UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. No. 07-1532 (EGS)**
	)	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANT THE HUMANE SOCIETY OF THE UNITED STATES'S REPLY IN SUPPORT OF ITS SUPPLEMENTAL MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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I. INTRODUCTION

FEI's opposition confirms that there are no viable RICO claims against HSUS – an organization distinct and separate from FFA. That is, FEI's opposition hinges entirely on the legally erroneous assumption that FFA's alleged RICO liabilities can be imputed to HSUS through successor liability. To that end, FEI raises a series of baseless arguments in an apparent attempt to postpone the inevitable. None has merit. First, FEI argues that HSUS's submission of exhibits with its motion to dismiss was improper despite clear authority in the D.C. Circuit to the contrary. Second, FEI argues that HSUS is responsible for all of FFA's racketeering despite the fact that (1) HSUS and FFA never merged (*de facto* or otherwise) and (2) HSUS never assumed FFA's RICO liabilities – both requisites for FEI's new successor liability claim. Accordingly, since there is no cognizable entity called FFA/HSUS to hold liable, and because FEI's RICO claims against FFA (a separate and distinct defendant in this action) cannot be imputed to HSUS as a matter of law, FEI's claims against HSUS must be dismissed. *See* Fed. R. Civ. P. 12(b)(6).

II. THIS COURT MAY PROPERLY CONSIDER THE DOCUMENTS ATTACHED TO HSUS'S MOTION TO DISMISS.

The law in this Circuit is clear that where documents "are referred to in the complaint and are integral to [plaintiff's] claim," such documents attached to a motion to dismiss may be considered without converting the motion to one for summary judgment. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004) (citations omitted); *see Hinton v. Corrections Corp. of Am.*, 624 F. Supp. 2d 45, 47 (D.D.C. 2009) (considering contract attached to motion to dismiss; "[b]y pleading that the defendant had a duty to provide him with eye treatment and care, the plaintiff's complaint necessarily rests on the contract, although it did not incorporate the contract"); *Navab-Safavi v. Broadcasting Bd. of Governors*, 650 F. Supp. 2d 40, 56 n.5 (D.D.C. 2009) (considering video attached to motion to dismiss; "[b]ecause the video is a document upon which the

complaint necessarily relies, and because plaintiff does not dispute its authenticity, the Court may consider the video without converting defendants' motion to dismiss into a motion for summary judgment"); *Aguirre v. SEC*, 671 F. Supp. 2d 113, 117 n.3 (D.D.C. 2009) (considering report attached to motion to dismiss); *see also Furman v. Cirrito*, 828 F.2d 898, 900 (2d Cir. 1987) (considering contract for sale of partnership assets attached to motion to dismiss in affirming dismissal of RICO claims).

Here, there is no question that the documents attached to HSUS's supplemental motion to dismiss, such as the Asset Acquisition Agreement between FFA and HSUS, are referred to in the Amended Complaint either expressly or implicitly, and are integral to plaintiff's claims, including FEI's successor liability claim.[1] Accordingly, this Court may properly consider such documents without converting the motion into one for summary judgment.[2]

III. FEI'S RICO CLAIMS AGAINST HSUS MUST BE DISMISSED BECAUSE FFA'S ALLEGED ACTIONS CANNOT BE IMPUTED TO HSUS UNDER SUCCESSOR LIABILITY.

A. HSUS is Not Responsible for FFA's Alleged Unlawful Racketeering – FFA is Responsible.

FEI now claims that successor liability applies because (1) the FFA/HSUS combination was a *de facto* merger and (2) HSUS assumed FFA's liabilities. Neither claim has merit.

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[1] (*See, e.g.*, Am. Compl. ¶ 36 (referring implicitly to the FFA/HSUS Asset Acquisition Agreement); ¶¶ 217-222 (referring expressly to Michael Markarian's Rule 30(b)(6) testimony in the ESA Action).

[2] In addition, "[w]here plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated." *Cortec Indus., Inc. v. SUM Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (holding district court could properly consider stock purchase agreement on motion to dismiss even though it was not public document, not incorporated into the complaint by reference, and not attached to the complaint; plaintiffs had notice of the stock purchase agreement and it was integral to their claim). Here, there can be no genuine dispute that FEI has had notice of all of the documents attached to HSUS's motion to dismiss for years. FEI's authorities (Pl.'s Opp'n at 2 n.3) are not to the contrary.

