IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FELD ENTERTAINMENT, INC.'S REPLY IN SUPPORT OF MOTION TO JOIN THE HUMANE SOCIETY OF THE UNITED STATES AS A PARTY PLAINTIFF

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I. INTRODUCTION

HSUS has turned on its "affiliate" FFA. In its Opposition to FEI's motion to join, HSUS embraces and emphasizes the Court's findings that this litigation was "groundless and unreasonable" and "vexatious," and even argues that the litigation of this case was unlawful. While HSUS's focus on how terrible the litigation was is evidently intended to show why HSUS should not be liable for the forthcoming fee judgment, HSUS's argument actually shows why it is necessary for HSUS to be formally joined so that FEI can be made whole.

On January 1, 2005 HSUS became legally responsible for the outcome of this litigation. On that day, FFA transferred its interest in this case, along with "control" over FFA generally, to HSUS. Contract § 1.1(h); § 7.2.[1] HSUS knows that the plain language of its own Contract makes it liable for FEI's fees. That is why its Opposition is an amalgamation of invented *post hoc* excuses to try to wriggle out of the Contract. All of these are unavailing. HSUS's request for the Court to consider the transfer of this case from FFA to HSUS retroactively undone based on a later finding of lack of standing is without basis or precedent, as is its claim that the Contract should be interpreted to mean something other than what it says. Nor can HSUS pretend that its hands are clean by blaming the vexatious conduct on FFA. That is the ventriloquist blaming the dummy. HSUS could have stopped any purportedly "unlawful" behavior starting on January 1, 2005 – well before the overwhelming majority of FEI's attorneys' fees were incurred – but HSUS didn't. And HSUS isn't culpable only by omission. It didn't just look the other way while its "controlled affiliate" FFA perpetrated bad acts. HSUS actively participated in the conduct which precipitated this Court's holding that FEI is entitled to recover its fees. Accordingly, HSUS cannot be heard to argue that it is against public policy for

[1] "Contract" herein refers to the Asset Acquisition Agreement between HSUS and FFA, attached as Ex. 1 to FEI's Motion to Join HSUS ("FEI Mot."), ECF No. 672-2.

"FFA's sanction" to be "transferred" to "innocent" HSUS, or to suggest that HSUS may have been "defrauded" by FFA, because HSUS has continually ratified any such fraud, for the past nine years. Because the Contract explicitly transferred FFA's interest in this case to HSUS, and HSUS has ratified the Contract and any "fraud" allegedly inducing its consummation, joinder of HSUS is textbook under Rule 25(c).[2]

While only one avenue for finding that HSUS is FFA's transferee in interest is sufficient to grant FEI's motion, there are others. In addition to the explicit contractual transfer of the case, HSUS also became FFA's transferee in interest by virtue of the express assumption of liability and *de facto* merger exceptions to the rule against successor liability. HSUS admits that its management, personnel, location, assets, and business operations are shared with FFA. It also cannot deny that it assumed the business-related liabilities of FFA. HSUS argues only that a *de facto* merger is impossible because of what it claims is a lack of continuity of ownership vis-à-vis stockholders. Under this rubric, however, two non-profits could never merge, an absurd proposition that is belied by an entire Article of the New York Not-for-Profit Corporations law dedicated to such mergers. The undisputed facts show that the FFA/HSUS "combination" meets the *de facto* merger criteria to the fullest extent possible for two non-profits.

Formalized joinder is essential here. HSUS assumed control over FFA, including explicitly assuming its interest in this case, and promoted the ongoing frivolous litigation

[2] HSUS's claim that it is "absurd" for FEI to move to join rather than substitute HSUS, based on FFA's transfer of interest to HSUS (HSUS Opp. at 3 n.2), is contradicted by both Rule 25(c) itself and the caselaw applying it (including caselaw cited by HSUS). The Rule assumes a transfer of interest as a baseline, and then allows for either substitution **or** joinder. Fed. R. Civ. P. 25(c) ("**If an interest is transferred**, … the court, on motion, [may] order[] the transferee to be substituted in the action **or joined with the original party**.") (emphasis added); *see also Learning Annex Holdings, LLC v. Rich Global, LLC*, 2011 U.S. Dist. LEXIS 86003, at *8-9 (S.D.N.Y. Aug. 3, 2011) (joining, not substituting, the lawsuit's transferee in interest under Rule 25(c)); *McKesson Info. Solutions, Inc. v. Bridge Medical, Inc.*, 2006 WL 658100, at *2 (E.D. Cal. Mar. 13, 2006) (cited in HSUS Opp. at 32-33) ("[T]he court, if it sees fit, … may retain the transferor as a party and order that the transferee be made an additional party."); *EEOC v. Pan Am. World Airways, Inc.*, 1987 U.S. Dist. LEXIS 15182, at *4 (N.D. Cal. Dec. 1, 1987) (cited in HSUS Opp. at 33) ("In ruling upon [a Rule 25(c)] motion, the court may … join the transferee as an additional party.").

conduct. HSUS acquired more than $18 million of FFA assets that otherwise would have been available to satisfy FEI's judgment. Now the named plaintiffs, including FFA, are claiming that they should not have to pay the amount that FEI itself was forced to pay in defense of this "groundless and unreasonable" and "vexatious" case because they allegedly lack the resources to do so. The only just outcome is for HSUS to be brought forth and be required to contribute to repairing the damage it helped create.

II. FFA'S INTEREST IN THIS CASE – AS PARTY PLAINTIFF – WAS TRANSFERRED TO HSUS WHEN HSUS CONTRACTED FOR IT

A. That Plaintiffs Ultimately Were Found to Lack Standing Does Not Retroactively Make The Case Disappear

FFA transferred its interest in this case (the ESA cause of action) to HSUS effective January 1, 2005. Contract § 1.1(h) ("HSUS shall purchase [and] acquire … from Fund, and Fund shall … transfer … to HSUS … ***all*** … causes of action") (emphasis added).

