

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

FLORENCE WALLACE, *et al.*,

v.

ROBERT J. POWELL, *et al.*,

WILLIAM CONWAY, *et al.*,

v.

MICHAEL T. CONAHAN, *et al.*,

H.T., *et al.*,

v.

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

SAMANTHA HUMANIK,

v.

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

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

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

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

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

**SUPPLEMENTAL BRIEF OF DEFENDANTS 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)**

Defendants Robert J. Powell (“Powell”) and Vision Holdings, LLC (“Vision”) (collectively “Defendants”) respectfully submit this Supplemental Brief in further support of the Joint Motion to Dismiss the Complaints (“Joint Motion”).¹ The Court should grant Defendants’ motion to dismiss the various claims against Powell and Vision 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 Joint Motion, the Complaints fail to allege that Powell or Vision reached a meeting of the minds with a state actor to deprive the Plaintiffs of their constitutional rights to a tribunal untainted by the probability of actual bias, to counsel, and/or to trial.

I. ARGUMENT

A. The Legal Standard For Pleading Conspiracy Claims Under § 1983 Requires Allegations Of The Personal Involvement Of Each Defendant In The Violation And His/Her Specific Intent To Cause The Constitutional Violation Alleged.

The sine qua non of a claim for civil conspiracy under § 1983 is showing “that two or more conspirators reached an agreement to deprive him or her of a constitutional right ‘under color of law.’” *Leer Elec., Inc. v. Pennsylvania Dept. of*

¹ This brief is limited solely to the allegations that Powell and Vision conspired to deprive plaintiffs of their constitutional rights as alleged in Counts II and IV of the Class Complaint and Counts III, IV, and V of the Individual Complaint.

Labor, 597 F.Supp.2d 470, 484 (M.D. Pa. 2009) (Caputo, J.) (quoting *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 700 (3d Cir. 1993)) (further citations omitted). To make such a showing, a plaintiff must allege each defendant's personal involvement in the violation and his or her specific intent to cause the complained of constitutional violation. *McCleester v. Mackel*, No. 06-120J, 2008 WL 821531, at *11, 14 (W.D. Pa. Mar. 27, 2008); *Wallace v. Fed. Judge of U.S. Dist. Ct.*, 311 Fed. Appx. 524, 525 (3d Cir. Mar. 26, 2008).

Each “defendant must have ‘personal involvement’ in the relevant violations of federal law. . . . Such personal involvement can be shown by ‘allegations of personal direction or of actual knowledge and acquiescence.’” *McCleester*, 2008 WL 821531 at *14 (quoting *Rode v. Dellarciprete*, 845 F.2d 1995, 1207 (3d Cir. 1988)). Thus, it is not sufficient to simply make “conclusory allegations of concerted action . . . devoid of facts actually reflecting joint action.” *Abbott v. Latshaw*, 164 F.3d 141, 148 (3d Cir. 1998); *see also Sershen v. Cholish*, No. 3:07-CV-1011, 2008 WL 598111, at *8 (M.D. Pa. Feb. 29, 2008) (Caputo, J.) (granting motion to dismiss claim of § 1983 conspiracy as to moving defendant, and explaining that “allegations that [defendant] acted ‘under color of state law’ and that it and the other [d]efendants ‘entered into an agreement and combined among themselves and with others to engage in unlawful conduct’ in order to violate [the]

[p]laintiff's constitutional and state common law rights . . . are simply legal conclusions and conclusory assertions.”)

Courts have consistently required specific allegations that a particular individual was both personally involved and had the specific intent necessary to deprive the plaintiff of a constitutional right. *See, e.g., Wallace*, 311 Fed. Appx. at 525 (citing *Fries v. Helsper*, 146 F.3d 452, 458 (7th Cir. 1998)); *see also D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1377 (3d Cir. 1992) (en banc). The simple use of the word “conspired” without providing the facts necessary to demonstrate an actual agreement between a state actor and a private actor to deprive the plaintiff of a constitutional right is not sufficient. *Panayotides v. Rabenold*, 35 F.Supp.2d 411, 420 (E.D. Pa. 1999) (granting motion to dismiss § 1983 conspiracy claim where plaintiff did not sufficiently allege that the judicial defendants took actions due to an agreement to deprive Plaintiff of his constitutional rights). Rather, “[t]o state a claim for conspiracy under § 1983, plaintiff must claim that, ‘[t]he private actor wrongfully influence[d] the state [actor’s] decision. . . .’” *Id.* at 419 (quoting *Spencer v. Steinman*, 968 F.Supp. 1011, 1020 (E.D. Pa. 1997)).

