UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF FELD ENTERTAINMENT, INC.'S
MOTION TO STRIKE INSUFFICIENT DEFENSES

Pursuant to Federal Rule of Civil Procedure 12(f), Plaintiff Feld Entertainment, Inc. ("FEI") hereby moves to strike certain defenses asserted in the answers of defendants the American Society for the Prevention of Cruelty to Animals ("ASPCA") (DE 102); Animal Welfare Institute ("AWI") (DE 96); The Fund for Animals ("FFA") (DE 104); Tom Rider ("Rider") (DE 99); Born Free USA United with Animal Protection Institute ("API") (DE 112); Wildlife Advocacy Project ("WAP") (DE 98); Katherine A. Meyer, Eric R. Glitzenstein, Howard M. Crystal, and Meyer Glitzenstein & Crystal (collectively "MGC") (DE 97); The Humane Society of the United States ("HSUS") (DE 103); Jonathan R. Lovvorn ("Lovvorn") (DE 100); and Kimberly D. Ockene ("Ockene") (DE 101).

As set forth in the accompanying Memorandum of Points and Authorities, defendants have asserted certain defenses that are insufficient as a matter of law and thus should be stricken from the pleadings. Therefore, FEI respectfully requests that its motion be granted. A proposed form of order is attached.

Pursuant to Local Rule 7(m), counsel for FEI conferred with counsel for defendants, who do not consent to the relief requested herein.

Dated: September 7, 2012

Respectfully submitted,

/s/ John M. Simpson

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MEMORANDUM IN SUPPORT OF PLAINTIFF FELD ENTERTAINMENT, INC.'S MOTION TO STRIKE INSUFFICIENT DEFENSES

Plaintiff Feld Entertainment, Inc. ("FEI") hereby moves, pursuant to Fed. R. Civ. P. 12(f), to strike certain defenses asserted in the answers of defendants the American Society for the Prevention of Cruelty to Animals ("ASPCA") (DE 102); Animal Welfare Institute ("AWI") (DE 96); The Fund for Animals ("FFA") (DE 104); Tom Rider ("Rider") (DE 99); Born Free USA United with Animal Protection Institute ("API") (DE 112); Wildlife Advocacy Project ("WAP") (DE 98); Katherine A. Meyer, Eric R. Glitzenstein, Howard M. Crystal, and Meyer Glitzenstein & Crystal (collectively "MGC") (DE 97); The Humane Society of the United States ("HSUS") (DE 103); Jonathan R. Lovvorn ("Lovvorn") (DE 100); and Kimberly D. Ockene ("Ockene") (DE 101).[1]

Defendants assert defenses that are insufficient as a matter of law. Certain of the defenses are completely inapplicable to FEI's RICO, Virginia Conspiracy Act, and intentional tort claims (*e.g.*, contributory negligence and lack of privity), while others are patently frivolous

[1] This Motion refers to defendants' answers by the defendant's name and the number of the applicable defense. For example, "Rider (4, 8)" refers to the fourth and eighth defenses asserted by defendant Tom Rider.

(*e.g.*, due process and compliance with the D.C. Rules of Professional Conduct). Moreover, with respect to other defenses, defendants' pleading is deficient. Defendants' answers do not specify which of FEI's claims the defenses are being asserted in response to. *Cf.* Fed. R. Civ. P. 8(b)(1) (a party must "state in short and plain terms its defenses to ***each claim*** asserted against it") (emphasis added).[2] Thus, on the face of defendants' answers, it appears that defendants are asserting a good faith defense to crimes which do not require bad faith, and equitable defenses to claims at law. Moreover, defendants plead no factual basis regarding why equitable defenses purportedly bar FEI's claims. Defendants' pleading is legally insufficient.

As pled, there is no set of facts upon which these defenses could succeed. Neither the parties nor the Court should have to expend any resources on discovery or argumentation regarding invalid defenses. Accordingly, FEI requests that the following defenses be stricken from defendants' answers: (1) contributory negligence; (2) assumption of risk: (3) privity of contract; (4) due process; (5) reasonableness/good faith; (6) compliance with District of Columbia Rule of Professional Conduct 1.3(a); (7) the District of Columbia Anti-SLAPP Act; (8) conduct taken by others outside of defendants' control; and (9) unclean hands, *in pari delicto*, laches, estoppel, and waiver.[3]

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[2] Such a "shotgun" pleading "water[s] down the rights of the parties to have valid claims litigated efficiently" and "harm[s] the court by impeding its ability to administer justice." *Byrne v. Nezhat*, 261 F.3d 1075, 1130-31 (11th Cir. 2001); *see also id.* at 1129 ("With minor exception, none of the affirmative defenses responded to a particular count of the complaint; rather, the affirmative defenses addressed the complaint as a whole, as if each count was like every other count."). It also is prejudicial to FEI. *Francisco v. Verizon South*, 2010 U.S. Dist. LEXIS 77083, at *14-15 (E.D. Va. July 29, 2010) ("A plaintiff may demonstrate prejudice if the answer unclearly articulates to which claims the affirmative defenses apply.").

[3] For the Court's reference, FEI hereby attaches as Exhibit 1 a chart summarizing the insufficient defenses asserted by defendants. The defenses at issue in the instant motion are those that have no legal validity under any set of circumstances. FEI's decision not to address other defenses herein should not be seen as a concession (and is not a concession) by FEI that any of the other defenses are valid either: they must simply be addressed at a later procedural time.

I. DEFENDANTS' IRRELEVANT AND LEGALLY INSUFFICIENT DEFENSES MUST BE STRICKEN

A district court has "liberal discretion" to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f); *Intex Recreation Corp. v. Team Worldwide, Inc.*, 390 F. Supp. 2d 21, 24 (D.D.C. 2005); *Ass'n of Am. Med. Colleges v. Princeton Review, Inc.*, 332 F. Supp. 2d 11, 22 (D.D.C. 2004) (citing *Pigford v. Veneman*, 215 F.R.D. 2, 4 (D.D.C. 2003)).

