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

FLORENCE WALLACE, *et al.*, Plaintiffs, v. ROBERT J. POWELL, *et al.*, Defendants.	:	CIVIL ACTION NO. 09-cv-286 (Judge Caputo)
WILLIAM CONWAY, *et al.*, Plaintiffs, v. MICHAEL T. CONAHAN, *et al.*, Defendants.	:	CIVIL ACTION NO. 09-cv-291 (Judge Caputo)
H.T., *et al.*, Plaintiffs, v. MARK A. CIAVARELLA, JR., *et al.*, Defendants.	:	CIVIL ACTION NO. 3:09-cv-357 (Judge Caputo)

SAMANTHA HUMANIK, Plaintiff, v. MARK A. CIAVARELLA, JR., *et al.*, Defendants.	:	CIVIL ACTION NO. 09-cv-0630 (Judge Caputo)

JOINT REPLY BRIEF IN FURTHER SUPPORT OF CERTAIN DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINTS UNDER FED. R. CIV. P. 12(b)(6)

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I. INTRODUCTION

Plaintiffs re-characterize their claim in order to attempt to avoid the favorable termination requirement necessary to pursue their § 1983 action. However, their § 1983 claim must be analyzed with reference to the damage sought in the complaint and the logical consequences of the theories set forth therein, rather than with reference to Plaintiffs' preferences. However, even if viewed as Plaintiffs ask, their § 1983 claims still fail. Those claims also fail because the have not pleaded the requisite *scienter* or causation elements. Parent Plaintiffs § 1983 actions also fail because they are simply impermissible derivative claims and because a cause of action is not permitted under § 1983 for interference with familial relations under these circumstances.

All of Plaintiffs RICO claims are also deficient. Their alleged RICO damages are not a proximate cause of any RICO predicate acts. They fail to plead the requisite state of mind or that the RICO enterprise and RICO persons are separate and distinct. They also allege that the Conspiracy in which the Non-Judicial Defendants entered is different than the conspiracy that allegedly caused their injuries.

Plaintiffs' civil conspiracy claim also fails because plaintiffs have failed to plead malice on the part of the Non-Judicial Defendants.

II. ARGUMENT

A. Plaintiffs Have Failed to Plead a Claim Under 42 U.S.C. § 1983 and Their Civil Rights Claims Should Therefore be Dismissed.

The Juvenile Plaintiffs attack what they describe as invalid adjudications of delinquency and placement into detention facilities. This determines where the Court should look for the elements of Plaintiffs' § 1983 claims, and whether those claims depend on a "favorable termination." Plaintiffs have not identified a single case in which a court allowed a party to pursue a claim for damages arising from adjudication and incarceration outside of the malicious prosecution model. Nonetheless, because Plaintiffs pursue damages for detention they must, under any theory, plead the elements of a claim that would allow them to seek such damages. Because they have failed to do this, the § 1983 claims should be dismissed. Plaintiffs also incorrectly contend that they should be entitled to recover damages for a § 1983 claim without first pleading the requisite *scienter* or causation. This is an independent ground for the dismissal of these claims.

1. Plaintiffs § 1983 Claims Can Only Be Viewed Under the Malicious Prosecution Model, but Without a Favorable Termination, Their Claims Must Be Dismissed.

Plaintiffs do not argue that they have the type of favorable termination that the Third Circuit has explained is required by the Supreme Court's jurisprudence

under *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009) (*en banc*), the Third Circuit explained that it has consistently "held that a prior criminal case must have been disposed of in a way that indicates the innocence of the accused in order to satisfy the favorable termination element." *Id.* at 187 (citation omitted). The Third Circuit also has determined that an expungement order, like the one obtained by these plaintiffs, is insufficient to satisfy the favorable termination requirements for a § 1983 action. *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005). In *Gilles*, the plaintiff entered into an Accelerated Rehabilitative Disposition ("ARD") program, which resulted in the expungement of Gilles's record after he successfully completed the rehabilitation period. *Id.* at 209. But because an expungement itself is not a recognition of actual innocence, the Third Circuit held that Gilles's § 1983 claims were barred. *Id.* at 211-12.

Plaintiffs make no mention of this controlling precedent, and they make no effort to satisfy these standards. Instead, they imply that they may choose any common law tort for which they believe they can establish the elements, and thereby avoid the "favorable termination" requirement associated with malicious prosecution. However, in *Heck* the Court explained that § 1983 claims are a species of tort and that the common law rules "defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for

the inquiry under § 1983." *Heck*, 512 U.S. at 483. Therefore, a **court** first must determine, based on the allegations of the complaint and damages sought, what elements a plaintiff must satisfy in order to recover the damages the plaintiff seeks. The reasoning of *Heck* underscores that plaintiffs may not, as they attempt to do here, simply pick a tort theory without regard to what typically would need to be proved to support the remedy they seek.

