IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No. 03-2006 (EGS/JMF)**
	)	
FELD ENTERTAINMENT INC.,	)	
	)	
Defendant.	)	

NON-PARTY THE HUMANE SOCIETY OF THE UNITED STATES' OPPOSITION TO DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION TO JOIN HSUS AS A PARTY PLAINTIFF AND NOTICE OF HEARING

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INTRODUCTION

On March 29, 2013, this Court issued a Memorandum Opinion holding the plaintiffs liable for a yet-to-be determined amount of attorneys' fees incurred by Defendant Feld Entertainment, Inc. ("FEI") in this case (ECF 620). FEI has now moved the Court to join non-party The Humane Society of the United States ("HSUS") as a party plaintiff pursuant to Federal Rule of Civil Procedure 25(c) in an attempt to subject HSUS to liability for those attorneys' fees.

As the Court noted in its March 29 Memorandum Opinion, "HSUS is not and has never been a party to the case" (ECF 620 at 48). FEI made no effort to add HSUS to this case during the seven years that followed the January 1, 2005 Asset Acquisition Agreement between HSUS and the Fund for Animals ("FFA"). Then, in the 2012 briefing that led up to the March 29 Memorandum Opinion, FEI dropped a footnote in which it blithely asked the Court to find HSUS jointly and severally liable for *all of* FEI's attorneys' fees in a nine-year-old case that HSUS never joined voluntarily, and in which it never had been joined. HSUS moved to strike the footnote. In its March 29 Memorandum Opinion, the Court declined to consider FEI's footnote argument, instead denying FEI's request without prejudice to FEI making that request "at an appropriate time and in an appropriate posture" (ECF 620 at 49), and denying HSUS' motion to strike as moot (*id.*).

Almost eight months later, FEI filed the instant motion. FEI first argues that the Court can join HSUS without even holding an evidentiary hearing because *as a matter of law* FFA "transferred its interest" in this litigation to HSUS – despite the fact that the whole premise of the Court's March 29 Memorandum Opinion is that FFA never had standing to bring this case, so that FFA had no interest in this case to transfer. Continuing to swing for the fences, FEI next asserts that *as a matter of law*, the 2005 Asset Acquisition Agreement either transferred all of FFA's liabilities by its terms, or was a "de facto merger," pursuant to which HSUS and FFA

became one entity – despite the plain language of the Agreement, the manifest evidence in the record that no de facto merger took place, and the key representations that underlay the Agreement. At last, belatedly taking into account the Court's March 29 observation that joinder of HSUS "raises factual and legal disputes" (*id.*), FEI requests discovery and an evidentiary hearing on its "de facto merger" claim – thereby finally, and fatally, undermining its argument that joinder of HSUS would "expedite and simplify [this] case."

For the reasons discussed below, FEI's motion should be denied in its entirety. At a minimum, the Court should order an evidentiary hearing to determine whether joinder of HSUS is appropriate.

ARGUMENT

I. THE COURT HELD THAT FFA NEVER HAD STANDING TO PURSUE A CLAIM UNDER THE ENDANGERED SPECIES ACT; THUS, FFA HAD NO INTEREST TO TRANSFER UNDER RULE 25(c)

"Although granting substitution of one party in litigation for another under Rule 25(c) is a discretionary matter for the trial court, such discretion may not be abused by allowing substitution in the absence of a transfer of interest." *In re Chalasani*, 92 F.3d 1300, 1312 (2d Cir. 1996) (citation omitted) (reversing district court's Rule 25(c) substitution; "[f]or Society to be substituted for State Bank, there must have been a transfer of interest from it to Society. Here there was none."); *see also Software Freedom Conservancy, Inc. v. Best Buy Co., Inc.*, 2010 U.S. District LEXIS 125426, at *9 (S.D.N.Y. Nov. 29, 2010) ("It would be an abuse of discretion for a court to allow a substitution in the absence of a transfer in interest.") (internal quotation marks omitted). A "transfer of interest" does not occur in the corporate context unless "one corporation becomes the successor to another by merger *or other acquisition of the interest the original party*

had in the lawsuit." *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir. 1993) (emphasis added).[1]

Here, FEI's lead argument to join HSUS – that FFA's interest in the ESA "cause of action" was an "asset" that was transferred to HSUS by the 2005 Asset Acquisition Agreement (ECF 672 at 4-6) – rests on quicksand. FEI neither explains how FFA had a "cause of action" in this case, nor identifies a viable interest in the ESA Action that FFA could have transferred to HSUS, given that the Court has found that the ESA Action was groundless from its inception. The very premise of the Court's March 29 decision allowing attorneys' fees to FEI was that FFA (and the other plaintiffs) lacked standing to maintain the ESA lawsuit. Hammering that point home yet again, FEI begins its brief on this motion by repeating yet again that "no plaintiff ever had standing to bring the case *in the first place*," (ECF 672 at 2 (emphasis added)). Because lack of standing to bring a lawsuit means, by definition, that the plaintiff had no cause of action or interest in that lawsuit, FEI effectively pleads itself out of court on that issue.[2]

The United States Supreme Court has held that the elements of standing "are not mere pleading requirements but rather *an indispensible part of the plaintiff's case*." *Lujan v.*

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[1] FEI does not argue in this motion, and did not seriously contend in the companion RICO Action, *Feld Entertainment, Inc. v. Animal Welfare Institute, et al.*, No. 1:07-cv-01532-EGS ("*FEI v. AWI*"), ECF 90 at 60, that there was a statutory merger between FFA and HSUS. The doctrine of "de facto merger" is addressed in Section III below.

[2] Also telling on FEI's "transfer" argument, if more subtle, is FEI's prayer for relief on this motion. FEI seeks to "join" HSUS in this case rather than to "substitute" HSUS for FFA. If FFA had truly transferred its interest away, and therefore was no longer responsible for the attorneys' fees sanction in this case, then the correct procedure would be to substitute HSUS for FFA, not to join HSUS in addition to FFA. FEI is familiar with the substitution procedure, having moved on December 30 to "substitute" party Tom Rider's estate, or his heirs, for Mr. Rider under Federal Rule of Civil Procedure 25, due to Mr. Rider's death. (ECF 683). Indeed, in its Petition for Attorneys' Fees currently pending before the Court, FEI represented to the Court that it would file a "separate motion to substitute" HSUS for FFA. (ECF 635 at 44.) However, apparently unwilling to let go of FFA's independent assets (which also undermine FEI's de facto merger argument, as addressed in Section III below), or perhaps recognizing the absurdity of allowing a party such as FFA to be "substituted" out of a sanction, FEI has instead filed a motion to "join" HSUS while attempting to leave FFA in the case -- thus leaving FEI in the absurd position of arguing that FFA both did, and did not, transfer its interest in this matter to HSUS. In fact, of course, no such transfer took place.

Defenders of Wildlife, 504 U.S. 555, 561 (1992) (emphasis added); *see also American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.,* 639 F.3d 13, 19 (D.C. Cir. 2011). Accordingly, a party that lacks standing in an action has no viable interest in that action. *See generally Herring v. FDIC*, 82 F.3d 282, 285 (9th Cir. 1995) ("A party with no interest in the litigation generally has no standing."). If FFA lacked standing in this case from the start, then Rule 25(c) is inapplicable because FFA never had an interest in the lawsuit to transfer to HSUS. *See Chalasani,* 92 F.3d at 1312; *see also Automated Information Processing, Inc. v. The Genesys Solutions Group, Inc*., 164 F.R.D. 1, 3-4 (E.D.N.Y. 1995) (denying Rule 25(c) motion).

A. The law-of-the-case doctrine mandates that FFA never had an interest in this litigation.

This Court held clearly and repeatedly that plaintiffs never had standing to pursue this case. *See, e.g*., ECF 620 at 3 (holding lawsuit was "groundless and unreasonable ***from its inception***"), *id.* at 27 (noting that "the lawsuit was, ***from the beginning***, frivolous and vexatious"), *id*. at 33 (reiterating that lawsuit was "groundless ***from its inception***"), *id*. at 6 (noting that "[t]he Court carefully considered the testimony of approximately thirty witnesses and hundreds of exhibits in an effort to find any evidence that any of the plaintiffs had standing to pursue their claims. There was none."), *id*. at 26 ("[T]he plaintiffs cannot [] re-file their complaint based on the same set of facts because the court has concluded, based on those facts, that they lack standing to satisfy Article III's case or controversy requirement."); *id*. at 30 ("[P]laintiffs are not insulated from scrutiny under *Christiansburg* if they have ***no right to be in court.***"), *id*. at 26 ("FEI did not win this case based on any findings regarding its treatment of the elephants. Rather, the court never reached that issue because it found that ***plaintiffs lacked standing to sue.***") (emphasis added).

The above statements are the law of the ESA Case, which FEI cannot avoid. "The law-of-the-case doctrine rests on a simple premise: 'the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.'" *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 2009) (quoting *LaShawn A. v. Barry*, 87 F. 3d 1389, 1393 (D.C. Cir. 1996) (en banc)). "Inconsistency is the antithesis of the rule of law." *LaShawn A*., 87 F.3d at 1393. "[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 38 (D.D.C. 2007) (Sullivan, J.) (quoting *Singh v. George Washington Univ*., 383 F. Supp. 2d 99, 101 (D.D.C. 2004)) ("Therefore, since parties should not have to battle for the same judicial decision again without good reason, the Court will follow the law of the case").[3] Accordingly, because the Court held that no plaintiff ever had standing to pursue this case, it is the law of this case that FFA never had a viable interest in the ESA Action to transfer to HSUS under Rule 25(c).

