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

FLORENCE WALLACE, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 09-cv-286
ROBERT J. POWELL, *et al.*,	:	(Judge Caputo)
	:	
Defendants.	:	
	:	

WILLIAM CONWAY, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 09-cv-291
MICHAEL T. CONAHAN, *et al.*,	:	(Judge Caputo)
	:	
Defendants.	:	
	:	

H.T., *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 3:09-cv-357
MARK A. CIAVARELLA, JR., *et al.*,	:	(Judge Caputo)
	:	
Defendants.	:	
	:	

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

SUPPLEMENTAL MEMORANDUM OF ROBERT MERICLE AND MERICLE CONSTRUCTION, INC. IN SUPPORT OF THEIR MOTION TO DISMISS

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I. INTRODUCTION

The Joint Memorandum in Support of Certain Defendants' Motions to Dismiss the Complaints Under Fed. R. Civ. P. 12(b)(6) ("Joint Memorandum") sets forth, *inter alia*, the legal standards applicable to allegations of conspiracy as applied to Plaintiffs' § 1983 claims, the Individual Plaintiffs' civil conspiracy claim under Pennsylvania law, and to Plaintiffs' conspiracy allegations under § 1962(d) of the RICO statute. *See* Joint Memorandum, pp. 14-17, 59-62, 63-65. Defendants Robert K. Mericle ("Mericle") and Mericle Construction, Inc. ("MCI") (collectively the "Mericle Defendants") join in the statement of legal standards set forth in the Joint Memorandum. The purpose of this Supplemental Memorandum is to address the specific allegations of the Complaints regarding the conduct of the Mericle Defendants. Those allegations are insufficient to state any claim for conspiracy against the Mericle Defendants, or to state a claim for punitive damages against these Defendants.

The Mericle Defendants realize that the narrow issue before the Court in the context of motions pursuant to Fed. R. Civ. P. 12(b)(6) is the sufficiency of the factual allegations of the Complaint, rather than the actual facts themselves. However, part of the process of examining that sufficiency is considering

allegations that do *not* appear in the Complaints, but which are legally necessary to sustain Plaintiffs' claims. It cannot be assumed that facts not alleged may later be proved – as explained in the Joint Memorandum, the Court should not assume in this context that Plaintiffs can prove facts they have not actually alleged, directly or by logical inference. *See* Joint Memorandum, at pp. 5-6.

Relying on dramatic rhetoric, the Complaints attempt in an impressionistic way to paint all defendants with a broad brush of corruption, venality and disregard for the rights of others. Viewed in closer focus, however, the Complaints are insufficient in critical respects with respect to the Mericle Defendants. The Complaints eschew pleading specific facts that pertain to the state of mind of the Mericle Defendants, or that might raise a logical inference on that subject. They allege no facts suggesting that the Mericle Defendants had a genuine motive to cause or hope for violations of juveniles' rights – either rights to counsel or rights to an unbiased tribunal. There is no allegation that the Mericle Defendants were even *aware* of the various financial connections between the other defendants. In short, the Complaints lack direct allegations as to the understanding or interactions of the Mericle Defendants, and they lack allegations from which even an inference on that point might fairly be drawn.

Nothing in the Complaints controverts the observations made by the Government at Mr. Mericle's arraignment[1] that after an extensive criminal investigation into the matters that form the basis of the Complaints, there is "no evidence that Mr. Mericle was aware of the other illegal activities on the part of Mr. Powell and the judges relating to P.A. Child Care and Western P.A. Child Care . . . regarding their placement of juveniles or the payment of kickbacks by Mr. Powell." Arraignment and Plea Hearing Transcript ("Plea Hrg. Tr.") at 15 (Sept. 2, 2009) (attached hereto as Ex. A). Rather, as the government explained, the payment of referral fees are a common and legal practice in real estate transactions of this nature. *Id.* at 17:2-3. They did not constitute a bribe or a kickback. *Id.* at 17:12-13.

Although the Complaints reflect Plaintiffs' awareness of Mr. Mericle's criminal proceeding, and freely rely on the fact that Mr. Mericle entered a guilty plea regarding other matters,[2] they remain silent on the subject of Mr. Mericle's

[1] As this Court recently explained, "[i]n deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint, and matters of public record. The Court may also consider 'undisputedly authentic' documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss." March 1, 2010 Order Denying Class Action Plaintiffs' Second Motion to Amend/Correct Master Complaint for Class Actions (Doc. No. 411).

