brothers_elephants.html), printout attached hereto as Ex. 6) in order to raise money, and helped to fund the litigation and Rider through its own payments and fundraising.

1. Pre-Existing Substantive Legal Relationship

"The substantive legal relationships justifying preclusion are sometimes collectively referred to as 'privity.'" *Taylor*, 553 U.S. at 894 n.8. "Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor." *Id.* at 894. The examples provided by the Supreme Court "involve traditional property or contract interests and relationships" in which "a person effectively steps into the shoes of another person by virtue of some transaction or relationship … ." *Roybal v. City of*

[13] The other three exceptions are (1) when a non-party agrees to be bound by the determination of issues in an action between others; (2) when a party who did not take part in litigation, as a way of avoiding preclusion, later sues as the designated representative of a person who was a party to the earlier suit; and (3) when a special statutory scheme, such as bankruptcy or probate, so directs. *Id*.

[14] "To summarize the foregoing principles: the general rule is that a person cannot be bound by a judgment in litigation to which he was not a party. However, there are six recognized exceptions to this rule. These exceptions represent examples of relationships between a party and a nonparty that are sufficiently related to justify preclusion of the nonparty. ***If any one of these exceptions applies*** to Relators in this case, due process is not offended, and the identity element necessary for preclusion is satisfied." *Id*. (citing, *inter alia*, *Taylor*, 553 U.S. at 891-95) (emphasis added).

Albuquerque, 2009 U.S. Dist. LEXIS 45663, at *19 (D.N.M. Feb. 2, 2009). Courts also have found a sufficient substantive legal relationship in the following circumstances: (1) between relators and the government in False Claim Act cases (*Kennard*, 2009 U.S. Dist. LEXIS 24753, at *27); (2) when the party is a corporate division of the non-party (*Royse v. Cohart Refractories Co.*, 2008 U.S. Dist. LEXIS 92499, at *7-8 (W.D. Ken. Nov. 13, 2008)); (3) when the party and non-party have identical or transferred rights with respect to a particular legal interest, (4) between partners and their partnerships, and (5) when there is a fiduciary duty between the party and non party with respect to the property at issue (*Princeton Strategic Inv. Fund, LLC v. United States*, 2011 U.S. Dist. LEXIS 147339, at *13 (N.D. Cal. Dec. 7, 2011) (collecting cases)).

2. Adequate Representation

A party's representation of a non-party is "adequate" for purposes of preclusion if: (1) the interests of the non-party and its representative are aligned; and (2) either the party understood itself to be acting in a representative capacity or the original court took care to protect the interests of the non-party; and sometimes requires (3) notice of the original suit to the person(s) alleged to have been represented. *Taylor*, 553 U.S. at 900. While a class action is the classic example of "adequate representation," it is not the only way to satisfy this exception. *See Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 92 (D. Me. 2008) (though "API [the party] did not seek class certification, and API is not a trustee, guardian, or fiduciary for AWI [the nonparties]," this "does not end the inquiry."). Courts have found "adequate representation" when the non-party's interest in the litigation was coextensive with that of the party and the party was the alter ego of the non-party. *Underwood Livestock, Inc. v. United States*, 89 Fed. Cl. 287, 301 (Fed. Cl. 2009); *cf. Highway J Citizens Group v. United States DOT*, 656 F. Supp. 2d 868, 884 (E.D. Wis. 2009) (adequacy of interests exception not met where there was no indication

that the "[party] had to consult [the non-party] about its litigation strategy or obtain [the non-party]'s consent before abandoning claims or entering into a settlement agreement").

3. Control of Litigation

"[A] nonparty is bound by a judgment if [it] 'assumed control' over the litigation in which that judgment was entered." *Taylor*, 553 U.S. at 895. At the heart of this exception is "the notion that 'because such a [third party] has had the opportunity to present proofs and argument,' he has already 'had his day in court' even though he was not a formal party to the litigation.'" *United States v. Bhatia*, 545 F.3d 757, 760 (9th Cir. 2008) (quoting *Taylor*, 128 S. Ct. at 2173). This exception is satisfied when the non-party had extensive involvement in "funding, arguing, and formulating the legal theory of the case." *Henry E. & Nancy Horton Bartels Trust ex rel. Cornell Univ. v. United States*, 88 Fed. Cl. 105, 113 (Fed. Cl. 2009), *aff'd* 2010 U.S. App. LEXIS 18678 (Fed. Cir. Sept. 7, 2010); *Flir Sys. v. Motionless Keyboard Co.*, 2011 U.S. Dist. LEXIS 42045, at *24 (D. Or. Apr. 18, 2011) ("control" exception satisfied when the non-party participated significantly in the proceedings, had significant financial and proprietary interests in the subject of the action, and directed the action). In other words, sufficient control exists when the non-party took the "laboring oar" in the conduct of the litigation. *Montana v. United States*, 440 U.S. 147, 155 (1979). In *Montana*, the non-party was found to have exerted control over the litigation because it, *inter alia*, caused the suit to be filed, reviewed and approved the complaint, paid the attorneys' fees and costs, and directed the appellate process. *Id.*