B. FEI is judicially estopped from claiming that FFA had an interest in this litigation.

In addition, having prevailed on its argument that FFA never had an interest in this litigation from the start, FEI cannot now be heard to claim the opposite. "Courts may invoke judicial estoppel where a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, and then, simply because his interests have changed, assumes a contrary position." *Moses v. Howard Univ. Hosp*., 606 F.3d 789, 799 (D.C. Cir. 2010) (citations and internal punctuation omitted); *see also Thomas v. Gandhi*, 650 F. Supp. 2d 35, 38 (D.D.C.

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[3] "The law-of-the-case may be revisited only if there is an intervening change in the law or if the previous decision was "clearly erroneous and would work a manifest injustice." *LawShawn A*., 87 F.3d at 1393. FEI offers no reason why either exception to the law-of-the-case doctrine applies here.

2009) (noting that the purpose of the doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment") (citations omitted).

FEI succeeded in persuading the Court that plaintiffs *never* had an interest in pursuing this litigation. In its Motion for Entitlement to Attorneys Fees alone, FEI argued forcefully, expressly, and repeatedly that plaintiffs never had standing to pursue claims against FEI. (*See, e.g.*, ECF 593 at 24 ("Plaintiffs had ***no possibility of a favorable outcome on the merits*** because ***no plaintiff ever had standing***, 'an indispensible part of [] plaintiff[s'] case."), *id*. ("[A]ll plaintiffs' standing arguments lacked legal merit and evidentiary support ***from the start***."), *id*. at 40 ("The organizational plaintiffs' claims were legally and factually hollow ***from the start***") (emphasis added). FEI does so again in its moving memorandum (ECF 672 at 2). Having prevailed on its argument that FFA lacked standing to pursue claims against it under the ESA from the inception of the lawsuit, FEI is now judicially estopped from arguing the contrary position that FFA transferred an interest that it never possessed to HSUS. *See Moses*, 606 F.3d at 799.

Thus, FFA had no "interest" in this lawsuit to transfer to HSUS, and Rule 25(c) is inapplicable. *See Chalasani,* 92 F.3d at 1312*; Automated Information,* 164 F.R.D. at 3-4. FEI's citations to *Koehler v. Bank of Bermuda, Ltd*., No. M18-302, 2002 U.S. Dist. LEXIS 13966 (S.D.N.Y. July 31, 2002) and *Organic Cow, LLC v. Center for New England Dairy Compact Research*, 335 F.3d 66 (2d Cir. 2003), actually support denial of FEI's Rule 25(c) motion here. In *Koehler*, for example, the district court denied the movant's Rule 25(c) motion. 2002 U.S. Dist. LEXIS 13966, at *12-13. The district court explained that "a 'transfer of interest' under Rule 25(c) generally occurs when a litigant transfers *its particular interest in the litigation*" to

another person or entity. *Id.* at 12 (emphasis added). The district court, however, denied the Rule 25(c) motion, finding "that is not the situation here." *Id.* Similarly, in *Organic Cow*, the Second Circuit reversed the district court's improper substitution of a party under Rule 25(c) because there was no legal basis for the transfer of interest from the party to the alleged substitute. 335 F.3d at 71-72.[4]

C. Deterrence-based sanctions against a party are not an "interest" that can be transferred away to a non-party under Rule 25(c).

FEI argues that the 2013 attorneys' fees sanction itself was an "interest" that FFA anticipatorily contracted away in 2005. (*See* ECF 672 at 4 (claiming that HSUS acquired FFA's sanction in this case by "contracting for it").) Unsurprisingly, FEI cites no authority for such a proposition. A sanction (let alone a future sanction) is not an "asset" akin to ownership in real property that is transferable under Rule 25(c). *See, e.g., Koehler*, 2002 U.S. Dist. LEXIS 13966, at *7 (noting "[g]enerally, a successor in interest may be a person or entity who acquires the particular interest at stake in the litigation, such as a certain piece of property or a contractual right"; denying Rule 25(c) motion); *Levin v. Garfinkle*, 514 F. Supp. 1160, 1163 (E.D. Pa. 1981) (noting "[a] motion under Rule 25(c) is grounded on the theory that there has been a transfer in ownership of assets"; denying Rule 25(c) motion).

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[4] FEI's cites no authority for the proposition that a party has a transferable interest in a civil action in which it has no standing. (*See* ECF 672 at 3-6.) Rather, FEI cites inapplicable cases in which a party was joined under Rule 25(c) because it received a *viable* interest in the property at issue in the lawsuit. *See Learning Annex Holdings, LLC v. Rich Global, LLC*, No. 09-cv-4432-SAS, 2011 U.S. Dist. LEXIS 86003, at *7 (S.D.N.Y. Aug. 3, 2011) (noting party received interest in $14.6 million jury verdict); *Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 481 (D.C. Cir. 1996) (noting "all parties agree that AU is a proper party to this case" because "Aetna transferred its interest in the subject property to AU"); *Negron-Almeda v. Santiago*, 579 F.3d 45 (1st Cir. 2009) (noting "the property in issue" was transferred to the substituted party by statute); *Taberna Capital Management LLC v. Jaggi*, No. 08-cv-11355, 2010 U.S. Dist. LEXIS 35347, at *11 (S.D.N.Y. Apr. 9, 2010) (noting Litigation Trustee "has both standing and statutory authority to assert the assigned claims"); and *Barrows v. Resolution Trust Corp.*, No. 94-1555, 1994 U.S. App. LEXIS 32038 (1st Cir. Nov. 15, 1994) (allowing substitution for receiver of failed bank as a matter of course).

A sanction does not stem from a party's *assets* but rather from a party's *conduct*.[5] Allowing a party to simply characterize a sanction as a "transferable interest" under Rule 25(c) is wholly inconsistent with the purpose of a sanction, which is to penalize violations of the law and deter future conduct. It would be against public policy to allow any party, including FFA, to avoid a court-ordered sanction by transferring its "interest" in that sanction to another entity. Under the *Christiansburg* standard applicable here, the purpose of the sanction is to adequately deter frivolous litigation by shifting attorneys' fees to the plaintiffs responsible for bringing that litigation. *See generally Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420-22 (1978).[6] A party must be held to account for its own conduct in litigation. FFA is no exception.

FFA's sanction in this case was based on its lack of an interest in the ESA Action. It is simply illogical to visit that sanction on HSUS on the basis that FFA transferred its lack of interest to HSUS. The Court should deny FEI's Rule 25(c) motion as a matter of law.[7]

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[5] *See* Black's Law Dictionary at 1458 (9th ed. 2009) (defining "sanction" as "a penalty or coercive measure that results from failure to comply with a law, rule, or order").

[6] *See, e.g., Savoy v. District of Columbia.*, No. 94-731, 1997 WL 122928, at *2 (D.D.C. Mar. 11, 1997) ("Awards to prevailing defendants are intended to deter plaintiffs from bringing frivolous lawsuits.") (citing *Christiansburg*); *Eastway Const. Corp. v. City of New York*, 637 F. Supp 558, 563-67 (E.D.N.Y. 1986), *modified and remanded,* 821 F.2d 121 (2d Cir. 1987) (recognizing that *Christiansburg* fees to prevailing defendants and sanctions under Rule 11 are both "deterrence-oriented provisions" that have the similar purpose of "discourag[ing] litigants from bringing frivolous cases or making frivolous motions") (citing, *inter alia*, *Advisory Committee Notes to Rule 11* ("The word 'sanctions' in the caption … stresses a deterrent orientation in dealing with improper pleadings, motions or other papers.")); *Kostiuk v. Town of Riverhead*, 570 F. Supp. 603, 612-613 (E.D.N.Y. 1983) (granting substantially reduced fee to prevailing defendant, which was "not intended to ... fully compensate defendants," but would hopefully be "sufficient to serve as a caution to potential litigants with similar claims").

[7] The result is no different if one focuses, as FEI does, on the term "cause of action" as being among the assets that FFA transferred to HSUS under the Asset Acquisition Agreement (ECF 672 at 5). If, as the D.C. Circuit ruled in this case, and as FEI vigorously contended, "the elements of standing are 'not mere pleading requirements but rather an indispensable part of the plaintiff's case,'" *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.,* 659 F.3d at 19, quoting *Lujan, supra,* then it is the law of this case, and FEI is judicially estopped from denying, that FFA had no "cause of action" in this matter.

FEI's argument that the sanction against FFA represents a liability that was incurred by HSUS as part of the Asset Acquisition Agreement is addressed in Point II below.

II. UNDER THE ASSET ACQUISITION AGREEMENT, FFA'S SANCTION IN THIS CASE WAS NOT A "LAWFUL LIABILITY" FOR WHICH HSUS ASSUMED RESPONSIBILITY

FEI next argues that HSUS is "liable for any judgment in this case against FFA" because HSUS assumed "all of FFA's liabilities." (ECF 672 at 6, 7.) This assertion is simply false. HSUS did not assume "all of FFA's liabilities." HSUS assumed FFA's *lawful* liabilities only:

> Subject to the conditions specified in this Agreement, HSUS shall assume, defend, discharge, and perform as and when due, all **lawful** liabilities and obligations of the Fund. . . .