Heck, like these juvenile plaintiffs, sought to recover compensatory and punitive damages arising from his state-court conviction and incarceration. The Court found that "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims considered here" because "a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society." *Id.* at 484 (citations omitted). The Court considered but rejected the "abuse of process" theory as an analogy because "[t]he gravamen of that tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends." *Id.* at 486 n. 5. In rejecting the abuse of process model as a basis for pursuing alleged damages arising out of conviction and incarceration, the Court held that when a Plaintiff seeks to recover damages in a § 1983 action, the district court must consider whether a judgment in favor of the plaintiff would

necessarily imply the invalidity of his conviction or sentence. If it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* at 486-87.[1]

Plaintiffs cannot evade this ruling simply by alleging that they are not challenging the results of the state process, but only the process itself. In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court confronted a similar attempt to avoid *Heck*; the plaintiff there "limited his request to damages for depriving him of good-time credits *without due process,* not for depriving him of good-time credits *undeservedly* as a substantive matter. That is to say, his claim posited that the procedures were wrong, but not necessarily that the result was." *Id.* at 645. Applying *Heck*, the Court held that the plaintiff's "claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the

[1] Attempting to escape the need to identify the relevant tort model, Plaintiffs cite *Carey v. Piphus*, 435 U.S. 247 (1978). However, *Carey* explicitly stated that "[i]n 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 difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constititonal right. Although this task of adaptation will be one of some delicacy as this case demonstrates it must be undertaken" *Id.* at 258 (internal citations omitted). In other words, a court must find the right model, depending on what rights the plaintiffs seek to vindicate as it is tied to the damages they seek to recover. Where, as here, a plaintiff is seeking damages for an adjudication and incarceration, the Supreme Court already has identified the appropriate model in *Heck* and has given clear direction regarding how it is to be applied.

decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983." *Id.* at 648.

Plaintiffs allege an "unconstitutional conviction or imprisonment" as contemplated by *Heck*, seeking damages for adjudications and detentions, which they allege resulted from constitutional deprivations. As a result, any award of damages means that the adjudication and detention were unconstitutional. Therefore, a proper application of *Heck*, regardless of how these Plaintiffs style their claim, requires that Plaintiffs have a favorable termination.

Plaintiffs do not (and likely could not) plead a "favorable termination" as defined by relevant cases. The Third Circuit has explained that a favorable termination is a ruling that is consistent with actual innocence and that an order of expungement alone will not suffice.[2] Therefore, Plaintiffs may not pursue their damages claim arising out of the adjudications and placements that they allege were improper unless and until they have terminations that are indicative of actual

[2] Plaintiffs argue that an expungement makes them innocent in the eyes of Pennsylvania law, but make no mention of *Gilles* and the fact that an expungement does not satisfy the favorable termination requirement. Yet, even if Plaintiffs had gone to trial and been acquitted of the crimes for which they were charged, the Third Circuit has explained that a defendant can escape liability in a malicious prosecution case by showing that "the plaintiff was in fact guilty of the offense with which he was charged…This requirement can bar recovery even when the plaintiff was acquitted in the prior criminal proceedings, for a verdict of not guilty only establishes that there was not proof beyond a reasonable doubt." *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir. 2000).

innocence. Here, Plaintiffs have not alleged that they have achieved favorable terminations or that they were actually innocent of the crimes for which they were adjudicated delinquent.

2. **Plaintiffs Have Failed to Allege the Elements of an Abuse of Process Claim.**

Even if Plaintiffs were permitted to select the common-law analog from which they wish to borrow, they have not pleaded the elements of abuse of process. Rather, their complaints contradict the "abuse of process" theory and, as a result, their § 1983 claims should be dismissed – even if "abuse of process" were the proper analog. As this Court has explained,

> There are three elements necessary to sustain the cause of action of abuse of process in Pennsylvania. They are: (1) the defendant used a legal process against the plaintiff, (2) that action was primarily to accomplish a purpose for which the process was not designed, and (3) harm was caused to the plaintiff. Abuse of process, is, in essence, the use of legal process as a tactical weapon to coerce the desired result that is not the legitimate object of the process.

Sershen v. Cholish, 2007 U.S. Dist. LEXIS 79627, at *34 (M.D. Pa. Oct. 26, 2007) (Caputo, J.) (citations and quotations omitted). "[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Id.* (quoting *Rosen v. Tesoro Petroleum Corp.*, 582 A.2d 27, 32 (Pa. Super. 1990)).

Although Plaintiffs allege that certain Defendants would have derived a financial benefit from allegedly improper adjudications and delinquency

decisions, Plaintiffs do not allege, in their complaints or in their briefs, that anyone coerced, extorted, or blackmailed them. Rather, they contend that the judicial decisions were carried through to the very ends contemplated, but for the purpose of enriching defendants.

As this Court has explained, when plaintiffs "allege[] only that Defendants initiated the proceedings against [them] with improper motive, and not that Defendants made additional threats or acts against [them], or that Defendants used the process to blackmail or coerce [them]," the plaintiffs cannot set out a claim under a theory of abuse of process. *Jordan v. Stanziola*, 2002 U.S. Dist. LEXIS 27334, at * 32 (M.D. Pa. May 15, 2002). Because Plaintiffs have not alleged that defendants made any extortionate threats against Plaintiffs or that defendants used the process to blackmail or coerce Plaintiffs, even Plaintiffs "abuse of process" theory under § 1983 would fail and their claims should be dismissed.

3. Plaintiffs Have Failed to Allege the Requisite *Scienter* Against All Non-Judicial Defendants.

Plaintiffs purport to rely on a "set in motion" § 1983 standard, suggesting that, under that theory, Plaintiffs may sustain a § 1983 conspiracy claim simply by alleging that defendants engaged in any conduct that caused Juvenile Plaintiffs' constitutional rights to be violated. However, Plaintiffs misunderstand the "set in

motion" theory, which speaks to when ***state actors*** can be said to have "subjected" § 1983 plaintiffs to constitutional deprivations, as the statute requires. Here, the question is whether the non-judicial defendants, who are ***not*** themselves state actors, are liable under § 1983, and, specifically what must be alleged and proved before non-state actors are liable for the conduct of state actors. That is a function of whether conspiracy is adequately alleged between the two.