4. The Facts Here Demonstrate that All Three *Taylor* Exceptions Apply to Bind HSUS

Under any one of the three *Taylor* exceptions described above – pre-existing legal relationship, adequate representation and control of the case – HSUS is, and will be, bound by

the decisions entered in this case. As a result of the FFA/HSUS "corporate combination," the substantive relationship changed as they legally "combined." Their "alignment of interests" was one of the cited reasons for the combination, after which HSUS took control of FFA's operations, including its presence in this litigation, guaranteeing that its interests were adequately represented.

The interests of FFA and HSUS are clearly aligned. *See* Ex. 2 at p.1 ("The parties [FFA and HSUS] are charitable corporations dedicated to the protection of animals, who have a common mission and whose operations complement each other."); *see also Animal Welfare Inst.*, 588 F. Supp. 2d at 92 (finding that interests of API, AWI, and another animal welfare organization were aligned for purposes of *Taylor* exception because each is "dedicated to the protection of wildlife."). After the "corporate combination," HSUS functionally controlled the resultant entity. It "stepped into FFA's shoes" by acquiring "all of [FFA]'s assets, including but not limited to all of its real and personal property, tangible and intangible, of any type or kind wheresoever situated," excluding a limited number of assets, and assuming its liabilities in exchange. Ex. 2 at §1.1. An examination of the assets enumerated as "included" demonstrates the all-encompassing nature of the combination:

> (a) all land, buildings, and other improvements thereon; all other interest in real property; all interests in equipment, fixtures, fittings, furniture, and other tangible personal property …"
>
> (b) all intangible assets and intellectual property … all publishing and distribution rights, and all associated goodwill; all statutory, common law, and registered copyrights; together with all rights to use all of the foregoing forever and all others rights in, to, and under the foregoing in all jurisdictions;
>
> (c) all cash and cash equivalent items …
>
> …
>
> (e) the right to receive mail and other communications addressed to [FFA]

> (f) all lists and records … pertaining to donors, contributors, members, suppliers, consultants, and agents, and all other books, ledgers, files, documents, correspondence, computer programs, and business records of every kind and nature;
>
> …
>
> (h) all claims, refunds, causes of action, choses in action, insurable interests, rights of coverage, defense, and recovery under insurance policies or otherwise, and rights of set-off of every kind and nature related to the Assets;
>
> …
>
> (k) all interest in and to telephone numbers, e-mail addresses, web sites, web site links, and all listings pertaining to [FFA] in all telephone books and other directories
>
> (l) all rights to use, control, exploit, and alienate the Assets described [above]

Id. at §1.1. The list of excluded assets further underscores HSUS's control. For example, the Agreement allowed FFA to keep "books and records relating to its incorporation and qualification to do business" but only with the proviso "that copies of such books and records are provided to HSUS." *Id.* at § 1.2(b). While FFA retained title to the Black Beauty Ranch, *id*., the operation is totally under HSUS control: ***HSUS*** operates, funds, and has "complete discretion to manage" it. *Id*. at § 1.5. In addition to acquiring FFA's assets, HSUS also took over FFA's employees and departments. After the "corporate combination," FFA had no employees of its own; all persons acting on behalf of FFA were HSUS employees whose salaries were paid by HSUS. *See* Ex. 3 at 56:18; 67:18 (Markarian) ("The Fund for Animals has no paid staff of its own"; "there are no Fund for Animals employees"). Furthermore, after the transaction with HSUS, FFA ceased to have any real operating departments of its own. In particular, it had no legal department. *See id.* at 57:22-58:14 (FFA has no fundraising, public relations, or legal departments, all of which is provided by HSUS employees).

With regard to this litigation specifically, FFA was the original plaintiff, but HSUS controlled the show as it concerned FFA's actions as a plaintiff. When Michael Markarian testified on behalf of FFA at the contempt hearing and was asked by whom he was employed, he responded, "The Humane Society of the United States." Ex. 3 at 50:8-11. Though Mr. Markarian was simultaneously the "president of the Fund for Animals," he only spent about one hour per week performing work for FFA, and ***HSUS*** paid his salary. *Id*. at 50:19-51:16. Mr. Markarian testified that his role in the litigation did not change after the combination, *id.* at 60:4-9, meaning that he "had decision-making authority, consulted with [the] staff about the nature of the lawsuit, consulted with [their] attorneys about legal strategy, what evidence [they] may choose to rely on, and [] had discussions with other co-plaintiffs." *Id*. at 59:6-10.

