IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NON-PARTY THE HUMANE SOCIETY OF THE UNITED STATES'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE

Without warning or foundation, Defendant FEI included non-party HSUS in its application for $20 million in attorneys' fees in this case and its proposed order on that application. Called out on this procedural trick by HSUS's motion to strike (ECF 598), Defendant FEI's response ranges from the flippant (suggesting that HSUS should "simply ignore" its inclusion in the proposed order (ECF 603 at 3)) to the circular (arguing that HSUS's status as a non-party – the very reason why HSUS should not be included in the proposed order – deprives HSUS of standing to address that issue through this motion (*id*. at 3-4)). Along the way, Defendant FEI accuses HSUS – which never invoked Rule 12(f) in its moving papers – of making a defective Rule 12(f) motion, ignoring both the Court's long-recognized inherent authority to strike inappropriate filings[1] and the fact that in this very litigation Defendant FEI

[1] *See generally Jones v. Mukasey*, 565 F. Supp. 2d 68, 81 (D.D.C. 2008) (granting motion to strike arguments not raised in opening brief); *Power Co. of Am., L.P. v. F.E.R.C.*, 245 F.3d 839, 845 (D.C. Cir. 2001) (same); *Bradley Min. Co. v. E.P.A.*, 972 F.2d 1356, 1361 (D.C. Cir. 1992) (granting motion to strike portions of petitioner's reply brief suggesting that EPA did not comply with the dictates of section 105(g)(2)(A)); *C&E Serv., Inc. v. Ashland*, Inc., 601 F. Supp. 2d 262, 280 (D.D.C. 2009) (granting plaintiffs' motion to strike bill of costs after jury verdict).

itself filed, and prevailed on, a motion to strike a brief where Defendant FEI's motion plainly lay outside of Rule 12(f). (*See* ECF 133, 176.)

When it comes to substance, however, Defendant FEI's opposition confirms that non-party HSUS must be stricken from FEI's motion for entitlement to attorneys' fees and from FEI's proposed order. HSUS is not a party to this litigation. HSUS is neither a plaintiff, nor a defendant. It is black-letter law that a district court lacks authority to enter an order for an award of attorneys' fees against such a non-party. (ECF 598 at 3-4 (collecting cases).)

Defendant FEI does not disagree with this basic proposition. Rather, Defendant FEI argues that (1) HSUS *will be* joined or substituted eventually as a successor in interest under Rule 25(c), and (2) HSUS *will be* bound eventually by principles of res judicata and/or collateral estoppel. At most, both points remain to be seen; as demonstrated below, neither justifies inclusion of non-party HSUS in an order for entitlement to attorneys' fees at this time. *First*, despite its invocation of Rule 25(c), Defendant FEI has failed to file the requisite Rule 25(c) motion to substitute or join a non-party, and the Court has not conducted the requisite Rule 25(c) evidentiary hearing. Accordingly, non-party HSUS cannot be joined properly to an order for attorneys' fees under Rule 25(c). *Second*, the principles of res judicata and/or collateral estoppel are inapplicable here. While a non-party may be *precluded* from relitigating an issue or claim in certain circumstances because of a judgment against a party, a non-party cannot be *added* procedurally to a judgment for attorneys' fees against a party by mere citation to those principles.

I. THIS COURT CANNOT JOIN OR SUBSTITUTE HSUS AS A PARTY TO THIS ACTION IN THE ABSENCE OF A RULE 25(c) MOTION AND AN EVIDENTIARY HEARING.

A district court cannot join or substitute an organization such as HSUS as a party without (1) proper service of a motion to join/substitute, and (2) if the resolution of the motion involves contested facts, an evidentiary hearing. Rule 25(c) requires expressly that "[i]f an interest is transferred, the action may be continued by or against the original party unless the court, on *motion*, orders the transferee to be substituted in the action or joined with the original party. The *motion must be served* as provided in Rule 25(a)(3)." *Id*. (emphasis added). Further, Rule 25(a)(3) mandates that "[a] motion to substitute, together *with a notice of hearing*, must be served on the parties as provided in Rule 4." Fed. R. Civ. P. 25(a)(3) (emphasis added). There is no question that Defendant FEI failed to abide by any of these requisites here.