Cornered by this unambiguous and dispositive provision, HSUS makes the flimsy argument that because the Court found, in 2013, that the ESA case was groundless from its inception, FFA had no interest to transfer to HSUS in 2005, thus making Rule 25(c) inapplicable. HSUS Opp. at 3-4. Unsurprisingly, HSUS offers no authority for this argument. The cases that HSUS does cite stand for the unremarkable proposition that substitution is not proper absent a transfer of interest. None of them, however, holds that if a party lacks standing it cannot be a transferor in interest, or that a future finding of lack of standing retroactively makes Rule 25(c) inapplicable.[3] Contrary to HSUS's citation, *Herring v. FDIC*, 82 F.3d 282 (9th Cir. 1995) does

[3] *In re Chalasani*, 92 F.3d 1300, 1311-12 (2d Cir. 1996) (cited in HSUS Opp. at 2, 4,6) (creditor could not substitute itself for another creditor for purposes of circumventing 60 day deadline to object to bankruptcy discharge when nothing had been given from original creditor to moving creditor); *Software Freedom Conservancy, Inc. v. Best Buy Co., Inc.*, 2010 U.S. Dist. LEXIS 125426, at *16-17 (S.D.N.Y. Nov. 29, 2010) (cited in HSUS Opp. at 2) (Rule 25(c) motion denied because there was no transfer of the lawsuit, given that the Asset Purchase Agreement specifically excluded it); *Automated Info. Processing, Inc. v. The Genesys Solutions Grp., Inc.*, 164 F.R.D. 1, 3 (E.D.N.Y. 1995) (no transfer of interest from original party to purported transferee because the original party never

not support the proposition that "a party that lacks standing in an action has no viable interest in that action." HSUS Opp. at 4. Indeed, HSUS must admit in its parenthetical that *Herring* actually says the converse, that a party with no interest in a lawsuit generally has no standing. *Id*. Further, *Herring* is not a Rule 25(c) case, and has nothing to do with joinder or transfer of interests. That this is the closest HSUS could come to support for its argument reveals how meritless it is.

Nothing in the New York statutes or caselaw purports to limit the ability to transfer a cause of action on the basis of its merit or whether it is plagued by some kind of jurisdictional defect that ultimately proves fatal for the plaintiff. *See* N.Y. Gen. Oblig. Law § 13-101 ("**Any** claim … can be transferred[4] except in one of the following cases: [personal injury claims; certain real estate transactions; and where otherwise prohibited by a state or federal statute].") (emphasis added). "Any" claim means any claim, as long as it is not specifically excepted. *See Quantum Corp. Funding, Ltd. v. Westway Indus.*, 825 N.E.2d 117, 119 (N.Y. 2005) (under New York law, claims are generally assignable); *McCormack v. Bloomfield Steamship Co.*, 399 F. Supp. 488, 490 (S.D.N.Y. 1974) (assignment of personal injury cause of action void because it is one of the exceptions to the general rule favoring transferability). As long as the cause of action is not one of the stated exceptions (and FFA's ESA claim against FEI is not), it is transferrable under New York law. There is no limitation that the cause of action must be viable.

Moreover, "[w]here a claim … can be transferred, the transfer thereof passes an interest, … subject to any defense or counterclaim existing against the transferrer," N.Y. Gen. Oblig. Law

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existed). None of these cases supports denying FEI's motion to join HSUS. Here, unlike in *Chalasani*, FEI is not trying to substitute itself to circumvent the bankruptcy rules, and there was an actual transfer from FFA to HSUS. Here, unlike in *Software Freedom Conservancy*, the Contract specifically included this lawsuit. And here, unlike in *Automated Info.*, FFA did exist as a real party; its lack of standing did not make it a fictional entity.

[4] "Transfer" includes "sale, assignment, conveyance, deed and gift." N.Y. Gen. Oblig. Law § 13-109.

§ 13-105, including defenses that show the plaintiff has no right to be in court. *See Amadeo Hotels Ltd. P'Ship v. Zwicker Elec. Co.*, 739 N.Y.S.2d 10, 11 (N.Y. App. Div. 2002) ("as the prior owner's successor-in-interest, [plaintiff] is subject to the same defenses that would have been available to [defendant] against the prior owner, including the statute of limitations."). In *Amadeo*, the fact that Amadeo's claim was barred by the statute of limitations – and thus it had no right to be in court – did not undo the fact that it was the transferee in interest to the lawsuit. Similarly, in *Westervelt v. Dryden Mut. Ins. Co.*, 676 N.Y.S.2d 358, 360 (N.Y. App. Div. 1998), the court held that the assignee's cause of action must be dismissed because "there [wa]s no possible factual or legal basis on which [the] defendant" would be obligated to perform for the assignor, and the defendant thus was "exonerated from potential liability" as a matter of law from the claim by the assignee. There, as here, the assignor transferred a claim that had no possibility of success. The court did not find that the transfer of interest was therefore void or somehow never happened. Rather, it put the transferee in the shoes of the transferor – neither had a case, and it was dismissed. *Id*. The same result should follow here: the interest that FFA had in the ESA case on January 1, 2005 (that of party plaintiff) was transferred to HSUS, subject to all defenses, counterclaims, (and claims to attorneys' fees) FEI had.[5]

A later finding of lack of standing does not retroactively revoke a transfer of interest or make it so that a case never happened. Here, when the transfer of interest took place, FFA had a live, pending case against FEI. At that time, all of the plaintiffs and the Court believed plaintiffs had standing and a cause of action. The D.C. Circuit had ruled that, assuming the allegations in the complaint to be true, FFA was properly a plaintiff in the case based upon Rider's alleged

[5] When FFA transferred its interest in this case to HSUS on January 1, 2005, FEI had filed an answer in which it asserted lack of Article III standing as an affirmative defense and in which it asserted a claim for recovery of attorneys' fees from plaintiffs, including FFA. ECF No. 4 (Answer) at 12-14 (Oct. 8, 2003). Thus, those defenses and claims were transferred to HSUS as well.

standing to sue. *ASPCA et al. v. Ringling Bros. & Barnum & Bailey Circus and Feld Entm't, Inc.*, 317 F.3d 334, 335-38 (D.C. Cir. 2003). Further, the district court also had ruled that FFA's complaint stated a cause of action under the ESA when it denied FEI's Rule 12(b)(6) motion to dismiss. No. 00-1641, ECF No. 34 (July 30, 2003 Order). Despite HSUS's new, self-serving argument that FFA never had standing in the first place, HSUS offers no evidence that HSUS actually believed that at the time it contracted to acquire the case. If, indeed, HSUS believed that FFA's cause of action was frivolous, why did it agree to acquire it and then continue to foster the same frivolous conduct through its control of FFA? At the time of the transfer, it was the law of the case that FFA had standing and a cause of action. Thus, there was in fact something for FFA to transfer to HSUS, regardless of the fact that that cause of action ultimately failed.[6]

The Court's entitlement decision does not retroactively make this case disappear. As the Court itself noted, '"the suit's failure did not make it the less [a lawsuit] brought pursuant to' the" ESA. ECF No. 620 (Mar. 29, 2013 Mem. Op.) at 23 (quoting *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 929 (7th Cir. 2000)).[7] This case – the ESA cause of action – is real. And it has cost FEI more than twenty million real dollars to defend. HSUS cannot capitalize on the fraud it now claims its affiliate perpetrated on the courts (and the vexatious conduct in which it actively participated and that precipitated the Court's decision that FEI is entitled to recover its

[6] Courts have rejected attempts to un-do transfers of causes of action based on the argument that there was "nothing" to transfer. *See, e.g., Renger Mem'l Hosp. v. State*, 674 S.W.2d 828, 830 (Tex. App. 1984) (rejecting hospital's argument that it was error to order assignment of hospital's cause of action to its creditors because it "possessed no cause of action against the directors and therefore possessed no property capable of being turned over.") The court held that a cause of action is a property right that can be assigned, and that whether the cause of action was ultimately unsuccessful is not relevant to whether "[a] cause of action *exists*." *Id*. at 831 (original emphasis).