After the combination, not only was HSUS's Executive Vice President the corporate representative for FFA, but HSUS employees were involved in devising and implementing legal strategy as counsel for FFA and the other plaintiffs as well. Two of its attorneys, Jonathan Lovvorn and Kimberly Ockene, remained counsel of record in this case after they left MGC and joined HSUS as employees, where they "monitored" the case and were "consulted" on strategic decisions. DE 599-36, at ¶ 8; DE 599-37, at ¶ 19. As HSUS employees, neither of these lawyers limited their representation to FFA. They continued, just as they had done while with MGC, to represent ***all plaintiffs***. No. 03-2006 (Docket Sheet); DE 601; Ex. 1 at 145:12.

Indeed, in February 2009, the president and CEO of HSUS, Wayne Pacelle, blogged the day before the trial in this case began that "our own Vice President and Chief Counsel for Animal Litigation and Research, Jonathan Lovvorn, is one of the Fund's lawyers in the case, and will be posting daily updates on the proceedings." HSUS Blog (02-02-09), attached hereto as Ex. 7 at 5. Regardless of any *post hoc* attempt to minimize Lovvorn's role that Lovvorn and

HSUS may try now, HSUS claimed Lovvorn as "its own" lawyer at the time that he was actively participating as counsel of record in a case that HSUS was simultaneously listing on its website as one of its own cases. *Id.*; DE 192-4. And, of course, these proclamations were in close proximity on the HSUS website to the ubiquitous "donate" button. *See* Ex. 6.

Furthermore, when FFA produced documents in response to the Court's August 23, 2007 Order, thereby revealing for the first time the true extent of its involvement in the Rider payments and the concealment of the same, see DE 559 at 36 (FOF 57), FFA did so pursuant to instructions from HSUS's General Counsel's Office. Ex. 3 at 73:15-23. The FFA document search itself was conducted by Markarian and Ethan Eddy, under the direction of Lovvorn – all three of whom were employed by HSUS at the time. Ex. 1 at 148:6-24. Moreover, HSUS's website listed, and continues to list, this case as one of HSUS's own cases on its "current docket." DE 192-4; Ex. 6. That website also identifies, as "HSUS counsel" in this case, Ethan Eddy, formerly with MGC who, at the time HSUS posted this listing, was an employee of HSUS. DE 192-4. For a purported "non-party" who claims that it "played no role whatsoever in the development or prosecution of this case," HSUS certainly had a lot of lawyers assigned to, and working on, this case: Eddy, Lovvorn and Ockene.

HSUS also played a significant role in the payments to Tom Rider. HSUS participated in the July 2005 Los Angeles fundraiser the proceeds of which were funneled to Rider through the Wildlife Advocacy Project ("WAP"). Ex. 3 at 81:8-82:1; *see also* DE 559 at 30 (FOF 39: finding that HSUS was one of the fundraiser's hosts and that, while the event was advertised to raise money to "rescue" Asian elephants and to wage the legal battle on behalf of plaintiffs in this case, the $13,000 in proceeds all ended up actually being paid to Rider). In addition to raising money for Rider, HSUS also paid it out. Six of the hundreds of payments that Rider

received in this case were sent to WAP for Rider by an ***employee of HSUS***, Lovvorn, with a letter on ***HSUS letterhead***, and were made with ***HSUS checks***, signed by ***HSUS employees*** that were drawn on an ***HSUS bank account***. DE 166-14, 166-19, 166-22, 166-15, 166-20, 166-23. Although Lovvorn maintains in his current declaration that these payments were "FFA grants to WAP," DE 599-36, ¶ 16, WAP contemporaneously recorded these sums in its own records as HSUS "donations." DE 85-5. Likewise, Eric Glitzenstein, President of WAP and formerly plaintiffs' counsel herein, actually sent a "thank you" note for this money, not to FFA, but to Mr. Lovvorn at HSUS. DE 166-24. He made no mention of any "FFA grants to WAP." *Id*.

HSUS clearly had the "laboring oar" for the operations of FFA generally, and its role in this case specifically, guaranteeing that its interests were "adequately represented." It participated in the funding, arguing, and formulating the legal theory of the case. As such, it is bound by any judgment against FFA.