Although motions to strike are disfavored, *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981), a motion to strike "should be granted where it is clear that the affirmative defense is irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense." *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 150 (D.D.C. 2009) (quoting *SEC v. Gulf & Western Indus., Inc.*, 502 F. Supp. 343, 345 (D.D.C. 1980)). If the questions of law and fact are not in dispute and "under no set of circumstances could the defenses succeed," *Western Indus.*, 502 F. Supp. at 345 (quotation omitted), a motion to strike "is the proper means for attacking the legal insufficiency of a defense." *Soc'y of Lloyd's v. Siemon-Netto*, 2004 U.S. Dist. LEXIS 29913, at *6 (D.D.C. Aug. 20, 2004) (quoting Moore's Fed. Practice § 12.37 (3d ed. 1999)); *see also United States v. Honeywell Int'l, Inc.*, 841 F. Supp. 2d 112, 113 (D.D.C. 2012) (a defense "that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted") (quotation omitted). ***The question is not whether "some unknown and hypothetical set of facts … could support the[] defenses."*** *Coach, Inc. v. Kmart Corps.*, 756 F. Supp. 2d 421, 426 (S.D.N.Y. 2010) (emphasis added). "Instead, the relevant question is whether, based on the pleadings as construed in the

light most favorable to Defendants, there is a question of fact or a substantial question of law that might allow any of these defenses to succeed." *Id.*

There is no set of circumstances under which the defenses discussed below could succeed. They are all inapplicable or invalid as a matter of law. The dubious and/or frivolous nature of some of these defenses is underscored by the fact that not all defendants have asserted them, even though all of the defendants are essentially subject to the same claims by FEI. FEI should not have to incur expense in exploring the factual bases for these legally insufficient defenses. Indeed, litigating these defenses would increase the duration and expense of discovery and trial of this matter, resulting in prejudice to FEI. *See Coach, Inc.*, 756 F. Supp. 2d at 428. Accordingly, the defenses discussed below should be stricken from the answers in which they are pleaded.

A. Contributory Negligence/Assumption of Risk

Defendants Rider, API, MGC, Lovvorn and Ockene assert the defenses of contributory negligence and/or assumption of risk.[4] Contributory negligence is "conduct which falls below the standard to which a plaintiff should conform for his own protection." *Wash Metro. Area Transit Auth. v. Cross*, 849 A.2d 1021, 1024 (D.C. 2004) (quotation omitted). Assumption of risk applies when a plaintiff "consciously relieve[s] the defendant of any duty which he otherwise owe[s] the plaintiff." *Jarrett v. Woodward Bros*., 751 A.2d 972, 986 (D.C. 2000) (quotation omitted).

FEI has not asserted a claim for negligence. All of its claims – RICO, Virginia Conspiracy Act, and the state law intentional torts – are based upon the intentional, not the negligent, conduct of the defendants. Because contributory negligence only bars a claim ***for negligence***, it is not, as a matter of law, a defense that is applicable to any of FEI's claims.

[4] Rider (4, 8); API (11, 15); MGC (4); Lovvorn (6, 11); Ockene (6, 11).

Attorneys Title Corp. v. Chase Home Mortg. Corp., 1996 U.S. Dist. LEXIS 11712, at *5 (D.D.C. Aug. 12, 1996) ("[C]ontributory negligence is not a good defense to an action not based on negligence."); *cf. Karma Constr. Co., Inc. v. King*, 296 A.2d 604, 605 (D.C. 1972) ("As a general rule, contributory negligence is a good defense to an action based on negligence.").

Moreover, it is well-settled that neither contributory negligence nor assumption of risk are valid defenses to intentional tort claims. *See Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 165 (D.C. Cir. 2007) ("Under District of Columbia law, in cases of reckless conduct by the defendant the plaintiff's contributory negligence will not bar his action.") (quotation omitted); *Bassi v. Patten*, 592 F. Supp. 2d 77, 80 (D.D.C. 2009) (excluding evidence of assumption of risk and contributory negligence defenses in intentional tort action); *C&E Servs., Inc. v. Ashland, Inc.*, 498 F. Supp. 2d 242, 264 n.10 (D.D.C. 2007) (Sullivan, J.) ("[C]ontributory negligence is not a bar to a fraud claim."); *Washington v. Group Hospitalization, Inc.*, 585 F. Supp. 517, 521 n.6 (D.D.C. 1984) ("The defense of contributory negligence is inapplicable in an intentional tort action."); *cf. Rude v. Dancing Crab at Wash. Harbour, LP*, 245 F.R.D. 18, 26 (D.D.C. 2007) ("Since defendants are not intentional tortfeasors, the law does not prohibit them from raising the affirmative defenses of contributory negligence and assumption of the risk.").

Contributory negligence and assumption of risk likewise are not defenses to FEI's RICO and Virginia Conspiracy Act claims, because racketeering and conspiracy involve intentional conduct. *See Chamberlain Mfg. Corp. v. Maremont Corp.*, 1993 U.S. Dist. LEXIS 17933, at *16-17 (N.D. Ill. Dec. 15, 1993) (striking contributory negligence/assumption of risk defense because "a RICO violation involves intentional conduct"); *see also Nat'l Council on Comp. Ins., Inc. v. Am. Int'l Group, Inc.*, 2009 U.S. Dist. LEXIS 14524, at *21-22 (N.D. Ill. Feb. 23, 2009) (in civil RICO action, striking "contributory wrongful conduct" defense); *Blue Cross & Blue*

Shield of New Jersey, Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560, 575, 587 (E.D.N.Y. 1999) ("Contributory or comparative negligence is not a defense to fraud.") (comparative liability not available in RICO because "[i]n the case of intentional, criminal fraud … there are no issues of comparative liability"). Therefore, as a matter of law, contributory negligence and assumption of risk are not valid defenses to FEI's claims and should be stricken from the answers of Rider, API, MGC, Lovvorn and Ockene.

