UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,

Plaintiff,

v.

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,

Defendants.

Case No. 07-1532 (EGS)

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE INSUFFICIENT DEFENSES

Defendants respectfully submit this memorandum of law in opposition to Plaintiff Feld Entertainment, Inc.'s ("FEI") motion to strike certain defenses asserted in various Defendants' Answers to FEI's First Amended Complaint.

PRELIMINARY STATEMENT

Motions to strike affirmative defenses are disfavored, as they consume the time and effort of the Court and the parties, and do little to narrow the scope of the case. Many courts will only strike affirmative defenses that are scandalous or prejudicial. Under the liberal provisions of the Federal Rules of Civil Procedure, defendants are generally given wide latitude to plead affirmative defenses, which serve to put a plaintiff on notice of the later defenses that are likely to be raised in the case. Ignoring these liberal standards and general federal court practice, Plaintiff continues its scorched earth litigation tactics and brings this motion attacking twelve defenses pleaded by various Defendants.[1] Defendants agree to withdraw one of the challenged affirmative defenses (and would have done so before Plaintiff filed this motion if Plaintiff had explained its argument in favor of striking this affirmative defense). With respect to the remainder of the defenses, Plaintiff has failed to carry its burden of supporting the disfavored remedy of a motion to strike.

First, Plaintiff contests several defenses as insufficiently pleaded. But Plaintiff, both from prior filings and arguments in this case and in *ASPCA, et al. v. Feld Entertainment, Inc.*, Case No. 03-2006 (the "ESA Action"), is fully on notice of the contours of these defenses. Any required notice to Plaintiff has thus been satisfied.

Second, Plaintiff seeks to strike Defendants' defense of good faith and reasonable

[1] Although various Defendants asserted different affirmative defenses, Defendants are submitting a single opposition brief addressing all of the challenged defenses. In order to assist the Court, a chart listing the affirmative defenses at issue and which Defendants have pleaded them is included at the end of this brief as Exhibit A.

conduct, despite conceding that it properly applies to all of the claims in this case. Instead, Plaintiff seeks to waste the Court's time with a motion to strike this affirmative defense only with respect to one of the predicate acts for its RICO claim. This is hardly an efficient use of the Court's or the parties' time. Moreover, for the one predicate act which Plaintiff claims is outside the bounds of the affirmative defense, evidence of good faith on the part of Defendants is nonetheless relevant to Plaintiff's claims.

Third, Plaintiff seeks dismissal of a number of defenses on the supposed ground that they are irrelevant to the claims it has pleaded. But each goes to causation, which is an element of Plaintiff's claims. Regardless of whether they are characterized as affirmative defenses, each embodies an argument relevant to the defense of Plaintiff's claims. Furthermore, several are potentially relevant to Plaintiff's claim of maintenance—the bounds of which, as this Court has recognized, are not well-defined.

Fourth, Plaintiff seeks to dismiss a defense pleaded by Defendants Lovvorn and Ockene based on the District of Columbia Rules of Professional Conduct. These rules are directly relevant to whether these Defendants engaged in the type of behavior Plaintiff has alleged.

PROCEDURAL HISTORY

On the afternoon of September 5, 2012, counsel for Plaintiff notified Defendants that it intended to move to strike a number of affirmative defenses that certain Defendants had pleaded in their Answers to the First Amended Complaint. The next day, defense counsel responded that it could not consent to the withdrawal of defenses absent an explanation from Plaintiff of its grounds for moving, a position joined by all Defendants. Plaintiff did not engage in any further discussions, and instead filed this motion the next day.

ARGUMENT

The assertion of affirmative defenses is governed by Fed. R. Civ. P. 8(c), which requires only that "a party must affirmatively state any avoidance or affirmative defense . . . ." Fed. R. Civ. P. 8(c). The pleading requirements of Rule 8(c) are not stringent, and "nothing in the text of the Federal Rules of Civil Procedure . . . even hints that a defendant must plead sufficient facts to establish the 'plausibility' of an affirmative defense." *Wells Fargo & Co. v. U.S.*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010) (finding that the heightened pleading standards set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), do not apply to affirmative defenses); *see also Shirk v. Garrow*, 505 F. Supp. 2d 169, 170 n.1 (D.D.C. 2007) ("Rule 8(c) . . . governs the pleading of affirmative defenses [while] *Twombly* specifically references Rule 8(a)(2).")