[7] HSUS's current case-evaporation-via-lack-of-standing argument is akin to the plaintiffs' argument during the entitlement briefing that, because the Court ultimately lacked Article III subject matter jurisdiction over plaintiffs' case, it lacked jurisdiction to rule on FEI's attorneys' fees claim. The Court rejected that argument then, and it should reject HSUS's argument now. The Court's 2013 opinion holding that FEI is entitled to recover its attorneys' fees does not mean that FFA was never a plaintiff or that there never was a lawsuit. Indeed, under HSUS's strained logic, because there was no standing from inception, there would be no vexatious or unreasonable conduct either. However, that abuse of the legal process was very real. And HSUS admits that the case was vexatiously and unreasonably litigated and that FEI is entitled to attorneys' fees as a result, thereby undoing its own argument.

fees (*see* Section V, *infra*)), by arguing that the ESA case never existed because FFA had no standing.[8] As the Supreme Court has held, a "final determination of lack of subject-matter jurisdiction … does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." *Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992).

B. The Doctrines of Law-of-the-Case and Judicial Estoppel Do Not Save HSUS

HSUS's "law of the case" and "judicial estoppel" arguments are unavailing for the same, simple reason – the issue of whether HSUS is FFA's transferee in interest has not previously been litigated and decided in this case.

HSUS's half-hearted "law of the case" argument consists of (1) quotes from the Court about the plaintiffs' lack of standing; (2) statements of the law of case doctrine; and (3) one sentence of argument. HSUS Opp. at 4-5. FEI does not disagree that it is the law of the case that FFA lacked standing. HSUS's one sentence argument that "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)," *id*. at 5, however, doesn't follow from that proposition. Unsurprisingly, HSUS does not provide any authority for its argument. For the law of the case doctrine to apply, it must be "the *same* issue presented a second time in the *same case* in the *same court*." *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999). The issue of whether FFA could transfer its interest in this case to HSUS under Rule 25(c) has not previously been decided in this case. Indeed, the Court specifically reserved decision on the Rule 25(c) issue when it denied HSUS's motion to strike

[8] This type of unreasonable litigation conduct is not common. That the Rule 25(c) cases finding that acquisition of a cause of action makes one a transferee in interest for joinder purposes (*see, e.g.*, *Learning Annex*, 2011 U.S. Dist. LEXIS 86003) did not involve lawsuits that were groundless and unreasonable from their inceptions does not mean that they are not valid support for FEI's motion. *Contra* HSUS Opp. at 7, n.4. HSUS's claim that the parties were joined in those cases because they received a viable interest in the property at issue in the lawsuit misrepresents the cases. None of them causally tied the joinder to the viability of the action. More importantly, none of the cases held that a transfer of interest is undone if the transferor is later found to lack standing, and HSUS was apparently unable to find any cases supporting that argument.

and granted FEI leave to raise the matter at a later time. ECF No. 620 (Mar. 29, 2013 Mem. Op.) at 49. Accordingly, the law of the case doctrine is inapplicable.

Similarly, that FEI has argued that FFA lacked standing does not judicially estop it from arguing that HSUS should be joined as a party plaintiff under Rule 25(c). *Contra* HSUS Opp. at 5-7. As HSUS admits, for judicial estoppel to apply, a party must have assumed a certain position in a legal proceeding and succeeded in maintaining it. *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 799 (D.C. Cir. 2010). FEI has never argued, let alone convinced the Court, that HSUS could not be FFA's transferee in interest because FFA had no standing. Therefore, HSUS's judicial estoppel argument fails.

III. HSUS ALSO BECAME FFA'S SUCCESSOR IN INTEREST BY VIRTUE OF THE EXPRESS ASSUMPTION AND DE FACTO MERGER EXCEPTIONS TO THE RULE AGAINST SUCCESSOR LIABILITY

As FEI argued in its opening motion, the Court need not look beyond the contractual transfer of the ESA cause of action to HSUS in order to grant FEI's motion. *See* FEI Mot. at 3-11. Should the Court do so, however, the successor in interest doctrine provides at least two bases for finding that HSUS is FFA's transferee in interest for Rule 25(c) purposes – express assumption of liabilities and *de facto* merger.

A. HSUS Expressly Assumed Liability in This Case

It is undisputed that under New York law "a corporation that acquires another corporation's assets assumes the latter's liabilities" if the acquiring company "expressly … agrees to do so." *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 205 (2d Cir. 2006). It is also undisputed that HSUS expressly agreed to assume all of FFA's "lawful liabilities."[9] Contract § 1.3; HSUS Opp. at 9 ("HSUS assumed FFA's *lawful* liabilities"). A money judgment ordered by a federal Court is a lawful liability. *See, e.g., Gregris v. Edberg*, 645 F. Supp. 1153,

[9] The Contract only excludes lawful liabilities relating to three pieces of real property not at issue. Contract § 1.4.

1157, 1166 (W.D. Pa. 1986) (describing court judgment, including attorneys' fees, as "lawful liability"), *aff'd* 826 F.2d 1054 (3rd Cir. 1987). A court judgment is a liability legally issued and that can be legally enforced. It is not an unlawful liability, like a debt owed to a bookie or a drug dealer. Indeed, the Court's judgment granting fees to FEI could only be an "unlawful" liability if the Court had no authority to issue the ruling – an argument that HSUS does not make. In fact, HSUS does not even dispute that a court judgment is a lawful liability.

Instead, backed into a corner again by its own Contract, HSUS makes the tortured argument that (1) the Contract doesn't mean what it says; that the term "lawful" in the phrase "lawful liabilities" doesn't refer to the "liabilities" themselves, but rather to the conduct that gave rise to the liability; and (2) because the plaintiffs' litigation conduct was unlawful, HSUS did not assume liability for the lawful judgment resulting therefrom. HSUS Opp. at 9-10. This contorts the phrase "lawful liabilities" beyond recognition.

HSUS's argument is meritless. Under New York law, a court must give effect to the unambiguous language of a contract. *Cruden v. Bank of New York*, 957 F.2d 961, 976 (2d Cir. 1992). Whether a contract is ambiguous is a question of law to be resolved by the Court, *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.S.2d 157, 162 (N.Y. 1990), but here, HSUS does not even argue that the contract is ambiguous. It isn't. The adjective "lawful" modifies the noun "liabilities." It is the liability itself that must be lawful. In the sentence "That is a red wagon," the adjective "red" modifies the noun "wagon." It means the wagon itself is red, not that all of the tools that were used to build the wagon are red.[10] Where, as here, the contract uses unambiguous language, the Court may not look further than its four corners. *W.W.W. Assocs.*, 77 N.Y.2d at 163; *Cruden*, 957 F.2d at 976; *Nicholas Laboratories, Ltd. v. Almay, Inc.*, 900 F.2d 19,

[10] "The language of a contract is not made ambiguous simply because the parties urge different interpretations. Nor does ambiguity exist where one party's view strains the contract language beyond its reasonable and ordinary meaning." *Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992) (internal quote omitted).

