

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

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FLORENCE WALLACE, *et al.*,

v.

ROBERT J. POWELL, *et al.*,

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:  
: CIVIL ACTION  
: NO. 09-cv-286  
: (Judge Caputo)

WILLIAM CONWAY, *et al.*,

v.

MICHAEL T. CONAHAN, *et al.*,

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:  
: CIVIL ACTION  
: NO. 09-cv-291  
: (Judge Caputo)

H.T., *et al.*,

v.

MARK A. CIAVARELLA, JR., *et al.*,

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:  
: CIVIL ACTION  
: NO. 3:09-cv-357  
: (Judge Caputo)

SAMANTHA HUMANIK,

v.

MARK A. CIAVARELLA, JR., *et al.*,

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: CIVIL ACTION  
: NO. 09-cv-0630  
: (Judge Caputo)

**SUPPLEMENTAL REPLY BRIEF OF DEFENDANTS  
ROBERT J. POWELL AND VISION HOLDINGS, LLC  
IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS  
PURSUANT TO FED. R. CIV. P. 12(b)(6)**

Defendants Robert J. Powell (“Powell”) and Vision Holdings, LLC  
 (“Vision”) (collectively “The Powell Defendants”) respectfully submit this

Supplemental Reply Brief in further support of their Motion to Dismiss the Complaints. The Court should grant The Powell Defendants' Motion to Dismiss the various claims in the Master Complaint for Class Actions (the "Class Complaint") and in the Individual Plaintiffs' Master Long Form Complaint (the "Individual Complaint") (together, the "Complaints") because, in addition to the various reasons set forth in the contemporaneously filed Joint Reply Brief, the Complaints fail to plausibly allege (a) that Powell or Vision had the requisite intent to enter into a conspiracy to violate § 1983 or RICO, or (b) that Powell and Vision were the proximate cause of any of Plaintiffs' alleged RICO injuries. Plaintiffs' RICO conspiracy claims also fail because they allege a conspiracy that is different from the conspiracy that allegedly caused the Plaintiffs' RICO injuries.

**I. ARGUMENT**

**A. Plaintiffs' § 1983 Claims Fail In Their Entirety Because The Pleadings Do Not Allege Plausibly That Either Powell Or Vision Had The Requisite Intent To Enter Into A Conspiracy To Violate Plaintiffs' Rights, Or That Their Actions Proximately Caused Plaintiffs' Injuries.**

Dismissal is appropriate if a plaintiff has not pleaded "enough facts to state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and

plausibility of ‘entitlement to relief.’” *Ashcroft v. Iqbal*, \_\_\_\_ U.S. \_\_\_\_, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 557).

Here, the Complaints fail to plausibly allege that Powell or Vision **willfully** participated in a conspiracy to violate Plaintiffs’ rights. Powell did not willingly make the payments demanded by the former judges—instead he made them because Conahan told him that if he wanted the facilities to open and operate, Conahan and Ciavarella had to be compensated. Individual Complaint ¶¶ 46, 59. *See McCleester v. Mackel*, No. 06-120J, 2008 U.S. Dist. Lexis 27505, at \*37 (W.D. Pa. March 27, 2009)<sup>1</sup> (explaining that one who is coerced to participate in a conspiracy cannot be fairly characterized as a willful participant and therefore cannot be liable); *see also Harvey v. Plains Twp. Police Dep’t*, 421 F.3d 185, 195 (3d Cir. 2005) (holding that a person who is compelled or coerced into acting is not acting willfully).

In their Response to The Powell Defendants’ Motion to Dismiss, Plaintiffs attempt to sidestep The Powell Defendants’ arguments by reframing the issue and claiming that whether The Powell Defendants willfully participated in a conspiracy is a question of fact. D.I. # 473, at p. 21 n.6. Testing a pleading to determine whether it states sufficient facts to assert a plausible claim for relief, however, is

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<sup>1</sup> This unpublished decision was attached to the Joint Memorandum In Support of Certain Defendants’ Motions to Dismiss The Complaints Under Fed. R. Civ. P. 12(b)(6), D.I. # 445-3.