[2] Mr. Mericle pled guilty to a violation of Title 18, United States Code, Section 4, misprision of a felony because, as the government explained, he "was implicitly aware that the judge[s] would of necessity have intended to falsely characterize

knowledge. In fact, they contain no allegations that even give rise to an inference that the Mericle Defendants had any interest (financial or otherwise) in the alleged deprivation of rights of any juveniles. Rather, the Mericle Defendants built the privately owned juvenile facilities pursuant to arms length contracts with Pennsylvania Child Care ("PACC") and Western PA Child Care ("WPACC"). In connection with those transactions, the Mericle Defendants paid a referral fee that even the government has characterized both as a legal and standard industry-wide practice. Furthermore, the Mericle Defendants had no financial interest in PACC or WPACC or the facilities that were built. They had no involvement or participation in or influence or authority over the placement of juveniles, or in the operation of the facilities. Instead, they were involved only in the actual physical construction of the facilities. In short, there is no causal connection or proximate causation between the construction of the facilities, the payment of the referral fees, and the alleged deprivation of the juveniles' constitutional rights.

The Complaints, through general and conclusory allegations, attempt to depict a tainted environment in which all are guilty, without regard to each

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the nature of their income on their tax returns." Plea Hrg. Tr. at 13:8-11. Mr. Mericle's plea does not speak to Plaintiffs' alleged conspiracy to deprive Plaintiffs of their protected rights. To the contrary, after a lengthy investigation, the government found "no evidence that Mr. Mericle was aware of the other illegal activities on the part of Mr. Powell and the judges relating to P.A. Child Care and Western P.A. Child Care, that is regarding their placement of juveniles or the payment of kickbacks by Mr. Powell." *Id.* at 15:16-20.

individual defendant's actual conduct or state of mind, but that is not enough. As explained below, the specific allegations regarding the Mericle Defendants are insufficient to withstand Defendants' Motion to Dismiss both as to conspiracy allegations and with respect to any claims for punitive damages.

II. ARGUMENT

A. Plaintiffs Fail To Plead Adequately That The Mericle Defendants Participated In A Conspiracy To Deprive Juveniles Of Their Constitutional Rights, Or In Any Civil Conspiracy Under Pennsylvania Law.

As set forth in the Joint Memorandum, Plaintiffs' obligation as to pleading a conspiracy for purposes of § 1983 requires an averment of facts (as opposed to legal conclusions). These factual allegations, however phrased, must logically suggest that those alleged to have conspired with a state actor "came to a mutual understanding to do the act that violated" plaintiffs' legal rights and that the alleged co-conspirators "specifically intended to *cause* (or reasonably should have known that their actions would *cause*)" the deprivation of rights alleged. *See* Joint Memorandum at pp. 16-17. The Complaints simply fail to make this factual allegation as to the Mericle Defendants, directly or inferentially, regarding Plaintiffs' alleged Constitutional deprivations.

1. The Allegations As To The Knowledge Or Understanding Of Mr. Mericle Or MCI Are Insufficient.

The Complaints collectively contain some 50 paragraphs that specifically mention the Mericle Defendants, but only a handful of those paragraphs make

specific averments relevant to what the Mericle Defendants understood, or what they knew or could have known, about actions taken by state actors that might constitute deprivations of legal rights. There are no allegations as to where such knowledge of the intent of the alleged conspiracy might have come from or any motive the Mericle Defendants would have to participate in a scheme intended to deprive juveniles of their rights. Nor do the Complaints allege supporting facts that would make any such allegations plausible.

The Individual Complaint alleges in conclusory fashion that the Mericle Defendants were "willful participants in joint activity with Defendants Conahan and Ciavarella;" it also alleges as a conclusion that various defendants (including the Mericle Defendants) "conspired to commit unlawful acts" and that such defendants collectively "knew or should have known that the natural consequences" of the unidentified unlawful acts "would result in juvenile plaintiffs being unlawfully detained . . . ." (Individual Complaint ("IC"), ¶¶ 108, 161, 163.)