FEI's further assertion that "HSUS's invocation of 'judicial notice' is unavailing" (Pl.'s Opp'n at 2) is incorrect. At a minimum, this Court can and should take judicial notice of the fact that HSUS was **never** a party to the ESA Action. (*See* HSUS Mot. at 1); *see also* Fed. R. Evid. 201(b). FFA – not HSUS -- was the plaintiff **before** the corporate combination, and remained the plaintiff **after** the corporate combination in 2005. (ESA Action Docket.)

1. FFA and HSUS did not merge as a matter of law.

FEI's repeated assertion that this Court must assume the truth of FEI's allegation that FFA and HSUS "merged" in 2005 is baseless. (Pl.'s Opp'n at 3.) FEI's allegation of a "merger" is merely an unsupported legal conclusion. The FAC does not and cannot allege sufficient facts to support such a claim. For example, there is no requisite allegation that FFA ceased to exist after the combination with HSUS. *See* 20 Am. Jur. Proof of Facts 2d 609. On a motion to dismiss, the Court must reject such unsupported legal conclusions and unwarranted factual inferences. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

As a matter of black-letter corporate law, FFA and HSUS did not "merge" as alleged in the FAC. "The transfer of the assets of one corporation to another does not, of itself, create a merger." *Fidanque v. American Maracaibo Co.*, 33 Del. Ch. 262, 270, 92 A.2d 311, 316 (1952). "A corporate merger consists of a combination whereby one of the constituent corporations remains in being, absorbing in itself all the other constituent corporations, which cease to exist." (*See* HSUS Mot. at 8 (citing 20 Am. Jur. Proof of Facts 2d 609).)[3] "The significance of the distinction between an asset transaction and a merger or consolidation is that a merger or consolidation gives rise to certain rights and obligations not present with a mere sale of assets." 19 Am Jur. 2d Corporations § 2300. Here, FEI does not and indeed cannot allege that FFA and HSUS entered into a formal statutory merger or that HSUS and FFA became a single corporation. FFA did not cease to exist after the corporation combination, as required for a

[3] FEI cites N.Y.Not-For-Profit Corp. Law 905(b)(3) for the unremarkable proposition that a successor corporation after a merger inherits the liabilities of the predecessor corporation. (Pl.'s Opp'n at 3.) Here, however, FEI has not and indeed cannot show the requisite factual predicate to adequately allege a merger between HSUS and FFA. Under New York law, a merger is a statutory procedure by which two or more constituent corporations become a **single corporation**. *See* N-PCL § 901 (governing mergers of not-for-profit corporations).

corporate merger. Instead, FFA continued to operate as a separate and distinct organization from HSUS. (HSUS Mot. at 2-3.)[4]

FEI's opposition all but concedes this point. Instead, FEI now claims that FFA and HSUS entered into a *de facto* merger – a claim found nowhere in its 354-paragraph, 129-page FAC. (*See* Pl.'s Opp'n at 4 ("[I]f not a merger, the FFA/HSUS combination was a *de facto* merger.").) FEI, however, fails to plead sufficient facts to support a *de facto* merger claim either. That is, the FAC does not and indeed cannot allege that FFA dissolved after execution of the Asset Acquisition Agreement, a requisite allegation for a *de facto* merger:

> A *de facto* merger occurs where one corporation is absorbed by another, but without compliance with statutory requirements for a merger. . . . To find that a *de facto* merger has occurred **there must be** . . . **a dissolution of the selling corporation**. . . . . Such a merger makes the **surviving** corporation liable for the claims against the **predecessor** corporation.

(*See* Pl.'s Opp'n at 5 (quoting *Arnold Graphics Ind., Inc. v. Ind. Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985)) (internal citations omitted) (emphasis added).

Here, FFA did not dissolve following the combination with HSUS. (*See* HSUS Mot. at 2-4.) FFA, by the express and unambiguous terms of the Agreement, survived the Asset Acquisition. (*Id*. (citing Ex. A at § 1.2.) Therefore, since FFA did not dissolve under the express terms of the Asset Acquisition Agreement, but in fact remained a separate and distinct organization with specific assets and operational programs, including cash, books and records, records related to financial statements, real property, its own fundraising identity, its own income stream, and its own litigation, there was no *de facto* merger as a matter of law.[5] *See Cargo*

[4] FEI's reliance on public statements about the Asset Acquisition Agreement is misplaced. (Pl.'s Opp'n at 4.) Such parole evidence has no legal significance. "Evidence of surrounding circumstances is admissible only where the written contract is ambiguous." *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1556 (D.C. Cir. 1991). Here, the relevant terms of the Asset Acquisition Agreement are unambiguous and FEI does not argue otherwise.