To sustain a § 1983 ***conspiracy***, Plaintiffs must allege and prove that each particular Defendant acted in concert with the other defendants, ***with specific intent to cause Juvenile Plaintiffs' constitutional rights to be violated***.

In *Shuey v. Schwab*, this Court stated:

> In order to establish a ***conspiracy claim*** against the 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***.…

Civ. No. 3:08-CV-1190, 2010 U.S. Dist. LEXIS 9715, *17-18 (M.D. Pa. Feb. 4, 2010) (emphasis added). In *Shuey*, this Court found that plaintiffs stated a § 1983 conspiracy claim against certain defendants – those defendants whom plaintiffs alleged had "communicated and conspired to violate [plaintiff's] rights." *Id.* at *18. However, plaintiffs' failure in *Shuey* to allege that other defendants engaged in such acts or communications in furtherance of a conspiracy to violate plaintiffs'

rights proved fatal under Rule 12 to plaintiffs' claims against those particular defendants. *Id.*

Likewise, in *McCleester v. Mackel*, Civ. No. 06-120J, 2008 U.S. Dist. LEXIS 27505, at *45 (W.D. Pa. Mar. 27, 2008), plaintiffs alleged that defendants (plaintiff's co-workers), conspired to persuade a third party "to recommend [plaintiff's] suspension and dismissal without the benefit of progressive discipline." However, because there was "no allegation that the five purported conspirators specifically contemplated that [plaintiff's] procedural due process rights would be violated by the deprivation of food, water and medication for a period of five hours," plaintiffs failed to state a claim for conspiracy to violate § 1983. *Id.* The court explained, "[s]ince the alleged conspiracy between [defendants] did not involve a ***specific intent*** to deprive [plaintiff] of food, water and medication for the duration of the fact-finding meeting, [plaintiff's] four subordinates could not have acted 'under color' of Pennsylvania law for purposes of the procedural due process violation alleged in the Amended Complaint." *Id.* at *47 (emphasis added).

Under *Shuey*, *McCleester* and similar cases, this Court should refrain from making the leap between Non-Judicial Defendants' alleged actions and Plaintiffs' constitutional deprivations ***without*** specific allegations as to each particular Non-Judicial Defendant that each intended, contemplated or knew that such violations

would occur. Although Plaintiffs' Rule 12 brief urges the Court to assume those allegations appear in the Complaints, they do not exist as to each of the Non-Judicial Defendants.

4. Plaintiffs Fail to Allege Plausibly that Conduct by the Defendants was the Proximate Cause of Plaintiffs' Alleged Injuries.

Even if Plaintiffs could plead the elements of their claims and the requisite state of mind, which they have not done, Plaintiffs have failed to allege that the injuries they allege in this action were caused by the Defendants, as opposed to natural consequences of their own illegal acts. Plaintiffs cite to *Carey v. Piphus* for the proposition that they may seek such damages under these circumstances (*see* Plaintiffs Response in Opposition to the Motions to Dismiss of Defendants ("Pl. Br.") at p. 39), but they also contend that "*Carey* is plainly distinguishable because it involved the review of a Court's decision after trial not to award damages" (Pl. Br. at 41).[3] Their reliance on *Carey*, immediately followed by an

[3] It is well settled that causation is an element that must be both pleaded and proved. *See, e.g., Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006) ("we are addressing a requirement of causation, which [plaintiff] must plead and prove in order to win, and our holding does not go beyond a definition of the element of the tort …"); *Morseth v. Ramsey Co. Sheriff Dep't.*, Civ. No. 06-3991, 2006 U.S. Dist. LEXIS 86915 (D. Minn. Nov. 29, 2006) ("to state an actionable § 1983 claim, Plaintiff must plead facts showing (1) a violation of a constitutional right, (2) committed by a state actor or person acting under color of state law, (3) who acted with the requisite culpability and causation to violate the constitutional right.") (citations omitted).

attempt to distinguish *Carey*, is revealing. Contrary to what Plaintiffs assert, *Carey* does not hold that a § 1983 plaintiff need not prove that defendants caused the plaintiff's constitutional deprivation.[4] Rather, *Carey* held that when a plaintiff can prove that a defendant caused the deprivation of a constitutional right, but cannot prove any injury caused by the deprivation (e.g., when a plaintiff would have received the same result regardless of the process), the plaintiff may recover nominal damages only.[5] The *Carey* Court explained, "if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners." *Carey*, 435 U.S. at 267. Similarly, the Third Circuit has held that nominal damages are available when a party proves a deprivation, but no

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[4] In *Carey* the issue of causation was not before the Court because the defendants never challenged the District Court's decision that "both suspensions had been ordered without the due process guaranteed by the Fourteenth Amendment and that the defense of good faith was not available to the defendants." *Piphus v. Carey*, 545 F.2d 30, 31 (7th Cir. 1976).

