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 REPLY IN SUPPORT OF MOTION TO STRIKE INSUFFICIENT DEFENSES

Defendants' Opposition to Plaintiff's Motion to Strike Insufficient Defenses (DE 122) (9-28-12) ("Opposition" or "Opp.") essentially concedes that there is no set of circumstances under which the affirmative defenses identified in FEI's Motion to Strike (DE 115) (9-7-12) ("Motion" or "Mot.") could succeed. The Opposition makes little attempt, and in many instances no attempt at all, to come forward with a legal and/or factual basis for the affirmative defenses identified in FEI's Motion. Defendants offer no response to much of the legal authority and argument proffered by FEI, thereby implicitly conceding that the defenses should be stricken. *Gates v. Dist. of Columbia*, 825 F. Supp. 2d 168, 170 (D.D.C. 2011) (treating motion to strike affirmative defense as implicitly conceded where defendant offered no response to plaintiff's argument).

Defendants come forward with ***no*** argument as to how certain defenses are applicable as a legal matter. For example, defendants make no argument as to how contributory negligence and assumption of risk – which, indisputably are affirmative defenses to negligence actions only – could possibly bar FEI's causes of action – all of which are predicated on ***intentional*** conduct. Moreover, defendants' answers pleaded no facts, and their Opposition likewise fails to proffer any facts, that could make their equitable defenses applicable in this case. For example, defendants make no allegations that FEI participated (let alone substantially participated) in defendants' illegal witness payments to Rider, fraud on the court or donor fraud – which are required predicates for the affirmative defenses of unclean hands and *in pari delicto*. Nor could they. Defendants request leave to amend, but offer nothing to show that such amendments would be anything but futile.

Instead of coming forward with factual allegations demonstrating that leave to amend should be granted – or addressing the legal authority in FEI's Motion – defendants invent an

"abundance of caution" pleading standard (Opp. at 8) and continue their *ad hominem* attacks on FEI (Opp. at 1). An "abundance of caution" does not justify burdening the Court or the plaintiff with defenses that are not "warranted by existing law" and/or utterly lacking in "evidentiary support." Fed. R. Civ. P. 11(b)(2)-(3). That defendants did not undertake a reasonable inquiry into the legal and factual bases for their defenses is evidenced by the fact that defendants now have (partially) withdrawn their D.C. Anti-SLAPP Act defense. Had defendants conducted basic legal research on the viability of the Anti-SLAPP Act as an affirmative defense when they filed their answers, they would not have asserted it in the first place. The same follows for the other defenses that FEI has challenged.

Far from a "scorched earth litigation tactic[]," Opp. at 1, courts in this district grant motions to strike affirmative defenses where, as here, "'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)). Avoiding wasting unnecessary time and money is exactly what FEI's Motion seeks to do. *Cf.* Opp. at 2. Neither the Court nor FEI should be burdened with discovery and argument concerning frivolous defenses that have no applicability to the claims to be litigated in this case. Striking the affirmative defenses identified in FEI's Motion will keep this litigation focused on the allegations of racketeering, conspiratorial and tortious conduct at issue, and avoid defendants' proposed frolic and detour into factual issues that have absolutely no relevance here. Defendants apparently view certain of their affirmative defenses as a fulcrum to relitigate the ESA Action. But defendants cannot use discovery in this case as a vehicle to delve into factual

matters that cannot, as a matter of law, bar FEI's claims. Wide-ranging discovery on irrelevant factual issues will unnecessarily expand the scope of discovery, resulting in prejudice to FEI.

There is no set of circumstances under which the following defenses could succeed: (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. All of them should be stricken from defendants' respective answers.[1]

I. DEFENDANTS MUST HAVE A LEGAL AND FACTUAL BASIS FOR THEIR AFFIRMATIVE DEFENSES, AND THEIR PLEADINGS MUST PROVIDE FEI WITH NOTICE OF THE SAME

A. The Defenses Should Be Stricken Regardless of Whether *Twombly* and *Iqbal* Apply

It is not settled whether *Twombly* and *Iqbal* apply to affirmative defenses. *See Francisco v. Verizon South, Inc.*, 2010 U.S. Dist. LEXIS 77083, at *15-23 (E.D. Va. July 29, 2010) (discussing split of authority among district courts). While no court of appeals has addressed this issue, the majority of district courts to consider it have applied *Twombly* and *Iqbal* to affirmative defenses. *Id.* at *16-17. A number of district courts have, however, declined to do so, reasoning that *Twombly* and *Iqbal* only address Rule 8(a) (claims for relief) and not Rule 8(b) (defenses; admissions and denials) and 8(c) (affirmative defenses). *Id.* at *19. Plaintiff is aware of no

[1] Defendants' characterization of FEI's attempt to confer with defendants concerning its Motion to Strike, Opp. at 2, is disingenuous. FEI first advised defendants that it intended to file a Rule 12(f) motion to strike on August 21, 2012, during the parties' meeting regarding their proposed discovery plans. One day later, FEI sought leave for additional time to file its Rule 12 motion (DE 111) (8-22-12), which was granted by the Court. Minute Order (8-23-12). On September 5, 2012, counsel for FEI provided defendants with a written list of the defenses which were the subject of its Motion, and indicated that the defenses either were unavailable as a matter of law and/or were not pleaded with the specificity required by Fed. R. Civ. P. 8. FEI, therefore, complied with Local Rule 7(m). Moreover, the process followed here is no different than what the parties have done concerning prior motions in the ESA Action, No. 03-2006 (D.D.C.) (E.G.S.), including, most recently, HSUS's Motion to Strike HSUS from Defendant Feld Entertainment's Motion for Entitlement to Attorneys' Fees (DE 598) (6-11-12).

decision by a court in the United States District Court for the District of Columbia addressing whether *Twombly* and *Iqbal* apply to affirmative defenses.[2]

But the Court need not reach this issue. *Twombly* and *Iqbal* have no bearing as to whether certain defenses are applicable, ***as a matter of law***, to FEI's claims. *See, e.g.*, *United States v. Honeywell Int'l, Inc.*, 841 F. Supp. 2d 112, 116 (D.D.C. 2012) (striking legally insufficient defenses, with no discussion of *Twombly*/*Iqbal*); *Kane Co.*, 668 F. Supp. 2d at 150-51 (same). Even district courts refusing to apply the *Twombly* and *Iqbal* pleading standards to affirmative defenses have continued to strike legally insufficient defenses. *See, e.g.*, *Tiscareno v. Frasier*, 2012 U.S. Dist. LEXIS 55553, at *38-48 (D. Utah Apr. 19, 2012) (cited by defendants) (declining to apply *Twombly* and *Iqbal* to affirmative defenses, but striking defenses that could not succeed as a matter of law); *Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC*, 752 F. Supp. 2d 721, 727 (W.D. Va. 2010) (declining to apply *Twombly* and *Iqbal* to affirmative defenses, but striking, *inter alia*, defenses "devoid of factual support that would make them contextually comprehensible," including estoppel defense).