Defendant FEI's opposition directs this Court to *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc*., 13 F.3d 69 (3d Cir. 1993), which FEI cites for a number of irrelevant propositions.[2] Far more significant is the *Luxliner* court's holding that it is reversible error for a district court to join a party such as HSUS in the absence of a properly served Rule 25(c) motion and an evidentiary hearing. In *Luxliner*, the district court joined a corporation to judgments entered against another corporation despite a factual dispute as to whether the joined corporation was the initial debtor's successor in interest. *Id*. at 70. The district court, "without conducting an evidentiary hearing, decided the Rule 25(c) motion." *Id*. at 71. The Third Circuit disagreed: "Because we hold that the district court should have conducted a hearing to determine the joined corporation's status under such circumstances, we will *reverse and remand for an evidentiary hearing*." *Id*. at 70 (emphasis added). The court of appeals directed that "[b]efore a party may be

[2] (*See, e.g.*, ECF 603 at 11.)

deprived of a property interest, due process requires, at a minimum, notice and an opportunity to be heard." *Id*. at 72 (citations omitted). "The adversarial process assumes that a factfinder will give the parties an adequate opportunity to be heard; if it does not, it cannot find facts reliably." *Id*. (citations and quotations omitted). Accordingly, the Third Circuit held that a district court must conduct an evidentiary hearing to resolve all factual disputes on a Rule 25(c) motion. Failure to do so is reversible error. *Id*. at 75-76.

Here, Defendant FEI failed to serve non-party HSUS with either (1) the requisite motion to substitute under Rule 25(c), or (2) the requisite notice of hearing.[3] Defendant FEI concedes repeatedly that there are numerous disputed factual issues that necessitate an evidentiary hearing, and not just an argument hearing. (*See*, *e.g.*, ECF 603 at 2 (noting HSUS's motion "raises additional factual and legal issues"); *id*. at 10 ("This raises a major issue of fact"); *id*. at 25 ("The motion itself . . . raises numerous legal issues, as well as issues of fact that are not only disputed**,** but that remain to be developed.").

Defendant FEI's assertion that HSUS is a successor in interest to FFA warranting joinder or substitution raises numerous factual and legal disputes regarding the meaning, applicability, and enforceability of the Asset Acquisition Agreement between HSUS and FFA, and in any event is premature. Before the Court could make the factual or legal findings that Defendant FEI urges on it, the Court would be required to resolve these disputes with an evidentiary hearing. (ECF 598 at 4 n.4.)[4] For example, as HSUS explained in its opening brief, a central assumption

[3] Defendant FEI's reliance on *Burka v. Aetna Life Ins. Co*., 87 F.3d 478 (D.C. Cir. 1996), and *Explosives Corp. of Am. v. Garlam Enter. Corp*., 817 F.2d 894 (1st Cir. 1987), is thus misplaced. In both cases, the non-party was served properly with a Rule 25(c) motion to substitute in accordance with Federal Rules of Civil Procedure 25(c) and 4. Here, Defendant FEI failed to serve such a motion on HSUS.

[4] Despite Defendant FEI's incorrect assertion to the contrary, under binding New York law, the Asset Acquisition Agreement does not constitute a merger. (*See FEI v. ASPCA, et al*., No. 07-cv-01532, ECF 90 at 60 (holding no statutory merger occurred between FFA and HSUS).) And the issue of whether a *de facto* merger took place (603 at 14) is an issue of fact not properly before this Court. (*See FEI v. ASPCA, et al*., No. 07-cv-01532, ECF 90 at 63 ("It may be that FEI will not be able to show that the corporate combination of HSUS and FFA amounts to a de facto

underlying Defendant FEI's motion for entitlement to attorneys' fees is that various FFA financial grants were unlawful. This assumption, which is disputed vigorously by Plaintiffs, *see* ECF 599, creates a fact issue regarding the enforceability of the Asset Acquisition Agreement under New York law. That is, FFA represented and warranted to HSUS expressly that "[n]o officer, director, employee, or agent of [FFA] has been or is authorized to make or receive, and [FFA] knows of no such person making or receiving, any bribe, kickback, or other illegal payment at any time." (ECF 603 at Ex. 2; DX68 § 2.10.) If Defendant FEI's assumption is correct, then the Agreement itself is unenforceable under New York law. For that and other reasons, HSUS would not be FFA's successor in interest. *See Bazzano v. L'Oreal*, No. 93-cv-7121, 1996 WL 254873, at *3 (S.D.N.Y. May 14, 1996) ("It is well-settled in New York that where a party is fraudulently induced to enter into a contract, the contract is voidable").