20-21 (2d Cir. 1990). The four corners of this Contract unambiguously provide that HSUS assumed all of FFA's liabilities that were lawful (and says nothing about underlying conduct).[11]

HSUS advances two facile, after-the-fact arguments in support of its "lawful liabilities"-means-"lawful conduct giving rise to liabilities"-interpretation. The first is actually an attack on its own (and/or FFA's) draftsmanship of the Contract. HSUS argues that importing Black's Law Dictionary's definition of "liability" ("legally obligated or accountable") into the phrase "lawful liabilities" would yield "lawful legal obligations," which is redundant and thus disfavored under New York law. HSUS Opp. at 12. This has nothing to do with FEI's "interpretation," – it is merely what happens when you apply Black's Law Dictionary's definition to the contractual term – and it is wrong in any event. There is no "redundancy." There can be lawful legal obligations as well as lawful moral or ethical obligations. HSUS assumed the former. This exercise in no way proves that the phrase "lawful liabilities" should be interpreted to mean "liabilities derived from lawful conduct," as HSUS claims. *Id*. at 9.

Second, HSUS argues that to interpret "lawful liabilities" to mean "lawful liabilities" is inconsistent with the "principle of contract interpretation that a contract's terms must be read so that they are consistent with one another." *Id*. at 12. HSUS bases this on two provisions of the Contract – (1) the list of examples of some of the liabilities HSUS assumed, which HSUS admits is "non-exhaustive"; and (2) the "no bribery" warranties FFA and HSUS exchanged – which HSUS claims are inconsistent with the notion that it would assume liabilities arising from unlawful conduct. *Id*. at 13. Neither proves HSUS's point. HSUS does not provide its definition of "unlawful," nor is it defined in the Contract. It is thus impossible to know whether

[11] HSUS claims that 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." HSUS Opp. at 10. Because the contractual language is unambiguous that it is the liability itself, and not the underlying conduct, that must be lawful, FEI has no reason to cite such a case. More importantly, HSUS fails to offer any authority holding that a court-ordered judgment for attorneys' fees, even for frivolous and vexatious conduct, is not a lawful liability.

one of the illustrative examples, such as "liabilities … under … contracts," could encompass liability for "unlawful" behavior, such as refusal to perform under a binding contract. And the "no bribery" warranty relates only to unlawful payments, not all "unlawful activity." Another provision of the Contract, however, affirmatively disproves HSUS's new theory that it only assumed "liabilities derived from lawful conduct."[12] As part of the Contract, HSUS required each FFA employee obtaining employment with HSUS to sign a release of all "liabilities, actions, causes of action, and suits" arising out of the employee's employment with FFA. Contract § 1.5(b)(1)(iii). Using HSUS's logic that a provision should be read consistently with the whole contract and with no superfluous terms, the inclusion of this waiver provision indicates that, without such a waiver, HSUS would have assumed liability for any judgment against FFA for employment discrimination (which is "unlawful").[13] Had HSUS assumed only liabilities derived from lawful conduct, there would have been no need for this waiver provision.

B. HSUS and FFA Underwent a De Facto *Merger*

1. HSUS's "Continuity of Ownership" Argument Fails Because Non-Profits Do Not Have Stockholders, But Can Merge

HSUS argues that "there cannot be a *de facto* merger in the absence of continuity of ownership," and there is no "continuity of ownership" between FFA and HSUS because they are non-profits without stockholders. HSUS Opp. at 16-18. By definition, non-profits do not have stockholders. According to HSUS, then, it would be impossible for two non-profits to merge. This is not the case. *See* N.Y. Not-for-Profit-Corp. Law, Article 9 ("Merger or Consolidation"). Thus, while it may be true that under New York law continuity of ownership – "where the shareholders of the predecessor corporation become direct or indirect shareholders of the

[12] While the Court need not look beyond the plain language of the Contract, HSUS has not even provided any parole evidence that the parties intended the phrase "lawful liabilities" to mean what HSUS now claims it means.

[13] Of course, there is no provision in the Contract pursuant to which third parties like FEI waive their claims for FFA's frivolous and vexatious litigation conduct.

successor corporation" – is a prerequisite to a finding of *de facto* merger of two stockholding corporations, it cannot be the case for the combination of two non-profits. As a result, the cases HSUS cites on pages 16-18, none of which involve non-profits, do not support its argument here.

While HSUS and FFA do not have stockholders, they do have voting members. And as a result of the Contract, FFA's Board members were "assumed into" HSUS's Board of Directors, and HSUS "***took control of the Fund's Board and voting membership***." *See* FFA 2005 IRS Form 990 (FEI Mot. Ex. 4, ECF No. 672-5) at ECF Page 44 of 48 (emphasis added). Also, any person donating $10 to FFA within 12 months of the closing became an HSUS member. Contract § 1.5(e). To the extent that voting Board members or an organization's members are the non-profit analog to corporate stockholders, the continuity of FFA and HSUS is clear.

2. Stating that More than a "Shell" of FFA Remains Does Not Make it True

HSUS tacitly admits, as it must, that the second prong of the *de facto* merger analysis – the "dissolution" prong – is satisfied if the selling entity has "become, in essence, a shell," even without legal dissolution. HSUS Opp. at 18-22 (arguing that FFA is more than a "shell").[14] *See also Fitzgerald*, 730 N.Y.S.2d at 72 ("So long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of a *de facto* merger will be made."). It is thus irrelevant whether FFA still exists on paper.

The Court has before it the Contract,[15] which is all that is necessary to make a determination that FFA was "shorn of its assets." HSUS acquired all of FFA's assets, except for

[14] HSUS misrepresents the law, however, when it argues that dissolution and being left a shell are required. HSUS Opp. at 18. Indeed, the case HSUS cites for this proposition, *In re New York Asbestos Litig.*, 789 N.Y.S.2d 484, 487 (N.Y. App. Div. 2005), states that "the dissolution criterion for a de facto merger may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity 'is shorn of its assets and has become, in essence, a shell.'" (quoting *Fitzgerald v. Fahnestock & Co.*, 730 N.Y.S.2d 70, 72 (N.Y. App. Div. 2001)).