(Ex. 1 ("Kindler Decl."), Tab A ("Asset Acquisition Agreement") § 1.3 (emphasis added).)

This narrower assumption of "lawful liabilities" only includes liabilities derived from *lawful* conduct. A non-exclusive list of such lawful liabilities is found expressly in the Asset Acquisition Agreement to include "trade payables incurred in the ordinary course of business," "agreements, contracts, orders, contracts, leases, and commitments," "promissory notes and security agreements," "leases," and "Annuity contracts." (Ex. 1, Tab A § 1.3(a)-(e).) None of the examples provided include liabilities for unlawful conduct.

In this case, the Court sanctioned the plaintiffs for what it found to be "frivolous" and "vexatious" conduct in violation of the law. (*See, e.g.,* ECF 620 at 36 ("The Court has . . . found **sanctions warranted** under *Christiansburg* **against all plaintiffs**.") (emphasis added); *id*. at 18 (noting purpose of award under *Christiansburg* is "to prevent plaintiffs from filing 'frivolous' or unjustified' suits"); *id*. at 26 ("**The Complaint was Frivolous, Unreasonable, and Groundless, and FEI Is Entitled to Attorneys' Fees under the ESA**" (emphasis in original)).[8] *See*

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[8] *See also* ECF 620 at 33-34 ("There is overwhelming evidence that the plaintiffs satisfy the vexatiousness standard," including "providing false or incomplete information about the financial arrangement between Rider and the other plaintiffs . . . and forcing FEI and the court to spend time and resources litigating against organizational plaintiffs and requests for relief which plaintiffs abandoned during the trial."); *id*. at 3 ("[I]t was conclusively determined that Rider was a paid plaintiff, hired by the other plaintiffs and their counsel, who had a 'motive to

generally Ruiz v. IRS, No. 86-3619, 1987 WL 9377 (S.D. Tex. Apr. 9, 1987) (admonishing plaintiffs that "filing frivolous lawsuits is *unlawful*") (emphasis added); *see also* Black's Law Dictionary at 1458 (9th ed. 2009) (defining "sanction" as "a penalty or coercive measure that results from failure to comply with a law, rule, or order"). The Court's sanction of FFA in this case is therefore not a *lawful* liability, akin to a contractual obligation, that HSUS assumed from FFA under Section 1.3 of the Contract.

FEI's Motion fails to offer any authority or argument that a court-ordered sanction for "frivolous" and "vexatious" conduct could be construed as a *lawful* liability. (*See* ECF 672 at 6-7.) In fact, other than including the term "lawful" in a block quote on page 6, FEI does not even acknowledge the term's existence. Rather, FEI simply asserts incorrectly that HSUS assumed "all of FFA's liabilities" and moves on. (*Id.*)

Nor does FEI claim that that the conduct underlying the Court's sanction in this case was lawful conduct and therefore resulted in a *lawful* liability. Instead, FEI asserts, without authority or argument, that HSUS accepted responsibility for FFA's sanction in this case simply because the Court's order was a lawful order that penalized unlawful conduct. But such an interpretation of "lawful" in the phrase "all lawful liabilities" accords the term no meaning at all and thus reads it out of the contract entirely. (*See* ECF 672 at 6 (claiming incorrectly that HSUS assumed "all

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falsify' his testimony so that he would continue to be paid."); *id.* ("[T]his court concludes this case was groundless and unreasonable from its inception, and, therefore, that FEI should recover the attorneys' fees it incurred when it was forced to defend itself in this litigation."); *id*. at 8 ("What the evidence did demonstrate was that Tom Rider was a paid plaintiff with a 'motive to falsify' his alleged attachment to the elephants: he was supplied with his only source of income-nearly $200,000 between 2000 and 2008-by the plaintiff organizations, funneled to him through plaintiffs' counsel Katherine Myer and Eric Glitzenstein. Rider, the organizational plaintiffs, and plaintiffs' counsel sought to conceal the nature, extent and purpose of the payments from FEI during the litigation"); *id*. at 10 ("The funds paid to Rider appeared to be paid in such a way as to avoid ready detection."); *id*. at 11 ("The organizational plaintiffs also concealed the payments from FEI, in whole or in part, by providing misleading or incomplete information to FEI until after the Court granted FEI's motion to compel complete information about payments to Rider in the summer of 2007.").

of FFA's liabilities"), *id.* at 7 (claiming again incorrectly that HSUS assumed "all of FFA's liabilities") (emphasis in original).) Under black-letter law, FEI's effort at contractual interpretation is unavailing.

A. The term "lawful" cannot be interpreted to be superfluous or meaningless.

It is well settled that Rule 25(c) is a procedural rule that creates no substantive rights or obligations, which instead must stem from applicable substantive law. *See, e.g., In the Matter of Covington Grain Co., Inc.,* 638 F.2d 1357, 1361 (5th Cir. 1981). FEI's interpretation of the term "lawful" in the phrase "all *lawful* liabilities" should be rejected because it renders the term superfluous in violation of the New York law that governs the Asset Acquisition Agreement.[9] A contract interpretation "that has the effect of rendering at least one clause superfluous or meaningless is not preferred and will be avoided if possible." *MBIA Ins. Corp. v. Patriarch Partners VIII*, 842 F. Supp. 2d 682, 706 (S.D.N.Y. 2012); *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1985) ("The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect."); *Westminster Secs. Corp. v. Petrocom Energy Ltd.*, 456 F. App'x 42, 43 (2d Cir. 2012) ("The rules of contract construction require us to adopt an interpretation which gives meaning to every provision of the contract.") (citations omitted).[10] Here, to give the term "lawful" in the phrase "all lawful liabilities" meaning, as is required under New York law, the term must be read to refer to the lawfulness of the *conduct* forming the basis of the liability.

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[9] The parties agree that New York law governs under Section 11.9 of the Asset Acquisition Agreement. (*See* ECF 672 at 11 n.10.)

[10] *See also Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349 (D.C. Cir. 2000) ("When interpreting the language of a contract, a court must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless.") (citation omitted).

FEI's apparent interpretation of the term "lawful" in the phrase "all lawful liabilities," however, would render the term entirely superfluous and meaningless. Black's Law Dictionary (9th ed. 2009) defines the term "liability" to be "legally obligated or accountable." *Id*. at 997. Therefore, if the term "lawful" in Section 1.3 is read to refer to the lawfulness of the liability itself (as FEI argues), rather than the lawfulness of the underlying conduct, then the term lawful in the phrase "all lawful liabilities" would have no meaning. That is, under FEI's interpretation, the Court would read the phrase "all lawful liabilities" to mean "all lawful legal obligations." This interpretation would make the term "lawful" superfluous and redundant. Put another way, under FEI's interpretation, there can be no *unlawful* liabilities as a matter of law because there cannot be an unlawful legal obligation.

Accordingly, this Court should reject FEI's interpretation as rendering the term "lawful" in the phrase "all lawful liabilities" entirely meaningless in violation of New York law. *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010) (noting courts should "safeguard against adopting an interpretation that would render any individual provision superfluous") (citations omitted).

B. The term "lawful" must be interpreted in a manner that is consistent with the Agreement as a whole.

FEI's interpretation of the term "lawful" also violates the principle of contract interpretation that a contract's terms must be read so that they are consistent with one another. Under New York law, a term in a contract should be interpreted in the way that "best accords with the sense of the remainder of the contract." *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) (citation omitted); *Muzak*, 1 N.Y.2d at 46; *see generally Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 63 (1995) (noting that it is a "cardinal principle of contract construction that a document should be read to give effect to all its provisions and to render them

consistent with each other"); *BWX Electronics, Inc. v. Control Data Corp.*, 929 F.2d 707, 711 (D.C. Cir. 1991) ("It is a fundamental tenet of contract interpretation that a contract provision should be interpreted, where possible, as consistent with the contract as a whole.").

Here, when read in context, the term "lawful" in the phrase "all lawful liabilities" cannot be read to include liabilities resulting from unlawful acts, such those identified in the Court's 2013 sanctions decision. Such an interpretation would be inconsistent with two other major provisions of the Agreement. First, Section 1.3 of the Agreement includes a non-exclusive list of the "lawful" liabilities contemplated by the parties, which include liabilities for (a) "trade payables incurred in the ordinary course of business," (b) "agreements, contracts, orders, contracts, leases, and commitments," (c) "promissory notes and security agreements," (d) "leases," and (e) "Annuity contracts." (Ex. 1, Tab A § 1.3(a)-(e).) None of the examples provided involve liabilities resulting from tortious or unlawful conduct.[11] Second, Section 2.10 required FFA to warrant that its officers, directors, employees, and agents had not been engaged in certain types of unlawful acts related to litigation, including "bribe[s]" and "illegal payments." (Ex. 1, Tab A § 2.10.)