Finally, to survive a motion to dismiss, the Complaint must allege that each co-conspirator “specifically intended to *cause* (or reasonably should have known that their actions would *cause*)” the constitutional deprivation. *McCleester*, 2008

WL 821531, at *14 (emphasis in original). For example, in *McCleester*, the plaintiff alleged that defendants entered into a conspiracy to recommend the plaintiff's suspension and discharge from his job without due process. *Id.* at *12. However, he did not allege that the co-conspirators "specifically contemplated that [plaintiff's] procedural due process right would be violated by the deprivation of food, water and medication for a period of five hours." *Id.* at *13. In dismissing the claim, "the [c]ourt must look to the actual agreement between the conspirators *rather than the unforeseen consequences of that agreement.*" *Id.* at *14 (citing *Nat'l Collegiate Athletic Assoc. v. Tarkanian*, 488 U.S. 179, 197 (1988)) (emphasis added).

B. Neither The Statements In Powell's Guilty Plea Colloquy Nor The Allegations In The Complaints Are Sufficient To Plead A Claim Under § 1983 That Powell Or Vision Conspired To Violate The Plaintiffs' Civil Rights.

Here, the constitutional injuries that the Plaintiffs allege are the deprivation of their rights to a tribunal untainted by bias, the right to counsel, and/or the right to trial by due process. As illustrated below, neither the facts admitted in Powell's guilty plea (and relied on by plaintiffs), nor the factual allegations in the Complaints themselves are sufficient to show that Powell had any intent, let alone the requisite specific intent, to deprive Plaintiffs of any of these specific constitutional rights. To the contrary, both the 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 the facilities.

1. The Admissions In Powell's Guilty Plea Do Not Support An Allegation Or Inference That Powell Specifically Intended To Cause Harm, Or Reasonably Should Have Known That His Actions Would Cause Harm, To Plaintiffs' Civil Rights.

Plaintiffs cannot rely upon the admissions contained in Powell's guilty plea entered in July 2009 as a basis for stating a conspiracy claim against him under § 1983 because neither the elements of crimes with which Powell was charged, nor the admissions he made during his plea colloquy, support a conclusion that Powell knew, condoned, or intended the constitutional violations that are alleged by Plaintiffs.

A guilty plea in a criminal action acts as collateral estoppel only with respect to the facts essential to the elements of the crime to which the defendant pled guilty. *Salvation Army v. Dumont Export Corp.*, No. 85-5685, 1986 WL 11080, at *2-3 (E.D. Pa. 1986). “[T]he court must examine the record of the criminal proceeding and plea colloquy to determine what issues were decided by the guilty plea.” *Id.* at *3 (citing *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 47-50 (3d Cir. 1981); *see also State Farm v. Rosenfield*, 683 F.Supp. 106, 108 (E.D. Pa.

1988). Only those matters *specifically determined* or which were otherwise essential to the determination of guilty will be precluded. *Id.* at *4.

On July 1, 2009, Powell pled guilty to misprision of a felony (wire fraud), 18 U.S.C. § 4, and to being an accessory after the fact (conspiracy to file false tax returns), 18 U.S.C. § 3. *See* No. 03:09-CV-0286, Docket Index No. 134 (M.D. Pa. June 25, 2009), Ex. C (copy of Powell’s Plea); *see also* No. 09-CR-189, Docket Index No. 12 (M.D. Pa. July 1, 2009) (Transcript of Proceedings of Arraignment and Guilty Plea), a true and correct copy of the relevant pages are attached hereto as Exhibit A.²

The elements of misprision of a felony are: (1) the principal committed and completed the felony alleged; “(2) the defendant had full knowledge of that fact [;] (3) the defendant failed to notify authorities [;] and (4) the defendant took steps to conceal the crime.” *United States v. Guishard*, 163 Fed. Appx. 114, 119 (D.V.I. 2006) (citing *United States v. Gebbie*, 294 F.3d 540, 544 (3d Cir. 2002)). Because the felony alleged in relation to Powell’s misprision charge was wire fraud, and not any crime relating to the violation of anyone’s civil rights, the essential facts of the