[5] Plaintiffs may not simply abandon their claims for compensatory relief and pursue only nominal damages as a method of circumventing *Heck*'s favorable termination requirements. As the Third Circuit recently explained, "[W]henever the challenge ultimately attacks the 'core of habeas' – the validity of the continued conviction or the fact or length of the sentence – a challenge, however denominated and regardless of the relief sought, must be brought by way of habeas corpus petition. Conversely, when the challenge is to a condition of confinement such that a finding in plaintiff's favor would not alter his sentence or undo his conviction, an action under § 1983 is appropriate." *Telepo v. Martin*, Civ. No. 09-3509, 2009 U.S. App. LEXIS 28591, at *5 (3d Cir. Pa. Dec. 29, 2009) (citation omitted).

damages: "[t]here can be no relief with respect to compensatory damages for injuries occasioned by the alleged deprivations (*i.e.*, the dismissals and press release) unless it is determined that, with such an opportunity, the result would have been different." *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74, 81 (3d Cir. 1989) (footnote omitted).

In this case, however, Plaintiffs seek more than nominal damages, yet fail to plead that, but for the misconduct of the allegedly biased tribunal, they would not have suffered their claimed injuries (*i.e.*, being adjudicated delinquent and detained). Plaintiffs have not alleged and do not argue in their briefs that that the disposition or treatment, rehabilitation or supervision ordered would have been any different if they had been offered the full panoply of rights of which they allege they have been deprived (including a different judge).[6] Plaintiffs have not identified a single paragraph in the Complaints that contains such

[6] At least one court in this Circuit has addressed a claim for monetary damages based on the allegation that a tribunal was biased, and that court held that plaintiffs must allege and prove that the damages sought were caused by the alleged constitutional deprivations. *See Shepherdson v. Nigro*, 5 F. Supp. 2d 305 (E.D. Pa. 1998) (finding the failure of a judge to recuse himself did not give rise to independent substantive due process claim for money damages and that such a plaintiff would need to establish that the injuries were actually caused by the "irregularities or improprieties" alleged.) As the Court explained in *Carey*, "injury caused by a justified deprivation, including distress, is not properly compensable under § 1983." 435 U.S. at 263 (footnote omitted).

an allegation, yet they have made it clear that they seek compensatory damages for such adjudications and placements.

Despite their frequent citation to the state's King's Bench proceedings, Plaintiffs have not identified a single state-court finding that any juvenile would have received a different adjudication. Instead of making this allegation, Plaintiffs ask this Court to infer that this must be the case. If Plaintiffs have a good faith basis for such an allegation, then that allegation should appear in the Complaints. Without such a pleaded allegation, their § 1983 claims should be dismissed.

If Plaintiffs wish to pursue a claim for compensatory damages, they must plead and prove that those damages were caused by the alleged improprieties. Because Plaintiffs have failed to plead causation with respect to their purported injuries, their § 1983 claims must be dismissed. Even if the Court determines that Plaintiffs satisfactorily have pleaded a § 1983 cause of action, Plaintiffs should be limited to nominal damages only.

5. Parent Plaintiffs Have Not Stated a § 1983 Claim on Their Own Behalves.

Count IV of the Individual Complaint does not allege any violation of Parent Plaintiffs' ***own*** constitutional rights. Parent Plaintiffs simply contend that they paid court and placement-related fees that resulted from ***Juvenile Plaintiffs'*** constitutional deprivations. Although Parent Plaintiffs argue that this constituted a violation of their rights, they do not allege that they were entitled to due process in

the juvenile court system. Parent Plaintiffs' claims exist solely by virtue of Juvenile Plaintiffs' alleged constitutional deprivations and therefore are derivative and unsustainable under § 1983.

Stacey v. City of Hermitage, 178 Fed. Appx. 94 (3d Cir. 2006) is not to the contrary.[7] In *City of Hermitage*, the court found that "City defendants are…correct that [plaintiff son] has not established his standing to bring a § 1983 claim based upon a violation of property rights with respect to [his mother]'s home." *Id.* at 100. Instead, the court found that the son had stated an unlawful seizure claim under the Fourth Amendment because he alleged that he himself had personal property in his mother's home. *Id.*

Nowhere in the complaints do the Parent Plaintiffs allege a constitutional violation of their individual rights. Rather, Parent Plaintiffs simply allege that their rights were violated when they had to pay fees on behalf of their children, and all of the allegations relate to defendants' conduct regarding the Juvenile Plaintiffs, not the parents.

[7] Parent Plaintiffs have not identified a case in which a court recognized a parent's § 1983 claim based on the parent's payment of fines on behalf of their child.

6. Parent Plaintiffs' Claims Fail to Allege That Defendants Specifically Aimed to Interfere With the Parent-Child Relationships.

Third Circuit law is clear that, in order to state a claim for deprivation of the substantive due process right to familial integrity, plaintiff must allege that "the state action at issue was specifically aimed at interfering with protected aspects of the parent-child relationship." *McCurdy v. Dodd*, 352 F.3d 820, 827-28 (3d Cir. 2003) ("It would…stretch the concept of due process too far if we were to recognize a constitutional violation based on official actions that were not directed at the parent-child relationship."). Many courts require that plaintiff allege not only the interference with the familial relationship, but the complete destruction of that relationship. *See, e.g.*, *Tilson v. School Dist. of Phila.*, Civ. No. 89-1923, 1989 U.S. Dist. LEXIS 12582, at *5 (E.D. Pa. Oct. 24, 1989); *H.T. v. E. Windsor Reg'l Sch. Dist.*, Civ. No. 04-1633, 2006 U.S. Dist. LEXIS 80833 (D.N.J. Nov. 3, 2006); *Trujillo v. Santa Fe Bd. of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985).

Plaintiffs apparently hope that the Court will ignore the settled law in this Circuit or will read more into the conclusory allegations in paragraph 136 of the Individual Complaint. (Pl. Br. at 56). However, Paragraph 136 does not allege that Non-Judicial Defendants' actions were ***intended*** to interfere with, let alone completely destroy, Juvenile Plaintiffs' relationships with Parent Plaintiffs.