FEI's proposed interpretation, however, would be inconsistent with both of these provisions. The former list of examples contemplates liabilities resulting from lawful acts only (*e.g.*, trade payables, contracts, leases). The latter representation evidences HSUS's understanding that it was not assuming liabilities resulting from unlawful acts. Accordingly, this

[11]Including unlawful acts with this list would also violate "the traditional canon of both statutory and contract construction, *noscitur a sociis*, 'a word is known by the company it keeps.'" *Bobrow Palumbo Sales, Inc. v. Broan-Nutone, LLC*, 549 F. Supp. 2d 249, 273 (E.D.N.Y. 2008); *see also Kese Indus. v. Roslyn Torah Found.*, 940 N.E.2d 530, 534 (2010) (discussing canon in the context of statutory interpretation).

Court should reject FEI's interpretation because it is not consistent with the other provisions of the Agreement.[12]

In sum, the interpretation proposed by FEI changes the Agreement substantially so that HSUS would have assumed "all liabilities" rather than the narrower assumption of "all lawful liabilities" found in the Agreement. As FEI itself notes, "One of the defining features of an asset sale, that distinguishes it from a formal merger, is that 'the purchasing corporation can presumptively pick and choose what it wants to take.'" (ECF 672 at 6 (quoting John M. Matheson, *Successor Liability*, 96 Minn. L. Rev. 371, 384 (2011).) HSUS did so here and chose to assume only FFA's "lawful" liabilities.

C. Liability for court-ordered deterrent sanctions cannot be transferred from a party to a non-party by contract under New York law.

A further basis for concluding that FFA did not transfer, and HSUS did not assume, FFA's future liability for an attorneys' fees sanction in this case is New York's public policy against the transfer of deterrent penalties such as punitive damages to third parties, as by indemnification. *See, e.g., Hartford Acc. & Indem. Co. v. Vill. of Hempstead,* 48 N.Y.2d 218, 228, 422 N.Y.S.2d 47, 53, 348 N.E.2d 737, 743 (1979) (punitive damages for violation of Civil Rights Act could not be covered by insurance as a matter of public policy); *Pfizer, Inc. v. Stryker Corp.,* 348 F. Supp. 2d 131, 145 (S.D.N.Y. 2004) ("New York prohibits indemnification for punitive damages as against public policy."); *Summerville v. Lipsig*, 270 A.D. 213 (N.Y. App. Div. 2000) ("It would be 'illlogical' to hold the law firm liable for causing the loss of a claim for

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[12] FEI's citation to *American Standard, Inc. v. Oakfabco, Inc*., 14 N.Y.3d 399, 927 N.E.2d 1056, 57 (2010), ECF 672 at 6, does not support FEI's interpretation here. In *American Standard*, the contract provided for assumption of "all debts, liabilities, and obligations" rather than the narrower assumption of "all *lawful* liabilities" found here. *American Standard* therefore provides this Court with no guidance as to the proper interpretation of the phrase "lawful liabilities." FEI's citation is merely further evidence that it is attempting to read the term "lawful" out of the Agreement entirely.

punitive damages which are meant to punish the wrongdoer and deter future similar conduct.") (internal citations omitted).

* * * *

Consequently, since HSUS did not assume responsibility for the court-ordered sanction against plaintiffs in this case, FEI's Rule 25(c) motion should be denied as a matter of law.[13]

III. THE ASSET ACQUISITION AGREEMENT DID NOT CREATE A DE FACTO MERGER

FEI argues in the alternative that HSUS should be joined under Rule 25(c) pursuant to the de facto merger doctrine. (ECF 672 at 11-23.) FEI's claim is without merit. There was no merger of HSUS and FFA, which remains to this day – nine years after the asset sale to HSUS – a viable, separate non-profit organization with millions of dollars in assets.

As a general rule, "a corporation which acquires the assets of another is not liable for the torts of its predecessor." *In re New York City Asbestos Litigation (Van Nocker)*, 15 A.D.3d 254, 255, 789 N.Y.S.2d 484 (2005) (quoting *Schumacher v. Richards Shear Co., Inc*., 59 N.Y.2d 239, 244 (1983)). There is a narrow exception to this rule for cases in which there has been a de facto merger. To determine whether a "de facto merger" has occurred, courts consider the following factors: "(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's

[13] Although it omits the word "lawful" and thus differs from the Asset Acquisition Agreement, the Omnibus Bill of Sale And Assignment and Omnibus Assumption Agreement entered into between FFA and HSUS, Ex. 1, Tab 2, states expressly that "**[i]n the event of a conflict between the terms of this Omnibus Assumption Agreement and the Asset Acquisition Agreement, the latter shall control**." *Id*. at 2 (emphasis added). Thus, by the express terms of the Omnibus Assumption Agreement, it cannot be read to conflict with the Asset Acquisition Agreement. Moreover, the Omnibus Assumption Agreement states that "[n]othing herein is intended to make a third party the beneficiary of this assumption agreement," so that by its terms, FEI cannot benefit from the Omnibus Assumption Agreement.

assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation." *In re Asbestos Litigation,* 15 A.D.3d at 256. These factors do not support a de facto merger here.[14]

A. FFA and HSUS do not have continuity of ownership.

The first factor of the de facto merger test fails if, as here, there is no continuity of ownership between the purchasing entity and the selling entity. Continuity of ownership exists "where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction." *Asbestos Litigation*, 15 A.D.3d at 256.

FEI concedes that the first factor cannot be satisfied here because FFA and HSUS do not have continuity of ownership. (*See* ECF 672 at 12-13 (noting that both HSUS and FFA are non-profit corporations without stockholders). However, FEI appears to regard the absence of continuity of ownership as some sort of victory, or at least a "tie," that permits it to move on and argue the remaining three factors. This is legally incorrect.

The de facto merger doctrine is a judge-made concept that permits a court to set aside the transaction that parties have contracted – an asset acquisition agreement – and treat it as though it were a different transaction – a merger. The New York courts thus recognize that "because continuity of ownership is 'the essence of a merger,' **it is a necessary element of <u>any</u> de facto**

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[14] FEI suggests that this Court's ruling that FEI's complaint in the RICO Action stated a claim for relief on the de facto merger issue (*FEI v. AWI*, ECF 90) somehow entitles it to judgment as a matter of law in this case (ECF 672 at 12 n.11). This assertion falls of its own weight. The denial of a motion to dismiss is not a determination on the merits that precludes further litigation of the claim. *See Linares v. McLaughlin*, 423 Fed. App'x 84, 85 (2d Cir. 2011); *see also Richardson v. United States*, 22 F. App'x 4 (D.C. Cir. 2001). Indeed, in denying HSUS's motion to dismiss, the Court explained that it could not take into account FFA's tax filings on a motion to dismiss but noted that "[i]t may be that FEI will not be able to show that the corporate combination of HSUS and FFA amounts to a de facto merger under New York law" when all of the facts are taken into consideration. *FEI v. AWI,* ECF 90 at 63.

merger finding, although not sufficient to warrant such a finding by itself." *Asbestos Litigation*, 15 A.D.3d at 256 (citation omitted) (emphasis added). Put another way, a court cannot use the *absence* of continuity of ownership to find a de facto merger. *See, e.g., Buja v. KCI Konecranes Int'l PLC*, 815 N.Y.S.2d 412 (2006) ("Courts have determined that continuity of ownership 'is a necessary element of any de facto merger finding,'" quoting *Asbestos Litigation*) (granting motion for summary judgment rejecting application of de facto merger theory) (citation omitted); *Asbestos Litigation*, 15 A.D.3d at 256 (affirming trial court's grant of summary judgment on de facto merger theory because first criteria not satisfied); *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 46-47 (2d Cir. 2003) (holding purchasing corporation was not liable under New York law for debts of selling corporation under de facto merger doctrine because there was no continuity of ownership); *Hayes v. Equality Specialties, MNC*, 740 F. Supp. 2d 474, 480 (S.D.N.Y. 2010) ("[T]he Court finds that Hays has not presented any evidence to demonstrate continuity of ownership between Equality and MNC. Thus, the Court concludes, based on the continuity requirement alone, that Hays has failed to adduce evidence from which a reasonable jury could find successor liability.").

FEI directs this Court to *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201 (2d Cir. 2006), which FEI cites for the general proposition that New York successor liability law is the same as traditional common law.[15] Far more significant is the Second Circuit's recognition that "several New York courts have held in tort cases that, because continuity of ownership is the essence of a merger, **a de facto merger will not be found in the absence of this element**." *Id.* at 212 (emphasis added). The Second Circuit explained that "**continuity of ownership is** the

[15] In accordance with LCvR 7(a), FEI indicates with an asterisk in its Table of Authorities that this is one of the authorities upon which it chiefly relies.

touchstone" or "'essence of a merger' and thus **a necessary predicate to a finding of a de facto merger**." *Id*. (emphasis added). The Second Circuit thus held that, because "the State has failed to point to any evidence of continuity of ownership," the State "has failed to raise an issue of fact that NSI is liable as Serv-All's corporate successor" under a de facto merger theory. *Id*. at 215.

Accordingly, New York law is clear that there cannot be a de facto merger in the absence of continuity of ownership. FEI fails to confront this reality, and provides no reasoned basis, why the Court should find a de facto merger in its absence.[16] Without continuity of ownership, the entire rationale underpinning the de facto merger theory of successor liability is absent.