[15] The Court and FEI additionally now have the Omnibus Bill of Sale and Assignment and Omnibus Assumption Agreement between FFA and HSUS. ECF No. 687-4. These documents were not produced in response to FEI's subpoena and Magistrate Judge Facciola's order requiring HSUS to produce documents sufficient to show its

those explicitly excluded. Contract § 1.1. FEI will thus not go through them all, but notes that even as to the excluded assets, HSUS maintains an active role. For example, while FFA retains title to the Black Beauty Ranch, HSUS agreed to "operate" it, to "fund" it, and has "complete discretion to manage" it. *Id*. § 1.5(a). Similarly, while FFA was allowed to keep books and records relating to its incorporation, copies had to be provided to HSUS. *Id*. § 1.2(b). HSUS's current claim that "FFA retained substantial assets" after the "combination," HSUS Opp. at 19, is contradicted by the Contract itself. One of the closing conditions was FFA obtaining approval from the New York Supreme Court, *id*. § 6.1, which only applies when there is a "[d]isposition of all or substantially all assets." N.Y. Not-for-Profit Corp. Law § 510 ("Disposition of all or substantially all assets."). This provision would be superfluous if FFA had in fact kept "substantial assets."

Neither of the cases HSUS cites supports a finding that more than a shell of FFA remains. In *Asbestos Litigation*, the selling company retained substantially more assets than did FFA. Indeed, in almost all instances, HSUS explicitly acquired the assets that the *Asbestos Litigation* court noted the seller retained:

(1) all cash and bank accounts (HSUS got all other than $250,000)[16]
(2) receivables (HSUS got them)[17]
(3) certain claims and choses in action (HSUS got them)[18]
(4) certain raw materials and supplies (HSUS got them)[19]
(5) automobiles (if FFA had them, HSUS got them)[20]
(6) certain real property (HSUS got all real property other than 3 pieces)[21]

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relationship with FFA, and HSUS provides no justification for this omission. ECF No. 231 (Dec. 3, 2007 Order) (granting motion to compel response to Request 1(a)); ECF No. 192-1, at Request 1(a) ("Documents sufficient to show Your relationship with FFA, including but not limited to, documents: (a) memorializing the transaction and/or merger between You and FFA"). Given that HSUS is now relying on these documents to explain the relationship between the two entities, clearly the production of the Asset Acquisition Agreement alone was not sufficient.

[16] Contract § 1.1(c).
[17] *Id*. § 1.1(f) (business records).
[18] *Id*. § 1.1(h).
[19] *Id*. § 1.1(g).
[20] *Id*. § 1.1 (HSUS acquired all assets not excluded); § 1.2 (list of excluded assets does not include automobiles).

(7) agreements related to the business (HSUS got them)[22]

Asbestos Litig., 789 N.Y.S.2d at 487. In *Buja v. KCI Konecranes Int'l*, 815 N.Y.S.2d 412, 416 (N.Y. Sup. Ct. 2006), the selling corporation had ceased its ordinary business before its assets were transferred. Here, in contrast, FFA had not ceased its ordinary business at the time of the "combination" with HSUS, as a result of which, it became a mere shell.

HSUS makes much of the fact that FFA's 2012 IRS Form 990 shows that it has $9 million of net assets. This is smoke and mirrors. HSUS controls how much FFA has. HSUS may put $9 million of assets in the "FFA account," or reduce it to nothing more than the $250,000 FFA retained. FFA "transfer[red] control and governance of the Fund to the HSUS," and HSUS has complete control over all of FFA's money (except for the $250,000). Contract § 7.2 (transfer of control); § 1.1(l) (HSUS acquires "all rights to use, control, exploit, and alienate" the Assets described in subsections (a) through (k), which includes "all cash and cash equivalent items, bank and securities accounts," etc.). The person who signed FFA's 2012 990 (Thomas Waite) is an employee and officer of HSUS, so HSUS has control over what is reported in the FFA 990. Because HSUS could decide to deplete nearly all of FFA's assets, HSUS cannot stand on FFA's 2012 net asset number to argue that FFA is a viable, stand-alone entity.

HSUS's other arguments regarding the viability of FFA, HSUS Opp. at 20-21, are similarly unavailing. While IRS Forms 990 and charitable solicitation registrations are filed in FFA's name, when FFA must submit financial statements to state regulators, it submits HSUS's "consolidated financial statement." *See* FEI Mot. at 16 n.14. All donations FFA receives are "immediately turned over to HSUS." Contract § 10.6. FFA has a board of directors, but those directors were chosen by HSUS. *See* FEI Mot. at 15. As noted above, FFA retains title to the

[21] *Id.* § 1.1(a).
[22] *Id.* §1.1(d) (all right under contracts).

Black Beauty Ranch, but HSUS is responsible for paying for, operating, and managing it. Contract §1.5(a). FFA maintains a New York office, but HSUS leases and operates it. *Id*. § 1.5(c). HSUS did not just "track" the ESA case on its website, *contra* HSUS Opp. at 25, it advertised it (and still advertises it) as one of HSUS's cases. FEI Mot. Ex. 14 (HSUS >> In the Courts >> Current Docket). HSUS's claim that FFA proceeds "with its own litigation, including this action" HSUS Opp. at 21, is disingenuous at best. *See* FEI Mot. at 17, 20-23. Demonstrating that HSUS is grasping at straws, it tries to argue that the fact that FEI noted that FFA President Markarian only spends one hour per week on FFA work is a "concession" that FFA continued to operate after the combination. HSUS Opp. at 21. To the contrary. This fact proves FEI's point. Any corporation that legitimately was more than a shell would require more than one hour per week from its president.

3. It is Undisputed that HSUS Assumed the Liabilities Necessary for Continuation of FFA's Business

The third *de facto* merger criterion is the "assumption by the purchaser of the liabilities ordinarily necessary for the uninterrupted **continuation of the business** of the acquired corporation." *Nat'l Serv. Indus., Inc.*, 460 F.3d at 209 (emphasis added). This is distinct from the "assumption of liabilities" successor liability exception.[23] In its Opposition, HSUS re-hashes its argument that FFA's litigation conduct was unlawful and therefore HSUS did not assume any lawful liability arising from it. HSUS Opp. at 23. What it does not dispute, nor could it, is that HSUS assumed the liabilities necessary for FFA's business. In fact, it stresses that those are just

[23] As discussed in FEI's opening motion, there are four exceptions to the general rule against successor liability: (1) express or implied assumption of liability; (2) *de facto* merger; (3) mere continuation; (4) fraudulent transaction. FEI Mot. at 11. HSUS confuses the assumption of liability exception with the third prong of the *de facto* merger exception. The court in *Subramani v. Bruno Mach. Corp.*, 736 N.Y.S.2d 315, 316 (N.Y. App. Div. 2001) went through three successor liability exceptions in the following order: express assumption of liability; mere continuation; and *de facto* merger. Its comment that the agreement disclaimed liability for products liability claims related to the first exception – express assumption of liability – not to the *de facto* merger exception sub-part related to business liabilities. Thus, it does not support HSUS's argument here.

the type of liabilities it did acquire. *See id.* at 9, 13 (emphasizing that HSUS assumed liability for regular business liabilities, such as "trade payables incurred in the ordinary course of business" and "leases"). It is therefore undisputed that the third *de facto* merger prong is satisfied.