Due to these liberal pleading rules, courts view motions to strike affirmative defenses with disfavor, and many courts "will grant such motions only if the portions sought to be stricken are prejudicial or scandalous." *Nwachukwu v. Karl*, 216 F.R.D. 176, 178 (D.D.C. 2003) (further stating that "absent a strong reason for so doing, courts will generally not tamper with pleadings.") (*citations omitted*). To succeed on a motion to strike, "the moving party must show that the allegations being challenged are so unrelated to the plaintiff's claims as to be unworthy of any consideration as a defense and that the moving party is prejudiced by the presence of the allegations in the pleading." *FTC v. Commonwealth Mktg. Group, Inc.*, 72 F. Supp. 2d 530, 545 (W.D. Pa. 1999) (*citation omitted*); *see also Soc'y of Lloyd's v. Siemon-Netto*, No. 03-1524, 2004 U.S. Dist. LEXIS 29913, at *6 (D.D.C. Aug. 20, 2004) (*citation omitted*) (motions to strike should only be granted where "the legal issues raised by [the motion] are clear and dispositive, so that under no set of circumstances could the defenses succeed."); *Sweeney v. Am. Registry of Pathology*, 287 F. Supp. 2d 1, 5 (D.D.C. 2003) (*citation omitted*) ("If an affirmative defense

presents substantial questions of fact or law, the motion to strike should be denied."). [2]

The affirmative defenses challenged by Plaintiff are neither prejudicial nor scandalous—quite to the contrary, these defenses represent the same arguments that Defendants have made against Plaintiff's accusations throughout this case and the underlying ESA Action: that Plaintiff was made aware of the funding that certain Defendants provided to Tom Rider well before it chose to initiate these claims, that no agreement to pay Tom Rider to influence his testimony exists, and that Plaintiff's own litigation tactics have caused delay in resolving its claims and exacerbated any 'damages' it purports to have suffered. These affirmative defenses directly relate to Plaintiff's claims, and the damages alleged to extend from them.

Further, "a party's failure to plead an affirmative defense generally results in the waiver of that defense and its exclusion from the case." *Kapache v. Holder*, No. 11-5017, 2012 U.S. App. LEXIS 7441, at *22 (D.C. Cir. April 13, 2012) (*citation omitted*). Commentators have thus advised defendants to plead all potentially applicable affirmative defenses to avoid this harsh result—a practice which is permitted under the liberal standards of Rule 8(c). *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278 (3d ed. 2012) ("[I]f the defendant is in any doubt as to the proper classification of particular defensive matter, it is advisable for him to plead it as an affirmative defense under Rule 8(c) to avoid any possibility of waiver.").

Moreover, commentators have recognized that the distinction between affirmative defenses and a defense that a plaintiff has failed to meet its burden of proving an element of one

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[2] *See also Tiscareno v. Frasier*, No. 2:07 cv 336, 2012 U.S. Dist. LEXIS 55553, at *45–46 (D. Utah April 19, 2012) (affirming that the "notice pleading standard is a liberal one and requires only a short and plain statement of each affirmative defense intended to be brought at trial."); *Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1245 (N.D. Ill. 1991) (noting that "[i]f a defense may be relevant, then there are other contexts [besides a motion to strike] in which the sufficiency of the defense can be more thoroughly tested with the benefit of a fuller record – such as on a motion for summary judgment.").

of its claims is often blurry, and have observed that striking such a defense is not the appropriate remedy since it will not narrow the scope of the case. *See* 5 Wright & Miller, *Federal Practice & Procedure* § 1278 ("If a defendant makes the mistake of pleading matter as an affirmative defense that could have been raised by a denial, there is no reason to penalize him . . . by granting a motion to strike, which will not promote the disposition of the case on the merits, or by shifting the burden of proof from the plaintiff to the defendant by invoking the fiction that by pleading affirmatively on the matter the defendant intended to assume the burden of proof."). The issues raised by the Defendants will remain part of the case—whether pleaded as affirmative defenses or not—and thus Plaintiff's motion to strike should be denied.

I. Defendants Have Adequately Pleaded the Defenses of Unclean Hands, Estoppel, Waiver, and Laches

Plaintiff challenges the defenses of unclean hands, estoppel, waiver, and laches as inadequately pleaded under Fed. R. Civ. P. 8, or otherwise unavailable. Each defense should be sustained.