Therefore, Parent Plaintiffs have failed to state a claim for deprivation of the right to familial integrity.

B. Plaintiffs RICO Claims Should Also Be Dismissed.[8]

1. Plaintiffs' Complaints Do Not Satisfy the RICO Proximate Cause Standard For RICO Standing Because They Have Not Alleged That Their Injuries Were A Direct Result Of The Predicate Acts.

"When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the **alleged violation led directly to the plaintiff's injuries.**" *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (emphasis added); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 989 (2010). Dismissal is appropriate at the 12(b)(6) stage where, as here, the alleged injury is merely an indirect result of the predicate acts. *Allegheny Gen. Hosp. v. Phillip Morris, Inc.*, 228 F.3d 429, 444 (3d Cir. 2000).

To avoid dismissal under this RICO proximate causation standard, Plaintiffs must plead that their claimed RICO injuries (*e.g.*, the money and property that they allegedly lost in connection to the allegedly wrongful detentions) were a direct

[8] Plaintiffs have conceded that plaintiffs who were juveniles at the time of the filing of the Individual Complaint have no standing. *See* Docket Index No. ("D.I. #") 473, at p. 63, n.24. Putative Class Plaintiffs have withdrawn their RICO § 1962(b) claims (Count VI) against all Moving Defendants. *Id.*

result of the alleged predicate acts (*i.e.*, bribery and frauds), rather than the result of the actions Judge Ciavarella took in his courtroom. [9]

Plaintiffs attempt to meet this pleading standard by characterizing their monetary injuries in their Briefs as being caused by a "short and direct chain of events." D.I. # 473, pp. 14, 64-76, 78, 105. But Plaintiffs' Complaints belie this characterization; they allege that the predicate acts were part of a scheme "to defraud and deprive **the citizens of Luzerne County** and **the Commonwealth of Pennsylvania** of their **right to the honest services** of Defendants Conahan and Ciavarella**.**" Individual Complaint ¶ 75 (emphases added); *see also* Class Complaint ¶ 756(b).

Most tellingly, Plaintiffs also concede in their Brief that the actual cause of their alleged monetary injuries was not a conspiracy to conceal payments made to the former judges, but rather the actions of Judge Ciavarella in his courtroom: "**Ciavarella's actions** of adjudicating and placing the juvenile Plaintiffs **caused the RICO injuries**." D.I. # 473, p. 68 (emphasis added).[10] Accordingly, the RICO injuries allegedly suffered by the Plaintiffs are "'too remote…or indirec[t]'" from

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9 See 18 U.S.C. § 1964(c); D.I. # 445 at pp. 32-34.

10 At best, Plaintiffs' monetary injuries are several steps removed from the direct harm caused by the alleged fraud and/or concealment. That remoteness is fatal to Plaintiffs' RICO claims because, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step", and this "'general tendency' applies with full force to proximate cause inquiries under RICO." *Hemi Group*, 130 S.Ct at 989 (citation omitted).

the alleged RICO scheme to conceal payments to Conahan and Ciavarella to establish Plaintiffs' standing. *Hemi Group,* 130 S. Ct. at 989 (quoting *Holmes,* 503 U.S. at 274).

Plaintiffs' reliance on *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S.Ct. 2131 (2008), does not help them to meet the RICO proximate cause standard. In *Bridge*, the causal connection was clear: plaintiffs' injuries were a direct result of the defendants' fraud, and the plaintiffs were "the *only* parties injured by the [defendants'] misrepresentations." *Id.* at 2138, 2144 (emphasis in original); *see also Hemi Group*, 130 S.Ct. at 992 (discussing *Bridge* holding). Here, however, Plaintiffs' causation theory is that their injuries were caused by multiple steps taken by multiple parties at various times over a period of several years: "a complex web of interactions and agreements" among the Defendants to "build and maintain private for-profit juvenile detention facilities." D.I. # 473, p. 24. Furthermore, the Plaintiffs concede that they were not the **only** parties injured by the alleged predicate acts. Individual Complaint ¶ 75 (emphases added); *see also* Class Complaint ¶ 756(b).

Plaintiffs also attempt in their Brief to circumvent the "direct" RICO proximate cause standard by importing a foreseeability standard from other Circuits. D.I. # 473, pp. 69-70, 73. However, the Supreme Court twice has specifically rejected the use of a foreseeability standard for RICO claims. *Hemi*

Group, 130 S.Ct. at 991; *Anza*, 547 U.S. 451. The only inquiry is whether the ***predicate acts directly caused the plaintiffs' RICO injuries***, and here, Ciavarella's independent actions were in no sense required to accomplish the alleged predicate acts, and thus were wholly independent from them.[11]

Because the RICO injuries allegedly suffered by the Plaintiffs are too remote and indirect from the alleged RICO scheme, and because Plaintiffs' own allegations admit that Plaintiffs were not the only ones injured by the scheme they allege, Plaintiffs lack RICO standing, and dismissal of Plaintiffs' RICO claims is appropriate. *See Hemi Group*, 130 S.Ct at 994; *Anza*, 547 U.S. at 461; *Allegheny Gen. Hosp.*, 228 F.3d at 444; *Longmont United Hosp. v. St. Barnabas Corp.*, 305 Fed. Appx. 892, 896 (3d Cir. 2009).