Moreover, "[e]ven under the pre-*Iqbal* notice pleading standards, defenses had to be 'stated in an intelligible manner' in order to give the opposing party 'adequate notice' of the nature of the defense." *Odyssey Imaging, LLC*, 752 F. Supp. 2d at 726 (quoting *Davis v. Sun Oil Co.*, 158 F.3d 606, 614 (6th Cir. 1998) (Boggs, J., concurring in part and dissenting in part)).

[2] Defendants' selective quotation of *Shirk v. Garrow*, 505 F. Supp. 2d 169 (D.D.C. 2007) ("Rule 8(c) … governs the pleading of affirmative defenses [while] *Twombly* specifically references Rule 8(a)(2)") (Opp. at. 3), is misleading. *Shirk* addressed a motion to dismiss a third-party complaint, not a motion to strike insufficient defenses. The third-party defendant in *Shirk* argued that the third-party complaint failed to set forth a short and plain statement showing entitlement to relief, as required by Fed. R. Civ. P. 8. 505 F. Supp. 2d at 170. In moving to dismiss, the third-party defendant incorrectly invoked Rule 8(c) (affirmative defenses), instead of Rule 8(a) (claims for relief). *Id.* at 170 n.1. In this context, the court noted that "*Twombly* specifically references Rule 8(a)(2)" and "presume[d] that [the third-party defendant] s[ought] to invoke Rule 8(a)." *Id.* *Shirk* therefore did not address whether the pleading standards announced in *Twombly* and *Iqbal* apply to Rule 8(c) affirmative defenses, as defendants' citation implies.

Indeed, even before *Twombly* and *Iqbal* were decided in 2007 and 2009, respectively, courts granted motions to strike equitable defenses that were inadequately pleaded as a factual matter. *See, e.g.*, *Qarbon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049-50 (N.D. Cal. 2004) (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. 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."); *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F. Supp. 832, 841 (S.D.N.Y. 1988) ("[T]he word 'estoppel' without more is not a sufficient statement of a defense.").

FEI's rationale for striking defendants' equitable defenses was insufficient notice under Rule 8. *See* Mot. at 15 (discussing cases). Nothing about the applicability of the *Twombly*/*Iqbal* "plausibility" standard changed the requirement that a defendant must provide notice as to how an equitable doctrine purportedly bars a plaintiff's claims. Accordingly, whether the pleading standards announced in *Twombly* and *Iqbal* apply to defendants' affirmative defenses is not an issue the Court needs to reach to grant FEI's Motion.

B. Defendants' "Abundance of Caution" Pleading Standard is Contrary to the Federal Rules of Civil Procedure

Defendants' purported "abundance of caution"[3] pleading standard is contrary to the Federal Rules of Civil Procedure. Defendants must have a legal and factual basis for asserting affirmative defenses to FEI's claims. *See* Fed. R. Civ. P. 11(b)(2)-(3) ("By presenting to the court a pleading … an attorney … certifies that to the best of the person's knowledge,

[3] Defendants repeatedly claim that they pleaded certain defenses out of "an abundance of caution." *See* Opp. at 8 (reasonable/good faith conduct); *id*. (contributory negligence, assumption of risk, lack of privity, conduct outside of defendants' control, unclean hands and *in pari deilcto*); *id*. at 10 (same); *id*. at 14 (Rule 1.3(a)); *id*. (due process and District of Columbia Anti-SLAPP Act).

information, and belief, formed after an inquiry reasonable under the circumstances: …[the] ***defenses*** … are warranted by existing law … [and] the factual contentions have evidentiary support … .") (emphasis added). Even district courts declining to apply the pleading standards of *Twombly* and *Iqbal* to affirmative defenses have held that a defendant's pleading must comply with Rule 11.[4] Indeed, courts have sanctioned defendants under Rule 11 for asserting frivolous affirmative defenses that were not grounded in law and/or fact.[5]

Courts specifically have rejected defendants' "abundance of caution" approach to pleading. A "legitimate concern" that a defense ***might*** be applicable is not a basis for pleading it. *See Gargin*, 133 F.R.D. at 505 ("As to Affirmative Defense # 7 (Statute of Frauds), counsel says 'she has a legitimate concern that this defense might be applicable to certain allegations in this case.' Having a 'legitimate concern' does not protect from a Rule 11 violation. There must be facts within counsel's knowledge to support an allegation as well as law. A 'concern' does not meet the test."); *cf.* Opp. at 8 (defendants "assert[ed] defenses liberally, lest they be accused of waiving a defense that ***might, at some juncture, be deemed relevant***") (emphasis added). If

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[4] *See, e.g., Unicredit Bank AG v. Bucheli*, 2011 U.S. Dist. LEXIS 103104, at *15-16 n.3 (D. Kan. Sept. 12, 2011) (noting that the court's decision "not to apply the *Twombly* standards does not mean that no standards govern the pleading of affirmative defenses. In particular, Rule 11 requires that 'to the best of [the attorney's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,' defenses must be warranted by law and factual contentions must have evidentiary support' … . Thus, an answer still may not simply contain a laundry list of boilerplate defenses, or assert affirmative defenses without any basis whatsoever."); *FTC v. Hope Now Modifications, LLC*, 2011 U.S. Dist. LEXIS 24657, at *11-12 (D.N.J. Mar. 10, 2011) ("although *Twombly* and *Iqbal* do not require specificity in stating defenses, Rule 11(b)(2) provides that defense counsel, by signing such a pleading, certifies to the best of counsel's belief, formed after reasonable inquiry, that 'the … defenses … are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law,' and that a breach of this duty, such as by asserting frivolous defenses, is subject to Rule 11(e) sanctions."); *Odyssey Imaging, LLC*, 752 F. Supp. 2d at 726 (declining to apply *Twombly* and *Iqbal* to affirmative defenses but noting that "Rule 11 proscribes," *inter alia*, the practice of "plead[ing] a form book list of affirmative defenses").