A. Plaintiff is adequately on notice of the bases for the defenses

Plaintiff argues that these defenses should be struck from Defendants' Answers because the factual bases underlying these defenses were not pleaded. In asserting this argument, Plaintiff attempts to impose a higher standard than is required by the law for the pleading of affirmative defenses. To the extent some courts do require defendants to plead the factual bases underlying these defenses, the purpose of this requirement is to ensure that "the plaintiff is not a victim of unfair surprise." *J&J Sports Prods. v. Jimenez*, No. 10 cv 0866, 2010 U.S. Dist. LEXIS 132476, at *4–5 (S.D. Cal. Dec. 15, 2010).

Plaintiff is already well aware of the bases for the affirmative defenses of estoppel, laches, and waiver that Defendants assert here. As Defendants explicitly stated in their Motion

to Dismiss Plaintiff's Amended Complaint, "it is indisputable that FEI has in fact known for many years about Mr. Rider's funding." *See* Motion to Dismiss Plaintiff's Amended Complaint (DE 54) at 21. Defendants have consistently taken the position that Plaintiff's May 2002 internal e-mail exchange unequivocally demonstrates that Plaintiff knew, shortly after the ESA Action was filed, that the ASPCA was providing funding to Mr. Rider for his living and travel expenses while he engaged in public education and media outreach. Defendants further revealed this position in their respective Answers by denying paragraph 32 of the First Amended Complaint, which stated that Plaintiff did not become aware of such funding until much later. The affirmative defenses of estoppel, waiver, and laches are all based on this well-known position, and Plaintiff is not victim to any unfair surprise.

With regard to the defense of unclean hands, Plaintiff is also on notice of Defendants' arguments. As described in their recently-filed discovery plan, Defendants maintain that Plaintiff's own conduct in the ESA Action was responsible for much of the delay and expense about which it now complains, and that Plaintiff engaged in certain tactics that it now alleges Defendants employed. *See* Defs. Joint Discovery Plan Pursuant to Fed. R. Civ. P. 26(f)(3) (DE 118) at 4–5. Plaintiff is aware of the scope of Defendants' arguments, and thus can adequately prepare.

Furthermore, even courts that have applied a more rigorous pleading standard to affirmative defenses have generally permitted defendants the opportunity to amend their defenses following a motion to strike. *See Francisco v. Verizon South, Inc.*, No. 3:09 cv 737, 2010 U.S. Dist. LEXIS 77083, at *32 (E.D. Va. July 29, 2010). Therefore, should the court require more factual details to be pleaded for the challenged defenses, Defendants respectfully request an opportunity to amend their respective Answers. *See Ulyssix Techs., Inc. v. Orbital Network*

Eng'g, Inc., No. ELH-10-02091, 2011 U.S. Dist. LEXIS 14018, at *41 (D. Md. Feb. 11, 2011) (allowing these affirmative defenses to be replead, and stating that "[i]f a motion to strike an affirmative defense is granted, the court will ordinarily give the defendant leave to amend.")[3]

II. Good Faith is a Valid Defense to the "Illegal Gratuity" Statute

Plaintiff concedes that acting in good faith will serve as a defense to some intentional torts and/or criminal activity, but argues that good faith is not a defense to one of the predicate acts underlying its RICO claim, 18 U.S.C. § 201(c), the "illegal gratuity" statute. Pls. Br. at 7. In support, Plaintiff cites dicta from *United States v. Project on Gov't Oversight*, 616 F.3d 544 (D.C. Cir. 2010) in which the Court of Appeals for the D.C. Circuit found that good faith could not serve as a defense to a violation of a separate statute, 18. U.S.C. § 209(a). *Id.* at 552–53.

As an initial matter, Plaintiff has not advanced any challenges to this defense other than in the context of the illegal gratuity statute. Thus, the defense should be sustained with respect to all other claims. Thus, with regard to good faith, Plaintiff's motion is not to strike an affirmative defense at all, but instead to strike the defense with respect to *one* predicate act (out of the many it has pleaded) of *one* claim (out of several it had pleaded). As noted above, this type of motion is entirely unsuited for such narrow application, prior to any discovery taking place in the case and either side being given an opportunity to develop and explore their theories of the case. Plaintiff's motion to strike this affirmative defense should be denied on this ground alone.