2. **Plaintiffs Do Not Adequately Plead an Association in Fact that Existed Separate and Apart From the Pattern of Racketeering.**

Dismissal of RICO claims is appropriate if the pleadings do not permit the inference of the existence of the required elements, or if they affirmatively negate any of the required elements, of an enterprise. *In re Actiq Sales & Mktg. Practices Litig.*, Civ. No. 07-04492, 2009 U.S. Dist. LEXIS 43710, at *12 (M.D. Pa. May 22,

[11]Plaintiffs do not contend that the non-judicial Defendants were aware of, or even had reason to know about, Ciavarella's actions during the various juvenile delinquency proceedings.

2009) (citing *Seville Indus. Mach. Corp. v. Southwest Mach. Corp.*, 742 F.2d 786, 790 n.5 (3d Cir. 1984)).

Furthermore, the existence of an **enterprise** is an element distinct from the **pattern of racketeering activity**, and "proof of one does not necessarily establish the other." *Boyle v. U.S.*, 129 S.Ct. 2237, 2245 (2009) (quoting *U. S. v. Turkette*, 452 U.S. 576, 583 (1981)). This "prevents the enterprise element from becoming superfluous [.]" *McClure Enters. v. Fellerman*, No. 3:06cv353, 2007 U.S. Dist. LEXIS 35374, at *3 (M.D. Pa. May 15, 2007).

Here, the averments in the Complaints negate the possibility that the alleged RICO enterprise had "an existence beyond that necessary to commit the predicate offences." *Freedom Med. Inc. v. Gillespie*, 634 F. Supp. 2d 490, 506 (E.D. Pa. 2007). The cases cited in Plaintiffs' Response on these points also are inapposite and distinguishable.

In *Freedom Medical*, the association-in-fact enterprise was alleged to be (a) providing legitimate services as well as engaging in the alleged pattern or racketeering, and (b) controlled by the individual at the "hub" of the enterprise. *Id.* Those allegations were deemed sufficient to demonstrate that the enterprise had an existence beyond that necessary to commit the predicate offenses. *Id.* Here, however, neither the Complaints nor Plaintiffs' Response identifies any legitimate services that were provided by the enterprise alleged, and Plaintiffs also do not

allege that any member of the alleged enterprise served as its "hub," or coordinated multiple predicate offenses through its other members.

Plaintiffs also rely upon *Flood v. Makowski*, Civ. No. 03-1803, 2004 U.S. Dist. LEXIS 16557, at *8 (M.D. Pa. Aug. 24, 2004), in which the Court found that allegations that a RICO enterprise engaged in multiple separate racketeering schemes were sufficient to allege that the association-in-fact enterprise had an existence beyond the racketeering activities which injured plaintiff. *Id.*

Plaintiffs expressly argue, however, that the RICO enterprises **did not** engage in multiple schemes:

> [t]he 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.

D.I. # 473, p. 102 (emphases added). This admission is fatal to Plaintiffs' ability to prove that their alleged association-in-fact enterprises had an existence beyond that necessary to commit the predicate offenses.

Plaintiffs' argument that certain members of the enterprises committed non-predicate acts, such as adjudicating juveniles delinquent and placing them in detention facilities, cannot overcome this fatal flaw. The non-predicate acts referenced by the Plaintiffs were not committed by the alleged **association-in-fact**

enterprises; rather, they were allegedly committed by only a few of the **members** of the enterprises.

The Fifth Circuit has explained that such allegations do not amount to an allegation that the **enterprise itself** engaged in legitimate activities or had some existence outside of what was necessary to commit the alleged predicate acts. *Clark v. Douglas*, Civ. No. 06-40364, 2008 U.S. App. LEXIS 113, at *5 (5th Cir. Jan. 4, 2008) (noting that "the *members* of any alleged enterprise will have an existence separate from the pattern of racketeering activity . . . , but § 1962 applies solely where the enterprise as a whole exists separately and apart from the alleged pattern of racketeering activity.")

Plaintiffs' "complaint[s] must contain sufficient allegations to allow a reasonable inference of an organizational structure, functioning as a continuous unit, with a separate existence from its predicate acts." *Freedom Medical*, 634 F. Supp. 2d at 504. Because Plaintiffs' Complaints do not allege facts that permit an inference that the enterprises had any existence separate from committing the alleged predicate acts, Plaintiffs' § 1962(c) Counts should be dismissed.

3. The RICO Persons and the Alleged RICO Enterprise are Identical in the Individual Plaintiffs' Complaint.

The Individual Plaintiffs describe the RICO enterprise as consisting entirely of an "association-in-fact of all RICO defendants." Individual Complaint ¶¶ 85-86. Plaintiffs now argue that, because they allege that both corporations and their

officers are named as RICO "persons," and individuals are distinct from corporations, then the RICO persons and enterprise are not identical. D.I. # 473, pp. 91-93. This argument misses the point—the issue is not whether the corporate RICO **persons** and the individual RICO **persons** are distinct, but rather whether the RICO **persons** are distinct from the RICO **enterprise**. The Plaintiffs' citation to *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 158 (2001), also does not support their argument. In that case, the Court recognized the significant distinction between a

> case [that] concerns a claim that a corporate **employee** is the "**person**" and the **corporation** is the "**enterprise**" . . . . [and] a case [that] concerned a claim that a **corporation** was the "**person**" and the **corporation**, together with all its employees and agents, were the "**enterprise.**"

Id. at 164 (emphases added). In contrast, here the Individual Plaintiffs have pled only an association-in-fact enterprise consisting of all RICO defendants: the RICO persons are identical to the RICO enterprise. Accordingly, Plaintiffs' reliance on *Cedric Kushner* is inapposite.