B. FFA remains a viable organization with substantial assets.

The second element of the de facto merger test is not met if, as here, the selling entity (1) does not "dissolve[] as soon as possible after the transaction" and (2) has not "become, in essence, a shell.'" *Asbestos Litigation*, 15 A.D.3d at 256 (citation omitted). Here, FFA did not dissolve following the asset sale.[17] Nor did FFA become an empty shell. Rather, FFA continued to remain a viable organization with millions of dollars in assets. Accordingly, the second factor is not satisfied here.

New York courts have held that an entity is not a "shell" for purposes of a de facto merger if it (1) retains assets or (2) continues its ordinary business operations in any meaningful

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[16] Again here, FEI attempts to use the Court's denial of HSUS' motion to dismiss in the RICO Action as though it were preclusive on HSUS for purposes of this motion (ECF 672 at 13 n.12.). As discussed in note 14 above, the denial of a Rule 12(b)(6) motion has no such preclusive effect; moreover, the legal *primacy* of the first factor in the de facto merger test was never briefed to the Court in the RICO Action. There, HSUS filed a supplemental motion to dismiss (which was limited to 10 pages), arguing that FEI had failed to adequately allege RICO claims against HSUS as a separate and distinct organization from FFA. *FEI v. AWI,* ECF 55 at 6-10. In opposition, FEI raised numerous arguments regarding HSUS's purported responsibility for FFA's alleged racketeering and torts, one of which was a de facto merger theory. (ECF 71.) While FEI mentioned in a footnote that HSUS and FFA do not have stock/shareholders, FEI did not cite any authority supporting the proposition that the first factor is not an essential element under New York law. HSUS's reply did not address the issue. (ECF 71.)

[17] (*See* ECF 672-21, (FEI Ex. 20), including FFA's corporate registration statements and certificate of good standing from the State of New York.)

way. *See, e.g., Asbestos Litigation*, 15 A.D.3d at 256 (entity not a shell for purposes of de facto merger analysis despite transferring most assets; it retained "minute books," "corporate records," and some assets, including "cash" and "certain real property"); *Buja*, 815 N.Y.S.2d at 416 (no de facto merger between buyer and seller despite seller filing for bankruptcy; seller "continued its existence past the close of the bankruptcy. After the purchase of assets by [buyer], [seller] has been involved in litigation . . . and is represented in ongoing litigation. [Seller] has remained in existence in a meaningful way since the subject transaction closed").

Here, FEI's claim that "only a shell of FFA remains" is patently absurd. (*See* ECF 672 at 13.) FFA retained substantial assets following the corporate combination with HSUS. In particular, the Agreement excluded the following assets:

- cash in the amount of $250,000.00;
- undeveloped real property in Colebrook, Connecticut, and
- real property and facilities at Murchison, Texas (the Black Beauty Ranch), and at Ramona, California (the Wildlife Rehabilitation Center);
- books and records relating to incorporation and minutes of proceedings of its members and directors;
- records relating to preparation and certification of financial statements; and
- the right to receive mail and other communications addressed to FFA.

(Ex. 1, Tab A § 1.2(a)-(g); *see also* Ex. 3, Michael Markarian Trial Tr. at 25:12-26:13.)

FFA's most recently published IRS Form 990 shows FFA as having **<u>over $9 million of net assets</u>** for the 2012 tax year. (Ex. 2 ("Waite Decl."), Tab M.) FEI itself argues in its Petition for Attorneys' and Expert Witness Fees that FFA has millions of dollars of assets available to satisfy any judgment in this case. (*See* ECF 635 at 44 (noting that "[a]ccording to their 2011 tax filings, the net worth of the organizations collectively is more than $25 million"). FEI fails to

cite a single case in its Rule 25(c) motion holding an entity with millions in assets – in this case over $9 million – to be an empty "shell" for purposes of a de facto merger. *See Asbestos Litigation*, 15 A.D.3d at 256 (no de facto merger where seller retained "minute books," "corporate records," "cash," and "certain real property").

In addition, more than nine years after the asset sale, FFA continues to conduct its ordinary business in a meaningful way. That is, FFA continues to maintain not only a separate corporate identity from HSUS but also a separate operational identity as well. (*See, e.g.,* Ex. 2, Tabs G-M.) FFA continues to maintain a board of directors and continues to conduct separate board meetings. (*See, e.g.,* ECF 672-21 (FEI Ex. 20).) FFA also continues to conduct its own programs as a separate entity, including running animal care centers. (Ex. 4, Michael Markarian FFA Rule 30(b)(6) Dep. Tr. at 29:13-17.) The Black Beauty Ranch in Texas, for example, is a 1,300-acre animal sanctuary that is home to numerous animals that have been rescued from abusive situations or have been abandoned. (Ex. 3, Markarian Trial Tr. at 71:4-8.) FFA has spent millions of dollars of its revenue on such FFA program services since the asset sale. (*See* Ex. 2, Tabs G-M.)

FFA also continues to maintain its own fundraising identity and its own income stream. FFA's Form 990s, filed annually with the Internal Revenue Service ("IRS"), demonstrate that FFA maintains a steady stream of revenue that in some years exceeded significantly the annual revenue that FFA generated in the years before the asset sale. (Ex. 2, Tabs A-M.) Between 2006 and 2012, FFA's total revenue averaged over $8 million per year. (*Id*. at Tabs G-M.)

FFA also maintains its own charitable solicitation registrations in 38 states.[18] Similarly, FFA has its own rating with the Better Business Bureau and is rated separately on Charity Navigator's website. (Exs. 6 and 7.) Moreover, FFA has its own website, www.fundforanimals.org, and continues to maintain a separate office, located at 200 West 57th Street, New York, NY 10019. (Ex. 8.) Finally, FFA continues to proceed with its own litigation, including this action. (Ex. 4, Michael Markarian Rule 30(b)(6) Dep. Tr. at 29:13-17.)[19]

FEI's Rule 25(c) motion points to no facts that demonstrate FFA is an empty corporate shell. (*See* ECF 672 at 13-15.) Indeed, FEI appears to concede that FFA's operational programs continued after the asset sale. (*See* ECF 672 at 15 (noting "FFA President Michael Markarian spends an hour per week on FFA matters"). FEI's primary reliance on *Marenyi v. Packard Press, Cor*p., No. 90-cv-4439, 1994 U.S. Dist. LEXIS 14190 (S.D.N.Y. June 9, 1994), is misplaced and demonstrates the flaw in its position under New York law.[20] In *Marenyi*, the district court denied movant's request to disregard the corporate form under a de facto merger theory, finding that a de facto merger "did not occur" despite a continuity of management, personnel, and physical assets, and the assumption of liabilities necessary to the uninterrupted continuation of the business enterprise. *Id*. at *43. The district court rejected a de facto merger

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[18] In particular, FFA is registered or licensed to solicit contributions or has been notified it is exempt from registration in Arkansas, Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Maine, Michigan, Missouri, Mississippi, Minnesota, North Carolina, North Dakota, New Jersey, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, Wisconsin, and West Virginia. (Ex. 2, Tab M.) Not all states require registration.

[19] FEI's contentions with respect to the conduct of this particular case are addressed in Section III.D below.

[20] In accordance with LCvR 7(a), FEI indicated with an asterisk in its Table of Authorities that this is one of the authorities upon which it chiefly relies.

finding because there was no continuity of ownership and the seller continued in existence after the sale. *Id*.

In view of FFA's substantial assets, and in view of the significant operations that FFA maintained after the closing, it cannot be said that the subject transaction left FFA a mere empty shell whose legal existence may be disregarded.[21] Indeed, prior decisions have found that no de facto merger occurred in cases where the asset-purchase transaction left the selling corporation with a significantly less substantial post-closing existence than the millions of dollars in assets that FFA has in this case. *Asbestos Litigation*, 15 A.D.3d at 256.

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The first and second elements of the de facto merger test have not been satisfied here. Therefore, under New York law, there can be no finding of a de facto merger in this case. Although a de facto merger finding does not necessarily require the presence of each of the four enumerated factors, New York courts have held that satisfaction of only the third and fourth factors does not suffice to create a de facto merger:

> Given the clear absence of the first two de facto merger factors, it does not avail plaintiff that the third factor (assumption of liabilities necessary for uninterrupted business operations) apparently is present, or that she may have raised an issue as to the presence of the fourth factor (continuity of management, personnel, physical location, assets and general business operation). A holding that the last two factors alone could establish a de facto merger would considerably enlarge the proportion of asset-sales qualifying for de facto merger treatment, and would essentially adopt the continuity-of-enterprise theory of successor liability and/or the product-line theory of successor liability, something the Court of Appeals specifically declined to do. . . .

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[21] As discussed in note 2 above, by seeking to join HSUS *in addition to* FFA, rather than to substitute HSUS for FFA, FEI itself demonstrates that FFA is no "empty shell."

Asbestos Litigation, 15 A.D.3d at 259 (citations omitted) ("[T]he record in this case reveals that the first and second criteria are not satisfied by the Old H-T/New H-T transaction. In our view, possible satisfaction of only the third and fourth criteria does not suffice to create a triable de facto merger issue." *Id*. at 256); *Buja*, 815 N.Y.S. 2d at 417-418 ("Where the record shows that in a corporate transaction there is no continuity of ownership and no cessation of ordinary business and dissolution of the predecessor as soon as practicable, 'possible satisfaction of only the third and fourth criteria does not suffice to create a triable de facto merger issue.'") (citing *Asbestos Litigation*, 15 A.D.3d at 256).