4. HSUS Admits that there is Continuity of Management, Personnel, Location, Assets, and Business Operation

HSUS does not seriously contest that the fourth *de facto* merger criterion is met. HSUS Opp. at 23 (admitting that HSUS and FFA have "shared management, personnel, location, assets, and business operations."). HSUS argues only that satisfaction of the fourth prong is in itself insufficient to establish a *de facto* merger. *Id*. at 26. Perhaps so. But as demonstrated above, there is also continuity of board members, overlapping membership, the stripping of FFA down to a shell, and HSUS's assumption of FFA's regular business liabilities. Therefore, even though all four *de facto* merger criteria are not required, *Asbestos Litig.*, 789 N.Y.S.2d at 486; *Fitzgerald*, 730 N.Y.S.2d at 71, here they all are satisfied to the extent possible for two non-profit corporations.

5. The Rationale Underlying the De Facto *Merger Doctrine Supports a Finding of* De Facto *Merger In This Case*

HSUS claims that without continuity of ownership via stockholders "the entire rationale underpinning the de facto merger theory of successor liability is absent." HSUS Opp. at 18. HSUS is wrong. "[T]he rationale for the merger exception is the conception that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities in order to ensure that a source remains to pay for the victim's injuries." *Buja*, 815 N.Y.S.2d at 418 (internal quote omitted); *Nettis v. Levitt*, 241 F.3d 186, 194 (2d Cir. 2001) (same); *Asbestos Litig.*, 789 N.Y.S.2d at 488 ("the underlying rationale for imposing liability on a successor by merger" is "to ensure that a source remains to pay for the victim's injuries.") (internal quotes

omitted). This case is precisely the type of scenario that implicates this rationale. Allowing HSUS to acquire substantially all of FFA's assets (and pay for them not in stock or in cash, but by acquiring FFA's lawful liabilities) but then shielding HSUS from FEI's attorneys' fees judgment could potentially deprive FEI of a source to fully compensate it for its injuries.[24] *See Minn. Mining & Mfg. Co v. Eco Chem, Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985) (joining corporation "because it succeeded to the assets from which [the plaintiff] may satisfy its judgment."); *Nazario-Lugo v. Caribevision Holdings, Inc.*, 2013 U.S. Dist. LEXIS 24121, at *7-8 (D.P.R. Feb. 19, 2013) (joining parties that "succeeded to the assets from which [the plaintiff] could execute its judgment.").

IV. HSUS HAS RATIFIED ANY FFA "FRAUD"

HSUS argues that the Contract may be unenforceable because HSUS may have been "fraudulently induced" by its "affiliate" FFA into signing the Contract (if FFA in fact bribed Tom Rider in violation of its contractual warranties). HSUS Opp. at 29. Were the payments illegal such that they violated the warranties, or not?[25] FFA either defrauded HSUS or it didn't.[26]

[24] While it is true that based on their 2011 tax filings FFA, AWI, and Born Free have a **combined net worth** of $25 million, HSUS Opp. at 19, it is far from clear that the entirety of that amount would immediately be available to pay the fee judgment, whereas HSUS could easily pay that amount itself, based upon its overall level of net assets, as well as its $20 million line of credit. FEI Mot. Ex. 9, HSUS 2012 Consolidated Financial Statements (ECF No. 672-10) at ECF Page 21 of 25.

[25] It is ironic that HSUS cites the Court's RICO motion to dismiss decision to support its fraudulent inducement argument, HSUS Opp. at 27 ("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"), when at other points in the brief it criticizes FEI's citations to the exact same decision. HSUS Opp. at 16 n.14 & 18 n.16.

[26] The Declaration of HSUS General Counsel Roger Kindler (ECF No. 687-2) is not competent evidence. All it does is state what the Court found and what FEI alleges, and then says that if these claims are true, then FFA breached its warranties. This is insufficient. An "if this, then that" declaration is not evidence, but speculation. Without stating that what the Court found and what FEI alleges is in fact what happened, there is no factual basis for any fraud. Unless the bribes/kickbacks/illegal payments really occurred, there was nothing for FFA to disclose, and thus no factual basis for any argument that the Contract can be voided. *See Lumbermens Mut. Cas. Ins. Co. v. Darel Grp.*, 253 F. Supp. 2d 578, 583 (S.D.N.Y. 2003) (fraudulent inducement requires showing that there was "material false representation."). Indeed, glaringly absent from Kindler's declaration is any statement concerning what HSUS knew about FFA's "fraud," ***and when the organization knew it.***

HSUS seems to hang it hat on its non-committal assertion that it "may have" been defrauded, and just assumes that means it can avoid the Contract entirely. HSUS is wrong.

"A contract induced by fraud is not void." *Ettlinger v. Nat'l Surety Co.*, 221 N.Y. 467, 469 (N.Y. 1917). Rather, it is voidable, but some action must be taken to void it. *Sotheby's Fin. Servs., Inc. v. Baran*, 2003 U.S. Dist. LEXIS 13079, at *18 (S.D.N.Y. July 29, 2003) ("a contract is voidable when it is the product of fraud."), *aff'd* 107 Fed. Appx. 235 (2d Cir. June 29, 2004); *Ettlinger* 221 N.Y. at 469 (a fraudulently induced contract is "voidable at the option of the party defrauded and it requires affirmative action on his part to relieve him of the obligation.").

Ultimately, however, it does not matter whether HSUS was "fraudulently induced" by FFA, because HSUS has ratified the Contract (and the "fraud"), and thus has waived any argument that it is not bound. A party ratifies a voidable contract when it "acts with respect to anything [it] has received in a manner inconsistent with disaffirmance." *Sotheby's Fin. Serv.*, 2003 U.S. Dist. LEXIS 13079, at *18. Once the contract has been ratified, the purportedly defrauded party "cannot succeed on defenses asserting that [it] should not be bound by the contract." *Id.*; *see also Barrier Sys. v. A.F.C. Enter.*, 694 N.Y.S.2d 440, 442 (N.Y. App. Div. 1999) (defendant could not avoid summary judgment by arguing that it was fraudulently induced into contract for lease of defective equipment where it "continued to use the leased equipment after learning of the alleged fraud and bait and switch tactics in which the plaintiff allegedly engaged.").