Instead, this case mirrors *Kaiser v. Stewart*, where plaintiffs alleged that a group of individuals and entities owned by some of the individuals were both the RICO "persons" and an association-in-fact enterprise. *Kaiser v. Stewart*, Civ. No. 96-6643, 1997 U.S. Dist. LEXIS 12788, at *24 (E.D. Pa. Aug. 19, 1997); Individual Complaint ¶¶ 85-86. Where, as here, "[t]he overlap between the

wrongdoers and the enterprise is complete," then "by definition [, plaintiff] cannot satisfy the distinctiveness requirement." *Kaiser*, 1997 U.S. Dist. LEXIS 12788, at *27-29. Thus, because the RICO "persons" and the RICO enterprise alleged here by the Individual Plaintiffs overlap completely, the Court should dismiss Individual Plaintiffs' § 1962(c) claims.

C. The Individual Plaintiffs' Allegations Defeat Their RICO Conspiracy Theory Under Section 1962(d).

1. Plaintiffs Allege a Conspiracy that Differ from the Conspiracy that Allegedly Caused RICO Injuries.

The conspiracy alleged by Plaintiffs to conceal a scheme of payments is not the same conspiracy as a conspiracy to violate Plaintiffs' constitutional rights by depriving them of plea colloquies or counsel during their adjudications. Because of this variance, Defendants cannot be liable under § 1962(d).

Plaintiffs' argument that the variance doctrine does not apply to civil cases (D.I. # 473, pp. 101-102) is not supported by either the civil RICO jurisprudence of this Circuit or the model jury instructions used in RICO cases. The Third Circuit applies a consistent standard to allegations of RICO conspiracies under § 1962(d), regardless of whether they arise in the criminal or the civil context. For example, in *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001), the Third Circuit discussed what may constitute a violation of § 1962(d), and noted that the Supreme Court's decision in *Beck v. Prupis*, 529 U.S. 494 (2000),

> **does not** in any way repudiate [the Supreme Court's prior] holding about what constitutes a conspiracy violation or **indicate that the violation is different in a civil context.**
>
> * * *
>
> To the contrary, the footnote [in *Beck*, 529 U.S. at 501 n.6] observes that *Beck* "does not present simply the question of what constitutes a violation of § 1962(d), but rather **the meaning of a civil cause of action for private injury** by reason of such a violation."

Id. at 538-39 (quoting *Beck*, 529 U.S. at 501 n.6) (emphases added).

The variance doctrine's applicability in the civil context also is reflected in federal model jury instructions on § 1962(d), such as this one from the Fifth Circuit Court of Appeals, which is referenced in the Third Circuit's Civil Model Jury Instructions:

> If you find that a particular defendant is a member of another conspiracy, but not the one charged by the plaintiff, then you must find for that defendant. In other words, y**ou cannot find that a defendant violated Section 1962(d) unless you find that he was a member of the conspiracy charged, and not some other separate conspiracy**.

Fifth Circuit Model Jury Instruction Section 1962(d), p. 61, *available at* http://www.lb5.uscourts.gov/juryinstructions/2006CIVIL.pdf. (emphasis added).[12]

As Plaintiffs admit, "the [alleged] RICO injury must have been caused by a violation of a substantive RICO provision." D.I. # 473, p. 103. But, Plaintiffs

have only alleged that the Moving Defendants were a part of a conspiracy to conceal payments, not the alleged conspiracy to violate juveniles' constitutional rights by depriving them of plea colloquies or counsel. Accordingly, Plaintiffs' claim of RICO conspiracy under § 1962(d) fails to state a claim and should be dismissed.

2. Plaintiffs Do Not Allege that the Moving Defendants Had the Required State of Mind.

Plaintiffs do not allege (or even argue in their Response that they have alleged) that each of the Moving Defendants understood that the alleged conspiracy was for any purpose other than to conceal the payments to Conahan and Ciavarella, or that they intended, much less knew, that the payments to Conahan or Ciavarella would result in the ***wrongful*** placement of juveniles into detention facilities. Accordingly, Plaintiffs have not alleged the state of mind required to state a violation of § 1962(d).

Instead of alleging that each of the Moving Defendants had the requisite state of mind for participating in a RICO conspiracy, Plaintiffs ask the Court to infer each of those facts. D.I. # 473, pp. 97, 100 ("reading the complaint as a whole and drawing permissible inferences regarding Defendants' mental states").

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[12] *See* Third Circuit Civil Model Jury Instructions, App. Two, *available at* http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/Appendix-Two.pdf

The Court should decline to do so, however, as the generalized allegations that Plaintiffs do make in their Complaints – which do not aver that each of the RICO Defendants knew that the concealed payments to Conahan or Ciavarella would result in the ***wrongful*** placement of juveniles into detention facilities – are not sufficient to permit an inference that each RICO Defendant intended to participate in the alleged conspiracy to deprive juveniles of their civil rights in Ciavarella's courtroom. *See* D.I. # 473, pp. 96-100.

Plaintiffs do not allege that any of the Moving Defendants intended, much less knew, that the payments to Conahan or Ciavarella would result in the wrongful placement of juveniles into detention facilities under circumstances in which they would otherwise not have been detained, nor do they allege that the RICO Defendants intended to deprive the Plaintiffs of their constitutional rights. *See id.* Instead, Plaintiffs only assert that because the 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. *Id.*, p. 98. Because Plaintiffs fail to assert that any individual Moving Defendant 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).