[5] *See, e.g., MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 621, 626 (8th Cir. 2003) (affirming imposition of Rule 11 sanctions for counsel's pursuit of frivolous claims and defenses which lacked factual and legal basis); *O'Grady v. Mohawk Finishing Prods., Inc.*, 1998 U.S. Dist. LEXIS 3866, at *2-5 (N.D.N.Y. Mar. 26, 1998) (granting motion to strike improper affirmative defense and imposing Rule 11 sanctions); *SEC v. Keating*, 1992 U.S. Dist. LEXIS 14630, at *14-17 (C.D. Cal. July 24, 1992) (imposing Rule 11 sanctions for asserting frivolous affirmative defenses previously stricken); *Gargin v. Morrell*, 133 F.R.D. 504, 504-06 (E.D. Mich. 1991) (imposing Rule 11 sanctions for asserting for frivolous affirmative defenses).

discovery reveals that certain defenses are applicable, then defendants can invoke Rule 15(a)(2), which provides that leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Safeco Ins. Co. of Am. v. O'Hara Corp.*, 2008 U.S. Dist. LEXIS 48399, at *3 (E.D. Mich. June 25, 2008) ("The court is aware of only a limited class of defenses that are waived if not immediately asserted. Rule 15 allows for appropriate amendments and counsel should therefore feel no need in this court to window-dress pleadings early for fear of losing defenses later.") (applying *Twombly* to affirmative defenses). Unless and until that occurs, FEI should not be forced expend time and money on discovery regarding defenses that have been asserted merely out of an "abundance of caution" and that are without legal and/or factual foundation. *See id.* at *2-3 ("Opposing counsel generally must respond to such defenses with interrogatories or other discovery aimed at ascertaining which defenses are truly at issue and which are merely asserted without factual basis but in an abundance of caution."). The "abundance of caution" pleading standard has no merit.

C. Defendants' Prior Filings and Arguments Are Insufficient Notice of the Defenses

Defendants' argument that FEI is "fully on notice of the contours" of their defenses by virtue of the "prior filings and argument in this case and [the ESA Action]," and thus can "adequately prepare," Opp. at 1 & 6, strains credulity.[6] FEI cannot be left to guess how the arguments made in the 600+ docket entries in the ESA Action somehow bar its claims in this case. Moreover, defendants' revised discovery plan, which purportedly put FEI on notice of the basis of defendants' unclean hands defense (Opp. at 6), was filed ***three days after*** FEI's Motion.

[6] Defendants' Opposition does not even acknowledge that their answers fail to specify which claims the defenses are being asserted in response to. *Cf.* Mot. at 2 n.2. This lack of notice is prejudicial to FEI. *See Gates*, 825 F. Supp. 2d at 170 (citing *Lee v. Habashy*, 2009 U.S. Dist. LEXIS 99766, at *9 (M.D. Fla. Sept. 30, 2009) ("To give fair notice of the defense, … a party should identify the claim to which the defense applies.")). If defendants are granted leave to amend, they should be required to identify which claims its defenses are being asserted in response to.

It thus could have in no way provided FEI with "prior" notice of the basis for defendants' affirmative defenses now at issue.

Further, only the allegations in defendants' pleadings – and not the allegations in the Opposition or any other filing or argument – can be considered on the present motion to strike. *See J&J Sports Prods. v. Jimenez*, 2010 U.S. Dist. LEXIS 132476, at *4 (S.D. Cal. Dec. 15. 2010) (cited by defendants) ("A ruling on a motion to strike affirmative defenses must be based on matters contained in the pleadings."); *D.S. America (E.), Inc.*, 873 F. Supp. at 797 ("A motion to strike an affirmative defense is decided on the basis of the pleadings alone."). Defendants' Opposition even concedes this. *See* Opp. at 11 (arguing that the "scope" of plaintiff's motion to strike "is limited solely to the pleadings").

II. MOTIONS TO STRIKE AFFIRMATIVE DEFENSES ARE GRANTED WHERE THERE IS NO SET OF CIRCUMSTANCES UNDER WHICH THE DEFENSES COULD SUCCEED

Defendants misleadingly imply that motions to strike affirmative defenses should only be granted when the defenses are prejudicial or scandalous. Opp. at. 3.[7] To the contrary, even though motions to strike are disfavored, courts in this district strike affirmative defenses where questions of law and fact are not in dispute and "under no set of circumstances could the defenses succeed." *Gulf & Western Indus., Inc.*, 502 F. Supp. at 345 (quotation omitted) (striking, *inter alia*, unclean hands, laches and equitable estoppel defenses); *see, e.g.*, *Gates,* 825 F. Supp. 2d at 172 (striking contributory negligence defense to 42 U.S.C. § 1983 claim, which requires proof of "some intentional or reckless conduct"); *Honeywell Int'l, Inc.*, 841 F. Supp. 2d

[7] Courts in this district have applied the "prejudicial or scandalous" standard to motions to strike ***allegations in a complaint or an answer***. *Nwachukwu v. Karl*, 216 F.R.D. 176, 178-79 (D.D.C. 2003) (cited by defendants), addressed a motion to strike the defendant's amended answer. In holding that "many courts will grant [motions to strike] only if the portions sought to be stricken are prejudicial or scandalous," 216 F.R.D. at 178, the court cited *Makuch v. Fed. Bureau of Investigation*, 2000 U.S. Dist. LEXIS 9487, at *7 (D.D.C. Jan. 6, 2000), which specifically applied this standard in the context of a "motion to strike portions of a complaint." *See also Wiggins v. Philip Morris, Inc.*, 853 F. Supp. 457, 457-58 (D.D.C. 1994) (cited in *Nwachukwu*) (striking allegations in complaint that were irrelevant and prejudicial to defendants).

at 116 (striking estoppel and waiver defenses in government action); *Kane Co.*, 668 F. Supp. 2d at 150-51 (striking laches defense in government action); *Chrysler Corp. v. Gen. Motors Corp.*, 596 F. Supp. 416, 418-20 (D.D.C. 1984) (striking unclean hands defense in private suit for equitable relief under Clayton and Sherman Acts). Indeed, in reciting the applicable legal standard, Opp. at 3, defendants cite two cases striking legally insufficient affirmative defenses. *Soc'y of Lloyd's v. Siemon-Netto*, 2004 U.S. Dist LEXIS 29913, at *6-12, *18 (D.D.C. Aug. 20, 2004) (striking affirmative defenses invoking, *inter alia*, repugnancy exception to District of Columbia Uniform Foreign Money Judgments Recognition Act (DCFMJRA)); *Fed. Trade Comm'n v. Commonwealth Mktg. Grp., Inc.*, 72 F. Supp. 2d 530, 545 (W.D. Pa. 1999) (striking affirmative defense under Federal Trade Commission (FTC) Act).