B. Lack of Privity

Defendants Rider and MGC assert the defense of lack of privity.[5] Lack of privity is a defense to a breach of contract action. *See, e.g.*, *Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008) ("In order to sue for damages on a contract claim, a plaintiff must have either direct privity or third party beneficiary status.") (quotation omitted). There is no contract at issue in this case: FEI has not alleged that it entered into a contract with defendants and neither its RICO, Virginia Conspiracy Act nor state law intentional tort claims pleads or depends upon a contract. FEI likewise has not made any claim for breach of contract in this case. Therefore, "lack of privity" as a defense should be stricken from the answers of Rider and MGC.

C. Relief Sought Violates Due Process

Defendants AWI, Lovvorn and Ockene assert a defense purportedly arising out of the due process clause of the Fifth and Fourteenth Amendments.[6] This defense is frivolous on its face, and does not apply to any of FEI's claims. This "defense" appears to be based on nothing more than the fact that these parties are defendants in a federal court case involving RICO, Virginia Conspiracy Act and established intentional state law tort claims and could be held responsible for

[5] Rider (10); MGC (8).

[6] AWI (24); Lovvorn (7); Ockene (7).

their actions through actual, treble, and punitive damages and legal fees. However, being found liable in a private civil suit in a United States District Court, under statutes and causes of action that are constitutional (and the validity of which has not been raised by any of these defendants) and where the Federal Rules of Civil Procedure apply, does not violate substantive or procedural due process. *See Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) ("A procedural due process violation occurs when an official deprives an individual of a liberty or property interest without providing appropriate procedural protections."); *FOP Dep't of Corr. Labor Comm. v. Williams*, 375 F.3d 1141, 1144 (D.C. Cir. 2004) (substantive due process is invoked when the government's conduct is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience") (quotation omitted). Accordingly, this defense should be stricken from the answers of AWI, Lovvorn and Ockene.

D. Reasonable/Good Faith Conduct

Defendants ASPCA, AWI, FFA, Rider, API, and MGC assert as a defense that they acted reasonably and/or in good faith.[7] Like all of their defenses, defendants have not specified which claims their "good faith" defense applies to. While good faith may be a defense of certain of FEI's claims, it is not a defense to crimes which do not require bad faith. *U.S. v. POGO*, 616 F.3d 544, 552-53 (D.C. Cir. 2010). Thus, as a matter of law, good faith is not a defense to defendants' alleged violations of the illegal gratuity statute, 18 U.S.C. § 201(c), which is one category of the predicate acts involved in FEI's RICO claims. *See POGO*, 616 F.3d at 552-53 (good faith not a defense to general intent crimes); *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974) ("[T]here is and must be a general criminal intent on the part of the defendant to

[7] ASPCA (6); AWI (19); FFA (11); Rider (27); API (20); MGC (24).

support a conviction under the gratuity section (g).") (interpreting § 201(g), predecessor to § 201(c) (illegal gratuity statute)).

Furthermore, the nebulous assertion that defendants acted "reasonably" is nothing more than an assertion that they were not negligent. But, as discussed above with respect to contributory negligence and assumption of risk, this is an intentional misconduct/intentional tort case. "Reasonableness" has nothing to do with it. Therefore, "reasonableness" should be stricken in its entirety, and "good faith" should be stricken insofar as it has been asserted as a defense to the predicate acts of illegal gratuity payments.

E. Compliance with D.C. Rule of Professional Conduct 1.3(a)

Defendants Lovvorn and Ockene assert as a defense that they acted in accordance with Rule 1.3(a) of the D.C. Rules of Professional Conduct, which requires a lawyer to "zealously and diligently" represent her client "***within the bounds of the law***."[8] Ex. 2, D.C. R. PROF. CONDUCT 1.3(a) (emphasis added). Neither their former partners Meyer, Glitzenstein, and Crystal, nor their former law firm, Meyer Glitzenstein & Crystal, raises such a defense. Under no circumstances could this defense succeed.

In the first place, the plain terms of the Rule show that it would never be a defense in this case. The "zeal" and "diligence" that Rule 1.3(a) commands must remain "within the bounds of the law." Rule 1.3(a). Here, FEI has alleged that defendants violated RICO and the Virginia Conspiracy Act and committed intentional torts – all of which is conduct ***outside the bounds*** of the law. So, if FEI prevails on any one of these claims, there is nothing in Rule 1.3(a) that will save Lovvorn and Ockene. Indeed, a determination by the Court that these defendants' acts in representing their clients led to RICO or Virginia Conspiracy Act violations or intentional torts

[8] Lovvorn (8); Ockene (8).

and, therefore, were actions outside the bounds of the law, would itself be a violation of Rule 1.3(a).

Second, the Rules of Professional Conduct do not insulate attorneys from liability for racketeering, conspiratorial, or tortious conduct. To the contrary, the Rules prohibit illegal witness payments. Ex. 3, D.C. R. PROF. CONDUCT 3.4(b). The Rules of Professional Conduct "presuppose a larger legal context . . . [including] substantive and procedural law in general." Ex. 4, D.C. R. PROF. CONDUCT, Scope, cmt. 2. The Rules expressly state that they are not "intended to ***enlarge or restrict*** existing law ***regarding the liability of lawyers to others***." *See id*. cmt. 4 (emphasis added). Even in a legal malpractice action, compliance with the Rules would not be complete defense. The Rules of Professional Conduct only serve as ***some evidence*** of the standard of care. *See Carranza v. Fraas*, 763 F. Supp. 2d 113, 126 n.7 (D.D.C. 2011) (although violations of the Rules of Professional Conduct "provide evidence of the relevant standard of care governing attorney conduct," they are not sufficient to demonstrate malpractice); *see also Waldman v. Levine*, 544 A.2d 683, 690-91 (D.C. 1988) ("A number of courts have held that although the Code [of Professional Responsibility for Lawyers] does not attempt to delineate the boundaries of civil liability for the professional conduct of attorneys, its provisions constitute some evidence of the standards required of lawyers.").

