IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FLORENCE WALLACE ET AL., Plaintiffs, v. ROBERT J. POWELL ET AL., Defendants.	**CONSOLIDATED TO:** Civil Action No. 3:09-cv-0286 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM CONWAY ET AL., Plaintiffs, v. MICHAEL T. CONAHAN ET AL., Defendants.	Civil Action No. 3:09-cv-0291 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

H.T. ET AL., Plaintiffs, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0357 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMANTHA HUMANIK, Plaintiff, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0630 (JUDGE CAPUTO)

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE MOTIONS TO DISMISS OF DEFENDANTS BARBARA CONAHAN; CINDY CIAVARELLA; ROBERT J. POWELL; VISION HOLDINGS, LLC; MID-ATLANTIC YOUTH SERVICES CORP.; PA CHILD CARE, LLC; WESTERN PA CHILD CARE LLC; ROBERT K. MERICLE; AND MERICLE CONSTRUCTION, INC.

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INTRODUCTION

The Complaints in these cases focus on the damages inflicted by Defendants on thousands of children through a five-year conspiracy that deprived the children of the most basic of constitutional rights. The unprecedented scandal already has been the subject of criminal proceedings against a number of the Defendants in this case, and has led the Pennsylvania Supreme Court to direct the vacatur and dismissal with prejudice of each of the adjudications entered by former judge Mark A. Ciavarella, Jr. during the life of the conspiracy. Characterizing the unlawful conduct at issue as "unique and extreme," the Supreme Court's conclusions were straightforward:

> Ciavarella's admission that he received [payments from Powell and Mericle], and that he failed to disclose his financial interests arising from the development of the [PACC and WPACC] juvenile facilities, thoroughly undermines the integrity of all juvenile proceedings before Ciavarella. Whether or not a juvenile was represented by counsel, and whether or not a juvenile was committed to one of the facilities which secretly funneled money to Ciavarella and Conahan, this Court cannot have any confidence that Ciavarella decided any Luzerne County juvenile case fairly and impartially while he labored under the specter of his self-interested dealings with the facilities.

In re: Expungement of Juvenile Records and Vacatur or Luzerne County Juvenile Consent Decrees or Adjudications from 2003-2008, No. 81 MM 2008, at 6, 8 (Pa. Oct. 29, 2009) (attached as Exhibit A) ("October 29 Order").

Despite the unprecedented and gravely serious nature of this scandal, Defendants seek in their motions to dismiss to deny the scandal's victims the opportunity to even attempt to prove Defendants' involvement and to be compensated for the damages they have suffered. As set forth in detail below, each of the motions should be denied.

SUMMARY OF RELEVANT FACTUAL ALLEGATIONS[1]

Plaintiffs' Complaints detail the illicit secret agreements and dealings among Defendants that evidence a concerted effort to achieve one illegal objective: build private, for profit juvenile placement facilities and fill those facilities with Luzerne County ("Luzerne" or "the County") youth to ensure substantial monetary gains to all those involved. (CAC ¶¶ 2, 757; IC ¶ 81.) Former judges Ciavarella and Michael T. Conahan were at the center of this conspiracy, accepting approximately $2.6 million in financial kickbacks from Robert J. Powell and Robert Mericle in a *quid pro quo* exchange for (a) awarding contracts relating to private juvenile detention facilities built by Mericle Construction, Inc. ("Mericle Construction") and operated by PA Child Care, LLC ("PACC"), Western PA Child Care, LLC ("WPACC"), and Mid-Atlantic Youth Services ("MAYS") (collectively the

[1] Plaintiffs provide a brief overview of Plaintiffs' detailed pleadings in this Section. Throughout the brief, Plaintiffs cite to additional specific allegations in their Complaints in support of each of their arguments in opposition to the motions to dismiss.

"Provider Defendants"), of which Powell was then a co-owner, and (b) placing children appearing before Ciavarella in those facilities. (CAC ¶¶ 2, 161-62, 656, 664, 668-71, 725, 758, 790; IC ¶¶ 5-6, 31, 40, 46, 51, 53, 81.) Separate entities owned, operated, and controlled by various individual Defendants – including Beverage Marketing of PA, Inc. ("Beverage Marketing"), Pinnacle Group of Jupiter, LLC ("Pinnacle"), and Vision Holdings, LLC ("Vision") – funneled and received the illicit payments to the former judges to conceal their true nature. (CAC ¶¶ 166-67, 173, 662, 671, 708-11, 714, 716, 753, 758-59; IC ¶¶ 13-14, 16, 33, 43, 51-54, 75-76.)

Defendants had a financial incentive to ensure full occupancy at PACC and then WPACC and acted with the common purpose of enriching themselves. (CAC ¶¶ 670, 668-69, 757; IC ¶ 34, 37, 53, 66.) As part of this enterprise, and to ensure a steady supply of youth to the facilities, Ciavarella, in concert with other Defendants, deprived all juveniles appearing before him between 2003 and May 2008 of their constitutional right to an impartial tribunal and, in addition, deprived thousands of these children of the right to be represented by counsel and to make a knowing, intelligent and voluntary waiver of trial rights before pleading guilty. (CAC ¶¶ 2, 672, 681-82, 686, 740, 741, 746-47; IC ¶¶ 66, 73, 109-10, 124-25.)

While Plaintiffs' Complaints recount numerous complex actions and transactions, the overall scheme was simple and straightforward. Beginning in

June 2000, Mericle and Mericle Construction, following discussions with Ciavarella and Powell, worked with Powell to locate land and to construct juvenile detention facilities. (CAC ¶¶ 649-59, 661, 669, 700, 710; IC ¶¶ 31, 39-40, 51, 53, 66.) From 2003 through 2006, Mericle, Mericle Construction, and Powell entered into secret agreements in which Mericle and Powell paid Ciavarella and Conahan for the judges' "services." For example, in or before January 2003, Defendants agreed that Powell and Mericle would pay $997,600 to Ciavarella and Conahan for their roles in facilitating the construction and profitability of PACC. (CAC ¶¶ 656, 671, 703; IC ¶¶ 45, 50.)

Due to the success of PACC, Provider Defendants contracted with Mericle and Mericle Construction to build WPACC in the western part of the state; Conahan and Ciavarella were financially rewarded upon the completion of WPACC in July 2005, when Powell paid them $1,000,000 through Pinnacle Group. (CAC ¶¶ 659, 671; IC ¶¶ 51-52.) Powell and Mericle then made another $150,000 payment to Conahan and Ciavarella, again through Pinnacle Group, upon completion of an addition to PACC in February 2006. (CAC ¶¶ 661, 671; IC ¶¶ 53-54.) In addition, Powell made hundreds of thousands of dollars in concealed payments to Conahan and Ciavarella for past and future actions, all aimed at ensuring the high occupancy and profitability of PACC and WPACC. (CAC ¶¶ 671, 712, 717; IC ¶¶ 43, 51, 53, 55.)

The Complaints allege that all the parties knew and understood that, in exchange for the illegal payoffs, Ciavarella and Conahan would have to misuse their judicial offices to first defund the County-run detention center; to then facilitate a contract between the County and Provider Defendants such that the latter became the primary provider of detention services to the County; and finally to ensure that youth were confined to these facilities. (CAC ¶¶ 651-55, 661, 667, 710, 739, 745; IC ¶¶ 41-43, 45-46, 53, 60.) The Provider Defendants contracted with Powell, Mericle, and Mericle Construction to build the facilities and their additions (CAC ¶¶ 650, 659, 661, 700; IC ¶¶ 31, 40-41, 51, 53), and the expansions were made possible by, and directly tied to, Ciavarella's increasing referrals of youth based on unconstitutional adjudications. (CAC ¶¶ 659, 663, 666, 668-670, 673-74, 679; IC ¶¶ 40, 55, 66-68.)

All Defendants had an incentive to ensure that beds were filled at PACC and WPACC so that the facilities were profitable. The Provider Defendants and their owners and operators, which then included Powell, received a *per diem* reimbursement from the County for every child placed in their facilities. The consistent placement of youth at PACC paved the way for the subsequent expansion of PACC and construction of WPACC, all of which directly benefited the Provider Defendants and their owners and operators, as well as the building contractor, Mericle and Mericle Construction. (CAC ¶¶ 670, 668-69, 757; IC

¶¶ 34, 37, 53, 66.) And of course, Conahan and Ciavarella benefited from the monetary payoffs they received first in exchange for ensuring that Luzerne County children were jailed at PACC, and then later for sending Luzerne children to WPACC.

In making, receiving, and attempting to conceal the financial kickbacks, Defendants committed mail and wire fraud, honest services fraud, as well as state-law bribery. (CAC ¶¶ 718-20, 753; IC ¶¶ 35, 44-45, 47-50.) Powell was an owner of Vision, which was used to facilitate secret payments made between other Defendants and Ciavarella and Conahan in connection with placing Luzerne County children in those facilities. (CAC ¶¶ 163, 173, 662, 671, 708, 710, 714, 716, 753, 758, 759; IC ¶¶ 4, 16, 33, 43, 51-54, 75-76.) Barbara Conahan and Cindy Ciavarella owned Pinnacle, a business entity through which Powell and Mericle transferred monies to Conahan and Ciavarella as part of the conspiracy, and which created false entries in its books to hide the monies and the real reason for the payments. (CAC ¶¶ 166-67, 659, 661-62, 671, 708-11, 713-16, 753, 758-59; IC ¶¶ 12-14, 51, 56-58, 75-76.) And Conahan owned Beverage Marketing, which disguised payments to both Conahan and Ciavarella from Mericle Construction. (CAC ¶¶ 703-08, 710; IC ¶¶ 48-60, 75-76.)

As part of the plot, Ciavarella, in concert with other Defendants, deprived all children appearing before him of their constitutional right to appear before an

impartial tribunal, and deprived thousands of them of their rights to be represented by counsel, to be protected against self-incrimination, and to a detailed colloquy with the court to insure a knowing, intelligent and voluntary waiver of trial rights before pleading guilty. (CAC ¶¶ 2, 686, 690-92, 740-41, 747-47; IC ¶¶ 66, 73.) The constitutional violations were a critical element of the conspiracy; by way of example, "[d]enying Plaintiffs their fundamental right to counsel increased the number of youth adjudicated delinquent and placed in detention while minimizing the likelihood that the adjudications and placement decisions would be questioned or appealed." (CAC ¶ 687.) In furtherance of the conspiracy, Ciavarella and Conahan also took other steps to ensure that youth were placed in detention facilities, including pressuring probation staff to change recommendations to detention when the officers were advocating community release, and directing these officers to ramp up admissions to the treatment wing of these facilities. (CAC ¶¶ 673, 675, 679; IC ¶¶ 67-68.)

Data collected by the Pennsylvania Juvenile Court Judges' Commission illustrate the success of this plan. In Ciavarella's courtroom, the average annual rate of waiver of counsel during the relevant time period reached as high as *ten times* the state average, virtually guaranteeing an increase in the number of juveniles adjudicated delinquent and placed in detention. (CAC ¶¶ 687, 689.) Further, among children who appeared without counsel – which included

approximately one-half of all children who appeared before Ciavarella – Ciavarella's placement rate was over seven times the state average. (CAC ¶ 689.) In 2004, approximately seven percent of all children statewide who waived counsel were placed outside the home; in Luzerne County, more than fifty percent of children who waived counsel were placed outside the home. (*Id.*) In 2005 and 2006, nearly sixty percent of youth appearing without counsel were placed outside the home. (*Id.*)

As a direct outcome of Defendants' outrageous misconduct, Plaintiff youth and their parents were forced to pay the costs of placement and other court-related costs, probation fees, fines, restitution and attorneys' fees. Plaintiff youth and their families suffered emotional trauma as a result of the youth being removed from their homes and placed in detention facilities. (CAC ¶¶ 694, 768, 776; IC ¶¶ 34, 36, 66.)

The federal criminal justice system has already recognized the potential gravity of Defendants' misconduct. Powell has entered a guilty plea to a two-count information charging him with misprision of a felony (wire fraud) and acting as an accessory after the fact in a conspiracy to file false tax returns. These charges relate to creating false records and mischaracterizing income in relation to the series of secret payments made to Ciavarella and Conahan. (CAC ¶ 696; IC ¶ 44.) *See also* Tr. of Proceedings of Arraignment and Guilty Plea 2:2-11, *United*

States v. Powell, No. 09-189 (M.D. Pa. July 1, 2009) (attached as Exhibit C). Mericle entered a guilty plea to a charge of misprision of a felony, for failing to disclose his knowledge that Ciavarella and Conahan were engaged in the commission of a felony, specifically the filing of false tax returns. Information, *United States v. Mericle*, No. 02-6000 (M.D. Pa. Aug. 12, 2009 (attached as Exhibit D) ("Mericle Information"); Tr. of Proceedings of Arraignment and Guilty Plea 4:7-5:8, *United States v. Mericle*, No. 09-247, (M.D. Pa. Sept. 2, 2009) (attached as Exhibit E) ("Mericle Transcript"). Conahan has agreed to plead guilty to criminal RICO conspiracy in violation of 18 U.S.C. § 1962(d). Plea Agreement, *United States v. Conahan*, No. 09-272 (M.D. Pa. April 29, 2010) (attached as Exhibit F) ("Conahan Plea Agreement"). And Ciavarella faces charges of racketeering, fraud, money laundering, extortion, bribery, federal tax violations, and receiving millions of dollars in illegal payments. Indictment, *United States v. Ciavarella*, No. 09-272 (M.D. Pa. Sept. 9, 2009) (attached as Exhibit G).

The state judicial system also has, albeit in a limited way, addressed the misconduct. As noted above, on October 29, 2009, the Pennsylvania Supreme Court vacated and dismissed with prejudice all of juvenile Plaintiffs' adjudications and dispositions. *See* October 29 Order (Exhibit A).[2] By vacating and dismissing

[2] Though the October 29 Order allowed the District Attorney to seek re-trial in a small category of open cases, all of the cases were subsequently dismissed

(continued...)

these cases with prejudice, the Pennsylvania Supreme Court has already rendered these adjudications a nullity under the law.

The Supreme Court was unsparing in its ruling. It noted Ciavarella's "complete disregard for the constitutional rights of the juveniles who appeared before him without counsel, and the dereliction of his responsibilities to ensure that the proceedings were conducted in compliance with due process." *Id*. at 4. The court concluded that there had been a "a disturbing lack of fundamental process, inimical to any system of justice, and made even more grievous since these matters involved juveniles," finding "a systematic failure to explain to the juveniles the consequences of foregoing trial, and the failure to ensure that the juveniles were informed of the factual bases for what amounted to peremptory guilty pleas." *Id.* According to the court, the record supported a determination that "Ciavarella knew he was violating both the law and the procedural rules promulgated by this Court applicable when adjudicating the merits of juvenile cases without knowing, intelligent and voluntary waivers of counsel by the juveniles." *Id*. at 5. The court concluded that "given the nature and extent of the taint, [the] Court cannot have

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(continued...)

with prejudice. *See In re: Expungement of Juvenile Records and Vacatur or Luzerne County Juvenile Consent Decrees or Adjudications from 2003-2008*, No. 81 MM 2008, at 2 (Pa. March 29, 2010) (attached as Exhibit B) ("March 29 Order").

confidence that *any* juvenile matter adjudicated by Ciavarella during this period was tried in a fair and impartial tribunal." *Id.* at 7.

While these federal and state actions are important steps in beginning to address the illegal conduct and hold some of the Defendants accountable, they do not, and cannot, compensate Plaintiffs for all they have lost. It is in order to seek financial redress and obtain the full benefit of civil remedies available to them that Plaintiffs seek to prosecute these actions.

SUMMARY OF ARGUMENT

Section 1983 Claims

Plaintiffs state causes of action against all non-judicial defendants for conspiracy to violate 42 U.S.C. § 1983. They plead state action by all Defendants pursuant to the principle that private parties who conspire with a state officer to deprive others of constitutional rights act "under color" of state law.

Plaintiffs' § 1983 conspiracy allegations are sufficiently "particularized." They address the period of the conspiracy, the object of the conspiracy, and specific actions the alleged conspirators took to achieve that purpose – to build and maintain juvenile detention facilities to which Ciavarella would send Luzerne County youth he adjudicated delinquent in violation of their constitutional rights, ensuring financial benefit to all members of the conspiracy. Plaintiffs sufficiently plead factual allegations of meetings, communications, payments, and other

contact and agreement among Defendants, demonstrating their involvement in the conspiracy.

Plaintiffs' Complaints sufficiently allege Defendants' state of mind as to the conspiracy. They specifically allege Defendants' intent to bribe the judges, and their awareness of a conspiracy with the other Defendants such that Defendants must have reasonably expected Ciavarella would deprive Plaintiffs of their constitutional rights, including their right to an impartial tribunal, in order to fill the detention facilities. Additionally, in related insurance declaratory judgment actions, this Court has already found that the Complaints satisfy any applicable *scienter* requirements.

Defendants' contention that Plaintiffs do not adequately plead causation with respect to their § 1983 claims also fails. In order to state a claim pursuant to § 1983, a plaintiff need not plead damages caused by the rights violations. Nevertheless, Plaintiffs allege in some detail that they are entitled to compensatory damages because Defendants' unconstitutional conduct and the underlying conspiracy to violate their constitutional rights caused their injuries.

Defendants further argue, without merit, that the Court must construe Plaintiffs' § 1983 claims as it would construe claims for malicious prosecution, contending that Plaintiffs must allege that each of the underlying arrests took place without probable cause. However, this Court is not required to consider Plaintiffs'

§ 1983 claims with reference to any specific common-law tort analog. And even if it were to use an analog, the appropriate one in these cases – cases alleging a gross misuse of process in connection with prosecutions that may in fact have been legitimately initiated – is abuse of process rather than malicious prosecution. An abuse of process claim does not require an allegation that probable cause was absent.

Provider Defendants mistakenly construe Plaintiffs' claims against them as akin to municipal liability claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). This leads them to argue erroneously that Plaintiffs fail, under *Monell*, to allege a custom, policy or practice of Provider Defendants that resulted in a violation of Plaintiffs' constitutional rights under § 1983. However, Plaintiffs allege that Provider Defendants are liable as private – *i.e.*, non-municipal – actors that conspired with state actors to deprive Plaintiffs of their constitutional rights, rendering *Monell* inapplicable.

Defendants' argument that Count IV of the Individual Complaint fails because Parent Plaintiffs do not allege a specific action taken against them that constituted a violation of their independent constitutional rights is without merit. Count IV seeks relief on behalf of Parent Plaintiffs, who are financially responsible for costs associated with their children's detention, for violations of their due process rights, including compensation for "deprivation of property" without due

process of law.

Defendants' argument to dismiss Count V of the Individual Complaint – alleging violations of Parent Plaintiffs' procedural and substantive due process rights – likewise fails. Count V alleges a violation of a constitutionally protected interest – the liberty interest of parents in the care, custody, and control of their children. The allegations that Defendants "unlawfully, and/or recklessly, willfully, wantonly and/or in a manner that shocks the conscience, and/or with deliberate and/or reckless indifference to the Parent Plaintiffs' rights violated 42 U.S.C. § 1983" meet the Court's standard that the actions must be "specifically aimed at interfering" with the Parent Plaintiffs' protected right to familial integrity.

RICO Claims

Plaintiffs state a claim for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* They sufficiently allege violations of § 1962(c), prohibiting the conduct or participation in the conduct of an enterprise's affairs through a pattern of racketeering activity, and § 1962(d), prohibiting a conspiracy to violate, among other things, § 1962(c).

As to both RICO claims, Plaintiffs plead a short and direct causal chain between the alleged racketeering activity – honest services mail and wire fraud, and state-law bribery – and Plaintiffs' injuries. Because of Ciavarella's position as a member of the scheme to commit the predicate acts, and because his in-court

actions were taken with the ultimate purpose of ensuring the success and profitability of PACC and WPACC, thereby enriching himself and the other Defendants, he was not an intervening third party who severed the causal chain. Moreover, Plaintiffs, who have suffered RICO-cognizable injuries to their business or property, are the most appropriate parties to vindicate the interests RICO seeks to protect.

As to their § 1962(c) claims, Plaintiffs sufficiently plead all necessary elements, including a pattern of racketeering involving an association-in-fact enterprise. The enterprise – consisting in the Class Complaint of Ciavarella, Conahan, Powell, Mericle, Mericle Construction, PACC, and WPACC; and in the Individual Complaint of those Defendants plus MAYS, Beverage Marketing, Vision Holdings, Pinnacle Group, Cindy Ciavarella, and Barbara Conahan – was formed for the purpose of housing juveniles adjudicated delinquent in Luzerne and elsewhere, functioned as a continuing unit separate and apart from the pattern of racketeering, and was distinct from Defendants.

Plaintiffs also sufficiently allege a RICO conspiracy under § 1962(d), involving all moving Defendants, which had as its object the success and profitability of the PACC and WPACC facilities and, as a result, the enrichment of all moving Defendants and their co-conspirators. The Complaints sufficiently allege that each moving Defendant had the requisite knowledge and agreement:

Powell, Mericle, and Mericle Construction (together with Ciavarella and Conahan) directly committed the predicate acts in furtherance of the object of the conspiracy; Provider Defendants, Barbara Conahan, Cindy Ciavarella, and Vision (together with Beverage Marketing and Pinnacle) knowingly facilitated the pattern of racketeering and the operation of the enterprise in order to further the object of the conspiracy.