Defendants' own authority holds that where, as here, "the insufficiency of a defense is clearly apparent, a motion to strike can help the litigants clear away irrelevant or redundant clutter." *Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1245 (N.D. Ill 1991); *see also id.* at 1245-51 (striking legally insufficient defenses). It is "clearly apparent" that the defenses identified in FEI's Motion are legally insufficient, and defendants' Opposition largely concedes this. Striking these insufficient defenses will streamline this litigation by eliminating needless discovery on irrelevant issues. Accordingly, FEI's Motion should be granted.

III. DEFENDANTS' AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT AND SHOULD BE STRICKEN

A. Contributory Negligence and Assumption of Risk

Only defendants Rider, API, MGC, Lovvorn and Ockene assert contributory negligence and assumption of risk as defenses. Defendants' Opposition lumps contributory negligence and assumption of risk together with their "abundance of caution" "causation" defenses. Opp. at 8-10. Defendants entirely ignore the authority and arguments raised in FEI's Motion (*see* Mot. at

4-6), and have no cogent explanation as to how these defenses could bar FEI's claims, all of which are predicated on ***intentional*** conduct. There is no legal basis for these defenses. Defendants' failure to respond to FEI's Motion essentially concedes that these defenses should be stricken. *See Gates*, 825 F. Supp. 2d at 170.

Defendants cite no authority holding that contributory negligence and assumption of risk are, as a matter of law, viable affirmative defenses to FEI's RICO, Virginia Conspiracy Act and intentional tort claims. Defendants do not even address the authority cited in FEI's Motion, which hold that contributory negligence is only a defense to ***negligence*** actions. *See* Mot. at 4-5. Nor do defendants attempt to distinguish the caselaw holding that contributory negligence and assumption of risk are not, as a matter of law, defenses to claims predicated on intentional conduct, including FEI's intentional tort and RICO claims. *See id.* at 5-6.[8]

Defendants' only retort is that FEI's conduct in the ESA Action may have been "intentional, negligent, or some combination of the two," which purportedly bears on whether FEI will be able to establish causation (Opp. at 9) – an element of its *prima facie* case which is not an appropriate subject of an affirmation defense. *See infra* section III.G. But, even if defendants could demonstrate that FEI's conduct in the ESA Action was "negligent" (it was not), this still would be no defense to causes of action requiring intentional conduct, as the authority in FEI's Motion plainly holds. *See, e.g., 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). Accordingly, there is no set of circumstances under which the defenses of

[8] *See also Gates*, 825 F. Supp. 2d at 172 ("[C]ontributory negligence is a defense only to negligent, not to reckless or intentional, conduct.") (striking contributory negligence and/or assumption of risk defense to 42 U.S.C. § 1983 claim, which requires the plaintiff to prove "some intentional or reckless conduct"); *Attorneys Title Corp. v. Chase Home Mortgage Corp.*, 1996 U.S. Dist. LEXIS 11712, at *6 (D.D.C. Aug. 12, 1996) (denying motion for leave to amend answer to include affirmative defense of contributory negligence because the plaintiff's complaint was not based on the defendant's negligence, making "a defense of contributory negligence [] legally insufficient" such that "permitting amendment to include that defense would be futile").

contributory negligence and assumption of risk could succeed and these defenses should be stricken from the answers of Rider, API, MGC, Lovvorn and Ockene.

B. Lack of Privity

Only defendants Rider and MGC assert the defense of lack of privity. There is no legal basis for this defense; it is patently frivolous and should be stricken. Apparently, Rider and MGC asserted lack of privity ***solely*** as a defense to FEI's maintenance claim. Opp. at 11-12. Defendants' Opposition argues that "the maintenance cause of action necessarily includes contractual components thereby providing a sufficient basis for the affirmative defense of lack of privity." *Id.* at 11. ***But FEI did not assert its maintenance claim against Rider or MGC.*** *See* First Am. Compl. ("FAC") (DE 25) (2-16-10), at 123-25 (Count VI, Maintenance) (alleging maintenance against defendants ASPCA, AWI, FFA/HSUS, API and WAP). Thus, even defendants' Opposition apparently concedes that the lack of privity defense has no applicability to any of the claims ***that were actually asserted against Rider and MGC.***[9]

Moreover, even if FEI had asserted a maintenance claim against Rider and MGC, lack of privity still would be no defense. By definition, ***the existence of privity***, not the lack thereof, is a defense to a maintenance claim: "'[M]aintenance means 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.'" *Golden Commissary v. Shipley*, 157 A.2d 810, 814 (D.C. 1960) (quoting 10 Am. Jur., Champerty and Maintenance, § 1) (emphases

[9] Underscoring further Rider's total lack of analysis (and care) in asserting this defense is the fact that Rider appears to have simply copied MGC's answer: Rider's "Jury Demand" was made – not for himself – but on behalf of "[t]he MGC Defendants." Rider Answer (DE 99) (8-9-12), at 35. Rider is not, and never has claimed to be, an "MGC Defendant."

added). A maintenance claim cannot succeed against someone who has privity in the subject matter (or who stands in a relation of duty to the suitor). *See Golden Commissary*, 157 A.2d at 814-15 (affirming directed verdict for defendant attorney on maintenance claim because defendant was "no stranger to the action but stood in a relation of duty to [the plaintiff]"). Defendants have the definition of maintenance backwards. *See* Opp. at 11 ("Plaintiff's claim of maintenance requires a showing of privity").[10]

Defendants' argument concerning lack of privity completely misses the mark.[11] There is no set of circumstances under which lack of privity could succeed as a defense to the claims asserted against Rider and MGC. Therefore, "lack of privity" should be stricken as a defense from the answers of Rider and MGC.