entirely appropriate at the motion to dismiss stage, and, in fact, it is the very purpose that a Rule 12(b)(6) motion is intended to address. Here, the allegations in the Complaints against Powell do not amount to a plausible claim that he ever intended to cause harm to the Plaintiffs, or even that he should have known that he would cause harm to the Plaintiffs. Indeed, Plaintiffs' own allegations support The Powell Defendants' position that the purpose of the concealed payments to the judges was to accomplish the construction and use of the juvenile detention facilities, not to deprive Plaintiffs of their civil rights:

- Powell met with the former judges, and eventually Mericle, and made plans to build the PACC facility. Class Complaint ¶¶ 649-651; Individual Complaint ¶¶ 39-40.
- The Complaints include various allegations as to the amounts that Powell paid to Conahan and Ciavarella “for constructing and guaranteeing placements.” Class Complaint ¶¶ 700-703; *see also* Individual Complaint ¶¶ 51-555 (alleging, *inter alia*, that Powell paid the former judges “for their past and future actions relating to PACC and WPACC”).
- “Through their administrative actions on behalf of the County of Luzerne, Defendants assisted PACC and WPACC and, by extension, Defendants Powell and Zappala to secure agreements with Luzerne County worth tens of millions of dollars for the placement of juvenile offenders, including an agreement in late 2004 worth approximately \$58,000,000.” Individual Complaint ¶ 66.
- The \$997,600 payment was for facilitating construction and use of the facilities: “Powell understood the payments to be a *quid pro quo* for the judges' exercise of their judicial authority to send juveniles to [PACC] and [WPACC] and other discretionary acts.” Class Complaint ¶ 656.
- Because of the success of PACC, “Powell and Zappala again contracted with Mericle . . . to build [WPACC]. . . . Conahan and Ciavarella were

financially rewarded upon the completion of the facility . . . when they received a \$1,000,000 payment from Powell.” Class Complaint ¶ 659.

- Powell and Zappala built an addition to PACC, and when it was completed, “Powell and Mericle made another payment, this time of \$150,000, to Conahan and Ciavarella.” Class Complaint ¶ 661.

Additionally, neither of The Powell Defendants has ever conceded that they voluntarily made payments to Conahan or Ciavarella, and even the United States Government agrees that **“there was no knowledge on the part of Mr. Powell that juveniles were being abused by these judges.”** *United States v. Powell*, No. 09-CR-189, D.I. # 12 at p. 19 (M.D. Pa. July 1, 2009) (Transcript of Proceedings of Arraignment and Guilty Plea).<sup>2</sup>

Both Powell’s guilty plea and the Complaints support a conclusion that, at most, Powell made payments to the former judges in order to secure their support to build the juvenile facilities and, later, to avoid having the former judges take unwarranted, retributive, and extortionate action against him and the facilities. At no point from the time the facilities were built did Powell or Vision intend to, or direct the judges to, wrongfully order the detainment of youths at PACC, WPACC, or anywhere else. In short, Plaintiffs fail to allege plausibly that The Powell Defendants intended to deprive the Plaintiffs of their constitutional rights, and they

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<sup>2</sup> The relevant pages of the transcript were attached as Exhibit A to the Supplemental Brief of Defendant Robert J. Powell and Vision Holdings, LLC In Further Support of the Joint Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(6) D.I. #441-2.

likewise fail to allege any knowing scheme by Powell to place juveniles into detention *wrongfully*, or under circumstances in which they otherwise would not have been detained.

As this Court has recently explained:

[i]n order to establish a conspiracy claim against Defendants pursuant to Section 1983, there is a requirement of “(1) an actual violation of a right protected under § 1983 and (2) actions taken in concert by the defendants *with the specific intent to violate the aforementioned right.*”

*Shuey v. Schwab*, Civ. No. 08 -1190, 2010 U.S. Dist. LEXIS 9715, \*17-18 (M.D. Pa. Feb. 4, 2010)<sup>3</sup> (emphasis added) (quoting *Williams v. Fedor*, 69 F.Supp.2d 649, 665) (M.D. Pa. 1999)).