In any event, to prove its claim under the illegal gratuity statute, Plaintiff will be required to show that the other Defendants made payments "for or because of" Mr. Rider's expected testimony in the ESA Action, and that Mr. Rider accepted those payments as compensation for

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[3] Plaintiff also argues that the defenses of unclean hands and laches are limited to equitable claims. *See* Pls. Br. at 15 n.15. Plaintiff has asserted claims for equitable relief in connection with its RICO and Virginia Conspiracy Act claims. *See* 1st Amended Compl. at 128. Thus, the equitable relief provided by the defenses of unclean hands and laches is available against these claim. Defendants consent to Plaintiff's request that these defenses be limited to the equitable relief advanced in Plaintiff's complaint.

his testimony. *See* 18 U.S.C. § 201(c). Furthermore, the D.C. Circuit has previously found that a plaintiff must prove that the "alleged [illegal] gratuities [were] given and received 'knowingly and willingly.'" *United States v. Campbell*, 684 F.2d 141, 150 (D.C. Cir. 1982) (citing *United States v. Brewster*, 506 F.2d 62, 80 (D.C. Cir. 1972)). Defendants' good faith belief in the propriety in making and receiving those payments, and any evidence that such payments were made for purposes other than for or because of Mr. Rider's testimony, will negate Plaintiff's ability to prove its claim. Whether phrased as a requirement of proof on the part of Plaintiff or as an affirmative defense (as was done here out of an abundance of caution), Defendants' good faith *is* relevant. Plaintiff's motion to strike in this regard should be denied.

III. The Defenses of Contributory Negligence, Assumption of Risk, Lack of Privity, Conduct Outside of Defendants' Control, Unclean Hands, and *In Pari Delicto* Are Relevant to Plaintiff's Conduct in the ESA Action, Which Implicates Its Ability to Recover Here

Defendants also oppose striking the defenses of contributory negligence, assumption of risk, conduct outside of Defendants' control, unclean hands, and *in pari delicto*, which were included out of an abundance of caution. Each of these defenses goes to the element of causation, which will be a highly-contested issue in this case. Other defenses require factual context that is not available for a motion based only on the pleadings. And, the Court itself has recognized that it is not even clear whether maintenance remains a viable claim in this jurisdiction. *See* July 9, 2012 Memorandum Opinion (DE 90) at 83. Accordingly, it also far from clear precisely which affirmative defenses may be invoked against it, hence making it prudent for Defendants to assert defenses liberally, lest they be accused of waiving a defense that might, at some juncture, be deemed relevant.

A. Plaintiff's conduct in pursuing the ESA Action is at issue in this action

Defendants seek to make clear that they intend to vigorously pursue, as a defense in this

case, that Plaintiff's own conduct in the ESA litigation—whether it be deemed intentional, negligent, or some combination of the two—contributed heavily to Plaintiff's claimed "damages," i.e., its purported fees and costs expended on the litigation. While aspects of this argument may be directed to Plaintiff's failure to plead the elements of its own case, rather than as affirmative defenses of contributory negligence, assumption of risk, unclean hands, *in pari delicto*, or the like, Defendants have done so to ensure that there is no question of waiver down the road.

For example, Plaintiff's challenge to Defendants' defense based on the conduct of others ignores its own requirement to prove causation. Plaintiff's claim that the conduct of others "is not a defense to any of FEI's claims" is incorrect. *See* Pls. Br. at 12. As a fundamental matter of causation, a defendant is entitled to present the defense that conduct of others caused any injuries or damages in any tort case, including one brought through the mechanism of RICO. For example, a particular Defendant may present evidence that Plaintiff's injuries and/or damages were caused by the conduct of another (including FEI itself), such that a superseding intervening cause (and not the conduct of a particular defendant, or even any of them) was the cause of Plaintiff's damages. Plaintiff's contention that since RICO liability is joint and several and co-conspirators are vicariously liable this defense is inapplicable simply misses the mark. First, a Defendant can prove that he, she, or it did not engage in the alleged RICO enterprise or conspiracy where all the acts causing injury to Plaintiff were done by another actor or actors. Additionally, to the extent that particular damages were caused by someone outside the control of all Defendants, such damages cannot be attributed to the alleged RICO enterprise or conspiracy in any respect. Similar logic applies to the remaining defenses of contributory negligence, assumption of risk, unclean hands, and *in pari delicto*.