False Imprisonment Claims

Defendants claim that Plaintiffs' false imprisonment counts should be dismissed because the Complaints do not allege that Plaintiffs were arrested without probable cause. Because probable cause is not an essential element of a state claim for false imprisonment where the claim does not involve any allegations of an illegal arrest, Plaintiffs are not required to plead lack of probable cause.

Provider Defendants argue further that because "Judge Ciavarella's orders placing juveniles were facially valid and . . . he acted within his jurisdiction," the juveniles do not state a claim for false imprisonment. However, the Complaints allege that the Provider Defendants were active participants in the conspiracy to unlawfully fill the beds at PACC and WPACC; they therefore had reason to know the orders placing juveniles at their facilities were invalid.

The statute of limitations has not run as to any of Plaintiffs' false

imprisonment claims. Because they did not know and could not reasonably have known that they had a cause of action for false imprisonment until the Information against Conahan and Ciavarella was filed, the statute of limitations was tolled until that time. Plaintiffs' claims are therefore timely.

Civil Conspiracy Claim

Provider Defendants, Powell, Mericle, Mericle Construction, Barbara Ciavarella and Cindy Ciavarella argue, without merit, that Individual Plaintiffs' civil conspiracy claim fails because it does not allege that Defendants acted with malice. Individual Plaintiffs allege that Defendants were aware that the actions they took in furtherance of their conspiracy were unlawful, and that Defendants directed that Plaintiffs be placed at PACC and WPACC in order to profit from this unlawful conspiracy, Individual Plaintiffs' injuries were therefore necessary for the conspiracy's success, not merely an accidental by-product of the conspiracy. Accordingly, Individual Plaintiffs sufficiently state a claim for civil conspiracy.

ARGUMENT

I. LEGAL STANDARD

In reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court must "'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be

entitled to relief.'" *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (internal citation omitted). The notice pleading standard of Federal Rule of Civil Procedure 8(a)(2) – which governs all allegations in this case except the predicate racketeering acts of fraud – does not require "detailed factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).[3] It requires only that a plaintiff plead sufficient facts to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

A court may not dismiss a complaint merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. *Phillips*, 515 F.3d at 231 (citing *Twombly*, 550 U.S. at 556). The pleading standard requires only that the complaint "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 570). "The 'plausibility determination' will be a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Fowler v.*

[3] Federal Rule of Civil Procedure 9(b), which governs Plaintiffs' allegations of fraud as racketeering activity, "requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud." *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). While "allegations of 'date, place or time'" are sufficient, "nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Id.* (internal citation omitted).

UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1950). The court must deny a motion to dismiss "'if, in view of what is alleged, it can reasonably be conceived that the plaintiffs . . . could, upon a trial, establish a case which would entitle them to . . . relief.'" *Phillips*, 515 F.3d at 233 (quoting *Twombly*, 550 U.S. at 563 n.8).

In deciding motions to dismiss, a court may consider the allegations in the complaint, exhibits attached to the complaint, matters of public record, and other documents that form the basis of a claim. *Lum v. Bank of Am.*, 361 F.3d 217, 221 n.3 (3d Cir. 2004); *see also Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993) (affirming the district court's consideration of certain facts set out in public documents plaintiffs attached to their opposition to a motion to dismiss and treating those documents as part of the pleadings).

II. PLAINTIFFS STATE CAUSES OF ACTION UNDER SECTION 1983

A. Plaintiffs Sufficiently Allege A §1983 Conspiracy Against All Non-Judicial Defendants

To state a cause of action under § 1983, plaintiffs must assert the deprivation or violation of a federally protected right[4] by someone acting "under color" of state law. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930-31 (1982) (citing

[4] Plaintiffs allege the deprivation and violation of constitutional rights in Counts II and IV of the Class Complaint and Counts III, IV, and V of the Individual Complaint. (CAC ¶¶ 730-35, 742-47; IC ¶¶ 100-39.)

Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)); *see also Lake v. Arnold*, 112 F.3d 682, 689 (3d Cir. 1997). Defendants contend that Plaintiffs fail to establish that the non-judicial Defendants were acting "under color" of state law and that Plaintiffs do not adequately plead Defendants' state of mind regarding the conspiracy. Defendants' arguments lack merit.

1. Plaintiffs Sufficiently Allege State Action By And Among Defendants Pursuant To A Conspiracy

(a) The § 1983 "Under Color" Of State Law Requirement Is Satisfied For Private Actors If They Are Alleged To Have Conspired With State Actors[5]

Defendants assert that Plaintiffs have not sufficiently alleged that each non-judicial Defendant acted jointly or in conspiracy with a state actor to deprive Plaintiffs of their constitutional rights such that the non-judicial Defendants come within § 1983's "under color" of state law requirement. (Doc. Nos. 445, at 14-17; 440, at 6-10; 443, at 5-12; 441, at 2-5; 434, at 15-17; 436, at 15-17.) Defendants' motions to dismiss on these grounds must be denied because Plaintiffs sufficiently allege that the "'state and . . . private actor[s] conspired with one another to violate [thousands of children's] individual[] rights'" so that the "'seemingly private behavior may be fairly treated as that of the State itself.'" *See Sershon v. Cholish*, Civ. No. 3:07-CV-1011, 2008 U.S. Dist. LEXIS 15678, at *21 (M.D. Pa. Feb. 29,

[5] Plaintiffs' § 1983 claims against the non-judicial Defendants are limited to conspiracy claims.

2008) (quoting *Adams v. Teamsters Local 115*, 214 F. App'x 167, 172 (3d Cir. 2007)).

Section 1983's "under color" of state law requirement is analyzed similarly to the Fourteenth Amendment's "state action" requirement. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). For § 1983 conspiracy purposes, the defendant need not be an officer of the state. As this Court recently acknowledged, a "nominally private entity" may be deemed a state actor if that "private party acted in a conspiracy with state officials" because this would "satisfy several of [the] tests" traditionally used for Fourteenth Amendment state action. *Sershon*, 2008 U.S. Dist. LEXIS 15678, at *7-8 (listing state action tests including public function, entanglement, state coercion, and joint action). Although "action taken by private entities with the mere approval or acquiescence of the State is not state action," *id.* at *11, "[i]t is enough [for § 1983 conspiracy purposes] that [the defendant] is a willful participant[6] in joint activity with the State or its agents." *Adickes*, 398 U.S. at 152 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

[6] Powell and Provider Defendants argue that any joint activity in a conspiracy on Powell's part was not as a willful participant but instead was in response to demand, threat to retaliate, and coercion by the judges. (Doc. Nos. 440, at 11; 441, at 12.) Whether or not Powell's participation was coerced is a fact question inappropriate for a motion to dismiss. Plaintiffs need only properly allege a conspiracy between Powell, the judges, and other defendants with enough facts to state a claim to relief that is plausible on its face. *Twombly*, 550 U.S. at 570. Plaintiffs have satisfied this requirement. *See infra* Part II.

Dennis v. Sparks, 449 U.S. 24 (1980), is analogous to the instant case. There, the United States Supreme Court held that allegations that a state court judge's issuance of an injunction was the product of a corrupt conspiracy involving bribery of the judge were sufficient to assert action under color of state law by the private parties involved in the conspiracy. The Supreme Court affirmed that private persons jointly engaged with state officials in a challenged action – as Plaintiffs have alleged in the instant case – are acting "under color" of law for purposes of a § 1983 action. *Id.* at 32.

The Third Circuit has repeatedly affirmed the principle that private parties conspiring with a state officer to deprive others of constitutional rights act "under color" of state law. *See, e.g.*, *Melo v. Hafer*, 912 F.2d 628, 638 (3d Cir. 1990) ("private parties acting in a conspiracy with a state official to deprive others of constitutional rights are also acting 'under color' of state law"); *Fisher v. Confer*, No. 08-3297, 2009 WL 405551, at *1 (3d Cir. Feb. 19, 2009) ("liability would attach if a private party conspired with a state actor"); *Todaro v. Bowman*, 872 F.2d 43, 49 (3d Cir. 1989) ("private party jointly engaged with a state official in a challenged action can be considered as acting under color of state law for § 1983 purposes"); *Darr v. Wolfe*, 767 F.2d 79, 80-81 (3d Cir. 1985), *abrogated on other grounds by Alston v. Parker*, 363 F.3d 229 (3rd Cir. 2004) (reversing the district court's dismissal of §1983 claims against private actors, holding that because the

judicial action of the immune judge was alleged to be the product of a conspiracy among the judge and individual private defendants, the individual defendants could be held liable under §1983).

(b) The Complaints' Conspiracy Allegations Against The Non-Judicial Defendants Satisfy The "Under Color" Of State Law Requirement

Plaintiffs' conspiracy allegations easily satisfy the "under color" of state law requirement as to the non-judicial Defendants. As an initial matter, while Plaintiffs must plead enough facts to state a claim that is plausible on its face to satisfy the federal pleading standard, *Twombly*, 550 U.S. at 570, the Third Circuit is "'mindful that direct evidence of a conspiracy is rarely available and that the existence of a conspiracy must usually be inferred from the circumstances. '" *Capogrosso v. Supreme Court of the State of N.J.*, 588 F.3d 180, 184 (3d Cir. 2009) (quoting *Crabtree v. Muchmore*, 904 F.2d 1475, 1481 (10th Cir. 1990). To properly plead a conspiracy under § 1983, a plaintiff must simply make "'factual allegations of combination, agreement, or understanding among all or between any of the defendants [or co-conspirators] to plot, plan, or conspire to carry out the alleged chain of events.'" *Zaimes v. Cammerino*, No. 09-1964, 2010 U.S. Dist. LEXIS 31887, at *15-16 (M.D. Pa. Apr. 1, 2010) (quoting *Hammond v. Creative Fin. Planning Org.*, 800 F. Supp. 1244, 1249 (E.D. Pa. 1992)). As the Third Circuit has explained, the "plausibility determination" required at this stage is a "context-

specific task that requires the reviewing court to draw on its judicial experience and common sense." *Fowler*, 578 F.3d at 211 (quoting *Iqbal*, 129 S. Ct. at 1950).

Plaintiffs' allegations meet this standard; they are "`particularized'" and address "`the period of the conspiracy, the object of the conspiracy, and certain other action of the alleged conspirators taken to achieve that purpose.'" *Panayotides v. Rabenold*, 35 F. Supp. 2d 411, 419 (E.D. Pa. 1999) (quoting *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989)). The Complaints detail a complex web of interactions and agreements among Ciavarella, Conahan, Provider Defendants, Mericle, Mericle Construction, Powell, Barbara Conahan, Cindy Ciavarella, Vision, Pinnacle, and Beverage Marketing that depict a conspiratorial plan among them to build and maintain private for-profit juvenile detention facilities. Plaintiffs' Complaints place former juvenile court judges Ciavarella and Conahan (CAC ¶¶ 161-162; IC ¶¶ 5-6) at the center of a "brazen scheme to accept financial kickbacks from defendants . . . in exchange for placing children appearing before Ciavarella in residential programs" by "routinely depriv[ing] children of their constitutional rights – established for decades – to appear before an impartial tribunal, to be represented by counsel, to be protected against self-incrimination and, through a detailed colloquy with the Court, to insure a knowing, intelligent and voluntary waiver of trial rights before pleading guilty," thus ensuring a regular and increasing flow of money to Defendants. (CAC ¶ 2; IC ¶¶ 66, 73.) This

Court's "judicial experience and common sense" compel a finding that Plaintiffs' allegations "permit the court to infer more than the mere possibility of misconduct" and sufficiently show a "plausible claim for relief." *See Iqbal*, 129 S.Ct. at 1950.

Moreover, the allegations against each of the non-judicial Defendants clearly establish the sufficiency of Plaintiffs' conspiracy claims, and hence satisfy the "under color" of state law requirement. As to the Provider Defendants, Plaintiffs sufficiently allege "concerted action" among Defendants by asserting that the judges accepted compensation from and/or through Provider Defendants in connection with the construction and expansion of facilities and in exchange for judicial actions ensuring Plaintiffs would be placed in these facilities. *See Crane v. Cumberland County*, No. 99-1798, 2000 U.S. Dist. LEXIS 22489, at *33 (M.D. Pa. June 16, 2000). (CAC ¶¶ 758, 790; IC ¶¶ 31, 81.) Plaintiffs further allege "concerted action" by asserting that the Provider Defendants contracted with Powell, Mericle, and Mericle Construction to build the facilities and their additions (CAC ¶¶ 650, 659, 661, 700; IC ¶¶ 31, 40, 51, 53) and that such additional building was necessary due to the increasing adjudications and referrals from Ciavarella that were made in violation of the juvenile Plaintiffs' constitutional rights. (CAC ¶¶ 659, 663, 666, 668-70, 673-74, 679; IC ¶¶ 40, 55, 66-68.) Plaintiffs allege that Provider Defendants and Powell participated in the conspiracy and detained Plaintiffs "in spite of the corruption and illegality underlying the detention orders."

(CAC ¶ 791; IC ¶ 31, 34.)

Plaintiffs also provide a timeline regarding the development of PACC and WPACC facilities, satisfying the need for allegations of the chain of events, scope, or period of the conspiracy. *See Zaimes*, 2010 U.S. Dist. LEXIS 31887, at *15-16; *Panayotides*, 35 F. Supp. 2d at 419. (CAC ¶¶ 650-51, 655, 658-59, 661, 666, 668-671, 673-74, 679; IC ¶¶ 40-42, 53, 66, 68, 72.) Plaintiffs provide the "object" of the conspiracy with allegations that the facilities and other Defendants signed a secret "Placement Guarantee Agreement" to house juvenile offenders in exchange for an annual sum administered by Conahan. *Panayotides*, 35 F. Supp. 2d at 419. (CAC ¶ 652; IC ¶¶ 41, 111, 125.)

As to Mericle and Mericle Construction, Plaintiffs allege concerted action and agreement to achieve the stated purpose with the allegations that, beginning in June 2000, Mericle and Mericle Construction communicated and worked with Powell to locate land and construct juvenile detention facilities following discussions with Ciavarella and Powell. (CAC ¶¶ 649-50, 659, 661, 669-700, 710, 733; IC ¶¶ 31, 39-40, 51, 53, 66.) Plaintiffs' allegations that Mericle paid the judges for facilitating construction of the facilities (CAC ¶¶ 656, 661, 667-72, 710, 733, 745, 757; IC ¶¶ 43, 45-46, 53, 60) are entitled, at this stage, to a "common sense" inference of misconduct under *Iqbal* that there was an understanding among Defendants as to the object and scope of the conspiracy. 129 S. Ct. at 1950. Given

the need to have the facilities occupied in order for the conspiracy to succeed, Mericle plainly knew or should have known that the payments would fatally compromise Ciavarella's impartiality. *See Fowler*, 578 F.3d at 211 (quoting *Iqbal*, 129 S. Ct. at 1950) (explaining the determination whether a plaintiffs' complaint states a plausible claim for relief requires a court to consider judicial experience and common sense).[7] *See also* Part II.A.1(c), *infra*.

As to Powell and Vision Holdings, Plaintiffs further allege the formation of the conspiracy in June 2000 with Powell's discussions with Ciavarella and Mericle that led to the later chain of events, including locating land and constructing juvenile detention facilities. (CAC ¶¶ 163, 649-50, 658-59, 661; IC ¶¶ 4, 39-40, 51, 53.) Powell agreed to plead guilty to criminal charges relating to false records and mischaracterizing income in relation to a series of secret payments made to Ciavarella and Conahan. (CAC ¶¶ 696, 707, 712-14, 716-18; IC ¶¶ 29, 45, 50, 55-56, 60, 76.) Powell is owner of Vision Holdings (CAC ¶ 163; IC ¶ 4), an entity which was used to facilitate secret payments made between other Defendants and Ciavarella and Conahan in connection with the facilities. (CAC ¶¶ 173, 662, 671,

[7] As discussed below in Part II.F, it is reasonable to infer that Mericle and Mericle Construction knew or should have known that building new juvenile detention facilities and paying Ciavarella for the privilege of building these facilities would trigger a series of acts that would, at a minimum, cause Ciavarella to breach Plaintiffs' constitutional right to an impartial tribunal. *See also infra* Part II.A.1(c).

708, 710, 714, 716, 753, 758-59; IC ¶¶ 16, 33, 43, 51-54, 75-76.)

With respect to Pinnacle Group, Plaintiffs allege it is a business entity controlled by Ciavarella and Conahan, and owned and also controlled by their wives, Cindy Ciavarella and Barbara Conahan, for the purpose of concealing improper payments to the judges. (CAC ¶¶ 709, 711; IC ¶¶ 52, 54.) Barbara Conahan is an owner and managing member (CAC ¶¶ 167, 709; IC ¶¶ 13, 52); Cindy Ciavarella is an owner of Pinnacle Group (CAC ¶ 166; IC ¶ 14). In a concerted action to achieve the object of the conspiracy, the wives received, through Pinnacle Group, money transferred by Mericle and Mericle Construction pursuant to a Registration and Commission Agreement in order to conceal payments to Ciavarella and Conahan. (CAC ¶¶ 709, 711; IC ¶¶ 52, 54.)

In sum, Plaintiffs sufficiently plead state action pursuant to a conspiracy with a state official under § 1983 as to each Defendant. Accordingly, Defendants' motions to dismiss on this ground should be denied.

(c) The Individual Complaint Sufficiently Pleads A § 1983 Conspiracy Claim Against The Mericle Defendants

The Individual Complaint alleges that the Mericle Defendants were "willful participants" in joint activity with two state officials, Conahan and Ciavarella. (IC ¶ 135.) These allegations are sufficient to state a claim that the Mericle Defendants are liable for a conspiracy to violate the Individual Plaintiffs' constitutional rights.

The Mericle Defendants allege that the Individual Complaint is too vague to give proper notice of their culpability. To the contrary, the allegations in the Individual Complaint, along with the other publicly available documents which expound on the nature and extent of the conspiracy to violate Plaintiffs' rights, adequately set forth the conspiracy and the Mericle Defendants' role in it. *See Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (holding a "court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document").

It is undisputed that the Mericle Defendants constructed PACC, WPACC and later an addition to PACC. (IC ¶¶ 40, 46, 51, 53.) These facilities replaced the prior juvenile detention center known as the River Street facility. After construction of PACC and the addition to PACC were completed, PACC (which the Mericle Defendants refer to as a "state-of-the art" facility) had approximately 60 beds available for juveniles. By contrast, the older River Street facility had only 22 beds available. Jennifer Learn-Andes, *Juvenile Detention Center Commissioner Says 'Unsolicited' Proposal for Facility a 'Sweetheart Deal,'* Wilkes-Barre Times Leader, July 7, 2001, at 1A (attached as Exhibit H). Accordingly, the facility built by the Mericle Defendants had almost three times the capacity of the old facility for the placement of juveniles. This does not even

include the number of beds available at the WPACC facility. *See* Lease Agreement Between PA Child Care, LLC and the County of Luzerne, "Background" (Nov. 17, 2004) (attached as Exhibit I); Letter from Kevin M. Friel, Pennsylvania Bureau of Financial Operations, to Richard Gold, Office of Children, Youth, and Families, at 4 (Jan. 11, 2008) (attached as Exhibit J).

It is also undisputed that Mericle suggested that Ciavarella should receive a "finder's fee" for his role in facilitating the development and construction of the facilities. (*See* IC ¶¶ 43-44.) It is further undisputed that Ciavarella directed Mericle to make these payments to Powell in order to disguise the payments from Mericle to Ciavarella. (IC ¶¶ 44, 46, 52.) Nevertheless, Mericle knew that the monies he "paid" to Powell were ultimately going to be paid to Conahan and Ciavarella. (IC ¶¶ 44, 46, 50-54.) *See also* Mericle Transcript (Exhibit E).

Taken as a whole, the alleged and publicly available facts show that the Mericle Defendants set into motion a series of actions by others which the Mericle Defendants knew or reasonably should have known would cause constitutional injury to the Individual Plaintiffs. *See infra* Part II.A.2. By paying the judges, the Mericle Defendants triggered a series of actions by Ciavarella that they knew or should have known would lead Ciavarella to deny the Individual Plaintiffs' right to an impartial tribunal and a fair trial which are basic requirements of due process. *Caperton v. A.T. Massey Coal*, 129 S. Ct. 2252, 2259 (2009).

Caperton reaffirmed that the Due Process Clause is implicated when a judge has a financial interest in the case before him. *Id.* Further, *Caperton* held that the inquiry regarding the removal or recusal of a biased judge in order to satisfy due process is an objective one. "The Court asks not whether the judge is actually, subjectively biased, *but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'*" *Id.* at 2262 (emphasis added) (internal citations omitted). It is not plausible to suggest that the Mericle Defendants continued to build larger for-profit detention centers and to pay Ciavarella for the privilege of building them, without knowing or having reason to know that they had triggered a system that unconstitutionally biased Ciavarella and would lead him to violate the constitutional rights of juveniles in order to illegitimately detain them.

Therefore, accepting all of the Individual Plaintiffs' allegations and facts from public records as true, and construing the Individual Complaint in the light most favorable to the Individual Plaintiffs, the Individual Plaintiffs sufficiently plead allegations to support their claim that the Mericle Defendants were willful participants in a § 1983 conspiracy.