What Lovvorn and Ockene are really proposing is that even if they are found liable for RICO or other statutory and tort violations, their duty of "zealous" and "diligent" advocacy will trump such violations. Not only does no provision of the Rules create the defense that Lovvorn and Ockene assert, it is clear that the District of Columbia Court of Appeals, under whose authority the Rules are promulgated, would reject it outright. In *In re Howes*, 39 A.3d 1 (D.C. 2012), the Court of Appeals ordered the disbarment of a lawyer, a former Assistant United States

Attorney, who was found to have engaged in improper witness payments amounting to misappropriation of government funds and to have concealed and made misrepresentations about such payments to the trial court and opposing counsel, notwithstanding the payments' clear relevance to witness credibility. That the violations grew from a "steadfast determination to achieve convictions," *id*. at 22, was not a mitigating factor. As the Court of Appeals noted, "failure to sanction respondent with our most extreme sanction would endorse respondent's reasoning that honorable ends justify unlawful means, failing to deter others from adopting similar attitudes." *Id*.

Lovvorn's and Ockene's similar efforts to exonerate themselves from their involvement in the racketeering and other conduct alleged here on the basis of "zealous advocacy" is equally flawed. Accordingly, the "zealous advocacy" defense should be stricken from the answers of Lovvorn and Ockene.

F. D.C. Anti-SLAPP Act

Defendants ASPCA, AWI, Rider, API, WAP, MGC, Lovvorn, and Ockene assert the District of Columbia Anti-SLAPP Act, D.C. CODE §§ 16-5501 *et seq*. (2012) ("Anti-SLAPP Act"), as a defense.[9] The Anti-SLAPP Act allows a party to "file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." § 16-5502(a). This "defense" fails because defendants (1) did not file an Anti-SLAPP Act "special" motion to dismiss, much less within the 45-day timeframe and (2) FEI's claims already have survived defendants' Rule 12(b)(6) motions.

[9] ASPCA (9); AWI (5); Rider (20); API (18); WAP (11); MGC (18); Lovvorn (16); Ockene (16).

Defendants thus waived any "defense" available under the statute, assuming it even applies here.[10]

The 45-day time period for filing the "special" motion began to run, ***at the latest***, on March 31, 2011, which is the date the statute became effective. Defendants first advised the Court of the Anti-SLAPP Act on July 1, 2011.[11] *See* Defs. Supp. Authorities in Support of Mot. to Dismiss (DE 78) (7-1-11), at 5 ("Defendants also bring to the Court's attention the D.C. Anti-SLAPP Act of 2010 . . . , which did not become effective as a basis for dismissing claims in the District of Columbia until March 31, 2011 … ."). Even then, however, they did not invoke the statute as a "defense" to FEI's claims – presumably because defendants well knew that this new law did not apply to this case. By July 1, 2011, the deadline for filing any "special" motion under the statute (even if it were applicable) – May 16, 2011 – already had passed. Even after their July 1, 2011 filing, defendants ***never*** filed a "special" motion. Nor have they sought leave to assert such motion. Defendants thus procedurally defaulted. *See Sherrod*, 843 F. Supp. 2d at

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[10] The Anti-SLAPP Act has no applicability here because it became effective on March 31, 2011, almost three years ***after*** FEI filed its initial complaint, Compl. (DE 1) (8-28-07). In the District of Columbia, only "purely procedural" statutes apply retroactively. *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 84-85 (D.D.C. 2012), *appeal docketed*, No. 11-7017 (D.C. Cir. Aug. 29, 2011). By contrast, "statutes that are not readily categorized as either procedural or substantive or would have substantive consequences, cannot [be applied retroactively] without a clear showing of retroactive intent." *Id*. at 84. "[T]he D.C. Anti-SLAPP Act is substantive," and as a result, courts have refused to apply it retroactively. *Id.* at 85. (refusing to apply Anti-SLAPP Act retroactively to complaint filed on 2-11-11).

Moreover, even if the Anti-SLAPP Act was a "purely procedural" statute and did apply retroactively, it does not apply to federal claims. *See Smith v. Levine Leichtman Capital Partners*, 723 F. Supp. 2d 1205, 1218 (N.D. Cal. 2010) ("California's anti-SLAPP law is inapplicable to federal claims brought in federal court.") (citing *Hilton v. Hallmark Cards*, 580 F.3d 874, 881, 599 F.3d 894 (9th Cir. 2009)). The *Erie* doctrine also bars its application in federal court with respect to state law claims under either supplemental or diversity jurisdiction. *Sherrod*, 843 F. Supp. 2d at 85 (refusing to apply Anti-SLAPP Act in diversity action) ("The *Erie* doctrine requires federal courts sitting in diversity to apply state substantive law and federal procedural law, thus barring the application of the D.C. Anti-SLAPP Act in this Court."); *accord 3M Co. v. Boulter*, 842 F. Supp. 2d 85, 102 (D.D.C. 2012), *appeal docketed*, No. 12-7017 (D.C. Cir. Feb. 24, 2012).

[11] Ironically, defendants never even raised the Anti-SLAPP Act in their replies in support of their Motions to Dismiss, even though, by that time, the Anti-SLAPP Act was effective. Defs. Reply in Support of Mot. to Dismiss (DE 73) (4-1-11); Reply in Support of Supp. Mot. to Dismiss (Lovvorn and Ockene) (DE 72) (4-1-11); *see also* Reply in Support of Supp. Mot. to Dismiss (HSUS) (DE 71) (3-30-11).

85 (defendants' Anti-SLAPP Act "special" motion to dismiss, filed more than two weeks after the 45-day deadline, barred as untimely and procedurally defaulted).