Since Defendant FEI has neither filed nor served a Rule 25(c) motion, and the Court has not held the required evidentiary hearing, none of these factual issues is properly before the Court, and non-party HSUS cannot be joined to this action under Rule 25(c). *See Luxliner*, 13 F.3d at 70. Defendant FEI appears to acknowledge this point, noting that "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* ECF 603 at 12 n.9) (emphasis added).) Thus, Defendant FEI's assertion that "the law is clear that under Rule 25(c) *nothing* had to be done *to add* HSUS as a party," ECF 603 at 12 n.9, is a profound

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merger under New York law.") Likewise, Defendant FEI offers no proof to substantiate its belief that "FFA itself [would be] judgment-proof," ECF 603 at 15, were this Court to award attorneys' fees against Plaintiff FFA. FFA's most recently published Form 990, which is publically available, shows FFA as having approximately $8 million of net assets for the 2010 tax year. (HSUS Reply Ex. A.) Nor can Defendant FEI prevail on this motion by making the yet more extreme assertion that Section 2.10 into the Asset Acquisition Agreement may have been a "fraudulent transaction." (ECF 603 at 15.) This claim finds absolutely no support in the record. Defendant FEI has provided no evidence that the warranties and representations in Section 2.10 are anything more than standard language.

misunderstanding of the law, belied by both the express terms of Rule 25(c) and the authority cited by FEI itself.

II. THIS COURT CANNOT ENTER AN ORDER FOR AN AWARD OF ATTORNEYS' FEES BASED ON PRINCIPLES OF RES JUDICATA OR COLLATERAL ESTOPPEL.

Defendant FEI's opposition fails to direct this Court to a single case awarding attorneys' fees against an entity, such as HSUS, that was not a party to the litigation. (*See* ECF 603 at 16-24.) Accordingly, there can be no dispute that, as a matter of black-letter law, a district court commits reversible error if it awards attorneys' fees against a non-party to the litigation. (*See* ECF 598 at 3-4 (quoting *Toth v. United Auto. Aerospace & Agric. Implement Workers of Am.*, 743 F.2d 398, 404-05 (6th Cir. 1984) (reversing district court's impermissible award of attorneys' fees against non-party unions)).

Defendant FEI attempts to "change the subject" by citing cases that stand for the irrelevant and unremarkable proposition that in certain circumstances – not present here – a non-party can be estopped from pursuing a second round of identical litigation. None of the cases cited in Defendant's opposition authorizes a district court to award attorneys' fees against a non-party.[5] For example, in *Taylor v. Stugell*, 553 U.S. 880, 884 (2008), the Supreme Court provided

[5] Defendant FEI's cases speak to the inapplicable doctrines of issue and claim preclusion. They do not address, much less support, joining or substituting a non-party to an action in the absence of Rule 25(c)'s requisites. *See, e.g., Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70 (D. Me. 2008) (holding consent decree did not bar plaintiffs, under doctrine of claim preclusion, from bringing action against state); *Flir Sys., Inc. v. Motionless Keyboard Co.*, No 10-cv-231, 2001 U.S. Dist. LEXIS 42045 (D. Or. Apr. 18, 2011) (applying issue preclusion to prevent re-litigation of relevant claim constructions of a patent from a prior action); *Henry E. & Nancy Horton Bartels Trust ex rel. Cornell Univ. v. United States*, 88 Fed. Cl. 105 (2009) (holding claim was not barred by collateral estoppel); *Highway J. Citizens Group v. United States DOT*, 656 F. Supp. 2d 868 (E.D. Wis. 2009) (holding fact that environmental organization was in privity with plaintiff in prior action was not law of the case); *Montana v. United States*, 440 U.S. 147 (1979) (holding the judgment in a civil action filed by government contractor at the direction of the United States, which upheld constitutionality of gross receipts tax, precluded United States from contesting tax's constitutionality in subsequent suit); *Princeton Strategic Inv. Fund, LLC v. United States*, No. 04-cv-04310, 2011 U.S. Dist. LEXIS 147339 (N.D. Cal. Dec. 7, 2011) (finding collateral estoppel barred *successive litigation* regarding IRS's allegedly improper adjustment to partnership taxes and assessment of penalties); *Roybal v. City of Albuquerque*, No. 08-0181, 2009 U.S. Dist. LEXIS 45663 (D.N.M. Feb. 2, 2009) (claim preclusion and collateral estoppel did not bar husband's lawsuit suit against city and police officers); *Royse v. Cohart Refractories Co*., No.