The Class Complaint contains even less information regarding what the Mericle Defendants assertedly understood or whether they shared a common purpose with a state actor to deprive juveniles of their legal rights. It alleges that several defendants, including Robert Mericle, entered into agreements for constructing and guaranteeing placements in the PACC and WPACC "in return for concealed payments" and that *Powell* "understood the payments to be a *quid pro*

quo for the judges' exercise of their judicial authority. . . ." (Class Complaint ("CC"), ¶¶ 656, 700.) No parallel allegation appears as to the actual knowledge of the Mericle Defendants.[3]

Indeed, it is telling that the Complaints not only fail to allege specific facts to support the conclusion that the Mericle Defendants conspired with the judges and other defendants to deprive juveniles of their Constitutional rights, but also conveniently ignore key portions of the public record regarding the resolution of Mr. Mericle's criminal case to which they referred. The Complaints mention nothing of the fact that after an extensive investigation federal prosecutors and investigators determined that the payments made by Mr. Mericle were part of a legal industry-accepted practice, rather than a quid pro quo relationship with the

[3] Based on the following exchange between Judge Kosik and the prosecutor, the failure of the Complaints to include a parallel allegation against Mr. Mericle does not appear to be an accident or mere oversight.

> **The Court:** "What you're suggesting is that any relationship Mr. Mericle had to the juvenile centers that were constructed by him or his company was entirely different than any relationship that may have existed between Mr. Powell and the two judges that you were referring to; is that correct?"
> **Mr. Zubrod:** "That's correct, Your Honor. In fact, Mr. Powell was paying money and he understood it to be a quid pro quo that he would not get juveniles anymore if he didn't pay up the money. And he paid over $700,000 for that purpose."
> **The Court:** "I want to emphasize that distinction because it's my recollection that in the case of the two judges you represented that there was a quid pro quo between Mr. Powell and between the judges. That is not the case – in this instance; is that correct?"
> **Mr. Zubrod:** "That's correct Your Honor. There's no quid pro quo."

Plea Hrg. Tr. at 19:4-19.

judges, and that there was no evidence that Mr. Mericle was aware of any illegal activities relating to the payment of kickbacks to the judges in connection with the placement of juveniles at PACC or WPACC. *See* Plea Hrg. Tr. at 15:16-20.

Specifically, during Mr. Mericle's arraignment and plea hearing, the Assistant U.S. Attorney represented to the Court that the government:

> spent an extensive amount of time both investigating and researching the law in this area [payment of referral fees]. Referral fees are a common place practice. They are legal practice in real estate and in the building market… .
>
> This is not a kickback or a bribe in any sense. It is a common practice. It is not a[n] [il]legal quid pro quo. It is a common practice between businessmen in real estate transactions. Mr. Mericle simply paid a finder's fee to the judge in accordance with standard practice. To him, his payment of the fee was what he had done hundreds of times before and was not related to the office that the judges held or any decision by the judges. He had contracted with a private party, Mr. Powell, to build a business – a private business. The judges steered Mr. Powell to Mr. Mericle because he can build the building cheaper than anyone else. In fact, he was the lowest bidder. That is why Mr. Powell chose him. Had Mr. Powell [Mericle] simply paid the finder's fee and given the money to Robert Powell to distribute as directed by Mr. Ciavarella, there would have been no prosecution of Mr. Mericle. He had no knowledge of what happened to the money once he gave it to Mr. Powell. He did know that the money ultimately was going to go to Judge Ciavarella and later found out it was going also to Judge Conahan. The crime came when the Internal Revenue Service approached Mr. Mericle and asked about the finder's fee. Mr. Mericle failed to disclose to the I.R.S. that he knew that the money was intended to be paid to Judge Ciavarella.

Plea Hrg. Tr. at 16:25-17:4, 17:2-18:10. It is not surprising then that the critical allegations that do *not* appear anywhere in either Complaint are plain factual allegations that the *Mericle Defendants* understood that constitutional rights were

to be violated, when they knew it, and/or whether they understood money was to be provided to the judges as "a *quid pro quo*" for judicial action relating to the juveniles that appeared before former judge Ciavarella. The conclusory allegations that appear instead are insufficient. As explained in the Joint Memorandum (pp. 4-5), the allegations in the Complaints as to the Mericle Defendants are the very type of conclusory allegations deemed insufficient by the Supreme Court in *Twombly* and *Iqbal*. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

2. The Allegations Are Insufficient To Support A Conspiracy For Purposes Of § 1983 Such That The Mericle Defendants Might Be Liable For The Conduct Of "State Actors."

a. The Individual Complaint

The allegations in the Individual Complaint that the Mericle Defendants were "willful participants in joint activity with Defendants Conahan and Ciavarella" and "knew or should have known that the natural consequences" of "unlawful acts" was that juveniles would be "unlawfully detained" are, as to the first averment, too vague to make the Mericle Defendants conspirators as to Ciavarella's conduct in his courtroom. The allegation that the Mericle Defendants engaged in "joint activity" with Ciavarella and Conahan may refer only to the construction of detention facilities (which was not unlawful) or the alleged concealment of referral fees paid; the reference to "joint activity" does not speak

directly to alleged Constitutional deprivations, and no allegation in the Individual Complaint supports that factual leap. An allegation that is consistent with lawful conduct does not suffice to state a claim.