Moreover, even putting aside defendants' time default, the Anti-SLAPP statute has no relevance here because FEI's claims already have survived defendants' traditional Rule 12(b)(6) motion. *See 3M Co.*, 842 F. Supp. at 102 (The "benefit [of] altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of a plaintiff's claim by setting a higher standard upon the plaintiff to avoid dismissal . . . is the *precise reason* that the District enacted the statute … ."). If the purpose of the Anti-SLAPP Act is to "enable a defendant to more expeditiously and more equitably dispense of meritless suits," then the statute is inapplicable because the Court already has ruled that FEI's First Amended Complaint states claims for relief. *Id*. at 93 (quotation omitted).

The "Anti-SLAPP defense" is invalid, both as a matter of law and because it has already been waived by defendants' own failure to comply with the statute's requirements. Therefore, this "defense" should be stricken from the answers of ASPCA, AWI, Rider, API, WAP, MGC, Lovvorn, and Ockene.

G. Conduct Taken By Others Outside Control

Defendants ASPCA, AWI, FFA, Rider, API, WAP, MGC, Lovvorn, and Ockene assert as a defense that FEI's injuries and damages were caused by persons outside of their control.[12] This is not a defense to any of FEI's claims. Joint tortfeasors are jointly and severally liable. *United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir. 2011) (citing RESTATEMENT (THIRD) OF TORTS § 12 (2000)). Similarly, RICO liability is joint and several. *United States v. Philip Morris*, 316 F. Supp. 2d 19, 27 (D.D.C. 2004) ("Every circuit in the country that has addressed the issue has

[12] Given the vagueness with which defendants' defenses have been pleaded, it appears that the conduct taken by others outside control defense has been asserted as follows: ASPCA (7, 23); AWI (20, 21); FFA (8); Rider (5, 6, 7); API (12, 13, 14); WAP (4); MGC (5, 7); Lovvorn (9, 12); Ockene (9, 12).

concluded that the nature of both civil and criminal RICO offenses requires imposition of joint and several liability because all defendants participate in the enterprise responsible for the RICO violations.").

Moreover, co-conspirators are vicariously liable for all acts that are (1) done in furtherance of the conspiracy; (2) within the scope of the agreement; and (3) foreseeable. *United States v. Childress*, 58 F.3d 693, 722 (D.C. Cir. 1995); *see also RSM Prod. Corp. v. Freshfields Bruckhaus Deringer LLP*, 682 F.3d 1043, 1048 (D.C. Cir. 2012) ("A defendant need not agree to be the one to commit the predicate acts. Nor must a defendant participate in the operation or management of [the] enterprise in order to be liable for conspiracy. It suffices that [the defendant] adopt the goal of furthering or facilitating the criminal endeavor.") (quotations and citations omitted). Defendants do not assert that the conduct at issue was outside the scope of the agreement, was not foreseeable, or that they did not know about it. *Cf. RSM Prod. Corp.*, 682 F.3d at 1048 (affirming dismissal of civil RICO conspiracy claim where there was no plausible inference that defendant law firm knew about conspiracy or agreed to foster its goals).

Further, defendants Lovvorn and Ockene assert as a defense that any unlawful acts by a partner of MGC were not "authorized by the partnership" and were made without their "actual or apparent consent, authorization, knowledge or ratification."[13] This defense is contrary to the express terms of the D.C. Partnership Act, which provides that:

> An act of a partner … for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership shall bind the partnership, unless the partner had no authority to act for the partnership in the particular matter ***and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.***

[13] Lovvorn (9); Ockene (9).

D.C. CODE § 29-603.01(2) (2012) (emphasis added); *see also* Opinion (7-9-12) (DE 90), at 43 ("A partnership, and its partners, may be held jointly and severally liable for wrongful acts committed by other partners acting in the ordinary course of business of the partnership."). Defendants Lovvorn and Ockene do not allege – and could not allege – that FEI (or any other victim of defendants' fraud) "knew or had received a notification" that any of the MGC partners lacked authority to act.

Accordingly, the "somebody else did it" defense asserted by ASPCA, AWI, FFA, Rider, API, WAP, MGC, Lovvorn, and Ockene is invalid as a matter of law because even if they showed that someone else in fact did commit the violation, these defendants are still jointly and severally liable due to the nature of the torts they have been sued for as well as the nature of the liability that flows from the RICO and conspiracy claims. This "defense" therefore should be stricken from these defendants' answers.

H. Unclean Hands, *In Pari Delicto*, Laches, Estoppel, and Waiver

Defendants ASPCA, AWI, FFA, Rider, API, WAP, MGC, HSUS, Lovvorn, and Ockene assert the defenses of unclean hands, *in pari delicto*, laches, estoppel, and/or waiver.[14] Defendants' answers merely list these defenses and nothing more. Defendants provide ***no*** factual basis for any of these defenses, which is insufficient under Rule 8. Defendants' answers also do not specify which of FEI's claims the defenses are being asserted in response to. This is important because not all of these defenses are available for each of FEI's causes of action. Unclean hands and laches are not defenses to legal actions, and unclean hands is unavailable as a

[14] Certain defendants have asserted some, but not all, of these defenses. *See* Ex. 1; *see also* ASPCA (5); AWI (18); FFA (6, 7, 12); Rider (11, 18, 19); API (5, 6, 17); WAP (6, 9, 10); MGC (9, 16); HSUS (7); Lovvorn (6); Ockene (6).

matter of law in a civil RICO case.[15] Moreover, there is no set of facts under which unclean hands and *in pari delicto* could apply here, because there has been no allegation that FEI engaged in the racketeering, conspiratorial, or tortious conduct for which defendants have been sued. Accordingly, all of these defenses are legally insufficient and should be stricken.