Here, Plaintiffs’ allegations can only support an inference that Powell intended that the payments to the former judges were made to obtain their assistance in building and using the facilities, as well as to appease their threats of retribution. They do not support an inference that Powell willfully sought to conspire to improperly detain juveniles:

- “Conahan and Ciavarella demanded kickbacks from [Powell] in exchange for closing [the older facility] and sending the juvenile offenders to [PACC].”). Individual Complaint ¶ 46

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<sup>3</sup> This unpublished decision was filed contemporaneously with this Supplemental Brief as an Exhibit to the Joint Reply Brief In Further Support Of Certain Defendants’ Motions To Dismiss The Complaints Under Fed. R. Civ. P. 12(B)(6).

- “[Ciavarella] advised [Powell that Powell] was making a lot of money from the youth detention center and he had to pay for that privilege. Implicit in the demand for kickbacks was the understanding that the payments were a quid pro quo for [Conahan and Ciavarella’s] exercise of their judicial authority to send the juveniles to [PACC or WPACC] and to take other discretionary acts.” *Id.*
- Powell “believed that had he stopped paying [Conahan and Ciavarella], they would have retaliated against him.” Individual Complaint ¶ 59.

These allegations negate any inference that Powell or Vision were willing participants in a scheme to pay the judges in exchange for depriving juveniles of their rights in Judge Ciavarella’s courtroom. Thus, Plaintiffs’ own pleadings admit that The Powell Defendants did not possess, and could not have possessed, the requisite specific intent to engage in a § 1983 conspiracy.

Finally, as detailed in Powell and Vision’s initial Supplemental Brief (D.I. # 441), Plaintiffs have not plausibly alleged that either Powell or Vision were the proximate cause of their injuries. In fact, Plaintiffs aver that **Ciavarella was violating juveniles’ civil rights before PACC was even completed.** Class Complaint ¶ 190. Additionally, the Plaintiffs repeatedly argue in their briefs and aver in their Complaints that “**Ciavarella** had the power to determine what juveniles were detained”, “**Ciavarella** chose to detain” the juveniles, “**Ciavarella** began directing” the offenders be sent to the facilities, **Ciavarella and Conahan** implemented zero tolerance policies, and “**Ciavarella . . . regularly den[ied]**” juveniles of their constitutional rights. *See, e.g.*, D.I. # 479, at pp. 1, 5, 7; Class

Complaint ¶¶ 675-682; Individual Complaint ¶¶ 67-68, 71. But notably absent from the pleadings is any explanation as to how Powell or Vision was aware, or would have been aware, of the former judges' activities within their courtrooms. The Complaints also fail to explain why Powell or Vision, in particular, reasonably should have known that their actions would result in the judges depriving the juveniles who appeared before them of their civil rights.

Thus, because Plaintiffs fail to plausibly allege that Powell or Vision proximately caused Plaintiffs' harm or that they willfully participated in any conspiracy, and because they fail to allege the requisite specific intent to cause the Plaintiffs' injuries, Plaintiffs' § 1983 claims fail as to Powell and Vision.

**B. Plaintiffs' RICO Claims Fail Because Plaintiffs Do Not Plausibly Allege That Either Of The Powell Defendants Proximately Caused, Or Intended To Cause, Plaintiffs' Injuries Or That They Intended To Cause Plaintiffs' Injuries, And Because They Have Alleged A Conspiracy That Differs From The Conspiracy That They Allege Was The Cause Of Their Monetary RICO Injuries.**

Plaintiffs are simply incorrect when they argue in their Response that The Powell Defendants proximately caused the Plaintiffs' injuries because the casual chain between the alleged predicate acts and their alleged RICO injuries is "short and direct." D.I. # 473, at pp. 65-81, 102-05. The Complaints do not allege facts supporting an inference that Plaintiffs' monetary RICO injuries – *e.g.*, monies paid by the parents of the juvenile plaintiffs for defense counsel, court costs, and custodial detentions – were proximately caused by anything other than Ciavarella's



unforeseeable actions in his courtroom. Neither The Powell Defendants' alleged predicate acts of making concealed payments to the former judges nor The Powell Defendants' alleged entry into a conspiracy to conceal those payments proximately caused Plaintiffs to suffer any monetary losses.

Further, neither brief makes any new argument with respect to Vision's role in the alleged violations of Plaintiffs' rights. They maintain only that Powell owned Vision, and used it to funnel payments from Defendants Mericle and Mericle Construction to Conahan and Ciavarella. D.I. # 473 at pp. 3, 6, 27, 85, 89, 99. There is therefore no basis for finding that Vision's activities proximately caused Plaintiffs to suffer any monetary RICO injury.