The separate, additional allegation that the Mericle Defendants "should have known" that juveniles would be "unlawfully" detained has no logical footing; even assuming that the Mericle Defendants understood that some juveniles would be adjudicated delinquent and "detained," the Complaint suggests no basis for alleging that the Mericle Defendants should have known that some or all of those detentions would be "unlawful." Nor is there anything contained in the Complaints to suggest that the Mericle Defendants had any reason to suspect that they were doing anything other than building a new, state-of-the-art facility to replace Luzerne County's old and outdated River Street juvenile facility.[4] No fact

[4] It is important to note that the Mericle Defendants entered into contracts to ***build*** the PACC and WPACC facilities and built the state-of-the-art PACC facility as a ***replacement*** for an older, outdated, and reportedly dilapidated juvenile detention facility in Luzerne County. There are no allegations that the Mericle Defendants had any interest in the facilities' operations or had any financial stake in whether the facilities were filled or remained empty following the completion of their construction. As such, the payment of legal, industry-accepted and customary referral fees cannot reasonably be viewed as putting the Mericle Defendants on notice that Ciavarella might engage in illegal conduct in his courtroom by allegedly systematically denying juveniles of their constitutionally protected rights. The Mericle Defendants had no reason to know (either while the old River Street facility was being used or after the construction of the new PACC and WPACC facilities) of the manner in which Ciavarella operated his courtroom, whether Ciavarella adhered to juvenile state court procedural rules and/or whether

alleged in the Individual Complaint suggests that excessive numbers of adjudications, let alone "unlawful" detentions, were necessary to justify the construction of a new replacement facility in Luzerne County and/or the new facility in Butler County, or otherwise to achieve any objective the Mericle Defendants might logically have had. The Court should not assume that Plaintiffs intend to prove (or could prove) such an allegation, because they have not *made* that allegation. Fairly read, the Individual Complaint does not allege as a fact – and does allege facts from which the inference can logically be drawn – that the Mericle Defendants "came to a mutual understanding" to deprive juveniles of their legal rights, and it does not allege facts pointing to the conclusion that the Mericle Defendants "should have known" that would happen. In short, the Individual Complaint fails to allege facts necessary for the Mericle Defendants to be liable under § 1983.

b. The Class Complaint

As noted above, even though the Class Complaint may allege that other defendants "understood" that "concealed payments" would be made to judges as "a quid pro quo for the judges' exercise of their judicial authority," no such allegation is made regarding the knowledge or understanding of the Mericle Defendants. As

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he complied with constitutional safeguards, and the Complaints contain no allegations to the contrary.

to the Mericle Defendants, the conspiracy allegations are different; specifically, the Class Complaint alleges that two unnamed parties, one of whom Plaintiffs "presumed" was Robert Mericle, agreed to conceal payments in exchange for assurances that Ciavarella would refer juveniles to PACC and WPACC. CC, ¶ 695. Even accepting this allegation as true for purposes of this Motion, an understanding that facilities would be used by Luzerne County is not the equivalent of an understanding that Constitutional rights would be violated in Judge Ciavarella's courtroom. Giving the Class Complaint a broad reading, it nevertheless simply fails to allege, directly or by logical implication, facts to support either (a) that the Mericle Defendants reached a "mutual understanding" that juveniles' rights would be violated in Ciavarella's courtroom, or (b) that the Mericle Defendants should have known that would happen, based on what they are alleged to have known. As with the Individual Complaint, the Class Complaint fails to make the allegations necessary to bring the Mericle Defendants into a conspiracy to violate Constitutional rights, as would be necessary for claims brought under § 1983.

