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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

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

I. INTRODUCTION

The "Master Complaint for Class Actions" ("Class Complaint") and the "Individual Plaintiffs' Master Long Form Complaint" ("Individual Complaint") (together, the "Complaints") consist largely of characterizations of facts that are at best remotely relevant to Plaintiffs' legal claims.[1] This lack of focus cannot insulate the Complaints from challenge, because in light of controlling law they fail to allege, with the requisite specificity, the facts necessary to sustain Plaintiffs' claims. The legal elements of those claims are well-settled, and Plaintiffs have failed to plead those elements in a manner sufficient to state any claims upon which relief can be granted.

This Memorandum addresses legal issues common to numerous defendants.[2] Each Moving Defendant may also file a brief separate memorandum addressing the allegations of the Complaints specific to that defendant.

[1] Fed. R. Civ. P. 8(a) provides that a complaint "must contain" "a short and plain statement of the claim. . . ." Fed. R. Civ. P. 8(a)(2). The Complaints (which collectively total over 250 pages) arguably fail to comply with this Rule, as they are far from plain, and certainly not short.

[2] The undersigned defendants (collectively the "Non-Judicial Defendants"), join in this Memorandum and adopt the arguments to the extent that the arguments are addressed to claims asserted against the relevant Non-Judicial Defendant.

II. SUMMARY OF ARGUMENT

In both the Individual Complaint and the Class Complaint, Plaintiffs allege that certain Defendants engaged in activity or conspired to engage in activity that constituted violations of 42 U.S.C. § 1983 and of the Racketeering Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§ 1961, *et seq.*). The Individual Complaint also contains an allegation that certain Defendants entered into a civil conspiracy generally. Plaintiffs claim that, as a result of this alleged conduct, they are entitled to, *inter alia*, compensation for costs, fines and fees associated with juvenile adjudications, emotional distress, etc. However, as explained in detail in this and accompanying briefs, Plaintiffs' Complaints fail to properly plead their claims for relief against the Non-Judicial Defendants, and, those claims should be dismissed.

All Plaintiffs have failed to plead the necessary elements to support their claims pursuant to 42 U.S.C. § 1983. The Juvenile Plaintiffs, who are seeking compensation for their adjudications and/or placements, are required by controlling precedent to demonstrate a favorable termination consistent with actual innocence and a lack of probable cause in order to seek such an award. Not a single Plaintiff has pleaded such a termination. Plaintiffs have also failed to plead properly that the injuries they allege were caused by the constitutional deprivations they assert, and they fail to allege facts under which non-judicial actors could be liable

pursuant to § 1983. The Parent Plaintiffs, who also seek damages in the Individual Complaint in association with the juvenile adjudications, also fail to plead § 1983 claims upon which relief could be granted. The Parent Plaintiffs either seek damages that are derivative of the juveniles' claims or bring claims directly for interference with familial relations. Neither iteration of the Parent Plaintiffs' claims is cognizable in this Circuit.

Plaintiffs have likewise failed to plead their RICO claims properly for the following reasons:

- Juvenile and Parent Plaintiffs lack standing to bring RICO claims because the alleged RICO violations are not the proximate cause of the harm they allege.
- Juvenile Plaintiffs lack standing to bring RICO claims because they have not alleged an injury that is cognizable under RICO.
- Individual Plaintiffs' have failed to plead that the alleged RICO enterprise and RICO persons are distinct.
- Individual and Class Plaintiffs have actually pleaded facts that ***negate*** the requirements of an association-in-fact RICO enterprise.
- Class Plaintiffs have failed to allege that the Defendants gained control of an enterprise through a pattern of racketeering, and the Plaintiffs have not alleged how they were harmed by the Defendants allegedly gaining of control of the alleged enterprise.
- All of the Plaintiffs' RICO conspiracy claims should be dismissed because (1) the Plaintiffs fail to allege a plausible RICO conspiracy to violate their federally-protected rights, (2) they fail to allege properly that any purported conspiracy was the cause of their alleged harm, and (3) the underlying allegations do not set forth a valid claim for a RICO violation.

Finally, the Individual Plaintiffs' claims for damages arising from a purported civil conspiracy fail because the Plaintiffs have not alleged facts against the Non-Judicial Defendants that the defendants' conspiracy to injure the plaintiff was done with ***malice*** towards the Plaintiffs. Therefore, as explained in detail below, Plaintiffs' claims against the Non-Judicial Defendants should be dismissed with prejudice.

III. ARGUMENT

A. The Standard for Evaluating Motions Under Fed. R. Civ. P. 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must make allegations with sufficient factual detail under Rule 8(a) that, if those allegations were assumed to be true, the Court could reasonably infer liability. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). Dismissal is appropriate if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556); *see also Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993) (requiring a complaint to set forth information from which each element of a claim may be inferred). "Where a

complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 557).

In light of Fed. R. Civ. P. 8(a)(2), the complaint must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (*per curiam*) (quoting *Twombly*, 550 U.S. at 555). A complaint that alleges mere "'labels and conclusions,'" "'a formulaic recitation of the elements of a cause of action,'" or "'naked assertion[s]' devoid of 'further factual enhancement'" will not suffice. *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. 555, 557). A plaintiff "must allege sufficient facts and **must state all the material elements** for recovery under the relevant legal theory." *Collins v. Chichester Sch. Dist.*, Civ. No. 96-6039, 1997 U.S. Dist. LEXIS 10532, at *3 (E.D. Pa. July 22, 1997) (emphasis added) (citations omitted).

In deciding a motion to dismiss, the Court properly considers the allegations in the complaint, exhibits attached to the complaint, and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). 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. *Id.* The Court need not assume the plaintiff can prove facts that were not alleged in the

complaint, *see City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 n.13 (3d Cir. 1998), or credit a complaint's "'bald assertions'" or "'legal conclusions,'" *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997)). "While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal*, 129 S. Ct. at 1950.