C. Relief Sought Violates Due Process

Defendants AWI, Lovvorn and Ockene vaguely assert a defense purportedly arising out of the due process clauses of the Fifth and Fourteenth Amendments. These defendants apparently pleaded their "due process" defense only out of an "abundance of caution" (Opp. at 14-15) – and not based on any legal authority. Defendants cite no authority holding that "due

[10] If anything, the "lack of privity" claim helps FEI. Defendants, when moving to dismiss FEI's maintenance claim, argued in favor of the ***connectedness*** between Rider and the organizational plaintiffs in the ESA Action. *See* Defs. Mot. to Dismiss (DE 54-1) (12-3-10), at 79 (arguing that FEI's maintenance claim should fail because "all of the organizational defendants did in fact have an undeniable interest in prevailing on the merits of the ESA litigation"); *cf.* FAC (DE 25) (2-16-10) ¶¶ 335-36 (alleging that WAP, ASPCA, AWI, FFA/HSUS, and API were all "strangers to any dispute between Rider and FEI concerning any 'aesthetic injury' suffered by Rider as a result of how FEI handles its Asian elephants").

[11] Defendants' citation to *In re Brown*, 354 B.R. 100 (N.D. W. Va. 2006) (which applied West Virginia, not District of Columbia, law), Opp. at 12, is inapposite. There, the bankruptcy court determined that a third party lacked standing to raise maintenance and champerty as a defense to the proposed transfer of a cause of action from the bankruptcy trustee back to the debtor, because the third party was not a party "to the contract of maintenance or champerty." *See* 354 B.R. at 105. Moreover, the court held that "the transfer of a personal injury tort claim from the bankruptcy estate back to a debtor, which originally belonged to the debtor, d[id] not violate an identifiable West Virginia policy that would prohibit the transfer based on the doctrines of champerty and maintenance." *Id.* at 106. The debtor was not a "stranger" to the litigation at issue, which was the debtor's own personal injury tort claim. Here, by contrast, FEI (and now apparently defendants) have argued the converse –that Rider and the organizational plaintiffs in the ESA Action ***were*** strangers who were ***not*** in privity. *See supra* note 10.

process" is a viable defense, as a matter of law, to FEI's RICO, Virginia Conspiracy Act and intentional tort claims.

The theory behind this amorphous defense is entirely unclear. Defendants' answers make no attempt to explain how "due process" could be a bar to FEI's claims for relief. Defendants' Opposition comes forward with no cogent rationale for a "due process" defense either, and instead makes incoherent references to FEI's "use" of the civil RICO statute, the concept of "fair notice" and the applicability of issue preclusion.

While defendants may "maintain that this action is an inappropriate use of a civil RICO action" (Opp. at 14), defendants do not even argue that the RICO statute is unconstitutional, on its face or as applied. As argued in FEI's Motion, "due process" is not a defense to civil liability in a federal court case based on constitutional causes of action. Mot. at 6-7. "Fair notice" is not applicable here either. Defendants have not alleged that they lacked "fair notice" that their conduct violated the RICO statute or any of the predicate act statutes identified in the FAC. For example, defendants AWI, Lovvorn and Ockene make no allegations that they lacked "fair notice" that the Rider payments could violate the bribery and illegal gratuity statutes, 18 U.S.C. § 201(b)-(c). The "fair notice" caselaw cited by defendants (Opp. at 15 n.6), which even they acknowledge addresses a "very different context," *id.*, is thus completely irrelevant.

Defendants' argument regarding issue preclusion gets them nowhere. Whether defendants AWI, Lovvorn and Ockene are precluded from relitigating the factual findings that were necessary and essential to the Court's 12-30-09 Opinion in the ESA Action has nothing to do with whether the due process clauses of the Fifth and Fourteenth Amendments is a bar to any of FEI's claims. "[I]ssue preclusion aims to avert needless relitigation and disturbance of repose, without inadvertently inducing extra litigation or unfairly sacrificing a person's day in court."

Otherson v. Dep't of Justice, 711 F.2d 267, 273 (D.C. Cir. 1983); *see also McLaughlin v. Bradlee*, 803 F.2d 1197, 1204 (D.C. Cir. 1986) ("The doctrine of issue preclusion is intended to free courts and parties from the onerous and unnecessary task of relitigating issues that already have been decided in a full and fair proceeding."). Thus, due process is automatically built into the standard that determines whether issue preclusion is applicable. Nothing in *Taylor v. Sturgell*, 533 U.S. 880 (2008) indicates that due process is a legally cognizable affirmative defense to causes of action which may be proved (or partially proved) through issue preclusion.

In sum, the purported "due process" defense is patently frivolous. There is no legal basis for this defense, which defendants' Opposition essentially concedes. Because there is no set of circumstances under which the "due process" defense could succeed, it 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 a reasonable/good faith conduct defense. Defendants dismiss FEI's motion to strike this defense as a "waste" of the Court's time. Opp. at 2. But whether defendants can, as a matter of law, assert a "good faith" defense to defendants' alleged violations of the illegal gratuity statute, 18 U.S.C. § 201(c) – FEI alleges that each and every payment to, and received by, Rider is an illegal gratuity and predicate act of racketeering – is a critical legal issue that can and should be resolved at the outset of this litigation.

The illegal gratuity statute prohibits a defendant from, *inter alia*, "directly or indirectly" giving or receiving "anything of value" "for or because of" a witness's testimony under oath. 18 U.S.C. § 201(c)(2)-(3). FEI contends that the Court's 12-30-09 Opinion in the ESA Action should be afforded preclusive effect, and the facts established therein establish, at a minimum,

violations of § 201(c) – if not other predicate acts of racketeering. *See ASPCA v. Feld Entm't, Inc.*, 677 F. Supp. 2d 55, 67 (D.D.C. 2009) (FOF 1: finding that Rider was "essentially a paid plaintiff and fact witness who [was] not credible"); *id.* at 80 (FOF 53: "The Court finds that the primary purpose of the funding provided by the organizational plaintiffs by and/or through MGC and WAP was to secure Mr. Rider's initial and continuing participation as a plaintiff [in the ESA Action]."). [12] If the 12-30-09 Opinion indeed establishes violations of § 201(c), to which defendants cannot, as a matter of law, assert a "good faith" defense, then hundreds of predicate acts of racketeering – more than what is necessary to establish a "pattern" of racketeering – will be established. Thus, resolving whether "good faith" is, as a matter of law, a defense to § 201(c) is anything but a "waste" of the Court's and the parties' time.