D. Individual Plaintiffs' Civil Conspiracy Claim Also Fails Because Plaintiffs Do Not Sufficiently Allege Malice.

An action for civil conspiracy "will lie only where **the sole purpose of the conspiracy**" was to injure the plaintiffs. *Spitzer v. Abdelhak*, Civ. No. 98-6475, 1999 U.S. Dist. LEXIS 19110, at *9 (E.D. Pa. Dec. 15, 1999) (emphasis added) (citing *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979)). If the facts show that the defendant acted to advance his or her own professional or business interests, "[t]his necessary proposition is negated." *Bro-Tech Corp. v. Thermax, Inc.*, 651 F. Supp. 2d 378, 419 (E.D. Pa. 2009); *see also Spitzer*, 1999 U.S. Dist. LEXIS 19110, at *9 (granting motion to dismiss). Plaintiffs acknowledge this standard in their Brief, D.I. # 473, p.120, and their Complaints contain allegations only that Defendants acted to advance their own professional or business interests.[13]

Thus, Individual Plaintiffs have failed to allege that Defendants acted with malice or that they acted solely **with the intent to harm Plaintiffs**. Plaintiffs ask the Court to excuse this fatal defect in their pleading by **inferring** that Defendants acted with malice because they purportedly acted with the knowledge that their

[13] *See* Individual Complaint ¶ 162; *id*. ¶ 81 (alleging that Defendants entered into an agreement "**for their own personal enrichment and profit**."); *id*. ¶ 88(D) (alleging that the conspiracy ensured "**increased profits and revenues** . . . and **increased return on investment** and/or other remuneration . . . ."); *id.* ¶¶ 33-34, 37, 41-55, 88(D)-(E).

actions were unlawful, D.I. # 473, p.122, and cite in support *Daniel Boone Area Sch. Dist. v. Lehman Bros., Inc.*, 187 F. Supp. 2d 400, 411-12 (W.D. Pa. 2002) (disagreeing with *Spitzer* and holding that, although the purpose of defendants' conspiracy was personal or professional benefit, because the defendants in *Daniel Boone* knew their acts were unlawful, malice could still be inferred). However, *Daniel Boone* is distinguishable on its facts. Unlike in the case at bar, the *Daniel Boone* plaintiffs affirmatively alleged that the defendants acted with malice – they did not ask the Court to infer it. *Id.* at 411. Moreover, in *Daniel Boone*, the defendant seeking to have the civil conspiracy count dismissed was alleged to have had ***actual knowledge*** that its co-conspirator was engaging in the illegal acts that caused harm to the plaintiff. *Id.* at 411-412, 402. Here, in contrast, none of the Moving Defendants are alleged to have had actual knowledge of the illegal acts that are alleged to have caused the Plaintiffs' harm – namely, Ciavarella's actions in his courtroom. As such, Plaintiffs' allegations provide no justification for

departing from the general rule for pleading malice that was established in *Spitzer*.[14]

Absent any specific allegations of malice, and absent any allegations that Defendants acted with any intent other than their own personal enrichment and profit,[15] the Court should decline to infer that Plaintiffs have alleged malice or a sole intent to harm Plaintiffs and should instead dismiss the Individual Plaintiffs' Civil Conspiracy Claim against the Moving Defendants.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' § 1983 and RICO Claims against the Non-judicial Defendants should be dismissed.

[14] The Western District's opinion in *Daniel Boone* has been criticized by other courts as an "outlier" decision, and it has been disagreed with on some of its holdings. *See Adelphia Communs. Corp. v. Bank of Am., N.A.*, 365 B.R. 24, 44 (S.D.N.Y. Bankr. 2007) (describing *Daniel Boone* as an "outlier" decision on the issue of whether Pennsylvania would recognize the tort of aiding and abetting a breach of fiduciary duty); *Gilliland v. Hergert*, No. 2:05-cv-01059, 2007 U.S. Dist. LEXIS 84508, at *16 (W.D. Pa. Nov. 15, 2007) (disagreeing with *Daniel Boone* on its interpretation of the Pennsylvania Securities Act).

[15] *Compare* Individual Complaint, ¶¶ 162, 81, 88(d) (alleging profit motive); *see also* Individual Complaint, ¶¶ 33-34, 37, 41-55, 88(d)-(e) (same).

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Dated: June 1, 2010

CERTIFICATE OF COMPLIANCE

I, Matthew J.D. Hogan, hereby certify, pursuant to Local Rule 7.8(b)(2), that this brief complies with the word-count limit allowed by the Court by Order dated June 1, 2010 (doc. no. 517). This Court allowed a Common Brief to be filed not to exceed 25 pages or 8,333 words. According to the word-count feature of the word-processing system, the word-count for this brief, excluding the caption and signature block, is 7,443 words.

Dated: June 1, 2010

/s/ Matthew J.D. Hogan
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CERTIFICATE OF SERVICE

I, Matthew J.D. Hogan, do hereby certify that a true and correct copy of the Foregoing Joint Reply Brief in Further Support of Certain Defendants' Motions to Dismiss the Complaints Under Fed. R. Civ. P. 12(b)(6) was filed electronically on this 1st day of June 2010 and is available for viewing and downloading from the ECF system. A copy is also being delivered by ECF or U.S. mail to all counsel of Record and any *pro se* parties.

Dated: June 1, 2010

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