1. Defendants Have Not Adequately Pled Unclean Hands, *In Pari Delicto*, Laches, Estoppel, and Waiver

As a threshold matter, defendants have not adequately pleaded the defenses of unclean hands, *in pari delicto*, laches, estoppel, and waiver. Merely naming the defense, as defendants have done, is insufficient. *Qarbon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004) ("[a] reference to a doctrine, like a reference to statutory provisions, is insufficient notice" under Rule 8); *see also D.S. Am. (E.), Inc. v. Chromagrafx Imaging Sys., Inc.*, 873 F. Supp. 786, 798 (E.D.N.Y. 1995) ("Pleading the words 'estoppel' and 'unclean hands' without more … is not a sufficient statement of these defenses."). Defendants' answers fail to allege any of the elements of the defenses or any factual basis for them. *Cf. Qarbon.com, Inc.*, 315 F. Supp. 2d at 1049 ("Because eHelp simply refers to the doctrines without setting forth the elements of its affirmative defenses, eHelp does not provide 'fair notice' of its defenses."). Such a bare assertion of a defense "gives no indication to [FEI] as to how [the] defense[] bars any of [its] claims." *D.S. Am. (E.), Inc.*, 873 F. Supp. at 798. For example, FEI has no notice as to how it intentionally relinquished or abandoned a known right (waiver), or how defendants detrimentally relied on FEI's conduct (equitable estoppel). This type of pleading is legally insufficient.

[15] FEI only has requested equitable relief with respect to its RICO and Virginia Conspiracy Act claims. FAC (DE 25) (2-16-10) at 128 (requesting injunctive relief and disgorgement). FEI's intentional tort claims are legal claims, as are its Virginia Conspiracy Act and RICO claims to the extent that legal relief (damages), not equitable relief, is sought under those two statutes. Therefore, the ***equitable*** defenses of unclean hands and laches are, as a matter of law, unavailable and should be stricken with respect to these claims. *See Roller v. Clark*, 38 App. D.C. 260, 266 (D.C. Cir. 1912) ("Laches, though a good defense in equity, is no defense at law."); *First Am. Corp. v. Al-Nahyan*, 17 F. Supp. 2d 10, 29 (D.D.C. 1998) (unclean hands not a defense to legal actions); *Johns v. Rozet*, 141 F.R.D. 211, 220 (D.D.C. 1992) (unclean hands and laches not a defense to legal actions).

Courts have stricken the defenses of unclean hands, *in pari delicto*, laches, estoppel, and waiver where, as here, the defendants' pleading of them was legally insufficient. *See Coach, Inc.*, 756 F. Supp. 2d at 426-28 (striking defenses of, *inter alia*, estoppel, laches, and waiver where defendants' pleadings were "void" of any facts supporting them); *Nat'l Council on Comp. Ins., Inc.*, 2009 U.S. Dist. LEXIS 14524, at *24-25 ("AIG's laches defense does not meet the minimal standards because AIG neither offers any factual basis for the defense, nor summarizes the necessary elements."); *Qarbon.com, Inc.*, 315 F. Supp. 2d at 1050 (striking defenses of waiver, estoppel, and unclean hands where defendant failed to plead the elements of, or provide any factual basis for, defenses); *D.S. Am. (E.), Inc.*, 873 F. Supp. at 798 (striking unclean hands and estoppel defenses where defendant only pled words of the doctrines); *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F. Supp. 832, 841 (S.D.N.Y. 1988) (striking estoppel defense where defendant only pled the word itself). Accordingly the defenses of unclean hands, *in pari delicto*, laches, estoppel, and waiver should be stricken from the answers of ASPCA, AWI, FFA, Rider, API, WAP, MGC, HSUS, Lovvorn, and Ockene.

2. Unclean Hands is Not a Defense to a Civil RICO Claim

The defense of unclean hands is, as a matter of law, barred in a civil RICO action. *See, e.g., Smithfield Foods, Inc. v. United Food & Commer. Workers Int'l Union*, 593 F. Supp. 2d 840, 848 (E.D. Va. 2008) ("The persuasive weight of authority is that the affirmative defense of unclean hands is not available in a civil RICO action and cannot be asserted by the Defendants as an affirmative defense."); *see also id.* at 847 (collecting federal district court cases holding that unclean hands barred in civil RICO actions).

In holding that the unclean hands defense is unavailable in a civil RICO action, courts have looked to the antitrust context. *See Smithfield Foods*, 593 F. Supp. 2d at 847 (citing *In re*

Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 636 F. Supp. 1138, 1155 (C.D. Cal. 1986)). In *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968), a private antitrust action, the Supreme Court cautioned against "invoking broad common-law barriers to relief," specifically the defenses of unclean hands and *in pari delicto*, where a "private suit serves important public purposes:"

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties could only result in seriously undermining the usefulness of the private action as a bulwark of anti-trust enforcement.

See id. at 138-39 (*in pari delito* no defense to civil suit for treble damages under Sherman and Clayton Acts); *see also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951) (private plaintiff's suit for treble damages under Sherman Act could not be barred by proof that he engaged in an unrelated conspiracy to commit some other antitrust violation). This rationale has been applied to bar an unclean hands defense to a private antitrust suit for equitable relief. *See Chrysler Corp. v. Gen. Motors Corp.*, 596 F. Supp. 416, 418-20 (D.D.C. 1984) (following *Kiefer-Stewart* and *Perma Life Mufflers* to strike unclean hands defense in private suit for equitable relief under Clayton and Sherman Acts). It was also applied by this Court in the ESA Case to bar FEI's assertion of an unclean hands defense to defendants' citizen suit under the ESA. *See ASPCA v. Ringling Bros.*, 244 F.R.D. 49, 53 (D.D.C. 2007) (Sullivan, J.) (denying motion for leave to assert unclean hands defense in Endangered Species Act citizen suit).

Unclean hands, likewise, should be barred as a defense in this private RICO action. RICO, like the Sherman and Clayton Acts, was designed to advance important public policies. *See Smithfield Foods,* 593 F. Supp. 2d at 848 (citing *Gilmer v. Insterstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Indeed, RICO's private right of action was modeled after the Clayton

Act. *Rotella v. Wood*, 528 U.S. 549, 557 (2000) ("There is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration … ."). In *Rotella*, the Supreme Court specifically noted that:

> [The Clayton Act and RICO] share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity.