²The Court Reporter’s Transcript of Proceedings of Arraignment and Guilty Plea, attached hereto as Exhibit A, is an “undisputedly authentic” public record that the Court may properly consider in the context of the motion to dismiss. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, Plaintiffs have pled and attached Powell’s guilty plea to their Complaints. *See* Class Complaint ¶ 696; Individual Complaint ¶ 29 and Exhibit C.

crime did not relate to violations of the civil rights of any individuals appearing in the judicial defendants' courtrooms. Similarly, the elements to accessory after the fact are: (1) someone else committed a crime; (2) the defendant "had knowledge of that crime and of the participation of the other person or persons in the crime"; (3) "with that knowledge of the crime, [the defendant], in some way, assisted the other persons with the specific purpose or plan to hinder or prevent that person's apprehension at trial for punishment." *United States v. Wesley*, 55 Fed. Appx. 47, 49 (3d Cir. 2002). The crime alleged in relation to Powell's accessory charge was conspiracy to file false tax returns, not a conspiracy to violate anyone's civil rights. Accordingly, Powell's guilty plea to the accessory charge also did not admit any essential facts supporting the Plaintiffs' claims.

Powell's plea colloquy also did not contain any admissions that establish the intent necessary to support plaintiffs' § 1983 conspiracy claims. Nowhere in Powell's Plea Agreement or during the course of his plea hearing did Powell ever admit that he had any knowledge or reason to believe that the former judges intended to deprive, or did deprive, any juveniles of their constitutional rights while committing them to various juvenile detention facilities. In fact, the Government stated during Powell's plea hearing that "**there was no knowledge on the part of Mr. Powell that juveniles were being abused by these judges.**" *Id.* at 19 (emphasis added). Thus, the Plaintiffs cannot rely upon Powell's plea

agreement or his plea hearing as a basis for alleging that Powell specifically intended to *cause* (or reasonably should have known that his actions would *cause*) the judges to deprive any plaintiffs appearing before them of any of their constitutional rights.

2. The Allegations In The Complaints Directed To Powell And Vision Also Do Not Support An Allegation Or Inference That Powell Or Vision Specifically Intended To Cause Harm, Or Reasonably Should Have Known That Their Actions Would Cause Harm, To Plaintiffs' Civil Rights.

The averments of the Class Complaint and Individual Complaint also do not allege a plausible claim that Powell or Vision intended to violate, or reasonably should have expected their actions to violate, the rights of the individuals appearing in the judicial defendants' courtrooms. While Plaintiffs do make various allegations against Powell and Vision throughout the two Complaints, they do not allege, and cannot allege, that Powell or Vision specifically intended to deprive the Plaintiffs of their constitutional rights or had any reason to believe that Defendants Conahan or Ciavarella would take the actions that they allegedly did. To the contrary, as in *McCleester*, Plaintiffs' allegations in the Complaint merely support a conclusion that Powell and Vision believed that the payments made 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.

a. The Allegations In The Complaints Relating to Powell Are Insufficient To State A Plausible Claim For § 1983 Conspiracy Against Him.

The allegations in the Complaints against Powell do not amount to a plausible claim that he intended to cause harm, or should have known that he would cause harm, to the Plaintiffs. Indeed, Plaintiffs' own allegations support Powell's view that the payments were required to facilitate the construction and use of the juvenile detention facilities, not as part of any scheme 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, 51.
- 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 ¶¶ 51-54 (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.

Moreover, although the Complaints allege that the payments made to the judges also served other purposes, such as earning fee income, bolstering occupancy rates at the facilities, assisting the judges in concealing income, and even defrauding Luzerne County, they fail to allege that Powell intended to deprive the Plaintiffs of their constitutional rights, and they likewise fail to allege any knowing scheme by Powell to place juveniles into detention under circumstances in which they would otherwise not have been detained. For example, the Complaints allege that:

- The former judges accepted payments from Powell, Vision, and others “in furtherance of the scheme and artifice to *defraud*.” Individual Complaint ¶ 31 (emphasis added).
- The Complaints also contain various allegations of the efforts Powell (through Vision) participated in to conceal the payments. *See* Class Complaint ¶¶ 707-717; Individual Complaint ¶¶ 44-45, 50-59.
- Powell agreed to plead guilty to “knowingly and intentionally cooperat[ing] in the creation of false records designed to hide, disguise, and mischaracterize income received by Ciavarella and Conahan and that Powell transferred tens of thousands of dollars in cash to Conahan with the intent that the cash not be traceable as income.” Class Complaint ¶ 696; *see also* Individual Complaint ¶ 29.