[5] FEI's reliance on Markarian's hearing testimony (Pl.'s Opp'n at 6) demonstrates that there are no facts in dispute on this point. It is undisputed that even after the combination, there were still "persons working for FFA." *Id.* FEI

Partner AG v. Albatrans Inc., 207 F. Supp. 2d 86, 112-14 (S.D.N.Y. 2002) (holding complaint's allegations "insufficient to state a basis for a de facto merger"; complaint failed to allege that predecessor corporation **dissolved** as part of the transaction); *see, e.g., Douglas v. Stamco*, 363 F. App'x 100, 102 (2d Cir. 2010) (affirming district court's grant of defendant's motion to dismiss for failure to plead successor liability; predecessor **entity survived** the asset sale as a bankrupt entity, which "render[ed] the mere continuation exception unavailable to breathe life into plaintiff's successor liability claim") (emphasis added).[6]

2. HSUS did not assume FFA's alleged RICO liabilities.

Likewise, FEI's claim that HSUS assumed FFA's alleged RICO liabilities is also an erroneous legal conclusion that ignores the plain language of the Asset Acquisition Agreement. HSUS only assumed FFA's *lawful* liabilities:

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thus appears to concede, as it must, that even after the combination, FFA remained an active organization. Likewise, HSUS's reliance on HSUS's current website does not create a fact issue that HSUS was a plaintiff in the ESA Action. (Pl.'s Opp'n at 6.) This Court can and should take judicial notice of the fact that HSUS was never a party to the ESA Action. FFA was the plaintiff both before and after the combination. The mere fact that HSUS tracked a significant case on its website related to animal treatment is neither surprising nor evidence of a merger.

[6] FEI's claim that the FFA and HSUS combination is an "issue of fact" not properly resolved on a 12(b)(6) motion completely ignores the express, unambiguous, and undeniable terms of the Asset Acquisition Agreement, which this Court may take into account on a motion to dismiss. For this reason, FEI's citations to *Software Freedom Cons., Inc. v. Best Buy Co*., 2010 U.S. Dist. Lexis 125426 at *21 (S.D.N.Y. 2010), *Wallace v. Midwest Fin. & Mortg. Serv. Inc*., 728 F. Supp. 2d 906 (E.D. Ky. 2010), *Rotherberg v. Chloe Foods Corp*., 2007 U.S. Dist. Lexis 53914 (E.D.N.Y. 2007), and *R.C.M. v. Rols Capital Co*., 901 F. Supp. 630, 636 (S.D.N.Y. 1995), are all inapposite.

Moreover, FEI's reliance on FFA's 990s supports dismissal of FEI's RICO claims against HSUS. FEI's claim that HSUS did not identify FFA as an "affiliate organization of [HSUS]" to this Court (Pl.'s Opp'n at 7) is simply untrue. HSUS pointed out to this Court in no uncertain terms that "[t]he Agreement was designed to create an **affiliation** between the two organizations but did not effect a merger." (HSUS Mot. at 2 (bold added, underline in original).) In addition, the fact that the two organizations have overlap in boards of directors (Pl.'s Opp'n at 7) does not establish a *de facto* merger. *Ioviero v. Ciga Hotels, Inc.*, 101 A.2d 825, 852-53, 475 N.Y.S.2d 880, 881 (1984) ("The fact that plaintiffs may discover that the two corporations have identical controlling shareholders, officers, and directors does not, by itself, warrant disregarding the separate corporate entities"; dismissing complaint "on ground that the plaintiffs had sued the wrong party").

Finally, while FEI claims that "[h]aving opposed discovery, HSUS is in no position to burden the Court with fact issues not appropriately addressed until discovery has been allowed," (Pl.'s Opp'n at 2-3), FEI's opposition does not identify a single proposed discovery request that would create a genuine issue of material fact regarding the terms of the Agreement.

> **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 (Assumed Liabilities) . . .:

(HSUS Op. Br. Ex. A § 1.3 (emphasis added).) This narrow assumption of **lawful** liabilities, which includes liabilities under (a) trade payables, (b) agreements and contracts, (c) promissory notes, (d) leases; (e) annuity contracts; and (f) employee benefit programs, does not include the alleged **unlawful** RICO violations asserted against FFA in this action. (*Id*. § 1.3(a)-(f).) In fact, the entire assumption of liabilities section is "[s]ubject to the conditions specified in this Agreement," including the representations FFA made to HSUS in Section 2.10: "No officer, director, employee, or agent of [FFA] has been or is authorized to make or receive, and [FFA] knows of no such person **making** or receiving, **any bribe**, kickback, or other **illegal payment** at any time." (*Id*. § 2.10 (emphasis added).)[7] Accordingly, under the express terms of the Agreement, HSUS did not assume FFA's alleged unlawful RICO liabilities.