2. <u>Plaintiffs Sufficiently Allege Defendants' State Of Mind</u>

Defendants argue that Plaintiffs are required, but have failed, to plead factual allegations "as to each defendant, that the defendant specifically understood and

agreed that actions would be taken that denied plaintiffs their federally protected rights" and that the non-judicial Defendants did not know Ciavarella was violating youths' constitutional rights and therefore are not liable for Plaintiffs' injuries. (Doc. No. 445, at 15-17; *see also* Doc. Nos. 440, at 7-10, 16-17; 443, at 5-12; 441, at 2-5, 8-14; 434, at 29-30; 436, at 29-30; 443, at 5-9.) Through their Common Brief, Defendants rely chiefly on *McCleester v. Mackel*, Civ. No. 06-120J, 2008 U.S. Dist. LEXIS 27505, at *44-45 (W.D. Pa. Mar. 27, 2008), for the proposition that a plaintiff must allege that co-conspirators "specifically intended to cause (or reasonably should have known that their actions would cause) the particular deprivation." (Doc. No. 445, at 16.) *McCleester*, however, lends no support to Plaintiffs' position. Plaintiffs' Complaints sufficiently allege the state of mind of the Defendants as to the conspiracy.[8]

[8] Section 1983 does not specify a particular state of mind requirement. A plaintiff must show only the state of mind required for the underlying constitutional violation alleged, *Daniels v. Williams*, 474 U.S. 327, 328 (1986), here, violations of the Fifth, Sixth, and Fourteenth Amendments. (CAC ¶ 179; IC ¶ 109.)

Mericle and Powell both argue that their respective guilty pleas and plea hearings affirmatively disprove the allegation of specific intent to deprive Plaintiffs of their constitutional rights, and have attached records of those proceedings as exhibits to their briefs. (Doc. Nos. 441, at 7-8; 443, at 5-9.) The government's findings in a criminal proceeding, far from controlling in this litigation, are not even relevant at this stage where Plaintiffs have no burden to prove or disprove facts. Plaintiffs need only allege a conspiracy among Mericle, Powell, the judges, and other Defendants with enough facts to state a claim to relief that is plausible on

(continued...)

The Third Circuit has not expressly addressed the issue of the required state of mind for a conspiracy regarding Fifth, Sixth, and Fourteenth Amendment violations as alleged by Plaintiffs; other circuit courts have held generally that § 1983 "conspirators need not know that their conduct is unconstitutional; specific intent to cause a constitutional deprivation is not required." *E.g.*, *Bendiburg v. Dempsey*, 909 F.2d 463, 469 (11th Cir. 1990) (rejecting a requirement for a "smoking gun" and providing "nothing more than an 'understanding' and 'willful participation' . . . is necessary to show the kind of joint action that will subject private parties to § 1983 liability"). In cases focusing on the "intent" of private co-conspirators, the Tenth Circuit held the "critical inquiry" regarding whether the private conspirator has "actively conspired" is whether "the plaintiff demonstrated the existence of a significant nexus or entanglement between the absolutely immune [s]tate official and the private party in relation to the steps taken by each

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its face, *Twombly*, 550 U.S. at 570, meaning enough factual allegations to raise a reasonable expectation that discovery will reveal evidence of each necessary element. *Phillips*, 515 F.3d at 234. As noted, Plaintiffs' Complaints need only support a finding by this Court, based on its "judicial experience and common sense," that there is "more than a mere possibility" of Defendants' misconduct. *Fowler*, 578 F.3d at 210-11 (citing *Iqbal*, 129 S. Ct. at 1950). *See supra* Part II.A.

In addition to the procedural due process violations in both Complaints, Individual Plaintiffs assert violations of substantive due process. The sufficiency of these allegations is discussed in Part II.E, *infra*.

to fulfill the objects of their conspiracy." *Norton v. Liddel*, 620 F.2d 1375, 1379-80 (10th Cir. 1980). Here, Plaintiffs' detailed Complaints sufficiently allege Defendants' intent to bribe the judges and their awareness of a conspiracy with the other Defendants such that Defendants must have reasonably expected Ciavarella would deprive Plaintiffs of their constitutional rights, including their right to an impartial tribunal, to ensure that the detention facilities would remain filled. *Iqbal*, 129 S. Ct. at 1950. (CAC ¶¶ 651-55, 661, 667, 710, 733, 739, 745; IC ¶¶ 41-43, 45-46, 53, 60.) *See also supra* Part II.A.1(b) (itemizing Plaintiffs' allegations as to each Defendant's participation in the conspiracy).

Additionally, this Court has already found that the Complaints satisfy any applicable *scienter* requirements, explicitly concluding in related insurance actions that Plaintiffs' Complaints allege knowledge and intentional conspiratorial activity on the part of the non-judicial Defendants. *See Colony Ins. Co. v. Mid-Atlantic Youth Services Corp.*, No. 09-1773, 2010 U.S. Dist. LEXIS 21432 (M.D. Pa. Mar. 9, 2010); *Alea London v. PA Child Care, LLC*, Civ. No. 09-2256, 2010 U.S. Dist. LEXIS 36674 (M.D. Pa. Apr. 14, 2010). In *Colony*, the Court found that "both the [Individual Complaint] and [Class Complaint] allege intentional conspiratorial activity on the part of the underlying defendants, including MAYS and Powell," and noted that Plaintiffs have "alleged that MAYS and Powell knew of these deprivations because it was part of the scheme, funded by their kickbacks, to

facilitate detention of the juveniles in the facilities owned by Powell and managed by MAYS." *Colony*, 2010 U.S. Dist. LEXIS 21432, at *14, 16. And in *Alea*, the Court held that a "reading of the underlying factual allegations demonstrates that PACC, Powell, and Zappala allegedly knew [of] and conspired [to] violate the juveniles' rights. . . . I find that the allegations in the underlying complaint articulate only intentional, knowing conduct." *Alea London*, 2010 U.S. Dist. LEXIS 36674, at *15, 17. These conclusions are equally applicable here.

Moreover, a number of circuit courts,[9] and district courts in this circuit, have followed the Ninth Circuit's analysis in *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978), which found that § 1983 liability attaches to any person who "'causes' any citizen to be subjected to a constitutional deprivation . . . not only by some kind of direct personal participation in the deprivation, but also [more broadly] by *setting in motion a series of acts by others which the actor knows or*

[9] The Third Circuit recently noted in an unpublished opinion that six other circuits have accepted the "set in motion" theory. *Burnsworth v. PC Laboratory*, No. 08-4248, 2010 U.S. App. LEXIS 2025, at *6 (3d Cir. Jan. 28, 2010); *see also Morris v. Dearborne*, 181 F.3d 657, 672 (5th Cir. 1999); *Sales v. Grant*, 158 F.3d 768, 776 (4th Cir. 1998); *Waddell v. Forney*, 108 F.3d 889, 894 (8th Cir. 1997); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 560-61 (1st Cir. 1989); *Conner v. Reinhard*, 847 F.2d 384, 396-97 (7th Cir. 1988); *Arnold v. Int'l Bus. Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). The *Burnsworth* court found the appeal before them was "not the appropriate context for considering whether to adopt this theory in § 1983 actions" because the claim failed even under the "set in motion" theory. *Burnsworth*, 2010 U.S. App. LEXIS 2025, at *7.

reasonably should know would cause others to inflict the constitutional injury." *See Guarrasi v. Gibbons*, Civ. No. 07-5475, 2009 U.S. Dist. LEXIS 77886, at *25 (E.D. Pa. Aug. 27, 2009) (emphasis added); *see also McCleester*, 2008 U.S. Dist. LEXIS 27505, at *39-44 (explaining and then following the "setting in motion" analysis for § 1983 conspiracy claim); *Williams v. Pa. State Police*, 144 F. Supp. 2d 382, 384 (E.D. Pa. 2001) (finding Third Circuit's reference to "personal involvement" in *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir 1988), does not control outside the *respondeat superior* context).[10]

In the central case relied upon by Defendants, *McCleester*, the alleged constitutional deprivation was a meeting prior to the termination of the plaintiff's employment, during which the plaintiff was deprived of food, water, and medication for five hours. 2008 U.S. Dist. LEXIS 27505, at *44-45. The *McCleester* court looked to the "actual agreement between the conspirators rather than the unforeseen consequences of that agreement," *Nat'l Collegiate Athletic Assoc. v. Tarkanian*, 488 U.S. 179, 197 (1988), and found the plaintiff did not properly allege that the conspirator-subordinates contemplated that McCleester's

[10] This Court, in *Pilchesky v. Miller*, No. 05-2074, 2006 U.S. Dist. LEXIS 73681, at *13-15 (M.D. Pa. Oct. 10, 2006), found the Ninth Circuit's analysis persuasive and applied this standard (in a case involving supervisor liability) inquiring if defendant "participated in or directed the violations, or knew of the violations and failed to prevent them."

procedural due process rights would be violated by the deprivation of food, water, and medication for a period of five hours." *McCleester*, 2008 U.S. Dist. LEXIS 27505, at *45.

McCleester is sharply distinguishable from the instant case. Plaintiffs here allege an "actual agreement" between the judges and other Defendants to build and maintain juvenile detention facilities, and document the exchange of over two million dollars between co-conspirators in furtherance of this objective. (CAC ¶¶ 668-671, 674, 686, 757, 790; IC ¶¶ 43, 51, 53, 66, 89, 109.) *See also supra* Part II.A. In this case, the breach of Plaintiffs' right to an impartial tribunal, Ciavarella's adjudication of juveniles without regard for other basic constitutional rights, and the increased placement of juveniles in Defendants' facilities cannot reasonably be labeled an "unforeseen consequence" of Defendants' agreement to secretly funnel large sums of money to the judges. Employing this Court's "judicial experience and common sense," it is reasonable to infer that Ciavarella's lack of constitutionally mandated impartiality, in the wake of receiving over one million dollars from those who built and operated the detention centers to which he would commit the very youth who appeared before him, was reasonably foreseeable by non-judicial Defendants. Similarly, Ciavarella's repeated trampling of Plaintiffs' other fundamental due process rights in order to help insure that the facilities remained full was a readily foreseeable consequence of Defendants'

brazen plot. *See Fowler*, 578 F.3d at 210-11 (citing *Iqbal*, 129 S. Ct. at 1950).

Plaintiffs' Complaints, along with the plausible inferences required at this stage, allege that the non-judicial Defendants' agreement with Ciavarella and Conahan to build and operate the detention facilities did in fact set in motion a series of acts by and among Defendants, and each knew or reasonably should have known that such agreement would cause Ciavarella to increase adjudications and placements through the denial of Plaintiffs' constitutional rights. (*See* CAC ¶¶ 668-671, 674, 686, 757, 790; IC ¶¶ 43, 51, 53, 66, 89, 109.) *See also supra* Part II.A. Consequently, Defendants' motions to dismiss must be denied.

B. Plaintiffs Sufficiently Allege That The Constitutional Deprivations Caused Their Injuries

Defendants contend that Plaintiffs "do not plead basic causation with respect to their § 1983 claims" (Doc. No. 445, at 13), asserting that Plaintiffs have not alleged that the outcome in their cases would have been different had their constitutional rights been protected. (*Id*. at 13-14.) Defendants' arguments fail. As set forth below: (1) Plaintiffs need not establish direct causation in order to state a claim under Section 1983; and (2) Plaintiffs sufficiently allege that they are entitled to compensatory damages because Defendants' unconstitutional conduct and the underlying conspiracy to violate their constitutional rights caused their injuries.

1. Plaintiffs Need Not Plead Direct Causation To State A Claim Under § 1983

Plaintiffs need not plead actual causal injury from procedural due process violations in order to state a claim under § 1983. To the contrary, because § 1983 claims may be sustained simply on a finding of nominal damages, no such causal injury need be alleged. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("*By making the deprivation of such rights actionable for nominal damages without proof of actual injury*, the law recognizes the importance to organized society that those rights be scrupulously observed.") (emphasis added).

In *Carey*, the Court found that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." 435 U.S. at 267.[11] The Third Circuit has similarly held that plaintiffs are entitled to nominal damages even where they have not proven that the damages were causally related to the due process violations.[12] *See Fraternal Order of Police, Lodge No. 5 v.*

[11] *Carey* involved a case that was submitted to trial on the basis of a stipulated record in which plaintiffs submitted no evidence quantifying the damages actually suffered or measuring the extent of their injuries. 435 U.S. at 251-52. Therefore, as contrasted with the instant case, *Carey*'s analysis was concerned with the sufficiency of the *evidence*, not the sufficiency of the *allegations*.

[12] Plaintiffs, of course, do not allege or concede that they are entitled *only* to nominal damages. To the contrary, they claim entitlement to far more. Plaintiffs' Complaints need not have included a claim for nominal damages in order to recover such damages. *See Allah*, 226 F.3d at 251.

Tucker, 868 F.2d 74, 81 (3d Cir. 1989); *Hohe v. Casey*, 956 F.2d 399, 415 (3d Cir. 1992). The Third Circuit has specifically noted "the Supreme Court's clear directive that nominal damages are available for the vindication of a constitutional right absent any proof of actual injury." *Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000). Accordingly, Plaintiffs' allegations that they were denied procedural due process, including the right to an impartial tribunal, the right to counsel, and the right to a knowing and intelligent guilty plea, are sufficient to survive a motion to dismiss. *See Carey*, 435 U.S. at 266; *Fraternal Order of Police, Lodge No. 5*, 868 F.2d at 81 & n.9.[13]

2. Plaintiffs Sufficiently Allege That They Are Entitled To Compensatory Damages Because Defendants' Conduct And Conspiracy Caused Their Injuries

Relying primarily on *Carey*, and ignoring the fact that to state a § 1983 claim, a plaintiff need not allege injuries caused by the violations, *see* Part II.B.1., *supra*, Defendants assert that Plaintiffs fail to plead that they would not have been injured "but for" the constitutional violations alleged.[14] *Carey* states, "where the

[13] Additionally, Plaintiffs need not establish a causal injury to recover punitive damages. *See* Part II.F.1., *infra*.

[14] While Defendants claim that Plaintiffs fail to allege that absent the constitutional violations they would have received different dispositions, this contention has no relevance or merit at the motion to dismiss stage. First, as noted at Part II.B.1, *supra*, allegations regarding damages are not an essential element to state a § 1983 claim. Second, even if, under the facts of the instant cases, proof that the deprivation was justified were relevant, Defendants would bear the burden

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deprivation of a protected interest is substantively justified but procedures are deficient in some respect, there may well be those who suffer no distress over the procedural irregularities." 435 U.S. at 263.

Carey is plainly distinguishable because it involved the review of a court's decision, after trial, not to award damages – not a review of the sufficiency of the pleadings at the motion to dismiss stage. *See id*. at 251-52. Moreover, Plaintiffs do sufficiently allege that Defendants' unconstitutional conduct, and the underlying conspiracy to violate their constitutional rights, resulted in unjustified deprivations.

Plaintiffs allege that the constitutional violations caused their injuries and damages. (CAC ¶¶ 729, 735; IC ¶¶ 109, 124.) They allege that Ciavarella and Conahan engaged in a *quid pro quo* conspiracy to accept kickbacks from Powell and Mericle in exchange for the judges placing children appearing in Luzerne County juvenile court in PACC and WPACC. (CAC ¶¶ 2, 656, 668-670, 725; IC ¶ 46.) In concert with other Defendants and in furtherance of their corrupt scheme,

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of proving that justification. *See Alexander v. Polk*, 750 F.2d 250, 264 (3d Cir. 1984). However, in any event, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant[s'] conduct may suffice." *Common Cause v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Ciavarella routinely violated Plaintiffs' constitutional rights, including their right to an impartial tribunal, right to counsel, and right to enter a knowing, intelligent, and voluntary guilty plea. (CAC ¶¶ 2, 672, 681-83, 686; IC ¶¶ 109-10, 124-25.) With counsel unavailable to challenge Ciavarella's rulings, and with his own financial self-interest at stake, Ciavarella readily adjudicated Plaintiffs delinquent and placed them in the PACC and WPACC facilities. (CAC ¶¶ 740-41, 746-47.)[15]

In support of these allegations that Defendants' unconstitutional conduct caused Plaintiffs' adjudications and dispositions, Plaintiffs cite data demonstrating that Ciavarella placed juveniles outside their homes at rates nearly double the state average. (CAC ¶ 688.) Additionally, the average annual rate of waiver of counsel in Luzerne County during the relevant time period was approximately *ten times* the state average, leading to an increase in the number of juveniles adjudicated delinquent and placed in detention. (CAC ¶ 687, 689.) Indeed, among children

[15] Specifically, Class Plaintiffs allege that "[d]enying Plaintiffs their fundamental right to counsel increased the number of youth adjudicated delinquent and placed in detention while minimizing the likelihood that the adjudications and placement decisions would be questioned or appealed." (CAC ¶ 687.) "As a result of the unconstitutional adjudications and placements . . . youth plaintiffs suffered emotional trauma, including removal from their homes and families, disruptions in their education, loss of educational credits and delayed completion . . . of their high school education" and were forced to pay the costs of placement and other court-related fees and expenses. (CAC ¶ 694.) Similarly, Individual Plaintiffs allege that the object of Defendants' plan was to ensure that a disproportionate number of juveniles were incarcerated in juvenile detention facilities owned, operated and influenced by Defendants. (IC ¶¶ 36-37.)

who appeared without counsel – which included approximately one-half of all children who appeared before Ciavarella – Ciavarella's placement rate was closer to *eight* times the state average. (CAC ¶ 689.) In 2004, approximately seven percent of all children statewide who waived counsel were placed outside the home; in Luzerne County, more than one-half of children who waived counsel were placed outside the home. (*Id.*) In 2005 and 2006, nearly sixty percent of youth appearing without counsel were placed outside the home. (*Id.*)

Additionally, Plaintiffs further allege that, pursuant to the conspiracy, Ciavarella ensured that youth were routinely placed in detention *even when detention was plainly not appropriate* and even when probation officers objected to, or did not recommend, detention. (CAC ¶¶ 673, 675; IC ¶¶ 67-68, 71.) Ciavarella also directed juvenile probation to "ramp up admissions" to PACC, including "ramping up" the treatment side of PACC, unrelated to Plaintiffs' treatment needs. (CAC ¶ 679; IC ¶ 68.)

Finally, all of Plaintiffs' adjudications and dispositions have been vacated and dismissed with prejudice by the Pennsylvania Supreme Court, *see* October 29 Order and March 29 Order (Exhibits A and B, respectively), belying any possible contention by Defendants that some deprivations of Plaintiffs' protected interest might be "substantively justified" despite constitutionally deficient procedures. *Carey*, 435 U.S. at 263. Considering the exceptional breadth and scope of the

corruption scheme, the Pennsylvania Supreme Court found that they "cannot have any confidence that Ciavarella decided any Luzerne County juvenile case fairly and impartially while he labored under the specter of his self-interested dealings with [PACC and WPACC]." October 29 Order, at 6 (Exhibit A).[16] Because the situation in Ciavarella's courtroom was "so unique and extreme," the Pennsylvania Supreme Court dismissed all of the cases *with prejudice*. *Id*. at 8. *See, e.g.*, *Reed v. Farley*, 512 U.S. 339, 368 (1994) (Blackmun, J., dissenting) ("The dismissal with prejudice of criminal charges is a remedy rarely seen in criminal law, even for constitutional violations."). Therefore, in the eyes of the law, Plaintiffs are innocent of the conduct underlying the adjudications and any retrial of Plaintiffs for that alleged conduct is barred by the Pennsylvania Supreme Court.[17]

Taken together, Plaintiffs' allegations sufficiently assert that Defendants' unconstitutional conduct, which resulted in unjustified adjudications and

[16] The Pennsylvania Supreme Court also found "a disturbing lack of fundamental process, inimical to any system of justice, and made even more grievous since these matters involved juveniles," and noted "Ciavarella's complete disregard for the constitutional rights of the juveniles who appeared before him without counsel, and the dereliction of his responsibilities to ensure that the proceedings were conducted in compliance with due process." October 29 Order, at 4 (Exhibit A).

[17] Since the Pennsylvania Supreme Court has dismissed all the charges with prejudice because of the gravity of the misconduct, any backward look at whether Plaintiffs would have suffered the same injury absent that misconduct would make no sense.

dispositions, caused Plaintiffs' injuries.

C. Defendants Wrongly Contend That This Court Must Construe Class Plaintiffs' § 1983 Claims As Malicious Prosecution Claims[18]

Defendants argue that Plaintiffs' § 1983 claims seeking compensation for the costs Plaintiffs incurred as a result of their detention must be construed as claims for malicious prosecution, and that therefore Plaintiffs must allege that each of the underlying arrests took place without probable cause. (Doc. No. 445, at 9.) This contention is meritless. First, this Court need not analyze Plaintiffs' § 1983 claims with respect to any particular common-law tort. And second, even if the Court looks to a specific common-law tort, the Court should look to abuse of process, not malicious prosecution.

Courts have held that "§ 1983 creates a species of tort liability." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). The rules developed by the common law of torts, "defining the elements of damages and prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well." *Carey*, 435 U.S. at 257-58. However, while common-law tort rules help guide the § 1983 analysis, they do not offer a complete solution. As the Court found in *Carey*:

[18] Defendants move for dismissal on these grounds only as to the Class Plaintiffs. (Doc. No. 445, at 9.) However, if the Court construes that Defendants intended to move to dismiss on these grounds against *all* Plaintiffs, Individual Plaintiffs incorporate the arguments in Part II.C.

> It is not clear, however, that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case. In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. . . . In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts. In those cases, the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.

Id. at 258 (internal citations omitted) (emphasis added). The *Carey* Court observed that "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." 435 U.S. at 258. *See also Heck*, 512 U.S. at 492 (Souter, J., concurring) ("While I do not object to referring to the common law when resolving the question this case presents, I do not think that the existence of the tort of malicious prosecution alone provides the answer"); *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000) ("[A]nalogies to the common law are not all that guide our decision.").