The Defendants suggest that the facts implicit in the above scenarios can properly be considered by the trier of fact as a failure of Plaintiff's proof of causation (for which FEI has the burden) as opposed to an affirmative defense. However, this in no way lends validity to Plaintiff's motion to strike. The fact that certain Defendants pleaded these defenses as affirmative defenses out of an abundance of caution is appropriate. *See* 5 Wright & Miller, *Federal Practice & Procedure* § 1278 (discussed *supra*). Moreover, because factually these affirmative defenses are coterminous—or at least highly overlap—with Plaintiff's burden of proving causation, Plaintiff suffers no prejudice or harm by the continued inclusion of these defenses. As such, Plaintiff's motion to strike these defenses is unwarranted and likely inappropriate, *see id.*, and should also be denied.

B. Plaintiff's Arguments About the Availability of Certain Defenses Rely on Facts Not Ascertainable From the Pleadings and Are Thus Not Appropriately Determinable on a Motion Addressed Solely to the Pleadings

Likewise, Plaintiff's argument regarding the unavailability of the defense asserted by Lovvorn and Ockene 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" (Pls. Br. at 13) is inappropriate at this juncture.

Plaintiff alleges (though Lovvorn and Ockene deny) that Lovvorn and Ockene were general partners of MGC. If FEI were to succeed in proving that allegation, then Lovvorn and Ockene would assert as a defense to any vicarious liability that the partnership never approved of any (alleged) criminal conduct by any partner, and that such conduct—to the extent it occurred—was outside of the "ordinary course of business" for the partnership. D.C. Code § 29-603.01(2) (2012). Despite plaintiff's protestations to the contrary (Pls. Br. at 13–14), whether or not such conduct was authorized or was within the ordinary course of business for the partnership are

each facts not determinable from the pleadings.[4] Nor is what Plaintiff—"or any other victim of defendants' [alleged] fraud" (Pls. Br. at 14)—knew or understood determinable from the pleadings.[5] Thus, the validity of this defense is not appropriately determined on Plaintiff's instant motion, the scope of which is limited solely to the pleadings. Accordingly, Plaintiff's motion to strike this defense should be denied.

C. Plaintiff's claim of maintenance requires a showing of privity

Furthermore, the maintenance cause of action necessarily includes contractual components thereby providing a sufficient basis for the affirmative defense of lack of privity. Thus, although the Court has acknowledged that it is unclear whether District of Columbia law recognizes a maintenance claim, the Court defined maintenance as: "the act of one improperly, and for the purpose of stirring up litigation and strife, encouraging others either to bring actions or to make defenses which they have no right to make, and the term seems to be confined to the intermeddling in a suit of a stranger or of one not having any privity or concern in the subject matter or standing in no relation of duty to the suitor." *Feld Entertainment, Inc. v. ASPCA et al.*, Case No. 07-1532 (EGS), 2012 U.S. Dist. LEXIS 93863, at *104 (D.D.C. July 9, 2012) (DE 90) (citing *Golden Commissary Corp. v. Shipley*, 157 A.2d 810, 814 (D.C. 1960)). The Court dismissed Plaintiff's champerty claim holding that "courts applying District of Columbia law in champerty claims have identified it solely as a defense to a contract claim." *Id.* at *111. However, it is undisputed that champerty is a form of maintenance. *See* 15 Corbin on Contracts § 83.10 (2012)("Champerty is maintenance with the added element that the party paying the

[4] Defendants Lovvorn and Ockene are certain, however, that they never, at any time or in any capacity, approved any unlawful conduct, nor do they believe that any unlawful conduct occurred. They have both so stated in their respective Answers. *See, e.g.*, Answer of Jonathan R. Lovvorn to First Amended Complaint (DE 100) at 47 ("[A]ny unlawful acts by a partner of [MGC] were made without Defendant's actual or apparent consent, authorization, knowledge or ratification."); Answer of Kimberly D. Ockene to First Amended Complaint (DE 101)52 (same).