3. The law of successor liability is therefore inapplicable.

A non-profit corporation, such as HSUS, which acquires the assets of another non-profit corporation, such as FFA, "is generally not liable for the seller's liabilities." *Douglas*, 363 F. App'x at 101 (citation omitted).

FEI's attempt to circumvent this general rule of non-liability by imputing FFA's potential RICO liabilities to HSUS through successor liability is unavailing. FFA remained a separate and distinct entity after the combination, which retained its own RICO liabilities. Successor liability, however, **only** applies to RICO claims where: "(1) the successor expressly or impliedly assumed the predecessor's [RICO] liability, (2) there was a consolidation or merger of seller and

[7] FEI's opposition makes the bizarre proffer that "[i]f this representation was made to insulate HSUS from liability for FFA's Rider payments, then the fraud exception to successor liability applies." (Pl.'s Opp'n at 5 n.7.) FEI, however, must concede that no such allegation can be found in the FAC. And for good reason. FEI could not possibly make such a fraud claim in good faith. Nor would such a claim survive scrutiny. *See* Fed. R. Civ. P. 9(b).

purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations." *Id.* at 102 (internal brackets and citation omitted). Therefore, because FEI has failed to adequately allege that (1) HSUS assumed FFA's RICO liabilities, and/or that (2) the Asset Acquisition Agreement constitutes a *de facto* merger (*see* Pl.'s Opp'n at 4), successor liability is inapplicable here.

As demonstrated above, there was no merger (*de facto* or otherwise) between HSUS and FFA. FFA neither ceased operations after the corporate combination nor dissolved. (*See* HSUS Mot. at 2-3.) Nor is there any allegation in the FAC or in FEI's opposition that FFA cannot satisfy its own RICO liabilities. And, under the express terms of the Agreement, HSUS did not assume FFA's unlawful liabilities for any alleged RICO violations. (*Id*. § 1.3(a)-(f).) Therefore, "this case does not implicate the underlying rationale for imposing liability on a successor by merger, namely, to ensure that a source remains to pay for the victim's injuries." *In re New York City Asbestos Litigation*, 15 A.D.3d 254, 258, 789 N.Y.S. 2d 484 (2005) (holding that subject transaction was not a de facto merger; selling entity did not dissolve under Asset Purchase Agreement). Here, FFA can stand (and is standing) in this action for its own alleged RICO violations. Accordingly, FEI's RICO claims against HSUS as a "successor" must be dismissed.[8]

[8] *See Fehl v. S.W.C. Corp*., 433 F. Supp. 939, 946 (D. Del. 1977) ("In refusing to find a *de facto* merger or continuation, the courts relied primarily on the fact that . . . the seller corporation **continued to exist** for a period of time after the sale, and that the seller corporation continued to possess substantial assets with which to satisfy demands of creditors") (emphasis added); *see also Schumacher v. Shear Co., Inc*., 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 (1983) ("The only arguable basis upon which plaintiffs can predicate a finding of successor liability is to characterize Logemann as a 'mere continuation' of Richards Shear Company. The exception refers to corporate reorganization, however, where only one corporation survives the transaction; the predecessor corporation **must be extinguished**. Since Richards Shear **survived** the instant purchase agreement as a distinct, albeit meager, entity, the Appellate Division properly concluded that Logemann cannot be considered a mere continuation of Richards Shear.") (emphasis added) (internal citations omitted).

B. The FAC Fails to Adequately Allege A Claim Against HSUS as a Separate and Distinct Organization from FFA under 18 U.S.C. §§ 1962(c) or (d).

Despite FEI's legally erroneous contention to the contrary, as a matter of law, FFA's alleged racketeering is not attributable to HSUS. As demonstrated above, successor liability is inapplicable here. (*See supra* at 6-7.)