Although courts read § 1983 claims "against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Hector*, 235 F.3d at 159 (quoting *Malley v. Briggs*, 475 U.S. 335, 344-45 n.7 (1986)), they frequently forego a common-law tort analysis when considering § 1983 claims based on constitutional violations. For instance, in *Carey*, as discussed in Part

II.B.1, *supra*, the Court held that defendants may be liable for violations of plaintiffs' due process rights without looking to a specific common-law analog such as malicious prosecution. 435 U.S. at 267; *see also Via v. Cliff*, 470 F.2d 271, 275 (3d Cir. 1972) (addressing plaintiff's § 1983 right to counsel claim, the Third Circuit held that plaintiff need only establish actual infringements of his right to counsel by defendants acting under color of law, and that plaintiff could maintain his cause of action without alleging or proving prejudice to his defense at trial by the alleged actual infringements); *Whitley v. Allegheny County*, No. 07-403, 2010 WL 892207, at *22 (W.D. Pa. Mar. 9, 2010) ("The court considers count I to be asserting *two constitutional claims under § 1983: malicious prosecution and denial of the right to a fair trial*.") (emphasis added); *Piskanin v. Hammer*, No. 04-1321, 2005 WL 3071760, at *15 (E.D. Pa. Nov. 14, 2005) (denying motion to dismiss a § 1983 right to counsel claim without looking to common-law torts); *Stepp v. Mangold*, No. 94-2108, 1998 WL 309921, at *4 (E.D. Pa. June 10, 1998) (examining a § 1983 cause of action under the theories of malicious prosecution and false arrest "*as well as under general due process guarantees of a fair trial*") (emphasis added).

Even if the Court were to construe Plaintiffs' § 1983 claims with reference to a specific common-law tort, abuse of process rather than malicious prosecution would be the appropriate analog. While a malicious prosecution claim involves the

initiation of a prosecution without probable cause and with a bad motive, an abuse of process claim involves a prosecution that may have been legitimately initiated but the process thereafter is misused for a purpose other than that intended by law. *Jennings v. Shuman*, 567 F.2d 1213, 1217 (3d Cir. 1977); *Bristow v. Clevenger*, 80 F. Supp. 2d 421, 431 n. 10 (M.D. Pa. 2000) (internal citation omitted) ("The goal of malicious prosecution is the bringing of the action itself, while the goal of abuse of process is something entirely different."). *See also Heck*, 512 U.S. at 495 n.2 (Souter, J., concurring) ("While 'the gist of the tort [of malicious prosecution] is . . . commencing an action or causing process to issue without justification,' abuse of process involves 'misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.'") (internal citation omitted). The core of Plaintiffs' claims here is *not* that the prosecutions of Plaintiffs were initiated illegitimately, but that once the process was initiated, it was used for an improper purpose, specifically to adjudicate Plaintiffs delinquent and place them in facilities as part of Defendants' corrupt kickback scheme. *See Jennings*, 567 F.2d at 1217. Defendants' goal was not the "bringing of the action itself," but "something entirely different" – unlawfully adjudicating and placing Plaintiffs. *See Bristow*, 80 F. Supp. 2d at 431 n.10.

"To establish a claim for abuse of process, a plaintiff must show evidence of an act or threat not authorized by the process or aimed at an illegitimate objective."

Mitchell v. Guzick, 138 F. App'x 496, 502 (3d Cir. 2005); *see also Williams v. Fedor*, 69 F. Supp. 2d 649, 668 (M.D. Pa. 1999) (explaining that, under Pennsylvania law, a claim for abuse of process requires showing "an 'abuse' or 'perversion' of process already initiated . . . with some unlawful or ulterior purpose") (internal citations omitted)). Notably, the presence or absence of probable cause is irrelevant to an abuse of process claim. *Jennings*, 567 F.2d. at 1218. Similarly, abuse of process claims are not barred merely because the underlying proceeding involving the abused process has not terminated favorably. *Rose*, 871 F.2d at 351.

Plaintiffs properly allege the elements of an abuse of process claim. Plaintiffs' claims that their constitutional rights were violated at trial for the purpose of adjudicating them delinquent and sending them to placement as part of a corrupt *quid pro quo* kickback scheme sufficiently allege that the process used against them was "aimed at an illegitimate objective." *See Mitchell*, 138 F. App'x at 502. Process, already initiated, was used against Plaintiffs for an ulterior, illegitimate purpose. *See Williams*, 69 F. Supp. 2d at 668. Accordingly, even if the Court looks to a specific common-law tort analogy, Plaintiffs sufficiently allege the elements of an abuse of process claim.

D. Provider Defendants Misconstrue Plaintiffs' § 1983 Claims As *Monell* Claims

Provider Defendants assert that a "private company cannot be liable for

constitutional violation absent allegations that the particular constitutional or statutory violation was pursuant to company policy" (Doc. No. 440, at 12 (citing *Hetzel v. Swatz*, 909 F. Supp. 261, 263-264 (M.D. Pa. 1995)), and thus argue that Plaintiffs' allegations are insufficient in failing to assert that Provider Defendants had policies to violate the juveniles' rights. (Doc. No. 440, at 13.) Specifically, Provider Defendants contend that Plaintiffs failed to allege an express policy, custom or decision by a policy-maker attributable to Provider Defendants in order to hold them liable. (Doc. No. 440, at 12-13.) These arguments are grounded in the erroneous premise that Plaintiffs' theory of liability against Provider Defendants is akin to municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), where the U.S. Supreme Court held that municipal governments may be sued for their own unconstitutional or illegal policies, but not for the acts of their employees.

Provider Defendants incorrectly imply that the only way to hold a private company liable under §1983 is on the basis of an unconstitutional company policy. Plaintiffs allege that Provider Defendants are liable as private actors that conspired with state actors to deprive Plaintiffs of their constitutional rights. *Dennis v. Sparks*, 449 U.S. 24, 38 (1980). While Provider Defendants correctly note that Plaintiffs' allegations do not establish an express policy of Provider Defendants that violated Plaintiffs' rights, Plaintiffs need not assert a policy or custom that

violated Plaintiffs' rights where Plaintiffs are not relying on a theory of municipal liability. Plaintiffs sufficiently allege that Provider Defendants conspired with state actors to deprive Plaintiffs of their constitutional rights. (CAC ¶¶ 2, 649, 656, 659, 661, 667, 671, 700-702, 712; IC ¶¶ 30-31, 39, 43-44, 46, 51, 53, 55, 60, 73.) Based on these allegations, Provider Defendants are subject to liability under § 1983. *Dennis v. Sparks*, 449 U.S. 24 (1980).

Finally, in asserting that Powell did not act as a final policy maker and that "only Powell's alleged actions could be relevant to the Provider Defendants' liability" (Doc. No. 440, at 14), Provider Defendants argue that, pursuant to Pennsylvania corporations law, Powell lacked the authority to act on their behalf. (*Id.*) Provider Defendants suggest they are absolved of liability because the allegations "do [not][19] support an inference that Powell had policy making authority for the Provider Defendants or acted in such a capacity on their behalf." (*Id.*)

This contention is also meritless. Provider Defendants' focus on "final policy making authority," a concept relevant only to a § 1983 claim against a municipal authority, again reflects their misunderstanding of Plaintiffs' claims as *Monell* claims. Because Plaintiffs do not that allege Provider Defendants are liable

[19] Provider Defendants presumably intended to include the word "not" here but failed to do so.

under a theory of municipal liability, Plaintiffs' failure to allege that Powell, or anyone else, had final decision making authority for Provider Defendants is irrelevant. Plaintiffs sufficiently allege that Provider Defendants are subject to liability under § 1983 pursuant to the Provider Defendants' conspiracy with state actors to deprive Plaintiffs of their constitutional rights. *See supra* Part II.A.

E. The Individual Complaint Sufficiently Alleges A § 1983 Claim On Behalf Of Parent Plaintiffs

1. Count IV Of The Individual Complaint States A Claim For Which Relief Can Be Granted

Defendants argue that Count IV of the Individual Complaint must be dismissed because Parent Plaintiffs do not allege a single action taken against them that constituted a violation of their independent constitutional rights. This argument is without merit.

Count IV of the Individual Complaint seeks relief on behalf of Parent Plaintiffs for violations of their due process rights pursuant to the Fourteenth Amendment. (IC ¶¶ 115-26.) The claim for damages includes compensation for "deprivation of property." (IC ¶ 126.) Specifically, in Count IV, the Parent Plaintiffs seek compensation for a deprivation of property without due process of law.[20] The Parent Plaintiffs were financially responsible for the detention of their

[20] Count V of the Individual Complaint also contains a claim on behalf of Parent Plaintiffs for loss of familial integrity.

children, the Juvenile Plaintiffs. (*See, e.g.*, Doc. Nos. 348, 353, 360, 363, at ¶ 10 (parents' short form complaints).) The Pennsylvania Supreme Court has determined that the numerous due process violations that took place in Defendant Ciavarella's courtroom resulted in the unlawful detention of the Juvenile Plaintiffs. *See* October 29 Order, at 5 (Exhibit A). Count IV seeks compensation, on behalf of the Parent Plaintiffs, founded on their own constitutionally based claims for the monies they paid for the unlawful detention of the Juvenile Plaintiffs as a result of the constitutional violations suffered by their children.

Stacey v. City of Hermitage, 178 F. App'x 94 (3d Cir. 2004), is instructive. In *Stacey*, the city demolished a home it deemed a hazard. The son of the homeowner brought a civil rights action, individually and as co-executor of the owner's estate, against the city and other individuals. *Id.* at 98. The Staceys alleged that the property was not a hazard, that there were alternatives to demolition and that the demolition occurred without affording them due process. *Id.* The court held that that the son's allegation that he had personal property in his mother's destroyed house was sufficient to establish an interest protected by the Constitution, specifically the Fourth Amendment, and thus found that the son had sufficiently pled his own §1983 claim. *Id.* at 100. Additionally, the court held that the son adequately asserted the infringement of a fundamental right in connection with the city's demolition of the house, as required to state a substantive due

process claim in his civil rights action. *Id.* As a result, the court permitted the son to proceed with his civil rights claims based on separate civil rights violations committed against his mother.

Similarly, here, the Parent Plaintiffs are not asserting civil rights claims on behalf of the Juvenile Plaintiffs – Count III of the Individual Complaint contains the Juvenile Plaintiffs' own civil rights claims – but rather on their own behalf for violations of their constitutional rights, *i.e.*, deprivation of property without due process of law, in the form of payments made by them for the costs associated with the unlawful detention of Juvenile Plaintiffs.[21] Therefore, Count IV of the Individual Complaint sufficiently states a cause of action for which relief may be granted on behalf of the Parent Plaintiffs.

2. Count V Of The Individual Complaint States A Claim For Which Relief Can Be Granted

Count V of the Individual Complaint contains allegations against Defendants on behalf of Parent Plaintiffs for procedural and substantive due process violations, specifically for violations of the constitutionally protected right of familial integrity. (IC ¶¶ 127-39.) Defendants incorrectly argue that (1) the Parent Plaintiffs have not alleged a protected interest that has been recognized in this

[21] Recognizing there is no basis to do so, Defendants have not challenged the standing of Parent Plaintiffs to assert the claims in Counts IV and V of the Individual Complaint. Defendants merely argue that Parent Plaintiffs have failed to state claims for which relief can be granted. (*See* Doc. No. 445, at 17-23.)

Circuit; and (2) even if the Parent Plaintiffs had alleged a protected interest, the Parent Plaintiffs have failed to allege that the violation of that purported right was the intent of any defendant. (*See* Doc. No. 445, at 19-23.) Count V of the Individual Complaint alleges a violation of a protected interest recognized by this Circuit and the requisite intent to violate that interest is sufficiently alleged. (IC ¶¶ 127-39, 136.)

The United States Supreme Court has held that the liberty interest of parents in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 72 (2000). *See also Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123, 1125 (3rd Cir. 1997) (court recognized "the constitutionally protected liberty interests that parents have in the custody, care and management of their children."); *Patterson v. Armstrong Children & Youth Servs.*, 141 F. Supp. 2d 512, 529 (W.D. Pa. 2001) (recognizing the constitutionally protected liberty interests that parents have in the custody, care and management of their children). In the present case, the Parent Plaintiffs claim the loss of familial integrity for the time the Juvenile Plaintiffs were unlawfully detained. Accordingly, Count V of the Individual Complaint properly asserts a violation of Parent Plaintiffs' constitutionally protected right to familial integrity.

Additionally, in the context of parental liberty interests, the due process

clause protects against deliberate violations of a parent's fundamental rights. *Chambers*, 587 F.3d 176. The Individual Complaint states, in part, that Defendants "unlawfully, and/or recklessly, willfully, wantonly and/or in a manner that shocks the conscience, and/or with deliberate and/or reckless indifference to the Parent Plaintiffs' rights violated 42 U.S.C. § 1983." (IC ¶ 136.) This language clearly satisfies the standard set forth in *Chambers*, requiring that the actions must be "specifically aimed at interfering," 587 F.3d at 193, with the Parent Plaintiffs' protected right to familial integrity. The unlawful detention of the juveniles inevitably resulted in the separation from their parents; it must be viewed, particularly at the pleading stage, as a deliberate violation of the Parent Plaintiffs' right to family integrity. The allegations set forth in Count V state the requisite intent with which the violations occurred. (IC ¶ 127-39.) Therefore, Count V states a claim for which relief can be granted and should not be dismissed.

F. Plaintiffs Sufficiently State A Claim For Punitive Damages

1. Plaintiffs Need Not Establish Causal Injury To Recover Punitive Damages

Plaintiffs sufficiently allege that Defendants' willful and malicious conduct entitles them to punitive damages. The purpose of punitive damages is to punish the wrongdoer, not compensate the plaintiff for an injury. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986) ("*Punitive damages aside*, damages in tort cases are designed to provide 'compensation for the injury caused to plaintiff

by defendant's breach of duty.'" (emphasis added) (internal citation omitted)); *Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980) ("[A]fter *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury."). The Third Circuit also has held that "[p]unitive damages may . . . be awarded based solely on a constitutional violation, provided the proper showing is made." *Allah*, 226 F.3d at 251.

The Complaints' allegations, many of which have gained credibility in the ongoing federal criminal proceedings and in the Pennsylvania Supreme Court case, tell a story of an unmitigated five-year corruption of the judicial process that was directed at thousands of children. (*See* CAC ¶¶ 1-5; 649-721; 725-27; 733-35; 739-41; 745-47; 753-62; 772-77; 788-91; IC ¶¶ 29-78, 109-14, 121-26, 136-39, 158-59, 162-64, 166-71, 173-74.) If the Complaints' substantive allegations are proven, one would be hard pressed to imagine a more appropriate occasion on which to impose punitive damages; both the punishment and deterrence goals served by punitive damages would mandate their imposition. Put simply, punitive

damages would send the message that never again will this type of conduct be allowed to occur.

2. Plaintiffs Sufficiently Allege A Claim For Punitive Damages Against The Mericle Defendants

The Mericle Defendants contend that Plaintiffs' allegations fail to sufficiently allege facts to warrant the imposition of punitive damages as to both Plaintiffs' state and federal claims. (Doc. No. 443, at 15-18). The argument fails. By arguing that the "Third Circuit precedent requires strict focus on the particular defendant's knowledge concerning his own conduct" in order to award punitive damages (Doc. No. 443, at 15), the Mericle Defendants over simplify the standard for punitive damages and ignore the alternative criteria, reckless disregard.

The Third Circuit in *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978), adopted a test for awarding punitive damages for a § 1983 claim requiring a showing that the defendant acted with actual knowledge *or with reckless disregard of* whether he was violating a federally protected right. (Doc. No. 443, at 15.) Plaintiffs need not allege facts that the Mericle Defendants possessed "actual knowledge" (Doc. No. 443, at 16) of a violation of a federally protected right in order to be awarded punitive damages. Clearly, these Defendants should have known that concealing over $2 million in payments to a president judge and a judge sitting in juvenile court would greatly compromise "the integrity of the juvenile justice system." *See* Memorandum from Chief Justice Ronald D. Castille

to the Honorable John M. Cleland, at 1 (Nov. 4, 2009) (attached as Exhibit K).

The Pennsylvania Supreme Court has recognized the obvious implications of Mericle's secret funneling of money to Ciavarella and Conahan during the period when Ciavarella was presiding over juvenile court matters in Luzerne: "[G]iven the nature and extent of the taint, this Court simply cannot have confidence that any juvenile matter adjudicated by Ciavarella during this period was tried in a fair and impartial manner." October 29 Order, at 7 (Exhibit A).

Punitive damages must be reserved "for cases in which defendant's conduct amounts to something more than a bare violation justifying compensatory damages or injunctive relief." *Cochetti*, 572 F.2d at 105-06.[22] Punitive damages "serve both punitive and deterrent functions"; "the availability of punitive damages as a deterrent may be more significant than ever today." *Id.*[23] "If there is any basis for

[22] Because the *Cochetti* complaint failed to allege – or even state facts from which the court could infer – that the defendants acted in reckless disregard of the plaintiff's civil rights, the court dismissed the plaintiff's claim for punitive damages. *Id.*

[23] Post-*Cochetti*, the Third Circuit, as well as this Court, has further clarified and explained the punitive damage standard for § 1983 claims. *See, e.g.*, *Keenan v. City of Phila.*, 983 F.2d 459, 470 (3d Cir. Pa. 1992) (upholding the award of punitive damages against defendants, a police commander and inspectors, who violated the constitutional and statutory rights of plaintiff police officers); *Young v. Pleasant Valley Sch. Dist.*, No. 07-854, 2008 U.S. Dist. LEXIS 10829, at * 33-34 (M.D. Pa. Feb. 13, 2008) (denying defendants' motion to dismiss where a jury could award punitive damages based on plaintiffs' allegations that defendants deliberately retaliated against them for exercising their free speech rights); *see also*

(continued...)

the imposition of punitive damages, it would have to be that the defendants acted in reckless disregard of whatever civil rights were allegedly infringed." *Id.* at 106.

Punitive damages may also be awarded as to Plaintiffs' state-law claims. Similar to the federal standard, punitive damages may be awarded for state claims "for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *See Feld v. Merriam*, 485 A.2d 742, 747 (Pa. 1984) (quoting Restatement (Second) of Torts § 908(2)). They are awarded to punish a defendant for certain outrageous acts and to deter him or others from engaging in similar conduct. *G.J.D. v. Johnson*, 713 A.2d 1127, 1131 (Pa. 1998). The Pennsylvania Supreme Court in *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963), held that a Court should consider the totality of the alleged circumstances; a court must consider "the [conduct] itself together with all the circumstances including the motive of the wrongdoer and the relations between the parties."

(continued...)

Smith v. Cent. Dauphin Sch. Dist., 511 F. Supp. 2d 460, 481 (M.D. Pa. 2007) (deferring a ruling on the issue of punitive damages until all evidence has been presented at trial); *Hopkins v. Vaughn*, No. 06-323, 2008 U.S. Dist. LEXIS 39564 (M.D. Pa. May 12, 2008) (same). A defendant will be liable for punitive damages under § 1983 when a plaintiff shows the defendant's conduct to be "at a minimum, reckless or callous." *Brennan v. Norton*, 350 F.3d 399, 428-29 (3d Cir. 2003) (quoting *Savarese v. Agriss*, 883 F.2d 1194, 1204 (3d Cir. 1989)).

The Complaints clearly allege that the Mericle Defendants' conduct in this case amounts to something more than a bare violation justifying compensatory damages. Here, the Mericle Defendants' alleged conduct of paying more than $2 million to two sitting judges is so shocking that it must be left for a jury, after full discovery is conducted, to decide how outrageous it was. (*See* CAC ¶¶ 1-5; 649-721; 725-27; 733-35; 739-41; 745-47; 753-62; 772-77; 788-91; IC ¶¶ 29-78, 109-14, 121-26, 136-39, 158-59, 162-64, 166-71, 173-74.)

Plaintiffs' Complaints more than adequately plead that Mericle acted with both knowledge of, or at the very minimum, with reckless indifference to, the federal and state rights of Plaintiffs, thus warranting punitive damages. (*See* CAC ¶¶ 667-69, 671, 673-74, 686, 700-11, 733-35, 745, 753-54, 757-58; IC 29-78, 109-114, 121-26, 136-39, 162-64, 166-71.) Mericle's conduct set in motion a series of actions by others which the Mericle Defendants knew or reasonably should have known would cause Plaintiffs' constitutional injuries. Plaintiffs allege that Mericle and Mericle Construction knowingly entered into contracts to construct the PACC and WPACC for-profit juvenile detention facilities with full knowledge that these detention centers would be used to house juveniles. (*See* CAC ¶¶ 649-50, 659-61, 700-11; IC ¶¶ 29-78, 109-14, 121-26, 136-39, 162-64, 166-71.) Mericle knowingly and willfully entered into agreements in which Ciavarella and Conahan, while presiding over County courts, would receive payments from him and other

Defendants in connection with the construction of these new detention facilities. (*See* CAC ¶¶ 649-50, 659-61, 700-21; IC ¶¶ 29-78, 109-14, 121-26, 136-39, 162-64, 166-71.) In return for these payments, Ciavarella and Conahan agreed to misuse their judicial offices to ensure that Plaintiff youth would be placed in detention facilities. (*See* CAC ¶¶ 656, 659, 661, 700-11, 730-35, 742-47; IC ¶¶ 29-78, 109-14, 121-26, 136-39, 162-64, 166-71.) Mericle compensated Ciavarella and Conahan "in exchange for official actions." (*See* CAC ¶ 758; *see also* CAC ¶¶ 649-711, 757; IC ¶¶ 29-78.) The Complaints also specifically allege that Mericle knowingly prepared and backdated documents meant to conceal the exchange of funds in furtherance of the conspiracy to violate the rights of Plaintiffs in order to earn profits. (CAC ¶¶ 700-11; IC ¶¶ 29-78.) *See also* Mericle Information (Exhibit D).