Accordingly, because FEI cannot satisfy either the first (continuity of ownership) or second (cessation of ordinary business and dissolution) factors of a de facto merger, successor liability is inapplicable here and this Court should deny FEI's Rule 25(c) motion.

C. FFA's sanction liabilities were not transferred to HSUS.

As established above, *see supra* at 9-15, HSUS did not assume FFA's liabilities resulting from its sanctioned conduct in this litigation. Therefore, this factor is not satisfied. *See Subramani v. Bruno Machinery Corp.*, 289 A.D.2d 167, 168, 36 N.Y.S.2d 315 (2001) (holding purchasing entity could not be held liable on de facto merger theory that it assumed the liability of the seller entity; asset purchase agreement provided that buyer did not assume liabilities in question); *Hayes*, 740 F. Supp. 2d at 483 (holding buyer did not assume liabilities of seller simply because buyer assumed "certain liabilities" of seller under the asset agreement).

D. HSUS's and FFA's shared management, personnel, location, assets, and business operations do not establish a de facto merger.

FEI spends a significant amount of its Rule 25(c) motion reciting FFA's and HSUS's public disclosures in their IRS Form 990s and various provisions in the Asset Acquisition Agreement. (*See* ECF 672 at 15-23.) None of these references demonstrates a de facto merger.

Rather, they simply show that in 2005 HSUS and FFA agreed to join forces in a corporate combination to advance their common mission.

The purpose of the corporate combination was to combine the resources of HSUS and FFA while allowing the two organizations to remain distinct corporate entities with distinct operational identities. Michael Markarian, in his role as President of FFA, testified as a Rule 30(b)(6) witness on behalf of FFA regarding this distinction:

> Q: The Fund for Animals and the Humane Society of the United States merged at the beginning of [2005], is that right?
>
> A: It was not a formal merger, it was a corporate combination of the two organizations.
>
> Q: What do you mean by "a corporate combination"?
>
> A: The organizations remain . . . distinct entities, but our management structures are coordinated and we take advantage of some efficiencies of administration, including accounting and . . . payroll. But the two organizations . . . are still . . . both in existence.

(Ex. 4, Michael Markarian FFA Rule 30(b)(6) Dep. Tr. at 25:9-21.)

Here, the two organizations remain distinct corporate entities, both legally and operationally. FFA and HSUS merely entered into a corporate combination that streamlined each entity's administrative functions while maintaining their corporate identities. (*Id.*) Under the terms of the Agreement, significant real property in three states, including land, buildings, and other facilities, is retained by FFA. (Ex. 1, Tab A § 1.2(a)-(g).) Moreover, following the corporate combination, FFA's board of directors remained active and held meetings. (*See, e.g.,* ECF 672-21 (FEI Ex. 20).)

FEI's citations to numerous pleadings in which HSUS and FFA state correctly that, in many instances, they "combined operations" and "pursue advocacy jointly," *see* ECF 672 at 17, do nothing to advance its argument that this Court should take the radical step of disregarding

FFA's corporate form. Likewise, the mere fact that HSUS's Website tracked a case related to animal treatment, *see id*. at 21, is neither surprising nor evidence of a merger.

FEI's reliance on public statements about the Asset Acquisition Agreement is similarly misplaced. Although the corporate combination may have been referred to colloquially as a merger by non-lawyers such as Mike Markarian and Wayne Pacelle, it was clearly not a "merger" in the legal sense of the term – there was no statutory merger under New York law, there was no continuity of ownership, and FFA remained a viable, corporate entity with millions of dollars in assets.[22]

Finally, FEI's claim that HSUS took "ownership" of the ESA litigation is false. FFA continued to proceed with its own litigation as a separate entity after the corporate combination, including serving as a plaintiff in this case. (Ex. 4, Markarian Dep. at 29:13-17.) FFA did not need to receive approval from HSUS to remain a plaintiff in the ESA Action. (*Id*. at 32:6-9.) Nor was the HSUS bound in any way to provide support for the litigation previously undertaken by FFA. (*Id*. at 32:10-14.)[23]

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[22] FEI's citation to *Arnold Graphics, Indus. v. Independent Agent Center, Inc*., 775 F.2d 38 (2d Cir. 1985), ECF 672 at 19, does not support its claim that colloquial references to a "merger" by non-lawyers in the press are sufficient to establish a de facto merger. In *Arnold Graphics*, the Second Circuit found a de facto merger not because of press releases but because there was (1) continuity of ownership and (2) the selling entity sold all of its assets to the buying entity. *Id*. at 42. Neither of those factors is present here. FFA and HSUS do not have continuity of ownership. And FFA is a viable organization with substantial assets.

[23] Although both were employed by HSUS, Jonathan Lovvorn's and Kimberly Ockene's involvement in the ESA Action does not demonstrate HSUS control over the litigation. Lovvorn and Ockene both testified that they served as in-house counsel for litigation in which FFA was a plaintiff, including the ESA Action. (*See, e.g.,* ECF 599-36 ¶ 8; 599-37 ¶ 19.) Lovvorn and Ockene continued to represent the *plaintiffs* in the ESA Action until they withdrew as counsel in 2012. HSUS was never a plaintiff. Instead, as HSUS CEO Wayne Pacelle stated in a blog posting the day before the ESA trial began in February 2009, Lovvorn was involved in the ESA Action, not as counsel for HSUS (which was never a party), but instead as "one of the Fund's lawyers in the case." (ECF 603 at 22.) With respect to the six grants that Lovvorn sent to WAP (ECF 672 at 22), Lovvorn made clear in his declaration that he sent these payments in his role as in-house counsel for FFA and that each of these grants was intended to be made on behalf of FFA, not on behalf of HSUS. (ECF 599-36 ¶ 16.) Likewise, Michael Markarian testified at an evidentiary hearing that none of the FFA payments in question were intended to be HSUS payments. (Ex. 5 at 66:20-67:6.) FEI also notes that HSUS was one of the co-hosts of a July 2005 fundraiser for the ESA Action, and

Even if FEI were correct in its interpretation of the above facts, satisfaction of the fourth factor alone (continuity of management, personnel, location, assets, and general business operations), does not itself establish a de facto merger as a matter of New York law. *In re Asbestos Litigation*, 15 A.D.3d at 259 (no de facto merger despite establishment of fourth factor); *Buja*, 815 N.Y.S.2d at 417-18 (same); *Marenyi*, 1994 U.S. Dist. LEXIS 14190, at *43-44 (same); *see also Ioviero v. Ciga Hotels, Inc*., 101 A.D.2d 852, 475 N.Y.S.2d 880, 881 (1984) ("The fact plaintiffs may discover that the two corporations have identical controlling shareholders, officers, and directors does not, by itself, warrant disregarding the separate corporate entities," 101 A.2d at 853; dismissing complaint "on the ground that the plaintiffs had sued the wrong party," *id*. at 852). This Court should therefore reject FEI's argument that Rule 25(c) relief is supported by the de facto merger doctrine.[24]

IV. ALTERNATIVELY, BASED ON FEI'S OWN ALLEGATIONS IN EITHER THIS ACTION OR THE RICO ACTION, THE ASSET ACQUISITION AGREEMENT IS UNENFORCEABLE AGAINST HSUS

FEI's contentions that HSUS is a successor in interest to FFA and/or assumed FFA's liabilities under the Asset Acquisition Agreement also raise fundamental issues regarding the enforceability of the Agreement itself. Defendant FEI's claim to attorneys' fees against FFA was based largely on the theory that FFA made unlawful witness payments in this case.[25] The

that the HSUS CEO was scheduled to provide concluding remarks. (ECF 672 at 22.) Whether HSUS co-hosted a fundraiser to support the ESA litigation, which has several organizational plaintiffs, including the Animal Welfare Institute and Born Free, does nothing to demonstrate a de facto merger between FFA and HSUS.

[24] FEI's citation to *Greater Potater Harborplace, Inc. v. Jenkins*, 1991 U.S. App. LEXIS 11015 (4th Cir. May 31, 1991), ECF 672 at 20, is clearly distinguishable. In *Greater Potater*, the Fourth Circuit noted that the original entity shared continuity of ownership with the successor entity. *Id*. at *17. In addition, the Fourth Circuit found that the original entity was "just a shell" and had "very little if any assets" after the transaction. *Id*. at *15. Here, unlike in *Greater Potater*, there is no continuity of ownership and FFA has substantial assets.

[25] *See* ECF 593 at 1 ("Tom Rider testified at trial and was found to be a **plaintiff for hire** who was completely untruthful. Rider's **purchased lies** fraudulently opened the courthouse door by creating federal jurisdiction where

Court relied on these witness payments in finding FEI entitled to attorneys' fees.[26] In addition, so far in the RICO Action the Court has ruled – at least for purposes of defendants' Rule 12(b)(6) motion – that those same actions by the defendants in the ESA case, including FFA, amounted to conspiracy to bribe and/or make illegal witness payments.[27] The Court, accepting these allegations as true, found that FEI had adequately alleged RICO violations and various other state law causes of action. (*See FEI v. AWI,* ECF 90.)