HSUS has been on notice of FEI's allegations regarding the Rider payments since at least February 2007, when FEI filed its motion for leave to file a RICO counterclaim (ECF No. 121) and served it on counsel for plaintiffs, which included Jonathan Lovvorn, HSUS's Vice President for Animal Protection Litigation and counsel of record for all plaintiffs in this case through June

2012, who was personally involved in all strategic litigation decisions.[27] Yet in the intervening seven years, HSUS did nothing to disaffirm any "fraud." It did not void the Contract and return the more than $18 million in assets it acquired, nor did it sue FFA for damages. *See Ettlinger*, 221 N.Y. at 470 (defrauded party can avoid contract "only on the condition of returning what he has received under it" or "[i]f he elects not to avoid it he has an independent cause of action for damages arising from the fraud."); *Bazzano v. L'Oreal, S.A.*, 1996 WL 254873, at *3 (S.D.N.Y. May 14, 1996) (defrauded party can "avoid the contract and return any consideration" received or affirm the contract and sue for damages). If HSUS really believed it was defrauded, it would have fired Michael Markarian, the apparent perpetrator of the "fraudulent inducement," and sued FFA for damages. It did neither (nor did it void the Contract and return the $18 million worth of FFA assets). Markarian is still on HSUS's payroll to this day, so HSUS has fully embraced his conduct. Indeed, aside from non-committally throwing this concept around in its briefing, HSUS continues to operate as if the Contract is valid; it is business as usual for HSUS and FFA.

Moreover, not only did HSUS not "disaffirm" the alleged fraud, it affirmatively participated in it. HSUS General Counsel Roger Kindler as well as HSUS attorney Jonathan Lovvorn participated in the preparation for Markarian's Rule 30(b)(6) deposition, FFA Dep., excerpts attached as Ex. 2, at 12 & 22, during which Markarian failed "to disclose the[] payments to Mr. Rider through MGC and WAP even when specifically asked about Mr. Rider's funding." ECF No. 559 (Dec. 30, 2009 Mem. Op.), Finding of Fact ("FOF") 57.[28] Lovvorn and

[27] *See* 5-30-08 Hearing Tr., excerpts attached as Ex. 1, at 145 ("I am counsel of record to all the Plaintiffs in the case."); ECF No. 288 (Plaintiffs' Reply in Opp. to Mot. to Quash) (4-10-08), at 23-24 ("Contrary to FEI's contention that Mr. Lovvorn is not 'really counsel of record,' … as reflected in both the Court's official docket and its many published opinions concerning this case, Mr. Lovvorn has in fact acted, and is continuing to act, in that capacity: indeed, he has fully participated in providing legal advice to plaintiffs concerning all significant strategy decisions in this case both before and after leaving Meyer, Glitzenstein & Crystal in 2005.").

[28] The payments were specifically noticed as a subject matter of inquiry for FFA's Rule 30(b)(6) deposition, and presumably would have been discussed by Kindler, Lovvorn and Markarian during the prep session. Ex. 2, FFA

HSUS attorney Ethan Eddy also participated in conference calls with the plaintiffs' representatives and counsel about the Rider payments. *See* 2-26-08 Hr'g Tr., excerpts attached as Ex. 3, at 114-15, 121 & 214; 3-6-08 Hr'g Tr., excerpts attached as Ex. 4, at 9. Lovvorn even personally transmitted six of the payments to WAP for Rider after the 01-01-05 combination, thus continuing the unlawful payments on HSUS's watch with HSUS money, HSUS checks and HSUS cover letters. *See* FEI Mot. at 22 and sources cited therein. As with Markarian, HSUS has not terminated any of these employees involved in the purportedly illegal payments. Having ratified the Contract both by failure to disaffirm and by actively perpetrating the fraud, HSUS cannot now argue fraudulent inducement to avoid joinder. *See Lindenwood Dev. Corp. v. Levine*, 578 N.Y.S.2d 209, 210 (N.Y. App. Div. 1991) (fraudulent inducement defense barred because plaintiffs made payments on voidable contract and failed "to disaffirm or take action when learning of the alleged fraud," and "elected to regard the contracts as valid until they were sued").

V. HSUS'S ARGUMENT THAT SANCTIONS CANNOT BE TRANSFERRED TO A NON-PARTY MUST BE REJECTED AS THE RED HERRING THAT IT IS

In multiple places HSUS argues that it would be against public policy to make HSUS pay for the attorneys' fees "sanction" assessed against the plaintiffs. HSUS Opp. at 8, 14. HSUS, however, is not a third party who had nothing to do with the sanctioned conduct and who would be joined purely due to an indemnification contract.[29] Indeed, as the chart below demonstrates, many of the Court's reasons for holding that FEI is entitled to recover its fees are based on

Dep., Ex. 1 thereto, Topic No. 15 ("The circumstances surrounding and amount of any money or other form of remuneration, reimbursement, or coverage for expenses paid by any Plaintiff or any animal activist to any former employee, consultant, or contractor of Defendant during the Relevant Time Period.").

[29] HSUS's citations to such cases, HSUS Opp. at 14, are thus inapposite.

events that took place **after** FFA had "transfer[red]" its "causes of action" to HSUS (Contract § 1.1(h)) and HSUS assumed "control" of FFA (*id.* § 7.2):

Conduct	**Court's Description**	**Date**
Pursued Frivolous Claim	"The organizational plaintiffs' claim of economic injury – taken up to the brink of trial by all the organizational plaintiffs, abandoned by all but API during trial, and pursued through trial and appeal by API – was likewise, 'not supported by any competent evidence.'" (p. 16)[30]	FFA/HSUS pursued this theory until trial, in 2009
Abandoned Claims For Relief	Most organizational plaintiffs (including FFA/HSUS) "dropped out of the case during the trial, after forcing FEI to prepare a defense against each of them." (p. 3); (p. 15) (abandoned at trial); (p. 27) (same)	2009
	Plaintiffs abandoned the only forms of relief that could have redressed Rider's injuries. (p. 13)	Abandoned forfeiture in 2008 Abandoned injunctive relief in final argument at trial in 2009
Paid Rider	"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 …. ." (p. 8)	FFA/HSUS payments continued after 1/1/2005, including 6 payments made by HSUS (*see* FEI Mot. Ex. 18, WAP ledgers, DX 50[31])
	"Rider was paid continuously and without interruption throughout the litigation" "in such a way as to avoid ready detection." (p. 10)	
Concealed Rider Payments	The organizational plaintiffs "sought to conceal the nature, extent and purpose of the payments from FEI during the litigation …" (p. 8)	FFA/HSUS did not disclose payments to Rider when asked about it at 30(b)(6) deposition in June of 2005 (FOF 57)
	"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	

[30] Citations in this column are to the Court's March 29, 2013 Memorandum Opinion (ECF No. 620).

[31] "DX" refers to an FEI trial exhibit.