3. The Allegations As To The Mericle Defendants Are Insufficient To State A Claim For Civil Conspiracy.

The precise focus of the "Civil Conspiracy" count of the Individual Complaint is somewhat unclear. Under Pennsylvania law, there is no free-standing tort of conspiracy; rather, there must be some additional independently wrongful

act for liability to attach. A claim of civil conspiracy requires either agreement "with intent to do an unlawful act" or intent "to do an otherwise lawful act by unlawful means." *See Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979). The Individual Complaint is ambiguous as what "unlawful acts" it makes reference to with respect to the Civil Conspiracy claim in Count VIII, alleging only that such "unlawful acts" "include[d] but [are] not limited to providing kickbacks and/or bribes" to Conahan and Ciavarella. For purposes of this Motion, the Mericle Defendants assume that the Civil Conspiracy Count of the Individual Complaint proceeds on the legal theory that the defendants identified in connection with that claim conspired to provide "kickbacks" and "bribes."

Lacking from the Individual Complaint is an allegation that the Mericle Defendants specifically intended to harm juveniles. As explained in the Joint Memorandum, a claim for civil conspiracy under Pennsylvania law requires a demonstration that the "sole purpose" of the alleged conspiracy was to harm plaintiffs. *See* Joint Memorandum at pp. 63-64 (citing, *inter alia, Thompson Coal*, 412 A.2d at 472). No such allegation appears in the Individual Complaint as to the Mericle Defendants, and the Civil Conspiracy claim of that Complaint (Count VIII) should therefore be dismissed.[5]

[5] Indeed, as explained in the Joint Memorandum, the Individual Complaint contains allegations that affirmatively suggest that injuring juveniles was not the "purpose" of the alleged conspiracy at all.

B. The Complaints Fail To Allege Sufficiently A RICO Conspiracy.

As explained in the Joint Memorandum (pp. 58-59), a RICO conspiracy under 18 U.S.C. § 1962(d) requires allegations of a conspiracy to violate some other part of the RICO statute (here, §§ 1962(b) and (c)). The Complaints in this case must allege facts to at least raise an inference that the Mericle Defendants' reached an agreement and had the necessary knowledge to do so. *See* Joint Memorandum, at pp. 59-61. Each Complaint must therefore contain factual allegations, in some form, logically suggesting that the Mericle Defendants knowingly acted with others to acquire an interest in (or control of) a RICO "enterprise" through a pattern of predicate acts (*see* 18 U.S.C. § 1962(b)), or knowingly acted with others to operate a RICO "enterprise" through a pattern of predicate acts (*see* 18 U.S.C. § 1962(c)).[6]

Here, the Complaint alleges nothing more than the conclusion that the Defendants generally "conspired with one another to commit the violations of § 1962 alleged herein." (IC, ¶ 99; *see also* CC, ¶¶ 771, 772.) No facts appear to form a basis for this conclusion. Allegations that the Mericle Defendants paid money that ended up with judges, and failed to disclose such payments, are not tantamount to allegations of a RICO conspiracy (or, for that matter, allegations of RICO predicate acts).

[6] The Individual Complaint also appears to seek punitive damages in connection with the claim for Civil Conspiracy under Pennsylvania law asserted therein.

C. The Complaints Fail to Allege Sufficiently a Claim for Punitive Damages

Plaintiffs have also asserted a claim against the Mericle Defendants for punitive damages in connection with their § 1983 claims.[7] If alleged properly and proved accordingly, punitive damages may be available in connection with claims pursuant to 42 U.S.C. § 1983. However, punitive damages "are not a favorite of the law." *Cochetti v. Desmond*, 572 F.2d 102, 105 (3d Cir. 1978). Rather, courts reserve punitive damages for cases in which the defendant's conduct constitutes more than a Constitutional violation. *Id.* at 106. The Third Circuit precedent requires strict focus on the particular defendant's knowledge concerning his own conduct. The Third Circuit specifically adopted a test for punitive damages for alleged civil rights actions enunciated by Justice Brennan, "requiring that the defendant acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so . . . ." *Id.*

Because these are the prerequisites of a claim for punitive damages, they must be pleaded with sufficient particularity in the complaint. *See, e.g.*, *Morrin v. Torresdale Frankford Country Club*, Civ. No. 07-5527, 2008 U.S. Dist. LEXIS 45951 (E.D. Pa. June 11, 2008) (dismissing punitive damages claim where a

[7] Although certain plaintiffs appear to have filed a free-standing claim for Civil Conspiracy, they simply allege that the defendants knew or should have known that the natural consequence of the alleged unlawful acts would cause the listed injuries to the parents. As explained above, such a conclusory allegation is simply insufficient to support a claim for punitive damages.