Furthermore, the Individual Plaintiffs admit that Powell made the payment in response to demands by Conahan and Ciavarella and out of fear of retaliation against Powell and his businesses:

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

Thus, by virtue of the Plaintiffs’ own allegations, Powell cannot be found to be a willful participant in any of the alleged joint activities with Conahan and Ciavarella. *See, e.g., McCleester*, 2008 WL 821531 at *11 (holding 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) (A person who is compelled or coerced into acting is not acting willfully).

Accordingly, neither of the Complaints contain any allegations that Powell specifically conspired with anyone to deprive any of the plaintiffs of their constitutional rights.

b. The Allegations In The Complaints Relating to Vision Are Also Insufficient To State A Plausible Claim For § 1983 Conspiracy Against It.

The allegations against Vision in the two Complaints are even more meager than those against Powell. The only allegations in the Class Complaint against Vision are that Vision's accounts were used to conceal payments made to the former judges. Nowhere are there any allegations that Vision conspired to do anything other than facilitate concealment of those payments. For example, the Class Complaint alleges as follows:

- “In addition to these payments, between February 2003 and January 1, 2007, Powell made hundreds of thousands of dollars in concealed payments to Ciavarella and Conahan for their past and future acts relating to [PACC] and [WPACC]. These payments were made through . . . Vision Holdings.” Class Complaint ¶ 662; *see also id.* at ¶ 671 (similar allegation against Powell and Vision).

For their part, the Individual Plaintiffs merely allege in a conclusory fashion that:

- Vision was “a willful participant[] in a joint activity” with the former judges and [was] thus acting under color of state law (Individual Complaint ¶¶ 108, 123, 135); and
- Conahan and Ciavarella accepted payments from Vision in furtherance of the “scheme and artifice to defraud.” Individual Complaint ¶ 31.

As in *McCleester*, *Panayotides*, and *Sershen*, conclusory allegations of this kind are insufficient to establish that Vision specifically intended to deprive any of the Plaintiffs of their constitutional rights.

c. The Complaints' General Allegations Directed To All Defendants Are Also Insufficient To State A Plausible Claim For § 1983 Conspiracy Against Powell Or Vision.

As illustrated above, neither of the Complaints contains any factual allegations that either Powell or Vision specifically understood or agreed that they would participate in a conspiracy in which actions would be taken to deny juveniles of their civil rights. Instead, the Complaints contain a variety of general allegations as to “all defendants” engaging in joint actions or a conspiracy.³ General allegations regarding the purported activities of groups of the defendants do not adequately allege that Powell or Vision reached an agreement with one of the state actors specifically to deprive Plaintiffs of any of their legal rights. *See, e.g., McCleester*, 2008 WL 821531, at *14; *Wallace*, 311 Fed. Appx. at 525. The Complaints do not explain how Powell or Vision was or would have been aware of the activities of the judges within their respective courtrooms or the former judges' treatment of juveniles in their courtroom proceedings. Nor do the Complaints explain why Powell or Vision, in particular, reasonably should have known that their actions would result in the judges depriving the juveniles that appeared before them of their civil rights. As a result, Plaintiffs also cannot rely upon their “group pleadings” against all of the defendants in the Complaints as a basis for asserting

³ *See, e.g.,* Class Complaint ¶¶ 665, 668, 670-71, 673-74, 686, 732-33, 739, 744-46; Individual Complaint ¶¶ 29-30, 35-37, 81, 108-09, 113, 123-24, 109, 124, 135-36, 138.

plausible § 1983 conspiracy claims against Powell or Vision for which relief can be granted.

II. CONCLUSION

For all of the reasons set forth above, and for the reasons set forth in the Joint Motion to Dismiss, 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 the Joint Motion for all of the reasons enumerated in that Motion.

Respectfully Submitted,

Dated: March 22, 2010

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CERTIFICATE OF SERVICE

I, Mark B. Sheppard, Esquire, hereby certify that on this date, the foregoing Supplemental Brief in further support of the Joint Motion to Dismiss the Complaints filed by Defendants Robert Powell and Vision Holdings, LLC (the “Supplemental Brief”) was filed via ECF and served electronically upon counsel of record, and that the Supplemental Brief was also served by U.S. First Class mail, postage prepaid, on the following defendants at the following addresses:

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Dated: March 22, 2010

/s/ Mark B. Sheppard
Mark B. Sheppard, Esquire