In *United States v. Proj. on Gov't Oversight ("POGO")*, 616 F.3d 544 (D.C. Cir. 2010), the D.C. Circuit addressed whether intent is an essential element of 18 U.S.C. § 209(a), "which prohibits giving or receiving any contribution to or supplementation of salary 'as compensation for [an individual's] services as an officer or employee of the executive branch.'" 616 F.3d at 545 (quoting § 209(a)). While the government argued that § 209(a) required no intent at all, the Circuit concluded that § 209, ***like § 201(c)***, is a general intent crime, which requires that the perpetrator "know that his act has the characteristics bringing it within the scope of the statute, not that those characteristics make the act unlawful." *Id.* at 553 (quotation and alterations

[12] Collateral estoppel applies to the 12-30-09 Opinion, even though the Court dismissed the case for lack of subject matter jurisdiction and did not reach the merits of plaintiffs' ESA claim. Issue preclusion applies to the jurisdictional questions that were resolved in the ESA Action and any substantive determinations the Court made in order to arrive at those holdings. *See NextWave Personal Comm. Inc. v. FCC*, 254 F.3d 130, 148 (D.C. Cir. 2001) ("[I]f a court makes a substantive determination in order to arrive at a jurisdictional holding, the substantive determination can have issue preclusive effect so long as it was 'actually litigated and determined in the prior action.'").

omitted).[13] The Circuit noted that "crimes requiring only a more basic level of intent do not require that the defendant act in bad faith." *Id.* at 552. ***"Accordingly, for such crimes, good faith is generally not a defense – notwithstanding that intent to do the things that constitute elements of the offense is required."*** *Id.* at 553 (emphasis added).

Defendants make no argument regarding why the D.C. Circuit's holding that "good faith" is no defense to § 209(a) should not be applied to § 201(c). In discussing the intent necessary for a violation of § 209(a), the Circuit's opinion explicitly referenced ***"similar language in the gratuities statute,"*** § 201(c). *Id.* at 550 (emphasis added). Indeed, neither § 209(a) nor § 201(c) requires that the payment "influence" the government employee (§ 209(a)) or the witness (§ 201(c)).[14] The statutes are analogous and the requisite intent to violate them (general intent) is the same. The Circuit's opinion in *POGO* therefore bars defendants' good faith defense. Accordingly, the "reasonable/good faith conduct" defense should be stricken from the answers of ASPCA, AWI, FFA, Rider, API and MGC. *Cf. J&J Sports Prods.*, 2010 U.S. Dist. LEXIS 132476, at *7-8 (striking, *inter alia*, good faith defense to statutory cause of action where evidence of intent not necessary in determining existence of violation).

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

Defendants Lovvorn and Ockene assert a defense based on compliance with D.C. Rule of Professional Conduct 1.3(a), which requires a lawyer to "zealously and diligently" represent her

[13] *See also United States v. Haldeman*, 559 F.2d 31, 114 n. 226 (D.C. Cir. 1976) ("The main distinction between specific and general intent is the element of bad or evil purpose which is required for the former. Thus a person who knowingly commits an act which the law makes a crime may be said to have general intent, while the person who commits the same act with bad purpose either to disobey or disregard the law may be said to have specific intent."). Defendants' citation to *United States v. Campbell*, 684 F.2d 141, 150 (D.C. Cir. 1982) (Opp. at 8), concerning knowing and willing conduct, merely repeats the standard for general intent.

[14] *Compare POGO*, 616 F.3d at 553 (noting that § 209(a) "bars a non-government source from paying for an employee's government services regardless of whether the source seeks to influence the employee to do anything in exchange") *with United States v. Valdes*, 475 F.3d 1319, 1322 (D.C. Cir. 2007) ("Unlike most of § 201's anti-bribery provisions, the anti-gratuity provision has no requirement that the payment actually 'influence[] … the performance' of an official act.").

client "within the bounds of the law." Ex. 2, D.C. R. PROF. CONDUCT 1.3(a). Defendants' Opposition confirms that there is absolutely no legal basis for this "defense." Even "[d]efendants Lovvorn and Ockene agree that compliance with Rule 1.3(a) will not trump a finding that the Defendants engaged in unlawful conduct." Opp. at 13. Lovvorn and Ockene thus admit that it is not a bar to FEI's claims. This "defense," which apparently was pleaded only out of an "abundance of caution" (Opp. at 14), is utterly frivolous and should be stricken.

Defendants again fail to address the arguments or authority cited in FEI's Motion. *See* Mot. at 8-10. Defendants cite no authority holding that Rule of Professional Conduct 1.3(a) is a legally cognizable affirmative defense to FEI's RICO, Virginia Conspiracy Act, or intentional tort claims. Nor do defendants even acknowledge that the Rules (1) prohibit illegal witness payments, *see* Ex. 3, D.C. R. PROF. CONDUCT 3.4(b), and (2) expressly state that they are not "intended to enlarge or restrict existing law regarding the liability of lawyers to others." Ex. 4, D.C. R. PROF. CONDUCT, Scope, cmt. 4. Defendants also make no attempt to distinguish *In re Howes*, 39 A.3d 1, 22 (D.C. 2012), where the D.C. Court of Appeals flatly rejected the defendant lawyer's "honorable ends justify unlawful means" approach to improper witness payments. *See* Mot. at 9-10.

Defendants' argument that Rule 1.3(a)'s requirement that an attorney "zealously and diligently" represents her client "within the bounds of the law" somehow bears on defendants' intent or "provides the appropriate lens through which to examine [their] conduct" (Opp. at 13), makes no sense. Compliance with Rule 1.3(a) cannot negate the intent necessary to commit racketeering, conspiratorial or intentionally tortious conduct. Once established, racketeering is, by definition, outside the bounds of the law and, therefore, outside the bounds of Rule 1.3(a). Moreover, intent is an element of plaintiff's *prima facie* case; any argument that plaintiff will be

unable to demonstrate the requisite intent for each of its claims is a denial of liability, not an affirmative defense. *See J&J Sports Prods.*, 2010 U.S. Dist. LEXIS 132476, at *5-6 ("Affirmative defenses plead matters extraneous to the plaintiff's *prima facie* case, which deny the plaintiff's right to recover even if the allegations of the complaint are true. … A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense.").

Furthermore, contrary to defendants' argument, denying FEI's motion to strike Lovvorn and Ockene's Rule 1.3(a) "defense" ***will*** prejudice and harm FEI. *Cf.* Opp. at 14. If the "defense" is left in the case, the parties will have to litigate it. This means that FEI will have to take discovery from Lovvorn on Ockene concerning their "zealous advocacy," and will potentially need to engage an expert to testify regarding the (in)applicability of the defense. FEI should not be forced to expend resources to engage in discovery, and in particular expert discovery (including expert reports and depositions), on a defense that, as a matter of law, cannot bar FEI's claims. Accordingly, the Rule 1.3(a) "defense" should be stricken from the answers of defendants 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*. (2010), as a defense, apparently under the purported "abundance of caution" pleading standard. Opp. at 14. These defendants evidently acknowledge that there is no legal or factual basis for asserting this defense, because they have voluntarily withdrawn it. *Id.* at 14-15.