clarity to the area of law known as *preclusion* as it pertained to the theory of "virtual representation" – a doctrine wholly unrelated to the issues of *joinder* and *substitution*:

> The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.' Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim. By precluding parties from contesting matters that they have had a full and fair opportunity to litigate, these two doctrines protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions.

553 U.S. at 892 (citations and quotations omitted). The issue of preclusion is not applicable here. There is no judgment. In addition, FEI is not seeking to preclude HSUS from relitigating this action. Rather, the issue before the Court is Defendant FEI's improper attempt to *join* or *substitute* a non-party to its proposed order for entitlement to attorneys' fees in the absence of Rule 25(c)'s due-process protections of a properly served motion and an evidentiary hearing. Neither *Taylor* nor the "*Taylor* exceptions" that Defendant FEI cites permits that result.[6]

08-21, 2008 U.S. Dist. LEXIS 92499 (W.D. Ken. Nov. 13, 2008) (granting summary judgment against plaintiff because claim against defendant was barred by plaintiff's prior federal court action); *United States v. Bhatia*, 545 F.3d 757 (9th Cir. 2008) (addressing whether there was privity between government and third party in civil fraud action sufficient to bar subsequent criminal prosecution).

[6] The three *Taylor* "exceptions" identified by Defendant FEI are not satisfied here in any event. The pre-existing substantive legal relationship and adequacy of representation exceptions rely on the enforceability of the Asset Acquisition Agreement. If the Agreement were to be declared void eventually, for all the reasons proffered by FEI in its own motion, then it is axiomatic that the legal relationship would be nullified and FFA cannot be said to have adequately represented HSUS's interests. In addition, non-party HSUS did not "assume control" over the ESA litigation. *Taylor*, 553 U.S. at 895. FFA remained a separate non-profit organization from HSUS after the corporate combination. As such, FFA continued to proceed with its own litigation as a separate entity, including the ESA Action. (*See, e.g., FEI v. ASPCA, et al.*, No. 07-cv-01532, ECF 55-3; Markarian Dep. at 29:13-17.) Michael Markarian, President of the Fund for Animals, testified in his representative capacity that "[t]he Fund for Animals was represented in this case by the law firm of Meyer Glitzenstein & Crystal (MGC)." (ECF 599-34 ¶ 10.) After the combination, Jonathan Lovvorn and Kimberly Ockene also served as in-house counsel for litigation in which the FFA was a plaintiff, including the ESA Action. (*See, e.g.*, ECF 599-36 ¶ 8; 599-37 ¶ 19.) Defendant notes repeatedly that Lovvorn and Ockene continued to represent the *plaintiffs*. HSUS, however, was not a plaintiff. Therefore, HSUS CEO Wayne Pacelle's blog posting the day before the ESA trial began in February 2009 is accurate: Lovvorn was involved in the ESA Action, not as counsel for HSUS (which was not a party), but instead as "one of the Fund's lawyers in the case." (ECF 603 at 22.) Finally, Defendant FEI's assertion that Lovvorn "sent" a

III. CONCLUSION

For the foregoing reasons, and the reasons addressed in HSUS's opening brief, this Court should strike non-party HSUS from Defendant FEI's motion for entitlement to attorneys' fees and the accompanying proposed order at this time.

July 9, 2012

Respectfully submitted,

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grand total of "six" of the "hundreds" of payments that Rider received does not establish that HSUS "assumed control" of the ESA litigation. Lovvorn made clear in his declaration that each of these grants was intended to be made on behalf of FFA and were not intended to be made on behalf of HSUS. (ECF 599-36 ¶ 16.) At most, FEI's opposition simply identifies disputed factual issues requiring an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served via electronic filing this 9th day of July, 2012, to all counsel of record.

/s/ W. Brad Nes
W. Brad Nes