FFA, however, represented and warranted to HSUS expressly under Section 2.10 of the Asset Acquisition Agreement 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,

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none existed, and are the **sole reason** that this case has been ongoing since July 2000.") (emphasis added); *id*. at 2 ("Plaintiffs and counsel knew this was not true because **they were paying Rider to see the elephants**, well before the 2001 dismissal.") (emphasis in original); *id*. at 3 ("**Hiring Rider** side-stepped Article III of the Constitution . . . and hijacked the ESA citizen-suit provision as a vehicle to advance plaintiffs' ulterior purposes, not to preserve an endangered species.") (emphasis added); *id*. at 13 ("**Rider was purchased as a plaintiff and witness** before the original complaint was filed. . . . **No reasonable co-plaintiff** or counsel **would have** brought Rider's claims, let alone **paid him** to make them, and then litigate them all the way through trial and beyond.") (emphasis added); *id*. ("**Rider was paid** because he was 'the only plaintiff who allege[d] a personal and emotional attachment to the elephants and an aesthetic injury based on the alleged mistreatment he claim[ed] to have witnesse[d] while working for FEI.'") (emphasis added); *id*. at 14 (""Plaintiffs and counsel attempted to **cover-up the payments**."); *id*. at 28 ("**These payments were Rider's sole source of income** for at least nine years, and ensured that Rider would continue the fraudulent case as long as he was getting paid.") (emphasis added); *see also* ECF 605 at 13 (arguing plaintiffs' payments to Tom Rider were "**unlawful**.") (emphasis added).

[26] *See, e.g.,* ECF 620 at 3 "[I]t was conclusively determined that **Rider was a paid plaintiff**, hired by the other plaintiffs and their counsel, who had a 'motive to falsify' his testimony so that he would continue to be paid."); *id* at 8 ("**Tom Rider was a paid plaintiff** with a "motive to falsify" his alleged attachment to the elephants: he was supplied with his only source of income-nearly $200,000 between 2000 and 2008-by the plaintiff organizations, funneled to him through plaintiffs' counsel Katherine Myer and Eric Glitzenstein. Rider, the organizational plaintiffs, and plaintiffs' counsel **sought to conceal the nature, extent and purpose of the payments** from FEI during the litigation, including through an affirmatively false interrogatory response signed by Rider and prepared by Ms. Meyer, the same attorney who was paying him."); *id*. at 11 ("The organizational **plaintiffs also concealed the payments** from FEI"); *id*. at 29 ("More important, the Court determined that [Rider] was '**essentially a paid plaintiff and fact witness**,' who had 'a motive to falsify' the entire basis for his standing – his alleged personal and emotional attachment to the elephants.") (emphases added).

[27] *See, e.g., FEI v. AWI, et al*., No. 07-1532, ECF 25 at 1-7 ("TOM RIDER WAS A PAID PLAINTIFF AND A PAID WITNESS"), *id*. at 7-14 ("OVERVIEW OF THE RACKETEERING ACTIVITY"), *id*. at 78-92 ("ATTEMPTS TO COVER-UP THE PAYMENTS TO RIDER"); *id*. at 102-112 (outlining alleged "**Bribery**" and "**Illegal Witness Payments**") (emphasis added).

any bribe, kickback, **or other illegal payment at any time**." (Ex.1, Tab A § 2.10 (emphasis added).) FEI cannot dispute that the Rider payments, as characterized by FEI itself, would be a clear violation of the representations and warranties disclaiming such payments in Section 2.10.[28]

In addition, under Section 2.17 of the Agreement, FFA warranted to HSUS that "[t]here is no material fact which has not been disclosed in writing to HSUS of which any officer, director, or key employee of Fund is aware and which materially adversely affects or could reasonably be anticipated to materially and adversely affect the Assets." (Ex. 1, Tab A § 2.17.) Likewise, under Section 2.15 of the Agreement, FFA represented to HSUS that "[FFA] and its officers and directors have complied in all material respects with all applicable laws and regulations of foreign, federal, state, and local governments and all agencies thereof which affect their operations or the Assets or to which [FFA] may otherwise be subject. . . ." (*Id*. § 2.15.)

FFA, however, did not disclose to HSUS the material facts forming the basis for the Court's sanction in this case, nor the material facts that are alleged in FEI's Amended Complaint in the RICO Action. (*Compare FEI v. AWI,* ECF 25, *with* Ex. 1, Tab A at 34-35 (Schedules §§ 2.5 and 2.10) and Ex. 1, Kindler Decl. ¶¶ 5-9.) For example, in this case, the Court held that "[a]t the time the Complaint was filed in 2000 and the Amended Complaint in 2001, the plaintiffs and their counsel knew that Rider was not, as he alleged, 'refraining from' seeing the animals in order to avoid suffering injury." (*See* ECF 620 at 11.) FFA, however, never disclosed this fact to HSUS prior to or after execution of the Asset Acquisition Agreement. *See, e.g.,* Ex. 1, Tab A at 35 (listing in Schedule 2.10 the various "actions" related to FFA that "present exposure"; the ESA Action is not listed); *see also* Ex. 1, Kindler Decl. ¶¶ 5-9. Nor did

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[28] FEI appears to have conceded this point in prior briefing on HSUS's motion to strike, choosing instead to take the extreme position that Section 2.10 must have been inserted into the Agreement fraudulently. (ECF 603 at 15.) FEI, of course, does not and cannot provide any evidence that the warranties and representations in 2.10 are anything more than standard contract language.

FFA disclose that Tom Rider "was essentially a paid plaintiff and fact witness," nor that plaintiffs "sought to conceal the nature, extent and purpose of the payments from FEI," as found by the Court. *See id.* Failure to disclose such material facts would violate the representations and warranties in Sections 2.10, 2.15, and 2.17.

In light of the foregoing, assuming the factual and legal basis for the Court's March 29 attorneys' fees sanction (as must be done on this motion), and giving due weight to the Court's rulings thus far in the RICO Action, the Asset Acquisition Agreement, by its own terms, is unenforceable against HSUS under applicable New York law. *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. . . .").

V. AT A MINIMUM, FACTUAL ISSUES EXIST THAT NECESSITATE AN EVIDENTIARY HEARING.

FEI's erroneous assertion that HSUS is a successor in interest to FFA warranting joinder raises numerous factual disputes regarding the applicability of the de facto merger doctrine and the enforceability of the Asset Acquisition Agreement between HSUS and FFA – for example, whether FFA is an "empty shell" despite having generated millions in gross revenues between 2006 and 2012, reporting over $9 million in assets in its most recent IRS Form 990, and continuing with its significant operational programs. This Court has already found, in denying FEI's previous unsuccessful attempt to join HSUS as an involuntary plaintiff, that the issue of joinder "raises *factual* and legal *disputes*," ECF 620 at 48, which necessitate an evidentiary hearing. *See Luxliner,* 13 F.3d at 70-71.

It is black-letter law that a district court cannot join or substitute an organization such as HSUS as a party without an evidentiary hearing if the resolution of the Rule 25(c) motion

involves contested facts. *See Luxliner*, 13 F.3d at 70.[29] In *Luxliner*, the Third Circuit held that it is reversible error for a district court to join a party such as HSUS in the absence of an evidentiary hearing. *Id*. There, 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*. 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. The court of appeals directed that "[b]efore a party may be deprived of a property interest, due process requires, at a minimum, notice and an opportunity to be heard." *Id*. at 72. "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 internal quotation marks omitted). The Third Circuit held that a district court must conduct an evidentiary hearing to resolve all disputes on a Rule 25(c) motion. Failure to do so is reversible error. *Id*. at 75-76.

Accordingly, because there are material facts in dispute that preclude granting FEI's motion against HSUS, an evidentiary hearing is warranted here. *See Software*, 2010 U.S. Dist. LEXIS 125426, at *21 (noting evidentiary hearing warranted to decide Rule 25(c) motion because of conflicting evidence regarding "nature of assumed liabilities" and "whether WDE liquidated").[30]

FEI's request for additional discovery into the relationship between FFA and HSUS "to establish the applicability of the successor in interest exceptions" prior to a Rule 25(c)

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[29] FEI relies heavily on the Third Circuit's *Luxliner* decision. (*See, e.g.,* ECF 672 at 4, 8, 10, 23, 24.)

[30] FEI's suggestion (ECF 672 at 23) that the Court "may rule [in its favor] on this motion by applying the law to [the] established facts" in the ESA Action ignores the fact that HSUS, as a non-party to the ESA Action, did not participate in the "establishment" of those facts.

evidentiary hearing, however, is not well founded. (*See* ECF 672 at 24.) As a threshold matter, FEI does not state with sufficient particularity what facts it intends to discover. *See Byrd v. EPA*, 174 F.3d 239, 248 n.8 (D.C. Cir. 1999). The record in this case is clear that FEI had years to explore the relationship between FFA and HSUS in this case, and indeed did so to the extent that it saw fit. As FEI itself cites in its Motion, FFA President Michael Markarian was not only deposed in this case regarding the relationship between FFA and HSUS but was also cross-examined about that relationship at an evidentiary hearing and at trial. (*See, e.g.,* ECF 672 at 23.)