But even though defendants have agreed to withdraw the defense, they still want to "reference it and related law." Opp. at 15 ("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.") (emphasis added). Defendants cannot have it both ways with this non-withdrawal withdrawal. The Anti-SLAPP Act is either "in" or "out" as an affirmative defense.

Defendants' "right" to "reference" the Anti-SLAPP Act has nothing to do with whether the Anti-SLAPP Act is properly asserted as an affirmative defense that, if proven, could bar FEI's claims. Defendants' Anti-SLAPP Act "defense" fails because defendants (1) did not file an Anti-SLAPP Act "special" motion to dismiss within the required 45-day time frame and (2) FEI's claims already have survived defendants' Rule 12(b)(6) motions. Mot. at 10. Defendants do not dispute (or even address) these arguments, and have thus implicitly conceded them. *See Gates*, 825 F. Supp. 2d at 170. There is no set of circumstances under which the Anti-SLAPP Act could succeed as an affirmative defense to FEI's claims, and it 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. Defendants' Opposition does nothing to cure their vague pleading of these defenses. Defendants claim that "others" caused FEI's injuries, but do not allege ***who*** supposedly caused them. To the extent that defendants claim that they are not liable because FEI's injuries were caused by a joint tortfeasor, co-RICO perpetrator or co-conspirator, the "somebody else did it" theory is no defense. *See* Mot. at 12-14. Thus, if, for example, ASPCA contends that it is not liable because MGC "caused" FEI's injuries, and the Court finds that ASCPA conspired with MGC to violate the RICO statute, this would be no defense. *See id.* Defendants cite no authority to the contrary.

Further, as defendants concede (Opp. at 10), causation is an element of FEI's *prima facie* case; it is not an affirmative defense. *See Gates*, 825 F. Supp. 2d at 171 ("The assertion that the actions of other individuals and entities may have broken the chain of causation is not an affirmative defense, on which the defendants bear the burden of proof, but rather a denial of [the plaintiff's] allegations that the defendants proximately caused his injuries."). Defendants' "causation" defenses therefore should be stricken. *See J&J Sports Prods.*, 2010 U.S. Dist. LEXIS 132476, at *6-7 (striking defenses which were "just another way of asserting that Plaintiff has not or cannot prove the element of causation"); *Clark v. Milam*, 152 F.R.D. 66, 73 (S.D. W.Va. 1993) (striking, *inter alia*, proximate cause defense because it is merely a "denial[] of liability" and "superfluous"). Alternatively, these defenses should be construed as a denial of liability. *See Gates*, 825 F. Supp. 2d at 171 (denying motion to strike causation defense but construing it as a denial of liability).

Moreover, defendants Lovvorn and Ockene's D.C. Partnership Act argument, Opp. at 10-11, is entirely unavailing. 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." *See* Mot. at 13. But the acts in the (1) "ordinary course" of a partnership bind the partnership unless the partner (2) "had no authority to act" and (3) "the person with whom the partner was dealing knew or had received a notification that the partner lacked authority." D.C. CODE § 29-603.01(2) (2012). Lovvorn and Ockene's answers only make allegations concerning lack of authority. They have made no ***allegation*** that the conduct alleged in the FAC was outside of the "ordinary course" of the MGC partnership. Nor have they ***alleged*** that FEI "knew or had received a notification" that any of the MGC partners "lacked authority" to act. Thus, Lovvorn and Ockene's pleadings, on their face,

do ***not*** allege that the acts of any MGC partner do ***not*** bind the partnership. *Cf.* § 29-603.01(2). Defendants' argument concerning matters ***outside*** of the pleadings makes no sense. Accordingly, for the reasons stated above, the "somebody else did it" defenses asserted by ASPCA, AWI, FFA, Rider, API, WAP, MGC, Lovvorn and Ockene should be stricken.

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

1. The Defenses are Insufficiently Pleaded, and Defendants Come Forward with No Factual Basis that Could Make Them Applicable Here

Defendants ASPCA, AWI, FFA, Rider, API, WAP, MGC, HSUS, Lovvorn and Ockene assert the defenses of unclean hands, *in pari delicto*, laches, estoppel and waiver. (Certain defendants have asserted some, but not all, of these defenses. *See* Ex. 1.)[15] As discussed *supra* section I.A, defendants have not adequately pleaded these defenses – even under pre-*Twombly* and *Iqbal* notice pleading standards. Listing these defenses is insufficient and does not provide FEI with "the intent or nature of the affirmative defenses pleaded." *J&J Sports Prods.*, 2010 U.S. Dist. LEXIS 132476, at *5; *see also* Mot. at 15-16.[16] Defendants' Opposition comes forward with only generalized allegations concerning their purportedly "well-known" positions. *See, e.g.*, Opp. at 6. However, defendants cite no caselaw holding that a defendant's "well-known" litigation positions are sufficient to satisfy the notice ***pleading*** requirements of Rule 8. Matters outside the pleadings cannot be considered on the present motion to strike in any event.

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[15] Defendants concede that neither unclean hands nor laches is a defense to FEI's claims at law (*i.e.*, for damages). *See* Opp. at 7 n.3.

[16] Even defendants cite cases striking equitable defenses where, as here, the defendant failed to "provide[] any facts related to these defenses ***in the pleadings***." *J&J Sports Prods.*, 2010 U.S. Dist. LEXIS 132476, at *5 (emphasis added); *see also id.* at *4-5 (striking "boilerplate recitations" of, *inter alia*, unclean hands, estoppel, waiver and laches) (no discussion of *Twombly*/*Iqbal*); *Ulyssix Techs., Inc. v. Orbital Network Eng'g, Inc.*, 2011 U.S. Dist. LEXIS 14018, at *45-46 (D. Md. Feb. 11, 2011) (cited by defendants) (striking defenses of unclean hands, estoppel and waiver and/or laches, where defendant "set forth bare legal conclusions, without factual bases") (applying *Twombly*/*Iqbal* to affirmative defenses).

See J&J Sports Prods., 2010 U.S. Dist. LEXIS 132476, at *4; *D.S. America (E.), Inc.*, 873 F. Supp. at 797.