At a minimum, Mericle's conduct, as alleged, was with "reckless and callous indifference" to Plaintiffs' rights, thus warranting the imposition of punitive damages for Plaintiffs' state and federal claims. As stated in *Keenan,* this case provides precisely the "special circumstance" for the imposition of punitive damages. 983 F.2d at 470. If the allegations are proven, the law would readily allow the jury to award Plaintiffs punitive damages to punish the Mericle Defendants for their misconduct and to warn others against doing the same.

III. PLAINTIFFS ADEQUATELY PLEAD RICO CAUSES OF ACTION AGAINST ALL DEFENDANTS SUCH THAT DEFENDANTS' MOTIONS TO DISMISS MUST BE DENIED AS TO THE RICO CLAIMS

Class Plaintiffs, in Counts V, VI, and VII, and Individual Plaintiffs, in Counts I and II, bring various claims pursuant to 18 U.S.C. § 1964(a) for violations of 18 U.S.C. § 1962. Defendants assert, without merit, that each of these claims must fail. As set forth below, Plaintiffs have standing to bring, and sufficiently plead, violations of § 1962(c) and (d).[24]

A. The Allegations In Plaintiffs' Complaints Demonstrate That Plaintiffs Have Standing To Pursue Their RICO Claims

In the Common Brief, Defendants assert that "both the Individual and the Class Plaintiffs lack standing for their RICO claims because their alleged damages

[24] Class Plaintiffs withdraw their claims in Count VI of the Class Complaint against all moving Defendants for violations of 18 U.S.C. § 1962(b). Additionally, Plaintiffs withdraw their claims in Count I of the Individual Complaint and Count V of the Class Complaint against Provider Defendants, Barbara Conahan, and Cindy Ciavarella for violations of 18 U.S.C. § 1962(c). As explained in this section, however, Plaintiffs sufficiently plead claims against these Defendants for violations of § 1962(d).

Finally, Individual Plaintiffs concede that the Juvenile Plaintiffs who were juveniles at the time of the filing of the Individual Complaint do not have damages as a result of the alleged RICO violations. The Individual Plaintiffs, however, contend that the Individual Complaint sufficiently alleges that the Parent Plaintiffs and the Juvenile Plaintiffs who had reached the age of majority at the time of the filing of the Individual Complaint are entitled to damages as a result of the alleged RICO violations in Counts I and II of the Individual Complaint – specifically damages associated with the payments related to the Juvenile Plaintiffs' detention.

are too remote from the alleged RICO violations." (Doc. No. 445, at 24.) Taking the well-pleaded allegations of the Complaints as true, however, as the Court must do in deciding Defendants' motions to dismiss, *Phillips*, 515 F.3d at 233, the Complaints plead a short, direct connection between the RICO predicate acts – including wire fraud and bribery – and the RICO damages.

1. RICO's Proximate Cause Requirement Derives From And Encompasses Common-Law Notions Of Proximate Cause

RICO's proximate cause requirement derives from and incorporates the principles of proximate cause in the common-law tort jurisprudence. In *Holmes v. Securities Investor Protection Corp.*, the U.S. Supreme Court set out the proximate cause requirement under RICO in great detail, explaining that "[a]t bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" 503 U.S. 258, 268 (1992) (quoting W. Keeton *et al.*, *Prosser and Keaton on Law of Torts* § 41 (5th ed. 1984)). While proximate cause requires "some direct relation between the injury asserted and the injurious conduct alleged," *id.*, the *Holmes* Court recognized that RICO's proximate cause requirement incorporates general common-law principles, and explained that the phrase "by reason of" in the RICO statute, *see* 18 U.S.C. § 1964(c), should have the same meaning as the identical phrase in Section 4 of the

Clayton Act. 503 U.S. at 267.[25] In sum, the proximate cause analysis must be made in light of broad common-law tort principles, particularly because "'the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.'" *Id.* at 272 n.20 (quoting *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983)).[26]

2. Plaintiffs Sufficiently Plead A Short And Direct Chain Between Defendants' Predicate Acts And Plaintiffs' Injuries

This case is readily distinguishable from *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), *Hemi Group*, 130 S. Ct. 989, and other cases relied on by

[25] That phrase in the Clayton Act was taken in turn from Section 7 of the Sherman Act, which has been interpreted "to incorporate common-law principles of proximate causation." *Id.*

[26] Defendants cite extensively from the plurality opinion of Justices Roberts, Alito, Scalia, and Thomas in *Hemi Group, LLC v. City of New York*, a recent Supreme Court opinion analyzing RICO's proximate cause requirement. Justices Breyer, Stevens and Kennedy dissented from the plurality's view of proximate cause that focuses primarily on "directness," applying instead a test based on the common-law notion of the foreseeability of the ultimate injury. 130 S. Ct. 983, 997-98 (2010). They explained that "an intervening third-party act, even if criminal, does not cut a causal chain where the intervening act is foreseeable and the defendant's conduct *increases* the risk of its occurrence." *Id.* at 998. And Justice Ginsburg, concurring only in the judgment, did not "subscrib[e] to the broader range of the Court's proximate cause analysis." *Id.* at 995. Justice Sotomayor took no part in the consideration of the case. As a plurality opinion, *Hemi Group* is entitled to no precedential value beyond the narrow holding – not encompassing "the broader range of the Court's proximate cause analysis" – to which five Justices agreed. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Defendants in their argument that Plaintiffs' alleged link between predicate acts and injury is too attenuated. The cause of Plaintiffs' harms is a set of actions intimately related to Defendants' single, overarching conspiracy, arising out of that conspiracy, and performed as part and parcel of that conspiracy. There are no independent third parties and Plaintiffs' injuries are not derivative of any other person's or entity's injuries. Thus, proximate cause exists.

In *Anza*, the plaintiff alleged that the defendant failed to charge New York sales tax and submitted fraudulent New York state tax returns and, in doing so, injured defendant's competitors by its ability to charge artificially low prices without impacting its own profits. 547 U.S. at 454. In an analysis that "beg[an] – and . . . largely end[ed] – with *Holmes*," the Court held that the "direct victim" of the scheme was the State of New York, which was defrauded of tax revenue, not the plaintiff. *Id.* at 458. The Court found important the fact that "[t]he cause of [the plaintiff's] asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violations (defrauding the State)." *Id.*

In sharp contrast, in this case the cause of Plaintiffs' asserted harms flows from and is *not* "entirely distinct from the alleged RICO violations." *Id.* The Complaints allege a scheme to commit honest services mail and wire fraud, as well as state-law bribery, among Ciavarella, Conahan, Powell, Mericle, Mericle Construction, and the corporations through which the illicit payments passed –

Vision, Pinnacle, and Beverage Marketing. (CAC ¶ 756; IC ¶ 88.) Powell and Mericle made payments to Ciavarella and Conahan for the purpose of ensuring the success (*i.e.*, the full occupancy) of PACC and WPACC. (CAC ¶¶ 656, 662-65; IC ¶¶ 30, 44-46.) These payments tainted Ciavarella's decisions as a juvenile court judge because of his ongoing financial interest, by way of the payments from Powell and Mericle. (CAC ¶ 667; IC ¶ 60, 62.) In order to complete the object of the conspiracy – the success and profitability of PACC and WPACC – Ciavarella adjudicated the juvenile Plaintiffs delinquent and sent a large number of them to PACC and WPACC, causing them and/or their parents to incur the costs of placement and additional economic injuries incident to their adjudications and placements. (CAC ¶¶ 668-70, 672-74, 687, 691-92, 694; IC 34, 36, 66.) In short, Powell and Mericle made payments for the specific purpose of ensuring the success of PACC and WPACC; Ciavarella and Conahan received these payments, concealed their partiality and financial interest, and ensured a steady stream of juveniles adjudicated delinquent to fill the facilities; and Plaintiffs' alleged injuries were proximately caused by these actions. The chain between the predicate acts and the injuries is therefore short and direct.

In a more recent case cited by Defendants, the *Hemi Group* plurality (*see supra* note 26) relied on *Anza* and concluded that proximate cause did not exist. In that case,

> Hemi committed fraud by selling cigarettes to city residents and failing to submit the . . . customer information [required to be submitted by federal law] to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, the City could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected.

130 S. Ct. at 989. Under that set of facts, "the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file [reports with the state]. Thus, . . . the conduct directly causing the harm was distinct from the conduct giving rise to the fraud." *Id.* at 990. The Court noted that "[t]he City's theory thus requires that we extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.*

Here, RICO liability does not extend beyond the direct causation chain envisioned in *Holmes*. No third or fourth party separate from the parties who committed the predicate acts exists here. Ciavarella's actions of adjudicating and placing the juvenile Plaintiffs caused the RICO injuries. Ciavarella was a willing participant in the alleged scheme to commit the predicate acts (and an actor who,

along with Powell, Mericle, Vision, Pinnacle, and Beverage Marketing, committed them), and he committed the alleged constitutional violations with the same motive and as part of the same conspiracy as produced the predicate acts.

Defendants' argument that Ciavarella was an intervening third party who cut off the causal chain between the predicate acts and the injuries (Doc. Nos. 445, at 34; 440, at 17-18) is without merit. Pursuant to the common-law tort principles from which RICO's proximate cause principles derive, *see supra* Part III.A.1, a later cause supersedes an original cause *only* if it is independent from the original cause. *Aetna Ins. Co. v. Boon*, 95 U.S. 117, 130 (1877). Moreover, to cut the causal chain, the later cause must be neither reasonably foreseeable nor the result of a risk created by the earlier, wrongful action. *See E. Hamptson Dewitt Corp. v. State Farm Mut. Auto. Ins. Co.*, 490 F.2d 1234, 1240 (2d Cir. 1973) (Friendly, J.) ("[N]ot every new force insulates a negligent defendant from liability or a plaintiff guilty of contributory fault from the consequences. The principle is limited to 'intervening causes which could not reasonably be foreseen, and which are no normal part of the risk created.'") (quoting W. Keeton *et al.*, *Prosser and Keeton on Law of Torts* § 44 (5th ed. 1984)).

Casting Ciavarella as an intervening third party who cut the causal chain between the predicate acts and the injuries completely disregards these principles. It is wholly contrary to Plaintiffs' allegations, *inter alia*, that "[t]he owners and

operators received a *per diem* reimbursement from the county for every child placed in the facilities"; that Defendants' "ability to maintain their association and continue their ongoing conspiracy depended on the continued profitability and viability of" PACC; that "[t]he consistent placement of youth at [PACC] facilitated the subsequent construction of [WPACC] and the expansion of [PACC], directly benefiting [PACC], [WPACC], and their owners and operators, as well as the contractor, Mericle, and Mericle Construction"; that "[a]ll [D]efendants had a financial interest in placing juveniles in [PACC] and [WPACC]"; and that the predicate acts "were all related to the common purpose of enriching [Defendants] by constructing and expanding juvenile detention facilities . . . and keeping the beds at [PACC] and [WPACC] full." (CAC ¶¶ 668-70, 757; *see also* IC ¶ 34, 37, 53, 66.) The Complaints' allegations cannot support a reading that Ciavarella's adjudications of the juvenile Plaintiffs were independent, superseding causes of Plaintiffs' injuries. *See Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994) (vacating summary judgment in favor of defendants, and explaining that, "[t]aking the complaint at face value, it cannot be said that we are confronted with circumstances . . . where the intervening acts were wholly independent of the alleged predicate acts").

This case is likewise sharply distinguishable from *Longmont United Hospital*, *Allegheny General Hospital*, and *Steamfitters Local Union No. 420*, also

relied on by Defendants. In *Longmont*, an independent government agency, CMS, plainly "st[ood] between [defendants'] conduct and [plaintiff's] injuries." 305 F. App'x 892, 894 (3d Cir. 2009). The court found that CMS's discretion "played a significant role in causing Longmont's alleged injuries." *Id.* at 895. Similarly, in *Allegheny*, "nonpaying patients," cigarette smokers suffering from tobacco-related diseases who were admitted to the plaintiff hospitals and then provided with unreimbursed medical care, stood between the cigarette companies' alleged fraud and the hospitals' losses. 228 F.3d 429, 440-41 (3d Cir. 2000). And in *Steamfitters*, union health and welfare funds argued that their increased costs for smoking-related illnesses (their alleged damages) resulted when the tobacco companies "conspired to suppress research on safer tobacco products, defrauded health care providers and payers by informing them that the companies' tobacco products were safe, and caused smokers to become ill by preventing the dissemination of smoking-reduction and smoking-cessation information." 171 F.3d at 918. The court found intervening causes of the harm in the individual smokers' "independent (i.e., separate from the fraud and conspiracy) decisions to smoke, [and] smokers' ignoring of health and safety warnings, etc." *Id.* at 933.

In *Longmont*, *Allegheny*, and *Steamfitters*, the individuals or entities separating the predicate acts from the injury were wholly independent of the scheme to commit the predicate acts. In contrast, in the instant case, Ciavarella

was a central member of the conspiracy to commit the predicate acts and his actions in adjudicating the juveniles and placing them in detention were taken with the same intent and in support of the same purpose as the predicate acts – to further the conspiracy to keep PACC and WPACC full and profitable, thereby enriching all Defendants.

This case is most closely akin to *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008). In *Bridge,* the U.S. Supreme Court applied the common-law principles discussed above to a scheme in which the defendants – prospective buyers of county tax liens on properties of delinquent taxpayers – sent agents to bid on their behalf, thereby obtaining a disproportionate share of the liens to the plaintiffs' detriment. *Id.* at 2135. To prevent the manipulation caused by multiple related bidders, the county required each bidder to submit bids in its own name only, prohibited the use of agents to submit simultaneous bids for the same parcel, and required each bidder to certify to the county its compliance with the rules. *Id.* Plaintiffs alleged that defendants had "fraudulently obtained a disproportionate share of liens by violating the [certification rules] at the auctions." *Id.* at 2136. The Court found "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*." *Id.* at 2144.

Contrasting *Holmes* and *Anza,* the *Bridge* court found "no independent

factors that account for respondents' injury," and concluded that the plaintiffs' alleged injury was "a direct result" and "a foreseeable and natural consequence of [the defendants'] scheme." *Id.* Although the misrepresentations were made to the county, the Court found that the plaintiffs and the other losing bidders "were the *only* parties injured by the [defendants'] misrepresentations." *Id.*

Here, likewise, it is alleged that Plaintiffs were the only parties injured in their business or property by the predicate acts. Ciavarella's action in adjudicating the juvenile Plaintiffs delinquent without regard for constitutionally required procedures was not a superseding cause of Plaintiffs' injuries; instead, his actions and Plaintiffs' injuries were a foreseeable and natural consequence of the predicate acts. Since the causal chain between the predicate acts and Plaintiffs' injuries is short and direct, Plaintiffs sufficiently allege proximate cause.

3. The Policy Concerns Underlying The Supreme Court's Proximate Cause Jurisprudence Support Finding That The Complaints Sufficiently Allege Proximate Cause Under RICO

In *Holmes*, the Supreme Court identified three policy concerns animating its emphasis on the "directness" of the relationship between the predicate acts and the injury. These concerns are, when the chain between the racketeering acts and the injury is not short and direct, (1) the potential difficulty in ascertaining the amount of a plaintiff's damages attributable to a RICO violation; (2) the potential difficulty apportioning damages among plaintiffs "removed at different levels of injury from

the violative acts, to obviate the risk of multiple recoveries;" and (3) the potential existence of more "directly injured victims [who] can generally be counted on to vindicate the law as private attorneys general." 503 U.S. at 269. These concerns do not constitute a three-factor test for proximate cause, but merely inform the analysis of "directness" in determining proximate cause. *See Holmes*, 503 U.S. at 259 (explaining that the Court's "conclusion is confirmed by considering the directness requirement's underlying premises"); *Steamfitters*, 171 F.3d at 933 (construing "apportionment of damages and vindication by others" as "two further concerns . . . that supported [the *Holmes* Court's] conclusion regarding" proximate cause).

Defendants conflate the first two concerns in their argument that "Plaintiffs' alleged injuries are also too speculative to sustain RICO standing." (Doc. No. 445, at 35.) This argument, and Defendants' argument as to the third concern that "more appropriate enforcers of the law exist and are taking action" (*id.* at 37), are addressed below. None defeats proximate cause as established by the short and direct causal chain, described in Part III.A.2, *supra*.

(a) As To The First Two Policy Concerns, Defendants Incorrectly Argue That Plaintiffs' Alleged Injuries Are Too Speculative To Sustain RICO Standing

Defendants argue that Plaintiffs' alleged injuries are too speculative to sustain a finding of proximate cause. (Doc. No. 445, at 35-37.) Defendants appear

to use "too speculative" as shorthand for the policy concerns regarding ascertaining and apportioning damages where a plaintiff's injury is not linked to the predicate acts by a short and direct causal chain. For the following reasons, this argument fails, particularly at this early stage of the litigation.[27]

First, as explained above, difficulty ascertaining or apportioning damages is simply an indicator of the absence of proximate cause; it is not a separate test for proximate cause. *See Bridge*, 128 S. Ct. at 2142 (explaining that the more indirect the injury is, the more difficulty a court will have in ascertaining the amount of a plaintiff's damages attributable to the defendant's wrongdoing). Defendants have made no new argument regarding ascertaining or apportioning damages; they have simply repackaged their argument that Plaintiffs' injuries are insufficiently direct. (Doc. No. 445, at 36.) Since Plaintiffs have established that their injuries as pled are the direct result of the racketeering activity, *see supra* Part III.A.2, Defendants' arguments that Plaintiffs' alleged injuries are too speculative adds nothing. *See Bridge*, 128 S. Ct. at 2144 (concluding that plaintiffs' alleged injury is the direct

[27] Importantly, Defendants do not argue that Plaintiffs' damages are not fixed and identifiable. Unlike in *Magnum v. Archdiocese of Phila.*, 253 F. App'x 224, 228-229 (3d Cir. 2007), where the plaintiffs' alleged damages were the lost opportunity to bring tort claims and the court found those alleged damages to be too speculative, Plaintiffs' alleged damages are fixed and identifiable, including payments made by Plaintiffs to defense attorneys, and payments made to Luzerne County for the costs of placement, court costs and fees, and probation costs. (CAC ¶¶ 761; 766; IC ¶ 95.)

result of defendants' fraud, was a foreseeable and natural consequence of their scheme, that no independent factors account for the injury, that there is no risk of duplicative recoveries, and that no more immediate victim is better situated to sue, but not analyzing the question of speculative damages); *Cement-Lock v. Gas Tech. Inst.*, No. 05-0018, 2006 WL 3147700, at *5 (N.D. Ill. Nov. 1, 2006) ("The fact that these damages may be difficult to prove is attributable to the nature of the alleged injuries, not, as [d]efendants assert, to their remoteness from the [d]efendants' conduct. The court concludes that *Anza*, like *Holmes*, is distinguishable, and that [p]laintiffs have sufficiently alleged that [d]efendants' conduct proximately caused [p]laintiffs' alleged injuries.").

Second, because the chain between Defendants' racketeering activity and Plaintiffs' injuries is short and direct, there are no other potential plaintiffs "removed at different levels of injury from the violative acts" among whom damages would have to be apportioned. *See Holmes*, 503 U.S. at 269. There are no victims of Defendants' scheme who suffered pecuniary losses standing between Defendants and Plaintiffs. *Contra Holmes*, 503 U.S. at 273 (explaining that, because the directly injured broker-dealers stood between the defendants' wrongdoing and the customers, "the district court would . . . have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover full treble damages").

Third – distinguishing this case from *Anza*, the only case cited by Defendants in support of their argument – in a class action, plaintiffs do not need to prove causation with respect to each individual. *See Alfaro v. E.F. Hutton & Co.*, 606 F. Supp. 1100 (E.D. Pa. 1985) (holding that, in a RICO class action, plaintiffs need not plead predicate acts affecting each class member; instead, "[i]t is only necessary to plead two racketeering acts which were part of the pattern of racketeering activity used by defendant to conduct or participate in the conduct of the enterprise and thus, indirectly affected all plaintiffs"). Plaintiffs plead statistics compiled by the Pennsylvania Juvenile Court Judges' Commission "confirm[ing] that [the strategy to increase placements] had an impact." (CAC ¶¶ 688-89.) *Cf. Chang v. Univ. of R.I.*, 606 F. Supp. 1161, 1209 (D.R.I. 1985) ("[T]he court finds that the statistical evidence presented is such that the possibility of stochastic variation as the proximate cause of the disparity in rank placement between men and women at the associate/full professor level looms large. . . . Once the court has made these findings, it is permissible to infer that discrimination was the cause of the disparity . . . if no other factor is evident as an explanation."). Plaintiffs' pleading of the link between the racketeering activity and the damages is sufficient at this stage of the litigation. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612, 615, 619 (6th Cir. 2004) (suggesting that dismissal on the pleadings based on a speculative or illogical theory of RICO damages, where there are many fact-

driven questions and it is possible for plaintiffs to prove the allegations in their complaint, is inappropriate at this "early stage of the case"); *Mendoza v. Zirkle Fruit Co*., 301 F.3d 1163, 1171 (9th Cir. 2002) (legally authorized apple workers sued growers under RICO alleging growers hired undocumented immigrants to depress wages of legally documented employees; court held that "it is inappropriate at this stage to substitute speculation for the complaint's allegations of causation . . . [T]he workers must be allowed to make their case through presentation of evidence, including experts who will testify about the labor market, the geographic market, and the effect of the illegal scheme.").