[5] Moreover, the very lack of clarity at this stage about who are the "victims" for whom notice must be established is yet another reason why a decision on the pleadings is inappropriate.

costs and expenses does so in return for a share in the proceeds of the litigation."); Am.Jur. 2d, Champerty Maintenance and Barratry § 1 (2012)("Champerty is a type of maintenance").

"In general, only the parties to the *contract* of maintenance or champerty have standing to assert those defenses/causes of action." *In re Eugene E. Brown and Debra R. Brown*, 354 B.R. 100, 105 (N.D. W. Va. 2006) (emphasis added); 15 Corbin on Contracts § 83.13 (2012) ("the defendant cannot rely on the champertous contract as a defense to liability. Although actions might not have been brought but for the champertous bargain, defendants must rely on such defenses as they may have on the cause of action asserted by the plaintiff.") Consequently, a cause of action for maintenance necessarily includes contractual elements, the affirmative defense of lack of privity is warranted, and Plaintiff's motion to strike the lack of privity defense should be denied.

D. The defense of unclean hands is relevant to Plaintiff's equitable claims

Plaintiff also seeks to challenge the defense of unclean hands as being limited to equitable claims. Pls. Br. at 15. In its First Amended Complaint, Plaintiff has specifically requested "[p]reliminary and permanent injunctions enjoining defendants from any further racketeering activity and from harming FEI's business." 1st Am. Compl. (DE 25) at 134. In its brief, Plaintiff acknowledges the existence of this request. Pls. Br. at 15 n.15. Plaintiff's conduct, as described above, goes directly to whether it is appropriate to enjoin Defendants from engaging in any future conduct. The defense of unclean hands should therefore remain as to these equitable claims.

Plaintiff also argues that unclean hands is not available in a civil RICO action. In support, it relies primarily on *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 593 F. Supp. 2d 840 (E.D. Va. 2008). *See* Pls. Br. at 16–17. There is no authority within this Circuit rejecting unclean hands in the civil RICO context. And even the *Smithfield* court

acknowledged that for RICO claims "the existence of inequitable conduct may be pertinent in shaping equitable relief, if there is a finding of liability." *Id.* at 848.

IV. The D.C. Rules of Professional Conduct Are Relevant to the Defenses of Defendants Lovvorn and Ockene

Plaintiff also asks the Court to strike the affirmative defense asserted by Defendants Lovvorn and Ockene that, "[i]n all aspects of [their] participation in the ESA action, [each] acted in good faith in accordance [with] Rule 1.3(a) of the D.C. Bar Rules of Professional Conduct to represent [their] clients zealously and diligently within the bounds of the law." *See* Answer of Jonathan R. Lovvorn to First Amended Complaint (DE 100) at 47; Answer of Kimberly D. Ockene to First Amended Complaint (DE 101) at 52. Plaintiff asserts that such defense should be stricken because the ethical rules require attorneys to operate within the bounds of the law; thus, "if FEI prevails on any [of its claims asserted against Lovvorn and Ockene], there is nothing in Rule 1.3(a) that will save [them]." Pls. Br. at 8.

Defendants Lovvorn and Ockene agree that compliance with Rule 1.3(a) will not trump a finding that the Defendants engaged in unlawful conduct; nor do the Defendants have the burden of proof of such compliance. Rather, for all of the claims Plaintiff has asserted against Lovvorn and Ockene, the burden of proving the Defendants' scienter is—as Plaintiff implicitly recognizes in its motion—squarely on Plaintiff. Pls. Br. at 8 ("FEI has alleged that defendants violated RICO and the Virginia Conspiracy Act and committed *intentional* torts." (emphasis added)). However, because the conduct they have been accused of primarily revolves around their activities as attorneys litigating a case as members of a team, *see, e.g.*, 1st Am. Compl. (DE 25) ¶¶ 44, 45 (alleging Defendants Lovvorn and Ockene signed the ESA complaint); *id.* at ¶ 256 (alleging that Defendant Ockene signed a subpoena in the ESA litigation), Rule 1.3 provides the appropriate lens through which to examine Lovvorn and Ockene's conduct. In other words, in

order to succeed Plaintiff will need—but be unable—to demonstrate that Defendants' conduct went substantially beyond the bounds of zealous and diligent advocacy on behalf of their clients, to engaging or conspiring in criminal conduct.