plaintiff did not "specifically allege the elements required for the award of punitive damages under any theory."). Nonetheless, the plaintiffs have failed to allege *any* facts that lead to an inference that either of the Mericle Defendants possessed "actual knowledge" of a violation of any federally protected rights of juveniles appearing before Ciavarella. Nor have the plaintiffs alleged any facts that even suggest that the Mericle Defendants acted recklessly with respect to the rights of any juveniles. Instead, the plaintiffs have alleged, or ask the Court to infer, that all of the defendants collectively knew or should have known that Ciavarella was or might be violating the rights of juveniles. *See, e.g.*, IC, ¶ 136 (alleging generally that "[a]ll Defendants, while acting under color of state law, 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 . . . .") and ¶ 138 (alleging that "Defendants knew or should have known and acted with deliberate indifference to the fact that the actions of Defendants CONAHAN AND CIAVARELLA created the potential for an increased number of juveniles to be sent to PACC and/or WPACC"). Under the pleading standards required by *Iqbal* and *Twombly*, such conclusory allegations are insufficient to support a claim for punitive damages specifically against the Mericle Defendants.

In the context of this case, in order to assert a claim for punitive damages against either of the Mericle Defendants, plaintiffs must allege facts that would lead to an inference that the Mericle Defendants acted maliciously or wantonly in violating the plaintiffs' rights. *See* Model Jury Instructions for the Third Circuit, Instructions for Civil Rights Claims Under Section 1983, § 4.8.3, Section 1983 – Damages – Punitive Damages (stating that "[y]ou may only award punitive damages if you find that [defendant] [a particular defendant] acted maliciously or wantonly in violating [plaintiff's] federally protected rights.").[8] Furthermore, the model jury instructions for the Third Circuit require a fact specific inquiry with respect to *each* defendant's conduct before punitive damages would be permitted. *See id.* (stating, "[y]ou must make a separate determination whether each defendant acted maliciously or wantonly.").[9]

The Complaints do not allege that the Mericle Defendants acted with ill will or spite towards any of the Plaintiffs, or that either of them recklessly and callously disregarded juveniles' rights. Plaintiffs do not allege any facts from which a reasonable inference could be drawn that either of the Mericle Defendants had any

[8] The model jury instructions state, "[u]se 'a particular defendant' and 'against that defendant' in cases involving multiple defendants." *Id*. at n. 115.

[9] The model jury instructions define the term "malicious" to mean a violation of rights that "was prompted by ill will or spite towards the plaintiff" and the term "wanton" to mean conduct committed by the defendant that "recklessly disregarded the plaintiff's rights."

actual understanding that Ciavarella would violate the rights of juveniles or any reason to believe that he would do so. The Mericle Defendants believe plaintiffs have grossly distorted the facts concerning the construction and development of the facilities; however, even accepting all of the allegations in the Complaints as true, Plaintiffs have at most alleged the Mericle Defendants concealed the referral fees paid in connection with the construction and expansion of the detention facilities. Plaintiffs have not alleged any facts to suggest that the Mericle Defendants understood that Ciavarella or Conahan would benefit financially based on the number of juveniles held in any of those facilities, or that Ciavarella or Conahan would violate the rights of juveniles in order to increase the use of the facilities. Absent factual allegations that would suggest such knowledge or understanding on the part of either of the Mericle Defendants, plaintiffs have failed to adequately plead a claim for punitive damages against the Mericle Defendants. As a result, the claim for punitive damages against the Mericle Defendants should be dismissed.

III. CONCLUSION

As the Court noted in considering Plaintiffs' Motions to Amend the Complaints to include allegations regarding Luzerne County:

> There are no factual allegations as to what the commissioners knew, or perhaps more importantly when they knew it. Without any such allegations, the factual allegations are insufficient to support the argument that the Luzerne County Commissioners ratified conduct of Conahan.

Nov. 20, 2009 Mem. at 31 (Doc. 335).

The same principles apply here. There are no factual allegations as to what the Mericle Defendants knew regarding the actions taking place in Judge Ciavarella's courtroom. Nor are there any allegations regarding the Mericle Defendants' motive to participate in a scheme for the purpose of depriving juveniles of their rights. The factual allegations against the Mericle Defendants are therefore insufficient to support a claim that they participated in any conspiracy – with a state actor or otherwise – to deprive juveniles of their protected rights.

Respectfully submitted,

Dated: March 22, 2010

/s/ Joseph B.G. Fay

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