In summary, Defendants cannot defeat the proximate cause requirement at this stage by repackaging their proximate cause arguments into arguments regarding speculative damages. The Complaints plead a short and direct causal connection between the racketeering activity and Plaintiffs' injuries, Plaintiffs' damages are ascertainable, and there are no other potential plaintiffs with whom damages would have to be apportioned.

(b) As To The Third Policy Concern, Defendants Mistakenly Argue That The Commonwealth Of Pennsylvania And The Federal Government Can Vindicate The Injuries Caused By Defendants' RICO Violations

Defendants wrongly assert that proximate cause should not be found because "more appropriate enforcers of the law exist and are taking action." (Doc. No.

445, at 37.) Defendants point to the federal government and the Commonwealth of Pennsylvania as those "more appropriate enforcers."

In evaluating this policy concern, the Court must ask whether there are other "victims [who] can generally be counted on to vindicate the law as private attorneys general," not whether there are other entities pursuing criminal prosecution or system-wide reform. *See Holmes*, 503 U.S. at 269-70 (relying on *Associated Gen. Contractors*, 459 U.S. at 541-42, an antitrust case describing more immediate victims of antitrust violations who "would have a right to maintain their own treble damages actions against the defendants"). Civil RICO's purpose is to award money damages to victims of racketeering activity, a purpose not furthered by either criminal prosecution or system-wide reform. *See Genty v. Resolution Trust Co.*, 937 F.2d 899, 914 (3d Cir. 1991) (explaining that Congress intended civil RICO to both compensate victims and punish wrongdoers). The Court therefore should look to who else might bring a RICO suit, not who might bring criminal charges or advocate systemic change.

Viewing the federal government as a more appropriate "victim" because it can bring (and has brought) criminal charges would eviscerate private parties' ability to bring civil RICO claims. Civil RICO claims are necessarily based on criminal conduct, and often are based on federal criminal conduct. *See* 18 U.S.C. § 1961(1). The federal government (or a state government, in the case of

violations based on state law) could always bring criminal charges.

The Commonwealth's actions identified by Defendants – the Pennsylvania Supreme Court's *vacatur*, expungement and dismissal with prejudice of the juveniles' adjudications and the forthcoming recommendations of the Interbranch Commission on Juvenile Justice – constitute relief wholly separate from that available under civil RICO and are attempts to remedy harms entirely distinct from the harms addressed by civil RICO. They will not provide damages to compensate the victims for their pecuniary injury caused by Defendants' plot. Plaintiffs are the *only* "victims [who] can . . . be counted on to vindicate the law as private attorneys general." *Cf. Lester v. Percudani*, 556 F. Supp. 2d 473, 487 (M.D. Pa. 2008) ("Government investigations may result in penalties, but they are ill-equipped to compensate plaintiffs for their damages.").

Significantly, Defendants have not argued that the predicate acts of wire fraud, mail fraud, and bribery caused a pecuniary loss to anyone other than Plaintiffs. In contrast, in *Anza*, the State of New York was injured (*i.e.*, lost money) as a result of the defendants' failure to charge sales tax. 547 U.S. at 458, 460. In *Hemi Group*, New York City was injured (*i.e.*, lost money) as a result of the cigarette purchasers' failure to pay cigarette taxes. 130 S. Ct. at 989. Here, the entities pointed to by Defendants would not have standing to bring a civil RICO suit. *See Fair Housing Council of Suburban Phila. v. Main Line Times*, 141 F.3d

439, 444 (3d Cir. 1998) (explaining that the violation of a statute "does not automatically confer standing on any plaintiff, even one who holds the status of a private attorney general"; instead, to have standing, a private attorney general must assert a "legally cognizable injury").[28]

B. Plaintiffs Sufficiently Plead The Existence Of A RICO Association-In-Fact

Contrary to Defendants' contention (Doc. No. 445, at 43-51), Plaintiffs' Complaints adequately allege the existence of an association-in-fact enterprise, including that the association had an existence separate and apart from its racketeering activity. Furthermore, the pleadings do not negate an inference as to the association's separate existence.

Section 1961(4) defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). To establish the existence of an association-in-fact enterprise (also known as an enterprise-in-fact), a plaintiff must elicit evidence at trial that (1) there exists an

[28] The "more appropriate enforcer" factor may not even be applicable here, where subrogation is not an issue. In many cases, "proximate cause issue[s] arise[] because the RICO action is brought by a third-party based on a subrogation theory." *Magnum v. Archdiocese of Phila.*, No. 06-2589, 2006 WL 3359642, at *7 (E.D. Pa. Nov. 17, 2006); *see also Holmes*, 503 U.S. at 270-74 (announcing the policy concerns in the subrogation context). "[S]uch is not the case here. Thus [this] factor does not apply." *Magnum*, 2006 WL 3359642, at *7.

ongoing organization or structure for making or carrying out decisions of the group on an on-going basis (the "structure element"); (2) the various associates of the enterprise function as a continuing unit;[29] and (3) the enterprise has an existence separate and apart from the pattern of racketeering (hereinafter the "separate and apart element"). *United States v. Irizarry*, 341 F.3d 273, 286 (3d Cir. 2003) (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981); *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir. 1983), *overruled on other grounds*, *Griffin v. United States*, 502 U.S. 46, 57 n.2 (1991).

While the three elements must be proven at trial, under the rules of notice pleading, a plaintiff does not have to specifically allege in the complaint the facts necessary to establish these enterprise elements; instead, plaintiff is only required to allege the existence of an enterprise. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.* 742 F.2d 786, 790 (3d Cir. 1984) (rejecting the argument that plaintiff need plead all three enterprise elements, and emphasizing that notice pleading under the Federal Rules of Civil Procedure requires nothing more than simply identifying the enterprises.); *accord CIT Group/Equipment Financing, Inc. v. Krones, Inc.*, No. 09-432, 2009 WL 3579037, at *8 (W.D. Pa. Sept. 16, 2009) (citing *Seville*); *Pappa v. Unum Life Ins. Co.*, No. 07- 0708, 2008 U.S. Dist. LEXIS

[29] Defendants do not argue that Plaintiffs failed to plead this second enterprise element.

21500, at *29-*31 (M.D. Pa. March 18, 2008) (Caputo, J.) (holding that at the pleading stage, plaintiff is not required to satisfy the *Turkette* and *Riccobene* factors to demonstrate a RICO enterprise; instead, plaintiff need only allege the existence of an enterprise).[30] It suffices if factual allegations in the complaint support an inference that all three elements exist. *Freedom Med. v. Gillespie*, 634 F. Supp. 2d 490, 503 (E.D. Pa. 2007) (citation omitted).

As discussed in detail *infra*, Plaintiffs allege that Ciavarella and Conahan were at the center of an association-in-fact – which in the Class Complaint also includes Powell, Mericle, Mericle Construction, PACC and WPACC; and in the Individual Complaint, includes those Defendants plus the Provider Defendants, Beverage Marketing, Vision Holdings, Pinnacle Group, and Cindy Ciavarella and Barbara Conahan. The former judges accepted financial kickbacks from Powell and Mericle as *quid pro quo* for placing children adjudicated by Ciavarella in facilities that were built by Mericle Construction and were owned and operated by

[30] In *CIT Group*, Judge Ambrose acknowledged that while *Seville* has not been overruled, some district courts within the Third Circuit have held that the *Seville* standard is inapplicable where an association-in-fact is at issue. *Id. (citing In re Am. Investors Life Ins. Co. v. Annuity Mktg. & Sales Practices*, MDL 1712, 2006 WL 1531152, at * 9 (E.D. Pa. June 2, 2006) (finding *Seville* inapplicable where the relevant enterprise is an association-in-fact), and *McCullough v. Zimmer, Inc.*, Civ. No. 08-1123, 2009 WL 775402, at *12 (W.D. Pa. Mar. 18, 2009) (same)). However, this Court has held as recently as 2008 that *Seville*'s more deferential pleading standard continues to govern. *Pappa, supra.*

the Provider Defendants. (CAC ¶¶ 2, 161-162, 652, 656, 661, 667-670, 710, 725, 745, 758, 790; IC ¶¶ 5-6, 31, 40-41, 43, 45-46, 51, 53, 60, 111, 125.) Beverage Marketing, Pinnacle, and Vision – entities owned and operated by various individual Defendants – funneled and received the illicit payments to the former judges and concealed their true nature. (CAC ¶¶ 166-67, 173, 662, 671, 708-11, 714, 716, 753, 758, 759; IC ¶¶ 13-14, 16, 33, 43, 51-54, 75-76.) And to ensure a steady supply of youth to the Provider Defendants, Ciavarella, in concert with other Defendants, routinely deprived children of various constitutional rights when adjudicating them delinquent and ordering the children placed at the Provider Defendants' facilities. (CAC ¶¶ 2, 672, 681-83, 686; IC ¶¶ 66, 110, 124-25.) Thus, Plaintiffs' allegations as to the association-in-fact more than satisfy the governing pleading standards.

1. Plaintiffs Affirmatively Allege Sufficient Facts Regarding The Association-In-Fact That Give Rise To Reasonable Inferences As To The Enterprise's Structure

An association-in-fact "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 129 S.Ct. 2237, 2244 (2009). To satisfy the structure element, plaintiffs must allege facts that allow an inference that "some sort of structure exists within the group for the making of decisions, whether it be hierarchical or

consensual" or of "some mechanism for controlling and directing the affairs of the group on an on-going basis rather than an ad hoc basis." *Freedom Med.*, 634 F. Supp. 2d at 505 (citation omitted).

In the instant case, Plaintiffs allege the three structural features of purpose, relationships and longevity. Specifically, the Complaints plead that the racketeering acts – the electronic fund transfers (CAC ¶ 753; IC ¶¶ 45, 47-48) and the efforts to conceal the payments (CAC ¶¶ 718-20; IC ¶¶ 35, 44-45, 49-50), which together form the basis for the wire fraud allegations, as well as allegations of bribery based on the money transfers between Powell, Mericle, Conahan, and Ciavarella (*id.*) – "were all related to the *common purpose* of enriching various defendants [namely, Powell, Mericle, Ciavarella, and Conahan] by constructing and expanding juvenile detention facilities, namely PACC and WPACC; contracting with Luzerne County to use those juvenile detention facilities; and keeping the beds at PACC and WPACC full." (CAC ¶ 757; *see also* IC ¶¶ 30-34) (emphasis added). These payments were made through Pinnacle, Vision, and Beverage, bringing those entities into the conspiracy. (CAC ¶ 671; IC ¶¶ 45-50.) These allegations also sufficiently plead the *relationship* among the different members of the enterprise. And Plaintiffs allege that this activity spanned a period of approximately eight years from June 2000 through May 2008. (CAC ¶¶ 190-91, 649; IC ¶ 30.) Thus, Plaintiffs sufficiently plead that the enterprise had *longevity*.

2. Plaintiffs Plead Facts Sufficient To Support An Inference That The Enterprise Existed Separate And Apart From The Pattern Of Racketeering

The "separate and apart" element does not require that plaintiffs allege that the enterprise has some legitimate purpose or that it conducted activities unrelated to racketeering; it only requires a pleading that the enterprise had some existence beyond that necessary to commit the predicate offenses. *Freedom Med.*, 634 F. Supp. 2d at 506 (citing *Riccobene*, 709 F.2d at 224 ("The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.")); *United States v. Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992) (citing *United States v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1998) (rejecting suggestion that the enterprise cannot be inferred from the pattern of racketeering or that the enterprise cannot exist unless it does something other than commit the predicate acts)). Specifically, "[a]llegations that members of the enterprise 'coordinated the commission of multiple predicate offenses' or provided 'legitimate services during the period in which they were engaged in racketeering activities' satisfies [the separate and apart] element." *Freedom Med.*, 634 F. Supp. 2d at 506 (citing *United States v. Console*, 13 F.3d 641, 652 (3d Cir. 1993)); *see also Flood v. Makowski*, No. 03-1803, 2004 WL 1908221, at *8 (M.D. Pa. Aug. 24, 2004) (Caputo, J.) ("An association-in-fact can be separate from the criminal activities by

the fact that it engages in more than one scheme."); *Town of Kearny v. Hudson Meadows Urban Corp.*, 829 F.2d 1263, 1266 (3d Cir. 1987) (holding that an association-in-fact can be found to be an enterprise separate and apart from the pattern of activity in which it allegedly engaged where those associated in it engaged in more than one similar scheme).

Applying these criteria, Plaintiffs' Complaints set forth sufficient facts to support an inference that an association-in-fact existed separate and apart from the pattern of racketeering. Specifically, Plaintiffs allege that members of the enterprise coordinated the commission of multiple predicate acts. *See Freedom Medical, Pelullo, Console, Flood, supra*. Plaintiffs plead that Defendants committed the predicate acts of mail and wire fraud and bribery and engaged in more than one scheme over an eight-year period – first building and ensuring the placement of children at PACC and then building and ensuring the placement of children at WPACC. *See Flood*, 2004 WL 1908221, at *8 (plaintiffs appropriately pled an association-in-fact separate and apart from pattern of racketeering where they alleged twelve separate schemes similar in nature conducted by roughly the same group of individuals over fourteen-year period). Since Plaintiffs here allege that members coordinated the commission of multiple predicate acts, Plaintiffs sufficiently plead an association-in-fact.

3. Plaintiffs' Allegations Do Not Negate The Requirement That The RICO Enterprise Have An Existence Separate And Apart From The Racketeering Activity

Defendants argue that Plaintiffs plead facts that negate the "separate and apart" element of a RICO enterprise. (Doc. No. 445, at 44-48.) They point to Plaintiffs' allegations that the association-in-fact enterprises committed the predicate acts of wire fraud and mail fraud in order to conceal the predicate acts of honest services fraud and bribery (i.e., the compensation to Ciavarella and Conahan), and thus argue, citing *Actiq* and *McClure*, that the alleged association-in-fact enterprises were created solely and expressly for the purpose of concealing and preventing the discovery of the payments to Ciavarella and Conahan – that is for the purpose of committing the predicate acts and avoiding prosecution. (Doc. No. 445, at 47) (emphasis added).

Defendants' negation argument is flawed in several respects. First, Defendants purposefully misstate the scope of the enterprise-in-fact that Plaintiffs actually plead. *See* Part III.B.1 and III.B.2, *supra*. Second, Plaintiffs' allegations that members coordinated the commission of multiple predicate acts are sufficient to show that the enterprise was separate and apart from the pattern of racketeering. See Part III.B, *supra*. Moreover, Plaintiffs also affirmatively allege that the association-in-fact committed certain non-predicate acts, including adjudicating youth delinquent and placing them in PACC and WPACC, or in other facilities

from which they could be transferred to PACC and WPACC when beds opened up. *See generally* Summary of Relevant Factual Allegations, *supra*. These allegations also allow an inference that the enterprise existed separate and apart from the racketeering activity.[31]

Additionally, Defendants focus on Plaintiffs' allegations in paragraph 759 of the Class Complaint, that Pinnacle, Vision, and Beverage Marketing were each created solely and expressly for the purpose of concealing payments to Ciavarella and Conahan, in arguing that Plaintiffs have negated the separate and apart element. However, Plaintiffs do *not* allege that any of these three entities is a RICO enterprise standing alone. To the contrary, Plaintiffs allege that these corporate entities, in collaboration with the other Defendants, comprised one larger association-in-fact created for the purpose of executing the much broader schemes described *supra*.

In accordance with *Console*, *Kearny*, *Freedom Medical*, and *Flood*, Plaintiffs in the instant case plead that members of the enterprise coordinated the commission of multiple predicate acts. *See* Part III.B, *supra*. Moreover, Plaintiffs allege the structure of the association-in-fact, including its purpose, the

[31] Defendants also incorrectly argue that Plaintiffs can only meet their pleading burden by alleging facts that the association-in-fact was engaged in "some legitimate business." (Doc. No. 445, at 47.) No such requirement exists. *Freedom Med.*, 634 F. Supp. 2d at 506 (citing *Riccobene*, 709 F.2d at 223-24).

relationships that existed, and its longevity. *See* Part III.B.1, *supra*.

In the cases cited by Defendants, it is the threadbare allegation that an enterprise existed to commit the predicate acts *in the absence of pleadings as to any other enterprise elements* that led those courts to hold that plaintiffs negated the separate and apart element. Thus, for example, in *In re Actiq Sales & Marketing Practices Litigation*, plaintiffs did not describe the structure of the enterprise, failed to actually identify the names or titles of individuals participating in the scheme, and merely stated that unnamed individuals performed particular roles and were aware of each other's roles. No. 07-4492, 2009 U.S. Dist. LEXIS 43710 at *16-*17 (M.D. Pa. May 22, 2009). Similarly, in *Parrino v. Swift*, No. 06-0537, 2006 U.S. Dist. LEXIS 40361, at *6-7 (D.N.J. June 19, 2006), plaintiffs simply alleged that the defendants and other unidentified individuals shared a common purpose to defraud plaintiffs without providing any further detail as to the structure of the enterprise, such as how decisions were made and the relationships between the various actors. *See also 300 Broadway v. Martin Friedman Assocs.*, No. 08-5514, 2009 U.S. Dist. LEXIS 95069, at *16-17 (D.N.J. Oct. 13, 2009) (finding that the complaint failed to allege any other characteristic of the enterprise's structure except what it was formed to do). Plaintiffs in the instant case provide sufficient detail in their pleadings to defeat Defendants' negation argument.

4. Individual Plaintiffs' Factual Allegations Sufficiently Distinguish Between The Association-In-Fact And Its Participants

Perhaps forgetting that the Individual Plaintiffs have alleged that both corporations and their officers and principals have been named by Individual Plaintiffs as RICO defendants and that there is no distinction between the RICO persons and the RICO enterprise, Defendants argue that Individual Plaintiffs' RICO claim should be dismissed. This argument stems from the text of section 1962(c) that the "person" sued must be "employed by or associated with" an enterprise. Because an enterprise cannot logically employ or associate with itself, the defendant, it is argued, must be distinct from the alleged enterprise. *See generally Brittingham v. Mobil Corp*., 943 F.2d 297, 300 (3d Cir. 1991) (citing *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984)).[32] However, the fact that a plaintiff alleges that all of the defendants are part of an association-in-fact does not necessarily destroy the person-enterprise distinction. *See St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445-47 & n.16 (5th Cir. 2000) (three individuals distinct from the association-in-fact of three); *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir. 1995)

[32] The notion that the enterprise must be distinguishable from the *persons* involved is distinct from the requirement discussed in Part III.B.2 and III.B.3 that the enterprise have an existence separate and apart from the *underlying racketeering activity*.

(individual and two corporations he owned distinct from the association-in-fact of three).

When a defendant is a corporation, however, the alleged enterprise "must be more than an association of individuals or entities conducting the normal affairs" of that corporation. *Brittingham*, 943 F.2d at 301. Although *Brittingham* stands for the proposition that a corporation is not distinct from an association-in-fact consisting solely of that corporation and its agents, the Supreme Court and the Third Circuit have held that an individual defendant is distinct from a corporation alleged to be the enterprise, even where that individual is the corporation's president or controlling shareholder. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001); *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 268 (3d Cir. 1995).

In *Kushner*, the Supreme Court directly addressed the issue of distinctiveness for purposes of § 1962(c) liability and concluded:

> While accepting the "distinctiveness" principle, we nonetheless disagree with the appellate court's application of that principle to the present circumstances – circumstances in which a corporate employee "acting within the scope of his authority," . . . allegedly conducts the corporation's affairs in a RICO-forbidden way. *The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more "separateness" than that.*

Id. at 163 (citations omitted) (emphasis added). This holding echoed the Third Circuit's holding in *Jaguar Cars*:

> In sum, we conclude that when officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce a pattern of racketeering activity, those defendant persons are properly liable under § 1962(c).

Id. at 269. The Third Circuit also held that the distinctiveness requirement did not shield corporate officers and directors from § 1962(c) liability. *Id.* at 265.

In the present case, Individual Plaintiffs allege that corporate owners and/or employees of the corporate defendants named in their RICO count conducted the affairs of the corporation in a RICO-forbidden way. (IC ¶ 85.) As such, since the corporate owners and/or employees are natural persons separate and distinct from their various corporations, the distinctiveness principle is satisfied. Specifically, in paragraphs 48 through 60 and 75 of the Individual Complaint, Individual Plaintiffs describe how Barbara Conahan and Cindy Ciavarella, owners of Pinnacle, conducted the affairs of the corporation in a RICO-forbidden way, through the use of fraudulent wire transfers designed to disguise the payment of "finder's fees" paid by Mericle Construction to Ciavarella. Likewise, those paragraphs and Count I of the Individual Complaint also detail how Conahan, owner of Beverage Marketing, operated Beverage Marketing in a RICO-forbidden way in disguising payments to both Conahan and Ciavarella from Mericle Construction. In addition,

the Individual Complaint details how the corporate owners/employees of the corporate RICO defendants used the mails and wires in RICO-forbidden ways. (IC ¶ 88.)

Accordingly, since Individual Plaintiffs allege a RICO enterprise comprised of both corporations and individuals who were either employed by, or were officers of the corporations, and these individual corporate employees and/or officers conducted the affairs of the corporation in violation of RICO, the "separateness" required by § 1962(c) is satisfied and Individual Plaintiffs' RICO claims should not be dismissed.