Defendants nevertheless pleaded compliance with Rule 1.3(a) as an affirmative defense in their respective Answers out of an abundance of caution—as defendants commonly do—in order to avoid giving Plaintiff any basis to argue lack of notice or waiver, particularly given the contentious nature of the litigation between the parties to date. *See* 5 Wright & Miller, *Federal Practice & Procedure* § 1278. Because the inclusion of such defense in Defendants' pleadings causes neither prejudice nor harm to Plaintiff, with respect to such defense Plaintiff's motion to strike should be denied. *See id.*

V. Due Process Considerations and the District of Columbia Anti-SLAPP Act Are Relevant to Plaintiff's Claims

Plaintiff also challenges certain Defendants' assertion of affirmative defenses under the due process clauses of the Fifth and Fourteenth Amendments to the Constitution and under the District of Columbia Anti-SLAPP Act. Pls. Br. at 6, 10. Defendants maintain that this action is an inappropriate use of a civil RICO action to attack public advocacy efforts protected, among other things, by the First Amendment, and is designed to use the court system to silence valid public critiques. Legal precedents interpreting the due process clauses and the District of Columbia Anti-SLAPP Act, which reflects the intent of the legislature in this jurisdiction to deter the kind of lawsuit brought here, are thus directly relevant to Defendants' legal arguments in this case. Reference in Defendants' Answers to these legal tenets was therefore included out of an abundance of caution, especially in view of Plaintiff's declared effort to employ estoppel or preclusion principles broadly to foreclose Defendants from waging an effective defense. *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) ("The federal common law of preclusion is, of

course, subject to due process limitations."). Having so preserved the due process argument against the risk of waiver,[6] Defendants assert that it properly remains Plaintiff's burden to demonstrate that collateral estoppel applies.

With respect to the D.C. Anti-SLAPP Act, because it need not be pleaded as a traditional affirmative defense, Defendants do not object to it being deemed withdrawn as such, so long as it is clear that such withdrawal is without prejudice to Defendants' right to reference it and related law in responding to Plaintiff's positions, and for precedential or persuasive value.

CONCLUSION

For the foregoing reasons, Defendants withdraw the defense asserted under the District of Columbia Anti-SLAPP statute, and the Plaintiff's motion to strike Defendants' defenses should be denied.

Date: September 28, 2012

Respectfully submitted,

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[6] The Defendants note that—in the very different context of the assertion of a "fair notice" defense based on due process—courts have treated the assertion of due process violations as an appropriate affirmative defense. *See, e.g., Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Authority*, 618 F. Supp. 2d 815, 831–32 (E.D. Tenn. 2009); *United States v. Cinergy Corp.*, 495 F. Supp. 2d 892, 901 (S.D. Ind. 2007); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 886 (S.D. Ohio 2003). The fair notice due process issue addresses different concerns than the due process infirmities raised by Plaintiff's broad attempt to prevent Defendants from having their fair day in court—in part because Plaintiff plainly has the burden of showing that issue preclusion is warranted. But here, as elsewhere, Defendants want to assure that there is no risk of a later assertion by Plaintiff that such arguments were waived.

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and

/s/ Andrew B. Weissman (with permission)
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EXHIBIT A

Affirmative Defense	ASPCA	AWI	Born Free	FFA	HSUS	MGC	WAP	Lovvorn	Ockene	Rider
Estoppel	X	X	X	X	X	X	X	X	X	X
Laches	X	X	X	X	X	X	X	X	X	X
Waiver	X	X	X	X	X	X	X	X	X	X
Unclean Hands	X	X	X	X	X	X	X	X	X	X
Reasonable / Good Faith Conduct	X	X	X	X		X		X	X	X
Contributory Negligence			X			X		X	X	X
Assumption of Risk			X			X		X	X	X
Lack of Privity						X				X
In Pari Delicto			X	X		X	X	X	X	X
Conduct by Others Outside Defendants' Control	X	X	X	X		X		X	X	X
Compliance with D.C. Rule of Professional Conduct 1.3								X	X	
D.C. Anti-SLAPP Act	X	X	X			X	X	X	X	X
Violation of Due Process		X						X	X	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendants' Opposition to Plaintiff's Motion to Strike Insufficient Defenses was served via electronic filing this 28th day of September, 2012, to all counsel of record.

/s/ Daniel S. Ruzumna
Daniel S. Ruzumna