Id.; see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) (private RICO actions "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate … ."); *ASPCA*, 244 F.R.D. at 53 ("Under both the ESA and antitrust laws, private citizens function as 'private attorneys general' representing the public interest."). In this case, the important public purpose of RICO – eliminating racketeering activity – will not be served if defendants' racketeering conduct is immunized by FEI's allegedly unclean hands. (Defendants have not alleged, nor could they, that FEI took part in their racketeering conduct. *See infra*.) FEI is acting as a "private attorney general" and thus the "relative moral worth" of the parties is irrelevant to whether defendants violated the RICO statute. *Cf. Perma Life Mufflers*, 392 U.S. at 139; *ASPCA*, 244 F.R.D. at 53. Accordingly, unclean hands is, as a matter of law, not a defense to a civil RICO claim and should be stricken as a defense.

3. Defendants Could Allege No Set of Facts Under Which Unclean Hands and *In Pari Delicto* Could Apply Here

Defendants' answers fail to make ***any*** factual allegations concerning their basis for asserting the related defenses of unclean hands and *in pari delicto*[16] – but even if they did, the defenses would fail anyway. There is ***no*** set of facts under which unclean hands and *in pari*

[16] Unclean hands is an equitable defense, while *in pari delicto* is, in appropriate circumstances, a defense to a legal claim. *Chevron Corp. v. Salazar*, 2011 U.S. Dist. LEXIS 92091, at *41 (S.D.N.Y. Aug. 17, 2011).

delicto could apply in the present case because ***FEI did not participate in the racketeering, conspiratorial, or tortious conduct at issue.*** Therefore, both defenses should be stricken.

a. Unclean Hands

"The unclean hands doctrine derives from the equitable maxim that 'he who comes into equity must come with clean hands.' The doctrine 'closes the doors of a court of equity to one tainted with inequitableness or bad faith ***relative to the matter in which he seeks relief***.'" *United States v. Philip Morris*, 300 F. Supp. 2d 61, 74-75 (D.D.C. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)) (emphasis added). Unclean hands "does not require that one be blameless in regard to other matters, but does require that one seeking relief shall have acted fairly and without fraud or deceit ***as to the controversy at issue***." *Graphic Sci., Inc. v. Int'l Mogul Mines Ltd.*, 397 F. Supp. 112, 127 (D.D.C. 1974) (citing *Precision Instrument Mfg. Co.*, 324 U.S. at 814-15) (emphasis added). To properly plead the unclean hands defense, a defendant must make factual allegations that the plaintiffs' "misconduct" was "immediately and necessarily" related to the conduct at issue in the lawsuit. *See Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933)) (conduct giving rise to unclean hands defense must have "immediate and necessary relation to the equity that [plaintiff] seeks in respect of the matter of in litigation").

Courts have found the defense of unclean hands insufficient as a matter of law where the defendant fails to make such allegations. For example, in *Philip Morris*, a government civil RICO action, Judge Kessler held that the defendant tobacco companies' unclean hands defense was insufficient as a matter of law where, *inter alia*, the defendants failed to allege that the federal government engaged in the "'same sort of wrongdoing' as [was] alleged against them." *Philip Morris*, 300 F. Supp. 2d at 76 ("Defendants in fact do not allege that the Government

fraudulently misrepresented anything or that it committed mail and wire fraud.").[17] Courts in other districts similarly have stricken the defense of unclean hands where the defendants failed to allege that the plaintiff engaged in the conduct giving rise to the litigation. *See Coach, Inc.*, 756 F. Supp. 2d at 30 (striking unclean hands defense where plaintiffs' alleged conduct in filing instant lawsuit was "unrelated to [p]laintiffs' obtaining or using the rights in suit"); *OSF Healthcare Sys. v. Banno*, 2010 U.S. Dist. LEXIS 7584, at *14 (C.D. Ill. Jan. 5, 2010), *adopted*, 2010 U.S. Dist. LEXIS 7582 (C.D. Ill. Jan. 29, 2010) (in civil RICO action, striking unclean hands and *in pari delicto* defenses where defendant made allegations regarding "[p]laintiff's similar misconduct towards others"); *Specialty Minerals, Inc. v. Pluess-Staufer AG*, 395 F. Supp. 2d 109, 114 (S.D.N.Y. 2005) (striking unclean hands defense where "the facts asserted fail to establish the requisite connection between the right in suit and [the plaintiff's] alleged misconduct"); *cf. Chevron*, 2011 U.S. Dist. LEXIS 92091, at *40-41 (in action concerning enforceability of foreign judgment, allowing unclean hands defense to proceed only to the extent allegations of misconduct related to whether underlying foreign judgment, *inter alia*, afforded due process or was procured by fraud).

Defendants do not allege that FEI engaged in defendants' racketeering, conspiratorial or tortious conduct, nor could they. An unclean hands defense cannot be asserted in this case merely because defendants are philosophically opposed to FEI's use of animals in entertainment or intend to argue that FEI failed to mitigate its damages in defending the ESA Action. *Cf. Chevron*, 2011 U.S. Dist. LEXIS 92091, at *31 (unclean hands cannot "be based merely on the generalized odiousness of the plaintiff") (quotation omitted). Indeed, in *Chevron*, where the issue was whether an underlying foreign judgment was procured by fraud, the Southern District

[17] Although *Philip Morris* was decided on summary judgment, the Court's opinion was based on the defendants' ***allegations*** concerning the defenses of unclean hands and *in pari delicto*, and thus is analogous to the present motion to strike. *See* 300 F. Supp. 2d at 76.