C. Plaintiffs Sufficiently Plead The Existence Of A RICO Conspiracy With The Object Of Ensuring The Success And Profitability Of PACC And WPACC And Thereby Enriching Defendants And Their Co-Conspirators

Section 1962(d) provides that "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." To plead a RICO conspiracy, plaintiffs must set out "allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." *Meeks-Owens v. F.D.I.C.*, 557 F. Supp. 2d 566, 572 (M.D. Pa. 2008) (Caputo, J.) (quoting *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989), *abrogated on other grounds*, *Beck v. Prupis*, 529 U.S. 494, 507 (2000). Additionally, plaintiffs must allege "agreement to commit predicate acts and knowledge that the acts were

part of a pattern of racketeering." *Id.* (quoting *Shearin*, 885 F.2d at 1166-67). Contrary to Defendants' arguments (Doc. Nos. 445, at 58-63; 443, at 14), Plaintiffs' allegations of the common purpose of Defendants, as well as the actions of each, are sufficient for purposes of a motion to dismiss to state a claim for violation of § 1962(d).

As a threshold matter, the Common Brief incorrectly asserts that "Plaintiffs' claims for damages from a RICO conspiracy under § 1962(d) should . . . be dismissed because Plaintiffs have failed to allege sufficiently an underlying RICO violation." (Doc. No. 445, at 62.) For all of the reasons set out in Part III.A, B, D, and E, *supra* and *infra*, Plaintiffs have sufficiently pled an underlying violation of § 1962(c).

In evaluating the sufficiency of a RICO conspiracy claim, "a court may look to any 'factual allegations of particular acts' within the complaint as a whole incorporated by the conspiracy claim to provide" the basis for pleading the elements of conspiracy. *Rose*, 871 F.2d at 366 (internal citation omitted). And a court "may infer from the language of the plaintiffs' RICO conspiracy claims, each of which refer to a 'conspiracy to engage in the conduct of an enterprise's affairs,' the requisite *mens rea* comprising knowing furtherance of the enterprises' affairs."

Id. at 367.[33]

1. Plaintiffs Sufficiently Allege Defendants' Knowledge Of And Agreement To Further The Goals Of The Conspiracy

As this Court has recognized, the "knowledge" and "agreement" elements of a RICO conspiracy claim are met by pleading "an[] agreement to commit the predicate acts [and] knowledge of those acts as part of a pattern of racketeering in violation of [18 U.S.C. § 1962](a), (b) or (c)," which may include "knowing[] . . . facilitat[ion of] a scheme which includes the operation or management of a RICO enterprise." *Meeks-Owens*, 557 F. Supp. 2d at 572 (citing *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001)). Thus, a co-conspirator may satisfy the knowledge and agreement elements by knowingly providing services to facilitate a pattern of racketeering or the operation and management of a RICO enterprise. *Id.*; *see also Salinas v. United States*, 522 U.S. 52, 65 (1997) ("It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.").

The "knowledge" and "agreement" elements may be inferred from the

[33] Notably, Conahan recently agreed to plead guilty to RICO conspiracy involving himself, Ciavarella, Powell, Mericle, and others. *See* Conahan Plea Agreement (Exhibit F).

alleged facts. *Shearin*, 885 F.2d at 1167 (explaining that "the nature of the Hutton companies' association . . . gives rise to a necessary inference that all three parties not only agreed to the ongoing securities fraud scheme, but that all three were aware that ongoing acts, such as the unlawful collection of fiduciary fees, were part of an overall pattern of racketeering activity"). Moreover, "the complaint need not contain specific[] allegations of overt acts committed by each defendant. All that is required is that the conspirator 'adopt the goal of furthering or facilitating the criminal endeavor.'" *Flood*, 2004 WL 1908221, at *27 (quoting *Salinas*, 522 U.S. at 65).

Plaintiffs' allegations are sufficient to show the requisite knowledge and agreement of each of the moving Defendants. The Complaints allege that Defendants each acted with the common purpose of enriching themselves and each other "by constructing and expanding juvenile detention facilities, namely [PACC] and [WPACC]; contracting with Luzerne County to use those . . . facilities; and keeping the beds at [those facilities] full." (CAC ¶ 757; IC ¶ 34.) Powell, Mericle, Conahan, and Ciavarella each agreed to commit the predicate acts. Having acquired land and constructed the facilities (CAC ¶¶ 649-650; IC ¶ 40), and after Conahan arranged for PACC to become the primary provider of juvenile detention services in Luzerne County (CAC ¶¶ 651-55; IC ¶¶ 41-42), Powell and Mericle made payments to Conahan and Ciavarella for facilitating the construction of

PACC and, later, WPACC and the addition to PACC. (CAC ¶¶ 656, 659, 661, 671; IC ¶¶ 43-52.) Powell, as an owner of PACC, understood the payments from him to be a *quid pro quo* for the judges' exercise of their judicial authority to send juveniles to PACC and, later, WPACC. (CAC ¶ 656; IC ¶ 46.) Mericle and Mericle Construction understood that the consistent placement of youth at PACC would facilitate the subsequent construction of WPACC and the addition to PACC, and their payments to a judge charged with adjudicating and placing juveniles easily supports the inference that Mericle and Mericle Construction knew, and shared, the purpose of the payments. (*See* CAC ¶¶ 669, 701-03, 710-11, 757.) All understood that if youth were not predictably placed at the facilities to ensure their profitability and viability, as well as MAYS' profitability, and their continuing service for the conspiracy, Defendants would not have been able to maintain their association and continue enriching themselves and each other. (*See* CAC ¶¶ 668, 757; IC ¶¶ 19, 34.)

Acting with this common purpose of mutual enrichment, Provider Defendants agreed to facilitate the operation of the RICO enterprise. They entered into extremely profitable agreements with the County and received a *per diem* reimbursement from the County for every child placed in the facilities. (CAC ¶¶ 651-652, 655, 658, 670; IC ¶¶ 41-42, 46, 55.) Indeed, in finding coverage under insurance policies issued to PACC and Powell, this Court has found that

"Defendants are alleged to have intentionally participated in the conspiracies, including providing use of their facilities for their own profit." *Alea London*, No. 09-2256, slip op. at 11 (citing CAC ¶ 790; IC ¶¶ 86, 88); *see also Colony Ins. Co.*, No. 09-1773, slip op. at 9 (examining the Complaints' factual allegations against Powell and MAYS and finding allegations of "intentional conspiratorial activity on the part of the underlying defendants, including MAYS and Powell").

Similarly, acting with that common purpose, Vision, Pinnacle, Beverage Marketing, Barbara Conahan, and Cindy Ciavarella each, according to the Complaints' allegations, agreed to facilitate the operation of the RICO enterprise. Vision, Beverage Marketing, and Pinnacle[34] – the last of which was owned and managed by Barbara Conahan and Cindy Ciavarella (CAC ¶¶ 166-167, 709, 711; IC ¶¶ 13-14, 54, 58) – facilitated the racketeering activity by passing payments from Powell and Mericle to Conahan and Ciavarella and making false records regarding those payments. (CAC ¶¶ 704, 706, 708-11, 713-16; IC ¶¶ 47, 49, 51-54, 56-58.) *See Flood*, 2004 WL 1908221, at *27 ("[B]ecause the [c]omplaint alleges that all [d]efendants conspired with the aforementioned [d]efendants against whom violations of 1962(c) are alleged, the completed conspiracy would satisfy all of the elements of § 1962(c).").

[34] Only Vision has moved to dismiss the claims against it. (Doc. No. 441.)

Reading the Complaints as a whole and drawing the permissible inferences regarding Defendants' mental states, *see Rose*, 871 F.2d at 366, the Complaints sufficiently allege the knowledge and agreement elements of § 1962(d). *See, e.g.*, *Lester v. Percudani*, Nos. 01-1182, 04-0832, 2008 WL 4722749, at *8 n.21 (M.D. Pa. Oct. 24, 2008) (in denying a motion for reconsideration of the denial of defendants' motions for summary judgment on a § 1962(d) claim, explaining that "[t]he record contains sufficient circumstantial evidence from which a reasonable juror could conclude that the Chase defendants knowingly facilitated Percudani's mortgage fraud enterprise").

2. The Complaints Allege A Single Conspiracy To Ensure The Success And Profitability Of PACC And WPACC And To Enrich Defendants And Their Co-Conspirators

Defendants incorrectly argue that Plaintiffs allege only a conspiracy to commit the predicate acts of wire fraud. (Doc. No. 445, at 58-59.) To the contrary, Plaintiffs sufficiently allege a conspiracy among all Defendants to commit substantive RICO offenses, namely, violations of § 1962(c).

To state a claim under § 1962(d), a plaintiff must allege "the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose." *Meeks-Owens*, 557 F. Supp. 2d at 573 (quoting *Rose*, 871 F.2d at 366). Importantly, while "[a] conspiracy claim must also contain supportive factual allegations," they need not be stated with "the level

of particularity required by Rule 9(b) for allegations of fraud." *Flood*, 2004 WL 1908221, at *27.

Plaintiffs' Complaints include the requisite allegations. Plaintiffs allege that the conspiracy "spann[ed] approximately five years between 2003 and 2008." (CAC ¶ 1; IC ¶¶ 43-55, 75-76.) The object of the conspiracy was to enrich Defendants "by constructing and expanding juvenile detention facilities, namely [PACC] and [WPACC]; contracting with Luzerne County to use those juvenile detention facilities; and keeping the beds at [PACC] and [WPACC] full." (CAC ¶ 757; *see also* IC ¶ 81.) In Count V, Class Plaintiffs allege that the racketeering activity was all *related* to that purpose (CAC ¶ 757), and in Count VII, Class Plaintiffs allege that the racketeering activity was *taken in furtherance* of the plot described in Count V (CAC ¶ 774). Similarly, Individual Plaintiffs allege the conspiracy centered around "defraud[ing] the Plaintiffs and . . . deny[ing] juvenile Plaintiffs of their liberty." (IC ¶ 90.) The actions of Defendants taken in furtherance of these purposes are set out in detail in Part III.C.1, *supra*. These allegations sufficiently plead that each Defendant was a member of the RICO conspiracy alleged.

In purported support of their argument about the existence of multiple conspiracies, Defendants wrongly analogize the criminal law doctrine of variance. (*See* Doc. No. 445, at 60-61.) First, the analogy is inappropriate because the

variance doctrine applies to criminal proceedings, when there is a difference between the conspiracy charged and the evidence presented at trial, in order to protect the rights of the accused, an application entirely inapplicable here, in a civil proceeding. *See United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989). Second, even if it were an appropriate analogy, there is nothing akin to variance here. Variance is found only when the multiple conspiracies are "separate and unrelated." *Id.* at 259. "[A] finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance." *Id.* at 258 (quoting *United States v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986)). The Complaints taken as a whole do not allege multiple, separate, unrelated conspiracies; rather the allegations sufficiently describe a single conspiracy dedicated to the purpose of enriching its members by keeping the beds at PACC and WPACC full, thereby ensuring their success and profitability.

3. Plaintiffs' Alleged Injuries Were Caused By The Predicate Acts Committed In Furtherance Of The Conspiracy's Object

Defendants argue that "Plaintiffs lack statutory standing to bring claims" under § 1962(d) (Doc. No. 445, at 58), and Provider Defendants argue in addition that "the allegations do not establish that Plaintiffs['] injuries arising from the RICO conspiracy were caused by an overt predicate act" (Doc. No. 440, at 17). As

described above in Part III.A, Defendants' racketeering activity caused Plaintiffs' alleged injuries. That causal chain is also sufficient for purposes of RICO conspiracy. *See* 18 U.S.C. § 1964(c) (requiring injury "by reason of a violation of section 1962" without distinguishing between § 1962(c) and (d)); *Holmes*, 503 U.S. at 265 n.9, 268-74 (analyzing proximate cause, in a case including claims under § 1962(c) and (d), without distinguishing between them).

In addition, liability for injury caused by a RICO conspiracy is not limited to those who themselves violate § 1962(c) (*i.e.*, participate in the operation or management of a RICO enterprise). *Berg*, 247 F.3d at 534. Through § 1962(d), plaintiffs can "sue co-conspirators who might not themselves have violated one of the substantive provisions of § 1962." *Beck*, 529 U.S. at 507. While the RICO injury must have been caused by a violation of a substantive RICO provision (*e.g.*, by a violation of § 1962(c)), defendants other than the defendants who committed the substantive violation may be held liable for the injury if they had knowledge of the conspiracy and intended to further it. For example, in *Berg*, a class of plaintiff homebuyers alleged that defendant Berg, "acting through corporate entities, misled them into purchasing homes which they could not afford . . . . [and] that the [d]efendant title insurance and lending companies . . . conspired with Berg to defraud the [p]laintiffs and realize the maximum profits from the sales and related title insurance and financings." 247 F.3d at 534-35. The Third Circuit concluded

that "the [p]laintiffs' claims in this case stem from injury directly attributable to Berg's racketeering; they are the direct victims of substantive RICO violations." *Id.* at 539. As a result, and in accordance with *Beck*, the defendant title insurance and lending companies "remain[ed] subject to liability" for violations of § 1962(d) arising out of their conspiracy with Berg. *Id.*

Furthermore, even if the Court finds that Plaintiffs could not establish a § 1962(c) claim against certain Defendants (because of, *e.g.*, a lack of proximate cause), Plaintiffs may still state a claim for RICO conspiracy under § 1962(d). In *Rehkop v. Berwick Healthcare Corp.*, the Third Circuit reversed the district court's dismissal of § 1962(c) and (d) claims on the basis that the plaintiff could not establish standing for purposes of § 1962(c). The district court had concluded that, because the plaintiff lacked standing to pursue the § 1962(c) claim, he could not state a claim for conspiracy. However, although he did not have standing to pursue it, the Third Circuit concluded that "Rehkop's allegations state a violation of section 1962(c)." 95 F.3d 285, 290 (3d Cir. 1996). "The reason he cannot pursue . . . a claim [under § 1962(c)] is that he was not harmed by the section 1962(c) violation. Nonetheless, the defendants' alleged violation of section 1962(c) can serve as the object of a section 1962(d) conspiracy, and if Rehkop was harmed by reason of the conspiracy, he may pursue a section 1962(d) claim." *Id.*

Plaintiffs here – like the plaintiffs in *Berg* – allege a single set of damages

resulting from the racketeering activity and related conspiracy. As to the Defendants against whom Plaintiffs are maintaining § 1962(c) claims – *i.e.*, Conahan, Ciavarella, Powell, Mericle, Mericle Construction, Vision, Pinnacle, and Beverage Marketing – the proximate cause analysis is identical to the analysis presented in Part III, *supra*. As to the Defendants against whom Plaintiffs are not maintaining § 1962(c) claims – *i.e.*, Barbara Conahan, Cindy Ciavarella, PACC, WPACC, and MAYS – the analysis is similar. As described above in Part III.A.2, the causal chain between the racketeering activity and Plaintiffs' injuries is short and direct. And, as described above in Part III.C.1, Barbara Conahan, Cindy Ciavarella, and the Provider Defendants are alleged to have knowingly provided services to facilitate a pattern of racketeering. Like the title insurance and lending companies in *Berg*, these Defendants "remain subject to liability under the reasoning enunciated by the Supreme Court in *Beck*," 247 F.3d at 539, permitting a plaintiff, "through a . . . suit for a violation of § 1962(d), [to] sue co-conspirators who might not themselves have violated one of the substantive provisions of § 1962," *Beck*, 529 U.S. at 506-07.

D. Plaintiffs Sufficiently Plead A Claim For RICO Conspiracy Against Provider Defendants

Provider Defendants' argument that Plaintiffs' "allegations do not establish any actions by Provider Defendants" to support RICO violations (Doc. No. 440, at 17) is without merit. To the contrary, Plaintiffs allege that Provider Defendants

were part of the RICO conspiracy to ensure the success and profitability of PACC and WPACC and thereby enrich themselves and their co-conspirators. Plaintiffs allege that PACC acted as part of the RICO conspiracy by contracting with Luzerne County to house juveniles adjudicated delinquent (CAC ¶¶ 651-52; IC 66), and by housing juveniles adjudicated delinquent by Ciavarella (CAC ¶ 666; IC ¶ 55). Plaintiffs make similar allegations against WPACC. (CAC ¶¶ 659, 663, 669-70, 757; IC ¶¶ 46, 51, 55, 59.) All Defendants – obviously including PACC and WPACC, and MAYS, the operator of PACC and WPACC (CAC ¶ 2; IC ¶¶ 18-19) – had a financial interest in the continued success and profitability of PACC, WPACC, and MAYS and therefore in placing juveniles in PACC and WPACC, as evidenced by the *per diem* reimbursement arrangements. (CAC ¶¶ 668-70; IC ¶ 19.) Provider Defendants, like the other Defendants, took the actions set out in the Complaints and described above in Part III.C.1 with the purpose of enriching themselves as a result of the construction and expansion of the juvenile detention facilities, contracting with the County to use those facilities, and keeping the beds at the facilities full. (CAC ¶ 757; IC ¶ 66.) As discussed above, *see supra* Part III.C.1, these pleadings sufficiently allege that Provider Defendants provided services in furtherance of the conspiracy.

E. Plaintiffs Plead Allegations To Support Their RICO Conspiracy Claims Against Barbara Conahan And Cindy Ciavarella

Defendants Barbara Conahan and Cindy Ciavarella further argue that the

§ 1962(d) conspiracy claims against them should be dismissed, contending that Plaintiffs have failed to assert a valid claim under Section 1962(c). (Doc. Nos. 434, at 20; Doc. No. 436 at 20.) As discussed in Parts III.A, B, and C.1, *supra*, Plaintiffs sufficiently plead a violation of § 1962(c). But it is important to note that Plaintiffs are not required to plead a substantive RICO violation specifically against Barbara Conahan and Cindy Ciavarella in order to successfully plead that they conspired to commit such an act. *Flood*, 2004 WL 1908221, at *27 (a plaintiff could, under § 1962(d), "sue co-conspirators who might not themselves have violated one of the substantive provisions of § 1962") (quoting *Beck*, 529 U.S. at 507). And even if Plaintiffs are unable to establish a violation of § 1962(c), they may still pursue a cause of action under § 1962(d). *See Rehkop*, 95 F.3d at 290; *supra* at Part III.C.3.

"A defendant may be held liable for conspiracy to violate section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise." *Berg*, 247 F.3d at 538. Plaintiffs allege that Barbara Conahan and Cindy Ciavarella owned and controlled Pinnacle Group, a business entity to which Powell and Mericle transferred monies as part of the schemes. (CAC ¶¶ 166-167, 659, 661-62, 671, 708, 710-11, 713-16, 753, 758-59; IC ¶¶ 12-14, 51, 56-58, 75.) Plaintiffs specifically allege that Defendants attempted to conceal the compensation they paid to the former judges by causing it

to pass through, among other entities, Pinnacle, which created entries in its books to hide the monies and the real reason for the payments. (CAC ¶¶ 708, 710-11, 715; IC ¶¶ 56-58.)

In *Shearin*, 885 F.2d at 1164, the plaintiff alleged that two companies agreed upon a scheme whereby a third company would be created as a front for the purpose of charging fees to customers of the first company – a brokerage firm – for trust services which were never performed, thereby defrauding customers of the brokerage firm. The Third Circuit concluded that "the *nature of the . . . companies' association also gives rise to a necessary inference* that all three parties not only *agreed* to the ongoing securities fraud scheme, but that all three *were aware* that ongoing acts, such as the unlawful collection of fiduciary fees, were part of an overall pattern of racketeering activity." *Id.* at 1167 (emphasis added). Similarly, in the instant case, Plaintiffs allege that Pinnacle was a conduit for the payoffs from Powell and Mericle to the former judges so as to conceal the illicit nature of these payments. (CAC ¶ 709.) Such allegations give rise to a reasonable inference that Barbara Conahan and Cindy Ciavarella, as owners and a manager of Pinnacle, knew that Pinnacle was a central part of the schemes, and agreed to further its objectives, in violation of § 1962(d). *See Flood,* 2004 WL 1908221, at *27 ("[T]he complaint need not contain specific[] allegations of

overt acts committed by each defendant.") (citing *Salinas*, 522 U.S. at 65).[35]

IV. PLAINTIFFS STATE A CLAIM FOR FALSE IMPRISONMENT AGAINST THE PROVIDER DEFENDANTS

The Complaints allege that Provider Defendants intentionally confined juveniles in PACC and WPACC as part of the conspiracy in which Provider Defendants, Powell, Mericle, and others paid Ciavarella and Conahan in connection with the construction and expansion of PACC and the construction of WPACC. (CAC ¶¶ 787-91; IC ¶¶ 165-71.) Provider Defendants unlawfully detained the juveniles as a result of corrupt and tainted delinquency adjudications and in spite of the corruption and illegality underlying the detention orders. *Id.*

In Pennsylvania, the elements of false imprisonment are (1) the detention of another person, and (2) the unlawfulness of such detention. *Renk v. City of*

[35] Barbara Conahan and Cindy Ciavarella argue, in addition, that the RICO claims against them must be dismissed because Plaintiffs have failed to allege a sufficient pattern of racketeering involving them. (Doc. Nos. 434, at 16-18; 436, at 16-18.) Because Plaintiffs withdraw their § 1962(c) claims against Barbara Conahan and Cindy Ciavarella, *see supra* note 24, and because Plaintiffs need not show that Barbara Conahan and Cindy Ciavarella violated § 1962(c) in order to state a claim against them for violations of § 1962(d), *Flood*, 2004 WL 1908221, at *8, Plaintiffs need not respond to this argument. No other Defendant has argued that Plaintiffs have not sufficiently alleged a pattern of racketeering, and any such argument would fail. The Complaints contain allegations of a pattern of racketeering activity that began in June 2000 and lasted through April 2007. (*See* CAC ¶¶ 649-64, 700-21, 756; IC ¶¶ 29-30, 43-65, 75-76.) Thus, closed-ended continuity exists, as evidenced by the allegations of "a series of related predicates extending over a substantial period of time." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989); *see also* 18 U.S.C. § 1961(5).