Conduct	**Court's Description**	**Date**
	to Rider in the summer of 2007. FOF 57" (p. 11)	
	"Plaintiffs prolonged the litigation by … attempting to conceal the nature and extent of Rider's funding." (p. 27)	
Pursued Case When Should Have Known No Plaintiff Had Standing	"Rider himself used the bullhook on the elephants, a fact which plaintiffs … knew by no later than 2005, when FEI produced photographs of Rider using a bullhook." (p. 9) (original emphasis)	2005
	"Plaintiffs … knew that Rider had made zero effort [to see relocated elephants] by no later than Rider's deposition in 2006," and when Rider was deposed again in 2007 "plaintiffs … knew that Rider visited the zoo once as part of the 'media work' which plaintiffs and counsel were paying him to perform, but still had made no effort to see the other two elephants." (p. 12)	2006 2007
	Plaintiffs produced a 2006 videotape in which Rider "described one of the elephants to whom he claimed an attachment as a 'bitch' and a 'killer elephant' who 'hated' him and would hurt or kill him if she could." (p. 12)	Video made in 2006; produced in discovery in 2007

A defendant is entitled to attorneys' fees under *Christiansburg* not just when a frivolous, unreasonable, or groundless case is filed, but when "the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Because this case continued to be frivolous, unreasonable and groundless after HSUS acquired it and took "control" of FFA on January 1, 2005, and provided its own employees (Lovvorn and Ockene) to participate in the case as counsel of record for all plaintiffs all the way through June 2012, HSUS cannot now be heard to argue that it would be against public policy for it to be held responsible for a fee judgment. As HSUS itself proclaims, "[a] party must be held to account for its own conduct in litigation." HSUS Opp. at 8.

VI. FEI'S MOTION WAS MADE "AT AN APPROPRIATE TIME AND IN AN APPROPRIATE POSTURE"

HSUS's suggestions that FEI's motion was filed too late is contrary to the Court's order and caselaw which holds that a Rule 25(c) motion may be made and granted at any time. The Court allowed FEI to file its motion "at an appropriate time and in an appropriate posture." ECF No. 620 (Mar. 29, 2013 Mem. Op.) at 49. The Court did not order that the motion be filed at any particular time, and properly so. "Since Rule 25(c) is wholly permissive there is no time limit on moving to substitute under its provisions." 7C Wright & Miller, *Federal Practice and Procedure* § 1958 at 704 (3d ed. 2007). "[I]t is well established that under Rule 25(c) a court can substitute [or join] parties, even after judgment … ." *Greater Potater Harborplace, Inc. v. Jenkins*, 1991 U.S. App. LEXIS 11015, at *12 (4th Cir. May 31, 1991); *see also Arnold Graphics Indus., Inc. v. Indep. Agent Ctr., Inc.*, 775 F.2d 38, 40 (2d Cir. 1985) (affirming district court's substitution of successor corporation for original defendant after entry of judgment).[32] HSUS's insinuation that FEI's motion is untimely is baseless.

Indeed, the joinder of HSUS is proper at this juncture because plaintiffs have forecast that they intend to argue, in response to FEI's Fee Petition, that their resources should be considered as an equitable factor to reduce the judgment amount. Though they have yet to provide any authority in support of this argument, if the Court is to consider the resources available to pay the judgment, then HSUS's must be considered as well. *See* ECF No. 672-3 (HSUS 2012 Annual Report) at Page 35 of 39 (showing that HSUS has more than $215 million dollars in net assets).

[32] To the extent that other, unreported cases from other district courts have denied Rule 25 motions and noted the timing of the motion, *see* HSUS Opp. at 32-33, they each had an independent basis for denying the motion. In *McKesson*, 2006 WL 658100, at *1, the corporation that the plaintiff sought to join as a defendant had specifically excluded liabilities relating to the lawsuit from its asset purchase agreement with the named defendant. In *Dekalb Genetics Corp. v. Pioneer Hi-Bred Int'l*, 2011 U.S. Dist. LEXIS 10985, at *10-19 (N.D. Ill. July 31, 2001), the defendant failed to make the necessary showing to pierce the corporate veil, and the reason the defendant sought to join an additional plaintiff was to circumvent the expired discovery deadline. In *Pan Am.*, 1987 U.S. Dist. LEXIS 15182, at *6, Rule 25(c) did not even apply because there was no transfer of interest.

HSUS provides no response to this argument, nor did any other plaintiff join HSUS's motion or file their own opposition and disclaim this intention.

HSUS has no argument that its joinder will slow down or complicate the case. Rather, it argues that "consideration" of the Rule 25(c) motion itself delays the case. HSUS Opp. at 32 ("consideration of [FEI's Rule 25] motion will slow and complicate matters tremendously, which in itself is a reason to deny it."; "consideration of this motion will require an indefinite stay of the parties' briefing on FEI's Fee Petition … ."); *id*. at 35 ("because consideration of FEI's Rule 25(c) motion will unnecessarily complicate and prolong this litigation … this Court should … deny [it]."). This makes no sense. That horse has already left the barn. The Court must "consider" the motion, whether it grants or denies it.[33] It should be granted if having HSUS in the case – the joinder itself – will expedite and simplify the action, which it will. *Learning Annex*, 2011 U.S. Dist. LEXIS 86003, at *5.

As FEI noted in its opening motion, courts have granted Rule 25 motions where, as here, the joinder of the additional party would aid in execution of the judgment. *E.g., Greater Potater*, 1991 U.S. App. LEXIS 11015, at *12 ("[I]t is well established that under Rule 25(c) a court can substitute [or join] parties … where substitution [or joinder] of a party is necessary for the enforcement of the judgment."); *Learning Annex*, 2011 U.S. Dist. LEXIS 86003, at *5 (granting Rule 25(c) motion because it would be "easier to satisfy th[e] judgment with the suit's rightful owner listed as a party."). It will be simpler and more efficient for FEI to enforce its fee judgment if all payors are listed on the judgment. Otherwise, it would have to file a separate

[33] The same is true for any evidentiary hearing the Court may hold. An evidentiary hearing is not necessary because HSUS specifically contracted to acquire FFA's interest in this case, and there is thus no genuine issue of material fact. *See Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 72-73 (3d Cir. 1993); *see also* FEI Mot. at 10-11; 23-24. Moreover, HSUS has not even offered any facts that might be revealed at such a hearing that would belie a finding of successor liability. However, if the Court determines that such a hearing is necessary to resolve the motion, then so be it. Such a hearing is part of the Court's "consideration" of the motion, and not a reason in itself to deny it.

enforcement action against HSUS. HSUS's argument in opposition is circular – that it should not be joined as a party because joinder will not help execute the judgment because all of the parties will already be listed on the judgment because HSUS isn't a party. HSUS Opp. at 34-35. This assumes away the very heart of FEI's motion – that by virtue of the Contract HSUS became a party and is bound by a judgment against FFA even without formal joinder, but that joinder should be granted to simplify the execution of FEI's forthcoming judgment.

VII. CONCLUSION

The material facts are undisputed. The Contract is unambiguous. FFA transferred its interest in this case to HSUS. HSUS doesn't get a "take-back" because the case ended up going poorly for plaintiffs. The Contract does not make an exception for lawful liabilities that are the consequences of unreasonable and vexatious litigation conduct. And HSUS ratified and actively participated in that conduct in any event. HSUS controls FFA both by law (by virtue of the contractual language) and in fact – through the governing bodies, employees, assets, locations, etc. HSUS is responsible, in every sense of the word, for the outcome of this case vis-à-vis FFA.

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Respectfully submitted,

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