of New York did "not regard the allegation of the filing of too many motions, of allegedly baseless motions, of discovery delay, and the like in the [underlying] case [by the plaintiff in the instant case] as remotely approaching a sufficient claim of unclean hands." 2011 U.S. Dist. LEXIS 92091, at *38 n. 69. Likewise here, any alleged failure to mitigate is not related to, *inter alia*, defendants' illegal witness payments, fraud on the court, or donor fraud. ***FEI was one of the victims of defendants' conduct – it did not participate in it.*** Therefore, even if unclean hands was applicable to an action at law or civil RICO claim (it is applicable to neither, *see supra*), defendants' failure to allege that FEI engaged in the "same sort of wrongdoing" as is now alleged against them is, in and of itself, sufficient to strike the defense. *See Philip Morris*, 300 F. Supp. 2d at 76.

b. In Pari Delicto

The doctrine of *in pari delicto* applies where a plaintiff is "an active, voluntary participant in the unlawful activity ***that is the subject of the suit***." *Pinter v. Dahl*, 486 U.S. 622, 636 (1988) (emphasis added); *see also id.* at 632 ("Traditionally, the defense was limited to situations where the plaintiff bore at ***least substantially equal responsibility*** for his injury, and where the parties' culpability ***arose out of the same illegal act***.") (quotation and citation omitted) (emphases added). "Plaintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant." *Perma Life Mufflers, Inc.*, 392 U.S. at 153 (Harlan, J., concurring in part and dissenting in part) (cited in *Pinter, supra*). "*In pari delicto* 'literally means ***in equal fault*** and is based on 'the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct.'" *Philip Morris*, 300 F. Supp. 2d at 75 (quoting *Pinter*, 486 U.S. at 632) (emphasis added).

The defense of *in pari delicto* is available "only where: (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement" of the underlying law. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310-11 (1985); *see also Rogers v. McDorman*, 521 F.3d 381, 389 (5th Cir. 2008) (applying *Bateman Eichler* test to *in pari delicto* defense in civil RICO claim); *Official Comm. of Unsecured Creditors v. Edwards*, 437 F.3d 1145, 1154 (11th Cir. 2006) (same); *Nisselson v. Lernout*, 469 F.3d 143, 152 (1st Cir. 2006) (same).

Courts have found the defense of *in pari delicto* to be legally insufficient where, as here, the defendant makes ***no*** allegations that could satisfy the first prong of the *Bateman Eichler* test (*i.e.*, whether the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress). In *Philip Morris*, Judge Kessler also found the defendant tobacco companies' *in pari delicto* defense insufficient as a matter of law where, *inter alia*, there was "no claim that the Government has violated the law in cooperation with the defendants." *See Philip Morris*, 300 F. Supp. 2d at 76. Courts in other districts have reached the same result. *See Chevron*, 2011 U.S. Dist. LEXIS 92091, at *45 ("[T]here is nothing in the proposed amended answer that suggests that Chevron's misconduct caused the harm with respect to which Chevron seeks relief … ."); *OSF Healthcare Sys.*, 2010 U.S. Dist. LEXIS 7584, at *14 (in civil RICO action, striking unclean hands and *in pari delicto* defenses where defendant made allegations regarding "[p]laintiff's similar misconduct towards others"); *Smithfield Foods, Inc. v. United Food & Commer. Workers Int'l Union*, 254 F.R.D. 274, 280-81 (E.D. Va. 2008) (in civil RICO action, denying motion for leave to assert *in pari delicto* defense as futile, where, *inter alia*, allegations that plaintiff's employee played a minor role in misconduct "would not establish that [plaintiff]

was of 'equal fault' relative to the [d]efendants in perpetrating the allegedly extortionate scheme set forth in the RICO counts"); *Bieter v. Blomquist*, 848 F. Supp. 1446, 1450 (D. Minn. 1994) (in civil RICO action, dismissing *in pari delicto* defense as a matter of law where the "[d]efendants d[id] not claim that [plaintiff] was involved in the same alleged bribery for which [plaintiff] now seeks relief").

In this case, defendants' *in pari delicto* defense fails for the same reason that their unclean hands defense does. Defendants do not, and could not, allege that FEI "knew about or authorized" their racketeering schemes, *cf. Rogers*, 521 F.3d at 393, or that it engaged in any, ***let alone a substantially equal amount,*** of the racketeering, conspiratorial, or tortious conduct for which it seeks relief in this litigation. *Cf. Edwards*, 437 F.3d at 1155 ("[I]t is beyond doubt that the allegations of the trustee's complaint render ETS in active participation with the [defendants]. If anything the conduct of ETFS was in majore delicto.") (affirming 12(b)(6) dismissal based on *in pari delicto* defense); *Nisselson*, 469 F.3d at 155 ("[T]he amended complaint leaves no doubt but that L&H played the primary role in contriving the scheme to acquire Old Dictaphone under false pretenses. The amended complaint also establishes that L&H created New Dictaphone (nee Dark) for the express purpose of furthering this artifice.") (affirming 12(b)(6) dismissal based on *in pari delicto* defense). Accordingly, defendants' *in pari delicto* defense is insufficient as a matter of law and should be stricken.[18]

II. CONCLUSION

The above defenses have no applicability to FEI's RICO, Virginia Conspiracy Act, or intentional tort claims. "Permitting discovery and the development of the case" under them "would serve only to divert and protract the litigation with concomitant expense," *Chrysler*, 596

[18] Ironically, if any party is subject to an "unclean hands" or "*in pari delicto*" defense, it is HSUS, who made six of the payments that FEI claims were bribes of Tom Rider and who now claims to have been a victim of "fraud" by FFA because FFA told HSUS that the payments were not bribes and HSUS allegedly believed it.

F. Supp. at 420 (citation and alteration omitted), thereby prejudicing FEI. Accordingly, for this and all the reasons stated above, the following defenses should be stricken from the pleadings: (1) contributory negligence; (2) assumption of risk: (3) privity of contract; (4) due process; (5) good faith/reasonableness; (6) compliance with District of Columbia Rule of Professional Conduct 1.3(a); (7) the District of Columbia Anti-SLAPP Act; (8) conduct taken by others outside control; and (9) unclean hands, *in pari delicto*, laches, estoppel, and waiver.

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Respectfully submitted,

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