Defendants have not offered any concrete factual allegations that provide FEI with notice of how estoppel, laches and waiver purportedly bar its claims. With respect to these defenses, the only fact defendants come forward with is that FEI has known "'for many years'" about Rider's "'funding'" through the May 2002 internal email exchange. Opp. at 6 (quoting Defs. Mot. to Dismiss (DE 54-1) (13-2-10), at 21).[17] But even these allegations are insufficient, for example, to provide FEI with notice of how defendants purportedly detrimentally relied on FEI's conduct (equitable estoppel).

Moreover, the facts proffered by defendants concerning the defense of unclean hands and *in pari delicto* are insufficient to invoke these defenses, even if they had been pleaded. Defendants completely ignore the legal standard for the applicability of these defenses, and instead rely on generalized allegations regarding irrelevant conduct. Defendants contend FEI's "own conduct in the ESA litigation" – including its failure to produce elephant medical records, expert and fact witness Dennis Schmitt's consulting agreement and fact witness Daniel Raffo's employment status – somehow amount to the defenses of unclean hands, *in pari delicto* and "heavy[]" "contribu[tion]" (there is no such defense). Opp. at 6, 9. Notwithstanding that all of those issues already have been litigated (and rejected) in the ESA Action, they have nothing to do with whether FEI engaged in the "same sort of wrongdoing" as defendants or "violated the law in cooperation with" defendants – *i.e.*, whether FEI engaged in ***defendants'*** racketeering, conspiratorial and tortious conduct. *See United States v. Philip Morris*, 300 F. Supp. 2d 61, 76 (D.D.C. 2004) (unclean hands defense legally insufficient where, *inter alia*, defendants did not

[17] Defendants' bare denials of FEI's allegation that "[t]he true nature and extent of the payment scheme was not fully disclosed until after the Court's order of August 23, 2007" (FAC ¶ 32) (Opp. at 6), in no way provides FEI with notice of the factual bases for the defenses of estoppel, laches and waiver. *See* DE 96-104, 112.

allege "that the Government fraudulently misrepresented anything or that it committed mail and wire fraud;" *in pari delicto* defense legally insufficient where, *inter alia*, there was "no claim that the Government has 'violated the law in cooperation with the defendants'"). Defendants totally ignore *Philip Morris*. To invoke unclean hands or *in pari delicto*, defendants would have to allege that FEI engaged in, among other things, defendants' illegal witness payments to Rider. FEI's litigation conduct has nothing to do with the Rider payments, or any of defendants' other illegal conduct.[18] Defendants' argument completely ignores the legal standard for invoking these defenses. *See* Mot. at 19-23. Neither FEI nor the Court should be burdened with discovery into factual issues that cannot, as a matter of law, bar FEI's claims. Accordingly, unclean hands, *in pari delicto*, laches, estoppel and waiver should be stricken from the answers of the defendants asserting these defenses.

2. Unclean Hands is Unavailable as a Matter of Law in a Civil RICO Action

Unclean hands is, as a matter of law, not a defense to 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). Defendants correctly note that neither the D.C. Circuit nor any court in the United States District Court for the District of Columbia has addressed this issue (Opp. at 12), but offer no rationale why this Court should not follow *Smithfield Foods* or other district court opinions reaching the same result. Defendants make no attempt to distinguish the "private attorneys general" civil action available under RICO from analogous provisions under the

[18] With respect to unclean hands, defendants do not even acknowledge or attempt to distinguish *Chevron Corp. v. Salazar*, 2011 U.S. Dist. LEXIS 92091, at *38 n. 69 (S.D.N.Y. Aug. 17, 2011), which held that the "filing of too many motions, or allegedly baseless motions, of delay discovery and the like" was not "remotely approaching a sufficient claim of unclean hands" in litigation concerning whether an underlying judgment was procured by fraud. *Cf.* Opp. at 6 ("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 … .").

Clayton and Endangered Species Acts, where courts have held that the defense of unclean hands is barred. *See* Mot. at 16-18.

Defendants' Opposition confuses whether unclean hands is available as an affirmative defense to liability with whether inequitable conduct may be considered in shaping equitable relief. *See* Opp. at 12-13; *cf. Smithfield Foods, Inc.*, 593 F. Supp. 2d at 848 (holding that affirmative defense of unclean hands is unavailable in a civil RICO action but noting that the "existence of inequitable conduct may be pertinent in shaping of equitable relief, if there is a finding of liability"); *Philip Morris*, 300 F. Supp. 2d at 76 n.21 (in civil RICO action, holding that, *inter alia*, unclean hands and *in pari delicto* defenses were insufficient as a matter of law with respect to liability, but noting that the court's decision did "not address the applicability of the doctrines discussed to issues related to equitable relief, should liability be established"). Unclean hands is not a defense to ***liability*** in a civil RICO action, and accordingly this defense should be stricken from the answers of ASPCA, AWI, API, FFA, HSUS, MGC, WAP, Lovvorn, Ockene and Rider.

IV. DEFENDANTS SHOULD NOT BE GRANTED LEAVE TO AMEND

Defendants request leave to amend (Opp. at 6-7), but have failed to proffer any legal arguments or concrete factual allegations that would make their amendments anything but futile. *See Attorneys Title Corp.*, 1996 U.S. Dist. LEXIS 11712, at *6 (denying motion for leave to assert affirmative defense because "permitting amendment to include that defense would be futile"); *cf. Stith v. Chadbourne & Parke, LLP*, 160 F. Supp. 2d 1, 6 (D.D.C. 2001) ("An amendment is futile if it would not survive a motion to dismiss or for judgment on the pleadings."). There is no set of circumstances under which certain of defendants' affirmative defenses could ever be a bar to FEI's claims as a matter of law (*e.g.*, contributory negligence,

lack of privity and due process), regardless of how defendants amend their answers. Moreover, to the extent certain of the defenses could be applicable as a matter of law, defendants proffer no facts that could make them applicable here (*e.g.*, unclean hands and *in pari delicto*). Any amendments to defendants' answers would be futile, and leave to amend should be denied.

V. CONCLUSION

For the reasons stated above, FEI's Motion should be granted. The following defenses are legally insufficient and should be stricken: (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 D.C. Anti-SLAPP Act; (8) conduct taken by others outside of defendants' control; and (9) unclean hands, *in pari delicto*, laches, estoppel and waiver.

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Respectfully submitted,

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