To the extent that this Court is inclined to grant FEI's request for additional discovery, however, the Court should consolidate such discovery with the identical discovery that is currently underway in the RICO Action. FEI has already served HSUS with document requests targeted at the relationship between FFA and HSUS, and HSUS is responding appropriately. This discovery is unavoidable because the sole issue remaining against HSUS in the RICO action is FEI's allegation that HSUS is a successor in interest to FFA, the Court having held that there are no viable claims pending against HSUS as a separate entity.[31]

If this Court allows FEI to take additional discovery, then the Court should consolidate the discovery in the two cases, allow HSUS to file a motion for summary judgment at the end of discovery on the identical de facto merger theory alleged by FEI in the RICO action, and then consider these identical issues simultaneously.

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[31] *See FEI v. AWI,* ECF 90 at 63-64 n.20 ("In its Opposition to HSUS's motion to dismiss, FEI for the first time implies that even if HSUS and FFA did not merge, HSUS is still separately liable under RICO. If indeed FEI is making such an argument, the Court rejects it. While the Federal Rules permit parties to plead more than one claim in support of alternative theories of recovery, *see* Fed. R. Civ. P. 8(d)(3), FEI has pled no claims against HSUS as an entity independent of its [alleged[merger with FFA.").

VI. FEI'S RULE 25(C) MOTION DOES NOT MAKE THIS LITIGATION SIMPLE OR EFFICIENT, AND IS UNNECESSARY.

As is clear from the foregoing discussion, granting FEI's Rule 25(c) motion would neither expedite nor simplify this litigation. Rather, consideration of the motion will slow and complicate matters tremendously, which in itself is a reason to deny it. *See Advanced Marketing Group, Inc. v. Business Payment Sys., Inc.*, 269 F.R.D. 355, 359 (S.D.N.Y. 2010) (denying Rule 25(c) motion because proposed substitution "would lengthen and complicate" the litigation "rather than bring the litigation nearer to its conclusion"); *see also Learning Annex*, 2011 U.S. Dist. LEXIS 86003, at *5 ("The primary consideration in deciding a motion pursuant to Rule 25(c) is whether substitution [or joinder] will expedite and simplify the action."); *see also Banyai v. Mazur*, No. 00-cv-9806, 2009 WL 3754198 (S.D.N.Y. 2009) (denying Rule 25(c) motion because the movant's successor status was contested and the court's resolution of the issue would not expedite the action).

As demonstrated in Plaintiffs' Motion for Extension of Time (ECF 676 at 8-9), consideration of this motion will require an indefinite stay of the parties' briefing on FEI's Fee Petition, particularly if the Court grants FEI's request for further discovery prior to the Rule 25(c) evidentiary hearing. FEI has known about the relationship between HSUS and FFA that forms the basis of FEI's Rule 25(c) motion since at least 2006. (*See* Ex. 9.) Yet, FEI waited for more than ***seven years*** to file this motion to join HSUS. FEI did not seek to join HSUS during discovery, in advance of trial, or during the appeal. "Courts have not condoned such belated attempts at joinder under Rule 25(c), even if an additional lawsuit becomes necessary."[32] *McKesson Information Solutions, Inc. v. Bridge Medical, Inc.*, No. CIVS022669-FCD-KJM,

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[32] Here, of course, FEI has already brought another lawsuit – the RICO action – that involves FFA's conduct in this case, and to which HSUS is a party.

2006 WL 658100, at *3 (E.D. Cal. Mar. 13, 2006) (denying Rule 25(c) motion in four-year-old case because "add[ing] a party at this late juncture is not warranted"); *DeKalb Genetics Corp. v. Pioneer Hi-Bred Int'l*, 2001 U.S. Dist LEXIS 10985, at *12, *19 (N.D. Ill. July 31, 2001) (denying Rule 25(c) motion, notwithstanding evidence that "Monsanto owns or controls all [of the litigant's] assets and [the litigant] is a mere shell" given "the late stage of the litigation"); *EEOC v. Pan Am. World Airways, Inc.*, 1987 U.S. Dist. LEXIS 15182, at *7 (N.D. Cal. Dec. 1, 1987 (denying Rule 25(c) motion because it is "presented at a very late date").

Nor has FEI shown that Rule 25(c) relief, and the attendant delay, are necessary to adjudicate the case that is before the Court. In particular, the Court should reject FEI's unfounded assertion that joining HSUS under Rule 25(c) is necessary so that FFA will not fraudulently transfer its assets to HSUS prior to judgment. (ECF 672 at 9.) This argument has been tried before and failed. In *Koehler*, for example, which FEI cites for a number of general propositions, *see* ECF 62 at 3, 7, the movant claimed that a bank had fraudulently transferred over $4 million of the defendant's assets. 2002 U.S. Dist. LEXIS 13966, at *5-*6. The movant therefore sought to join the bank under Rule 25(c) on a fraudulent transfer theory. The district court, however, denied the motion, explaining that the movant "apparently assumes that 'fraudulent conveyance' is synonymous with 'transfer of interest' under Rule 25(c). That assumption is false. . . . By making a motion under Rule 25(c) to join or substitute the Bank as judgment debtor, Koehler tries in vain to fit a square peg into a round hole. Koehler cannot obtain the relief he seeks by way of a Rule 25(c) motion, and therefore I deny the motion." *Id.* at *11-13. Thus, in addition to the utter lack of any evidence that FFA has transferred or intends to

transfer assets fraudulently to HSUS or any other entity to avoid the Court's judgment, Rule 25(c) would not be the appropriate procedural vehicle for such relief in any event.[33]

FEI's citation to the 2005 Asset Acquisition Agreement is wholly inapposite. (ECF 672 at 9 n.8.) FEI does not, because it cannot, proffer any evidence whatsoever that FFA's transfer of assets to HSUS in 2005 was to allow FFA to "sabotage [FEI's] efforts of reaching the assets should liability on [FFA] attach." (ECF 672 at 9.) Likewise, FEI's reliance on *Maldonado v. Valsyn*, 434 F. Supp. 2d 90, 91-92 (D.P.R. 2006), is misplaced. (*See* ECF 672 at 9.) In *Maldonado*, the district court denied the movant's Rule 25(c) motion because, as is the case here, the buyer did not assume the liabilities in question, the buyer and seller shared no common shareholders, and the buyer and seller utilized their own attorneys in the case. *Id*.[34]

Finally, FEI's assertion that "it will be simpler and more efficient for FEI to execute on the forthcoming judgment if all of the liable parties are included in that judgment," ECF 672 at 8, does not support joining HSUS in this case. All of the liable parties will already be included in the judgment, including plaintiff FFA, which "was an original plaintiff when this case was first filed on July 11, 2000," ECF 672 at 1, and is a viable, going concern with operational programs and over $9 million in assets according to its 2012 Form 990. HSUS, on the other hand, as this

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[33] FEI's citations to *Minnesota Mining & Mfg., Co. v. Eco Chem, Inc.*, 757 F.2d 1256 (Fed. Cir. 1985), *Panther Pumps & Equip. Co., Inc. v. Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977), and *Nazario-Lugo v. Caribevision Holdings, Inc.*, 2013 U.S. Dist. LEXIS 24121 (D.P.R. Feb. 19, 2013 (Feb. 19, 2013), are inapposite. In *Minnesota Mining*, all the previous defendant's assets were transferred during the litigation. 757 F.2d at 1258-59. Likewise, in *Panther*, the original defendant transferred all of its assets and became a "worthless shell of a corporation." 566 F.2d at 27-28. Finally, in *Nazario-Lugo*, the seller entity "transferred all of its assets" to the buyer entity. 2013 U.S. Dist. LEXIS 24121, at *7. Unlike the original parties in *Minnesota Mining*, *Panther*, and *Nazario-Lugo*, however, FFA did not transfer all of its assets to HSUS. In fact, FFA retained millions of dollars worth of assets following the transaction.

[34] In this case, plaintiff FFA and non-party HSUS have been represented by separate counsel. Plaintiff FFA has been represented by the law firms of Meyer Glitzenstein & Crystal and Zuckerman Speader LLP. Non-party HSUS has been represented by the law firms of Paul Hastings LLP and Morgan, Lewis & Bockius LLP.

Court noted not once but three times, "is not and has never been a party to the case." ECF 620 at 48; *see also FEI v. AWI,* ECF 90 at 57 n.18 ("HSUS was never a plaintiff in the ESA Action."); ECF 629 at 3 n.2 ("HSUS is not a party to this case and there is no pending request that it be deemed a party").[35]

Accordingly, because consideration of FEI's Rule 25(c) motion will unnecessarily complicate and prolong this litigation -- a situation entirely of FEI's own making -- this Court should exercise its discretion and deny the motion. *See Advanced Marketing*, 269 F.R.D. at 358-359 (noting that substitution or joinder under Rule 25(c) is "within the sound discretion of the trial court" and that "[t]he primary consideration" "is whether substitution will expedite and simplify the action").

CONCLUSION

For the foregoing reasons, FEI's motion to join HSUS as a party plaintiff should be denied. Alternatively, if the Court does not deny the motion it should order an evidentiary hearing on the disputed issues identified above.

[35] FEI's statement that "HSUS clearly wanted to be part of this case when it thought things were going well for plaintiffs," ECF 672 at 23, is without merit. The best evidence that HSUS never wanted to be a plaintiff in this case is the fact that HSUS was never a plaintiff in this case.

January 10, 2014

Respectfully submitted,

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