FEI's further claim that "[t]he FAC pleads specific racketing acts committed by HSUS as well" is equally erroneous and cannot survive judicial scrutiny. (Pl.'s Opp'n at 9.) FEI concedes that HSUS's motion to dismiss must be granted if the FAC does not set forth a claim that is "plausible" on its face. (Pl.'s Opp'n at 1 (citing *Iqbal*, 129 S. Ct. at 1949-50).) Here, FEI fails to confront that the FAC lacks a sufficient allegation that HSUS *knowingly* participated in the alleged criminal enterprise. FEI has not adequately pleaded that HSUS – as distinct from FFA – "'knowingly implement[ed] decisions' by the enterprise's managers to commit crimes." *In re Ins. Brokerage Antitrust Lit.*, 618 F.3d 300, 378 (3d Cir. 2010).

Moreover, FEI's citation to *Reves v. Ernst & Young*, 507 U.S. 170 (1993), supports dismissal. *Reves* mandates that a pattern of racketeering requires "at least two acts of racketeering activity." 507 U.S. at 183. Here, FEI's opposition claims eight such acts (Pl.'s Opp'n at 9-10). None, however, are "plausible" in the face of the ESA record. *See Iqbal*, 129 S. Ct. at 1949-50. First, there is no requisite allegation that HSUS **knew** that FFA's funds were intended for Rider. Therefore, to the extent that HSUS transmitted FFA's payments to WAP, HSUS was merely an "unwitting participant" in processing those checks. (HSUS Mot. at 8.) FEI's opposition fails to confront that RICO liability cannot attach solely because HSUS processed/transmitted checks to WAP for FFA.[9] Second, FEI fails to acknowledge that FFA's

[9] This Court can consider Markarian's deposition testimony, which is incorporated in the FAC by reference. (*See* Am. Compl. ¶¶ 217-222). *See supra* at 1-2. In addition, Markarian's trial testimony is a matter of public record, which this Court considered in the ESA Action. *Offutt v. Kaplan*, 884 F. Supp. 1179, 1187 (N.D. Ill. 1995) ("Since

Rule 30(b)(6) deposition applied to FFA only – not HSUS. (HSUS Mot. at 4-5.)[10] Under Rule 30(b)(6), an organization must designate a person to "testify about information known or reasonably available **to the organization**." Fed. R. Civ. P. 30(b)(6) (emphasis added). FFA did so. HSUS did not. As such, since HSUS neither knowingly participated in the alleged enterprise's affairs nor knowingly committed two predicate acts of racketeering, FEI's Section 1962(c) claim must be dismissed.

Finally, FEI's opposition confirms that its Section 1962(d) claim must be dismissed. FEI does not dispute that RICO conspiracy law requires the same scienter as traditional conspiracy law. *See Salinas v. United States*, 522 U.S. 52 (1997). Here, the FAC fails to allege the requisite scienter. There is no specific allegation that HSUS had knowledge regarding FFA's alleged intent to use HSUS's disbursements of FFA monies to allegedly bribe Rider. Without such an allegation, however, HSUS and FFA cannot be considered to be joined in a conspiracy to bribe Rider through FFA's payments to WAP. *See* 18 U.S.C. § 1962(d).

IV. CONCLUSION

For the foregoing reasons, and the reasons stated in HSUS's opening brief, this Court should grant Defendant The Humane Society of the United States's supplemental motion to dismiss.[11]

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when evaluating a motion to dismiss under 12(b)(6) a court may take into account matters of public record, plaintiffs' contention that defendants' 12(b)(6) motions to dismiss should be treated as motions for summary judgment is without merit . . ."); *see also Western Assoc. Ltd. P'ship v. Market Square Assoc.*, 235 F.3d 629, 634 (D.C. Cir. 2001) (relying on facts outside amended complaint to dismiss RICO claim).

[10] Not surprisingly, FEI fails to cite a single authority for the remarkable proposition that FFA's Rule 30(b)(6) deposition can be imputed to HSUS because Michael Markarian (current and past President of FFA) was also an employee of HSUS at the time of FFA's Rule 30(b)(6) deposition.

[11] FEI essentially concedes that its abuse of process and malicious prosecution claims against HSUS must be dismissed because HSUS was never a party to the ESA Action. FEI merely asserts that HSUS could be liable if successor liability applied. (Pl.'s Opp'n at 13 n.14.) Successor liability, however, is unavailing here.

March 30, 2011

Respectfully submitted,

/s/ W. Brad Nes

BARBARA VAN GELDER
(DC Bar No. 265603)
W. BRAD NES
(DC Bar No. 975502)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 739-5779 (telephone)
(202) 739-3001 (fax)
bnes@morganlewis.com

Counsel for Defendant
The Humane Society of the United States

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served via electronic filing this 30th day of March, 2011, to all counsel of record.

/s/ W. Brad Nes
W. Brad Nes