Pittsburgh, 641 A.2d 289, 293 (Pa. 1994). Provider Defendants claim that Plaintiffs' false imprisonment claims (Count IX of the Class Complaint and Count IX of the Individual Complaint) should be dismissed because (a) the Complaints do not allege that Plaintiffs were arrested without probable cause, and (b) the Complaints were filed after the expiration of the applicable statute of limitations. (Doc. No. 440, at 18-24.) Both contentions are without merit.[36]

A. Plaintiffs Need Not Allege Lack Of Probable Cause In Their False Imprisonment Claims

1. Under Pennsylvania Law, Probable Cause Is Not An Essential Element Of A Claim For False Imprisonment

Citing *Dintino v. Echols*, 243 F. Supp. 2d 255, 267 (E.D. Pa. 2003), Provider Defendants erroneously argue that in order to succeed on their state-law false imprisonment claim, Plaintiffs "must establish lack [of] probable cause." (Doc. No. 440, at 25).

Dintino is plainly inapposite. Not only was it based upon a claim under

[36] Provider Defendants additionally contend that PACC could not have falsely imprisoned juveniles sentenced only to WPACC and that WPACC could not have falsely imprisoned juveniles sentenced only to PACC. (Doc. No. 440, at 20-21.) However, Plaintiffs do not allege that PACC or WPACC falsely imprisoned juveniles who were never detained in their respective facilities. (*See* CAC ¶¶ 177 (defining subclass "A2" to include children who were confined to either or both facilities), 788.) Additionally, Provider Defendants argue that MAYS could not have falsely imprisoned juveniles who resided at PACC before May 5, 2005. (Doc. No. 440, at 19-20.) The date on which MAYS began managing PACC is a question of fact that need not be resolved at this stage of the litigation.

federal rather than state law, the *Dintino* false imprisonment claim was itself based on a claim for false arrest.[37] Given the false arrest claim, *Dintino* correctly and unremarkably required a showing of "no probable cause" for the arrest in order to sustain the claim; the merits of the false imprisonment claim were totally dependent on the merits of the false arrest claim. Indeed, Provider Defendants do not rely on a single case interpreting a state claim for false imprisonment without an associated claim for false arrest or unlawful seizure. For example, in *Tarlecki v. Mercy Fitzgerald Hosp.*, No. 01-1347, 2002 U.S. Dist. LEXIS 12937, at *8-9 (E.D. Pa. July 15, 2002), relied on by Provider Defendants, the plaintiff actually pled false arrest and false imprisonment as one and the same claim (Count IV of the complaint was for "False Arrest/Imprisonment"). Plaintiffs have made no false arrest claim here. Rather, they claim that their false imprisonment resulted from the violations of their constitutional rights entirely unrelated to their arrests.

In order to support their allegation that Plaintiffs must establish that they were detained without probable cause, Provider Defendants further argue that false imprisonment and false arrest claims "are essentially the same claims." (Doc. No.

[37] Specifically, Count I of the complaint alleged "that the individual defendants lacked probable cause to arrest, and that arresting plaintiff in the absence of probable cause constitutes unlawful seizure, false arrest, malicious prosecution and illegal imprisonment, all in the violation of the Fourth and Fourteenth Amendments … and Section 1983." 243 F. Supp. 2d at 267.

440, at 18 (citing *Olender v. Township of Bensalem*, 32 F. Supp. 2d 775, 791 (E.D. Pa. 1999).)[38] Defendants' reliance on *Olender* is misplaced. *Olender* involved state tort claims against police detectives not only for false imprisonment, but also for false arrest, malicious prosecution, and intentional infliction of emotional distress. All the claims were based on the same events. Viewing the facts before it, the *Olender* court, citing *Gagliardi v. Lynn*, 285 A.2d 109, 110 (Pa. 1971), explained: "*Under certain circumstances* . . . false arrest and false imprisonment are merely different labels which describe the same conduct." *Id.* at 791 (emphasis added). Although some Pennsylvania courts liken false imprisonment to false arrest – and therefore find that a plaintiff must establish he was arrested without probable cause to succeed on a claim of false imprisonment – these cases involve those "certain circumstances," *Gagliardi*, 285 A.2d at 110, where the false arrest and false imprisonment arise from the same violations and are one and the same. *See, e.g.*, *Teeple v. Carabba*, No. 07-2976, 2009 U.S. Dist. LEXIS 119937 (E.D. Pa. Dec. 22, 2009) (plaintiff alleged claims for both false arrest and false imprisonment based on his allegations that "he was entrapped by Defendants and

[38] "In Pennsylvania, a 'false arrest is defined as 1) an arrest made without probable cause or 2) an arrest made by a person without privilege to do so.'" *Debellis v. Kulp*, 166 F. Supp. 2d 255, 279-280 (E.D. Pa. 2001) (citing *McGriff v. Vidovich*, 699 A.2d 797, 799 (Pa. Commw. Ct. 1997) (plaintiff alleged state law claims for false arrest and false imprisonment arising from the same actions)).

that they omitted exculpatory evidence." (citations omitted)). In the instant case, again, Plaintiffs have made no false arrest claim.

In sum, because absence of probable cause is not an essential element of a state claim for false imprisonment where the claim does not involve any allegations of an illegal arrest, Plaintiffs are not required to plead lack of probable cause in order to state a claim for false imprisonment claim.[39]

2. Provider Defendants Knew Or Should Have Known That Ciavarella's Detention/Placement Orders Were Not Valid

Provider Defendants argue further that because "Judge Ciavarella's orders placing juveniles were facially valid and . . . he acted within his jurisdiction," the

[39] If this Court determines that an analysis of probable cause to arrest or detain the juveniles is pertinent, Plaintiffs would nevertheless succeed because the juveniles' adjudications and guilty pleas were obtained by corrupt means. The Pennsylvania Supreme Court has found that evidence of corruption defeats a presumption of probable cause and may even establish that an arrest or imprisonment was unlawful. *Grohmann v. Kirschman*, 32 A. 32, 37 (Pa. 1895) ("[I]n the trial of an action of malicious prosecution or false arrest a verdict of guilty is strong *prima facie* evidence of probable cause, but it may be rebutted by proof that it was obtained by corrupt or undue means"); *see also Fillman v. Ryon*, 168 Pa. 484, 492 (1895) ("Though a person is arrested under legal warrant and by proper officer, yet if one of the objects of the arrest is thereby to extort money, or enforce the settlement of a civil claim, such arrest is false imprisonment by all who have directly or indirectly procured the same or participated therein for any such purpose. . . . [I]f there is just cause for the prosecution, and it is resorted to for an unlawful purpose, the prosecutor will not be permitted to acquire anything by it."). The Complaints are replete with allegations of the corrupt means through which the juveniles' detentions were obtained and of Provider Defendants' knowing and willing participation in the conspiracy. (CAC ¶¶ 733-34, 745-46, 752-53, 757-58, 787-91; IC ¶¶81, 88, 90, 99, 109, 113, 124, 161-63, 165-71).

juveniles do not state a claim for false imprisonment. (Doc. No. 440, at 19.) This argument fails.

Provider Defendants knew or should have known that Ciavarella's detention and/or placement orders were not valid because they were active participants in the conspiracy to unlawfully fill the beds at PACC and WPACC. (CAC ¶¶ 757, 765, 787-91; IC ¶¶ 34, 66, 165-71).

In arguing to the contrary (Doc. 440 at 19), Provider Defendants improperly rely on this Court's finding on November 20, 2009 that Defendant Perseus House was entitled to quasi-judicial immunity as to the allegations of false imprisonment because a facially valid court order directed the juvenile's incarceration. *Wallace v. Powell*, No. 09-0286, 2009 U.S. Dist. LEXIS 109163, at *48 (M.D. Pa. Nov. 20, 2009). Perseus House's posture is starkly different from Provider Defendants' since it was not a member of the alleged conspiracy and thus had no reason to know that the orders were not facially valid. Provider Defendants were co-owned by Powell, who created private juvenile detention centers, contracted with the Mericle Defendants for their construction, and paid millions of dollars to Ciavarella and Conahan to ensure their success. (CAC ¶¶ 2, 649-50, 656-57, 659-71, 695-96, 701-17, 787-91; IC ¶¶ 39-60, 165-71). The Provider Defendants' facilities were constructed for the purpose of detaining juveniles for profit. (CAC ¶¶ 656, 665-669, 787-791; IC ¶¶ 39-60, 165-71.) Against that background, the

Complaints' allegations plainly allow the inference that the Provider Defendants had reason to believe that Ciavarella's orders sending juveniles to their facilities – orders issued by a judge rendered biased precisely because of the conspiracy of which Provider Defendants were participants – were invalid. (CAC ¶¶ 656, 673-74, 686, 691, 695-96, 787-91; IC ¶¶ 39-60, 165-71.)

Provider Defendants also cite *Hamay v. County of Washington*, 435 A.2d 606 (Pa. Super. 1981), in support of their argument that Ciavarella's orders must have been invalid on their face or issued without jurisdiction for Provider Defendants to be liable for false imprisonment. (Doc. No. 440, at 18). In *Hamay*, the Pennsylvania Superior Court found that a domestic relations officer, sheriff and his deputies, and clerks of court could not be held liable for alleged illegal arrest and confinement of plaintiff, who was in default of a support order, where they were enforcing an order of a judge with jurisdiction.

Hamay is plainly distinguishable from the present case. There, the plaintiff brought a claim for illegal arrest and confinement. Unlike Plaintiffs' claims here, *Hamay* does not include any allegations that the parties were in a conspiracy with the judge issuing the orders so as to have a reason to know that the orders were invalid. The Complaints here allege that the Provider Defendants were active participants in the conspiracy to unlawfully fill the beds at PACC and WPACC and therefore had ample reason to know the orders placing juveniles at their facilities

were invalid.

B. All Plaintiffs Filed Their False Imprisonment Claims Within The Two-Year Statute Of Limitations

Provider Defendants argue that because Plaintiffs "necessarily knew what occurred at their hearings," the two year statute of limitations for false imprisonment has run as to those juveniles who reached majority two years before the filing of the Complaints. (Doc. No. 440, at 21-22.) The argument is meritless. Because the Complaints were filed within months of the criminal allegations filed against Conahan and Ciavarella and the entry of their original plea agreements, they satisfy the applicable statute of limitations.

Under Pennsylvania law, claims of false imprisonment are governed by a two-year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524(1). The discovery rule tolls the running of the statute of limitations until a plaintiff, through the exercise of reasonable diligence, has reason to know of the injury and its cause, *i.e.*, "to ascertain the fact of a cause of action." *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983).

Provider Defendants erroneously assert that the statute for the false imprisonment claims began to run on the date the juveniles were detained and thus, that many claims are time barred. Defendants' assertion that Plaintiffs "necessarily knew what occurred at their hearings" and cannot avoid the tolling of the statute by alleging inability to discover facts completely ignores the corrupt conspiracy

scheme at the heart of Plaintiffs' claims. (Doc. No. 440, at 22.)

Because Plaintiffs (1) had no way of knowing of the conspiracy among the parties before January 26, 2009 when the Information was filed; and (2) adequately pled equitable tolling of the statute in their Complaints, the statute of limitations does not time bar any of Plaintiffs' claims.

1. Pursuant To The Discovery Rule, Plaintiffs Did Not Discover The Corruption Underlying Their False Imprisonment Claims Until January 2009

The "discovery rule" is an exception to a prescribed statutory period, and arises from the inability of the injured, despite the exercise of due diligence, to know that he has a claim. *Pocono Int'l Raceway*, 468 A.2d at 471. The salient point giving rise to the equitable application of the discovery rule is a plaintiff's inability, despite the exercise of diligence, to know of his claim. *Id*.

Here, the cause of action for false imprisonment could not have been discovered by the exercise of diligence or means within reach of Plaintiffs. Plaintiffs could not have known of the denial of their constitutional rights which led to their unlawful detention. Specifically, before the January 26, 2009 filing of the Information against Conahan and Ciavarella, Plaintiffs were not and could not have been aware that the Provider Defendants, by and through Powell, conspired with Mericle, Conahan, and Ciavarella to facilitate their unlawful detention.

Provider Defendants' suggestion that Plaintiffs should have known that their

detentions were unlawful by virtue of the public record regarding the closing of the River Street facility and the opening of the new PACC facility is absurd. (Doc. No. 440, at 23-24.) This argument assumes that Plaintiffs should have deduced the Defendants' scheme to unlawfully detain juveniles in exchange for money well before the federal government, the Attorney General, and other authorities knew about the scheme.

2. Plaintiffs Are Entitled To Equitable Tolling Based On Defendants' Efforts To Conceal The Corruption Underlying Their False Imprisonment Claims

If a defendant through fraud or concealment causes plaintiffs to relax vigilance or deviate from the right of inquiry, a defendant is estopped from invoking the statute of limitations defense where plaintiffs could not, through the use of reasonable diligence, have ascertained the facts constituting the cause of action. *See Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063, 1074 (M.D. Pa. 1988) (citing *Urland v. Merrell-Dow Pharms.*, 822 F.2d 1268 (3d Cir. 1987)). A party relying on this doctrine will be entitled to a tolling of the statute of limitations by proving that there has been either intentional or unintentional deception by defendant, *Nesbitt v. Erie Coach Co.*, 204 A.2d 473 (Pa. 1964), and the statute will be tolled until plaintiffs would, through the exercise of reasonable diligence, have discovered the fraudulent concealment. *Id*.

The allegations of this case meet this standard. First, the Individual

Complaint specifically includes allegations sufficient to invoke the doctrine of equitable tolling. (IC ¶¶ 82-83.) *See Akrie v. City of Pittsburgh*, No. 08-1636, 2009 U.S. Dist. LEXIS 52231, *10-11 (W.D. Pa. June 22, 2009). Second, the Class Complaint is replete with allegations that Plaintiffs were misled and deceived as to vital information essential to the pursuit of their false imprisonment claim. (CAC ¶¶ 656-57, 659-62, 665, 701-17.) Specifically, the Complaint alleges that "[f]or defendants' scheme to succeed, Ciavarella and Conahan had to ensure that youth were placed at the facilities and that youth were not aware of Ciavarella's or Conahan's financial stake in their placement. All defendants therefore acted in concert to conceal and disguise the existence, nature, location, source, ownership, and control of the money paid to Ciavarella and Conahan." (CAC ¶ 665.) And, of course, Plaintiffs' lack of knowledge as to Defendants' conspiracy was without any fault or lack of diligence on their part.

V. THE INDIVIDUAL COMPLAINT SUFFICIENTLY PLEADS A CLAIM FOR CIVIL CONSPIRACY

Under Pennsylvania law, in order to prove a civil conspiracy claim, one must show (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. *RDK Truck Sales & Serv., Inc. v. Mack Trucks, Inc.*, No. 04-4007, 2009 WL 1441578, at *24 (E.D. Pa. May 19, 2009) (citing *Gen.*

Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003)). In alleging a civil conspiracy, one must plead particularized facts, "addressing the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." *Id.* (citing *Bair v. Purcell*, 500 F. Supp. 2d 468, 500 (M.D. Pa. 2007). Additionally, a plaintiff must allege that the defendant had an unjustified intent to injure, or acted with malice. *Id.* (citing *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979)). Malice can only be found "when the sole purpose of the conspiracy is to cause harm to the party who has been injured." *Thompson Coal*, 412 A.2d at 472. Where defendants act solely to advance legitimate business interests and any injury to the plaintiff was a mere secondary and unintended effect of the otherwise proper conduct, malice will not be found. *Id.* at 473.

However, not all economically beneficial actions negate the malice component of a civil conspiracy claim. *See RDK Truck*, 2009 WL 1441578, at *33; *see also Daniel Boone Area Sch. Dist. v. Lehman Brothers, Inc.*, 187 F. Supp. 2d 400 (W.D. Pa. 2002). In *Daniel Boone*, the school districts, which were defrauded by an investment advisor, brought an action against a broker-dealer ("Lehman") which sold unauthorized derivative securities to the advisor, who purchased them on behalf of the districts. Specifically, Plaintiffs alleged that Lehman sold derivatives to the school districts investment advisor with the

knowledge that the advisor's purchase of those derivatives on behalf of district was unlawful. On a motion to dismiss brought by Lehman, Lehman relied on *Thompson Coal* for the proposition that since Lehman's sale of derivatives was not itself unlawful, the sale of the derivatives was solely for Lehman's own financial benefit and therefore Lehman acted without the malice required for civil conspiracy. *Id.* at 411. Distinguishing *Thompson Coal* as addressing the question of malice at the summary judgment stage, not the pleading stage, *id.* at 412, the *Daniel Boone* court held that since the plaintiffs had alleged that Lehman knew that the advisor's actions were unlawful, it could be inferred that plaintiffs' injuries were not simply an accidental side-effect of Lehman's otherwise legitimate business interests, *i.e.* financial benefit. *Id.* at 412. The court held that the district adequately alleged malice and that the allegation was sufficient to state a claim against Lehman for civil conspiracy. *Id.*

Similarly, in *RDK Truck*, a national low-cost provider of garbage trucks alleged that various defendants, including Mack, entered into various illegal agreements to divide the market of Mack refuse trucks by allocating Mack customers via coordinated refusals to deal and discriminatory pricing. 2009 WL 1441578, at *1. Defendant Mack counter-claimed, alleging that RDK committed a civil conspiracy against it despite the fact that the improper actions of RDK and Worldwide were economically beneficial to them. *Id.* at *2. The court found that

the allegations of improper actions "could lead a reasonable fact-finder to infer that Mack's injuries were not simply an incidental side-effect of otherwise legitimate business interests, but rather the fruits of an unlawful conspiracy." *Id.* at *33.

The Individual Plaintiffs allege civil conspiracy against PACC, WPACC, Powell, Mericle, Mericle Construction, MAYS, Conahan, Ciavarella, Barbara Conahan and Cindy Ciavarella. (*See* IC ¶¶ 160-64.) Defendants argue that Plaintiffs have failed to sufficiently plead a claim for civil conspiracy by failing to allege malice by the Defendants.[40] (*See* Doc. Nos. 445, at 63-65; 443, at 12-13.) Because Individual Plaintiffs have alleged that the conspiracy entered into by Defendants was for Defendants' own enrichment and profit, Defendants contend that this allegation negates the requirement that the sole purpose of the conspiracy was to injure plaintiffs.

Defendants' argument fails. In both *Daniel Boone* and *RDK Trucks*, where the complaints contained allegations that the co-conspirators knew that the actions were unlawful, the court held that it could be inferred that the injuries sustained were not simply an accidental side effect of the co-conspirators' financial benefit. Here, the Individual Plaintiffs allege that the Defendant co-conspirators were

[40] Defendants do not argue that Individual Plaintiffs' Civil Conspiracy claim should fail because the elements of civil conspiracy are not adequately pled. (*See* Doc. No. 445 at 63-65; *see also* Doc. No. 443, at 12-13.)

aware of the unlawfulness of the actions that gave rise to the conspiracy, and that although the Defendants received a substantial financial benefit from the conspiracy, the injuries suffered by the Individual Plaintiff were more than accidental side effects of Defendants' financial benefit. (*See* IC ¶¶ 161-64.) The injuries to the Individual Plaintiffs were the "fruits of an unlawful conspiracy" and necessary for Defendants to obtain a financial benefit. (*See* IC ¶¶ 161-64.) As Plaintiffs allege, Defendants "directed that juvenile offenders be lodged at juvenile detention facilities operated by PACC and WPACC thereby ensuring increased profits and revenues of PACC and WPACC and increased return on investment and/or other remuneration." (IC ¶ 88(D).) Consistent with *Daniel Boone* and *RDK Trucks*, the Individual Plaintiffs sufficiently plead a claim for civil conspiracy against Defendants PACC, WPACC, Powell, Mericle, Mericle Construction, MAYS, Conahan, Ciavarella, Barbara Conahan, and Cindy Ciavarella.

CONCLUSION

Plaintiffs' Complaints detail an unprecedented five-year conspiracy involving the violation of Plaintiffs' basic constitutional rights, the commission of a pattern of racketeering, and the false imprisonment of a subclass of juvenile Plaintiffs. Apart from undermining the Luzerne County judicial system, as already recognized by the Pennsylvania Supreme Court, the conspiracy inflicted serious injury on thousands of children. Plaintiffs want no more than the opportunity to

prove the facts of the conspiracy and the magnitude of their injuries. For the reasons set out above, Plaintiffs respectfully request that the Court deny Defendants' motions to dismiss in their entirety.

Respectfully submitted,

Dated: May 10, 2010

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CERTIFICATE OF SERVICE

I, Daniel Segal, hereby certify that, on this 10th day of May, 2010, Plaintiffs' Response in Opposition to the Motions to Dismiss of Defendants Barbara Conahan; Cindy Ciavarella; Robert J. Powell; Vision Holdings, LLC; Mid-Atlantic Youth Services Corp.; PA Child Care, LLC; Western PA Child Care LLC; Robert K. Mericle; and Mericle Construction, Inc. was filed and made available via CM/ECF to all counsel of record. Additionally, the foregoing motion was served by First Class mail upon the following:

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