> [T]he persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be 'strangers to the cause. … [One] who prosecutes or defends a suit in the name of another to establish or protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own … is as much bound … as he would be if he had been a party to the record.'

Montana, 440 U.S. at 154 (quoting *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87 (1910)). Since, pursuant to the law of judgments, the record in this case already shows that HSUS is, and will be, bound by the outcome, HSUS has no basis for "striking" the references to it in FEI's attorneys' fee motion.

III. AT THE LEAST, HSUS'S MOTION IS PREMATURE

HSUS's motion seeks what amounts to a partial summary judgment excluding it from FEI's attorneys' fees claim. HSUS Mot. Proposed Order. The motion itself, however, raises numerous legal issues, as well as issues of fact that are not only disputed, but that remain to be

developed. HSUS did not submit an affidavit or anything else to support any of the statements of fact in its motion, including the false claim that it had "no role whatsoever" in the prosecution of this case. Yet, while it stands in naked default of its obligation to support its factual assertions, HSUS seeks an order that would allow it to shut down any further inquiry into its role in this case and to insulate itself, prematurely and unfairly, from any responsibility for the damage that this case inflicted on FEI.

For example, while it is clear on the basis of the record as it now stands that HSUS had a significant hand in the conduct and outcome of this case – not only through its absolute control over FFA but also through the participation of two of its employees as counsel of record for all plaintiffs – the complete picture on that degree of control remains to be developed. For example, who pays (and paid) FFA's lawyers – the current ones and the former ones? As Markarian testified at the contempt hearing, after the "corporate combination," FFA had no infrastructure and relied entirely on "the administrative functions of the Humane Society of the United States when processing checks, making payments, etcetera." Ex. 3 at 67:4-6. This is why, Markarian claimed, the post-January 1, 2005, payments to WAP for Rider were "processed" by HSUS even though Markarian maintained that they were actually payments on behalf of FFA. *Id*. at 66:20-67:6. Thus, FFA had no checks and no bank accounts. People who received payments "from" FFA after January 1, 2005, received HSUS checks drawn on HSUS bank accounts, representing payments that were approved, accounted for and transmitted by employees of HSUS, all of which placed HSUS in complete control of the money flow, regardless of how it was allocated internally on paper. Since that is how the Rider payments worked, then it is a fair inference that that is how other payments on behalf of FFA worked after January 1, 2005, including the legal fees paid to the lawyers purportedly representing FFA. Payment of legal fees is relevant to

determining who controls the prosecution of a case, and HSUS has clearly opened that door by claiming to be a "stranger" to this case with "no role whatsoever." HSUS Mot. at 4 n.4. However, this and numerous other factual matters remain to be explored, demonstrating that the relief HSUS seeks is at the very least premature,[15] and thus that the motion to strike should be denied. *See Chaconas v. JP Morgan Chase Bank*, 713 F. Supp. 2d 1180, 1191 (S.D. Cal. 2010) ("[E]ven when the [material] under attack presents a purely legal question, courts are reluctant to determine disputed or substantial questions of law on a motion to strike.").

CONCLUSION

HSUS's motion is entirely without merit and should be denied. The posture is self-defeating ("non-party motion"); it is procedurally improper (parties can only strike material from pleadings, not motions); it contains a shockingly anemic and incorrect legal analysis; and it makes factual misrepresentations to this Court (the assertion that HSUS "played no role whatsoever" in the prosecution of this case is contradicted by HSUS's own in-house attorneys in their declarations filed within hours of HSUS's motion). Through its own actions in taking over FFA, including FFA's role in this litigation, HSUS also inherited and became bound by any judgment entered against FFA. HSUS cannot escape the consequences of its own actions now by rehearsing its feeble "non-party" claim. It is bound by the language in its own Agreement, bound by the Federal Rules of Civil Procedure, and bound by the judicial doctrines of res judicata and/or collateral estoppel, all of which recognize that when one corporation assumes control of another, it becomes responsible for the liabilities as well.

[15] HSUS's motion is not a procedurally proper motion to strike, let alone a proper motion for partial summary judgment, given its total failure to comply with the federal and local rules on summary judgment motions. HSUS cannot, through such an artifice, deny FEI the opportunity to invoke the procedures that otherwise would apply with respect to a properly filed motion for partial summary judgment, given the numerous matters of fact that would be the appropriate subjects of post-judgment, in-aid-of-execution discovery requests directed to HSUS. *See, e.g.*, Fed. R. Civ. P. 56(d). All of that, however, is premature at this juncture, since the Court has not entered a judgment for recovery of attorneys' fees.

WHEREFORE, premises considered, FEI respectfully requests that HSUS's motion be denied.

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Respectfully submitted,

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