For similar reasons, Plaintiffs have also failed to state a claim for RICO conspiracy against The Powell Defendants under the doctrine of variance. As Plaintiffs admit in their Response, "the [alleged] RICO injury must have been caused by a violation of a substantive RICO provision." D.I. # 473 at p. 103. Thus, in order to state a claim against The Powell Defendants under § 1962(d), the Plaintiffs must allege that their alleged monetary RICO injuries were caused by The Powell Defendants being a member of the RICO conspiracy that caused their RICO injuries. Here, the conspiracy alleged by Plaintiffs that involved The Powell Defendants relates to concealing payments to the former judges in return for the building and use of PACC and WPACC. That conspiracy is not the same as a

conspiracy by former judges to cause the parent-plaintiffs' monetary RICO injuries by violating the juvenile Plaintiffs' constitutional rights, and there is no basis to infer that The Powell Defendants were a member of the latter conspiracy because they were also allegedly members of the former.

Furthermore, the Complaints do not plausibly allege any facts from which the Court could infer that The Powell Defendants specifically intended to enter into a conspiracy to cause the Plaintiffs' alleged RICO injuries. Although Plaintiffs make general allegations about the averred purpose of the RICO conspiracy, they do not allege that either of The Powell Defendants understood that the he or it was participating in the alleged conspiracy for any purpose other than committing the predicate acts designed to conceal the payments to Conahan and Ciavarella. As discussed in greater detail above regarding The Powell Defendants' intent, Plaintiffs' own allegations support the inference that the purpose of the concealed payments to the judges was to accomplish the construction and use of the juvenile detention facilities, not to deprive the juvenile plaintiffs of any of their rights or deprive the parent-plaintiffs of the money they spent on lawyers, court costs, or detention costs. Plaintiffs simply do not plausibly allege that The Powell Defendants intended, or much less knew, that the concealed payments to Conahan or Ciavarella would result in the *wrongful* placement of juveniles into detention facilities, nor do the Plaintiffs allege that The Powell Defendants intended to

deprive Plaintiffs of their constitutional rights. Instead, Plaintiffs only assert that because The Powell Defendants entered into a scheme to pay Conahan and Ciavarella while enriching themselves, they knew that Conahan or Ciavarella would exercise their judicial authority to send juveniles to PACC and WPACC. D.I. # 473, p. 98. Because Plaintiffs fail to assert that The Powell Defendants knew that the former judges would take the extraordinary and unnecessary steps of exceeding their judicial authority and depriving juveniles of their constitutional rights, Plaintiffs have not alleged the state of mind required to state a violation of § 1962(d).

## **II. CONCLUSION**

For all of the reasons set forth above, and for the reasons set forth in the Joint Reply Brief, defendants Robert Powell and Vision Holdings, LLC respectfully request that this Honorable Court dismiss Counts II and IV of the Class Complaint and Counts III, IV, and V of the Individual Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state claims for which relief can be granted.

In addition, Powell and Vision also respectfully request that this Honorable Court grant their Motion to Dismiss for all of the reasons enumerated in the Joint Memorandum in Support of Certain Defendants' Motions to Dismiss and The

Powell Defendants' separately filed Supplemental Brief in Support of their Motion to Dismiss.

Respectfully Submitted,

Dated: June 1, 2010

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**CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT**

I, Mark B. Sheppard hereby certify that pursuant to Local Rule 7.8(b)(3) that the foregoing brief complies with the word-count limitation of Local Rule 7.8(b).

Relying on the word count feature of Microsoft Word, the text of the brief contains 2619 words.

Respectfully Submitted,

Dated: June 1, 2010

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**CERTIFICATE OF SERVICE**

I, Mark B. Sheppard, Esquire, hereby certify that on this date, the foregoing Supplemental Reply Brief in further support of the Motion to Dismiss the

Complaints filed by Defendants Robert Powell and Vision Holdings, LLC (the “Supplemental Reply Brief”) was filed via ECF and served electronically upon counsel of record, and that the Supplemental Reply Brief was also served by U.S. First Class mail, postage prepaid, on the following the Powell Defendants at the following addresses:

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Dated: June 1, 2010

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