B. Plaintiffs Have Failed to State Claims Cognizable Under 42 U.S.C. § 1983 Against Any Non-Judicial Defendant.

1. The Nature Of Plaintiffs' Claims Under § 1983.

The Class Complaint asserts two claims under 42 U.S.C. § 1983 against the non-judicial defendants, Count II and Count IV. Count II, alleging a deprivation of the procedural Due Process right to a tribunal untainted by "probability of actual bias" (*see Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. __, ___, 129 S.Ct. 2252, 2265, (U.S. June 8, 2009)), is asserted on behalf of a putative class of juveniles designated "Class A"; Count IV, based on an alleged conspiracy to deprive certain Plaintiffs of their Sixth Amendment right to counsel and/or their procedural right to a trial (absent a knowing and voluntary waiver of that right) is asserted on behalf of a different group of juveniles, "Class A1."[3] Both Counts

[3] "Class A" includes all juveniles adjudicated delinquent or referred to placement, while "Class A1" includes all such juveniles who appeared without counsel, or

cover the time period from 2003 to 2008. As to each Count, Plaintiffs seek compensatory damages, punitive damages, prejudgment interest, costs of suit, attorneys' fees, disgorgement and restitution. *See* Class Complaint, Prayer for Relief (p. 182).

The Individual Complaint asserts three claims under § 1983 -- Count III, Count IV and Count V.[4] Only Count III is asserted on behalf of juvenile plaintiffs, alleging a deprivation of "substantive and procedural" Due Process. Counts IV and V, asserted on behalf of "parent plaintiffs," allege a "deprivation of rights" and a "deprivation of substantive due process rights," respectively. As with the Class Complaint, the relief sought includes compensatory and punitive damages.

Although the statute defines its reach only in very general terms, "[t]he Supreme Court has 'repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.'" *Hector v. Watt*, 235 F.3d 154, 155 (3d Cir. 2000) (quoting *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (citations omitted)). Therefore, "the common law of torts, 'defining the elements of damages and the prerequisites for their recovery, provides the appropriate starting point for inquiry under § 1983 as well." *Id*. (quoting *Heck*, 512 U.S. at 483) (quoting in turn *Carey v. Piphus*, 435

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without record colloquies as to their right to counsel. The Class Complaint does not appear to assert § 1983 claims on behalf of parents or guardians.

[4] These claims are asserted against all defendants identified in the Individual Complaint except Luzerne County and Andromeda House. The Individual Complaint also asserts separate § 1983 claims against these two defendants.

U.S. 247, 257-58 (1978)). "Given the Supreme Court's mandate that we look to similar common-law causes of action" (*Hecter*, 235 F.3d at 156), the Court must determine whether tort principles historically provided recovery for injuries to interests similar to the injuries raised by Plaintiffs' § 1983 claims. If so, the Court should then look to the elements of the most closely analogous tort to determine the elements of the parallel claim under § 1983.

As demonstrated by the Supreme Court's analysis in *Heck*, the central criterion for identifying the most closely analogous tort is the alleged injury for which relief is sought. In *Heck*, the plaintiff challenged the constitutionality of the process that caused him to be sentenced to prison, and he sought compensatory and punitive damages. *See Heck*, 512 U.S. at 479. Faced with the task of providing structure for the plaintiff's § 1983 claim, the Court explained:

> The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. . . .[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."

Heck, 512 U.S. at 484 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER AND KEETON ON LAW OF TORTS 887-888 (5th ed. 1984) (footnotes omitted)) (further citation omitted).

Plaintiffs' § 1983 claims in this case, like those presented to the Supreme Court in *Heck*, seek compensation for the costs associated with assertedly wrongful imprisonment or detention. *See, e.g.*, Class Complaint ¶ 210 ("B.W.'s father was ordered to and paid $3,500 to the court to cover the costs of his placements in various facilities"), ¶ 218 (reciting costs of placement), ¶ 234 (recounting "restitution, fines and probation fees"); *see also* Prayer For Relief, ¶¶ 3, 4 (seeking compensatory and punitive damages).[5] As was the case in *Heck*, the appropriate common-law analog for analyzing Plaintiffs' § 1983 claims is malicious prosecution. Looking to the traditional elements of malicious prosecution, Plaintiffs' § 1983 claims (like the claim in *Heck*) must fail.

2. The Class Complaint Fails to Allege the Necessary Elements of Plaintiffs' § 1983 Claims.

"One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484 (citation omitted). Additionally:

> To prove malicious prosecution under § 1983, a plaintiff must show that:
> (1) the defendants initiated a criminal proceeding;
> (2) the criminal proceeding ended in plaintiff's favor;
> (3) the proceeding was initiated without probable cause;
> (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and

[5] The Individual Complaint seeks similar relief. *See, e.g.*, Individual Complaint ¶¶ 114, 126, 139.

> (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.

Kossler v. Crisanti, 564 F.3d 181, 186 (3d Cir. 2009) (*en banc*) (quoting *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003)). In this case, the critical elements are numbers (ii) and (iii) in the *Kossler* formulation because Plaintiffs have failed to allege that their criminal proceedings terminated favorably within the meaning of *Kossler*, or that those proceedings were initiated without probable cause.

a. Favorable Termination

The Court of Appeals noted in *Kossler* 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." *Kossler*, 564 F.3d at 187 (citing *Donahue v. Gavin*, 280 F.3d 371, 383 (3d Cir. 2002); *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005) (holding expungement not sufficient to establish favorable termination)) (footnote omitted). Plainly stated, "a plaintiff claiming malicious prosecution must be innocent of the crime charged in the underlying prosecution." *See Hector*, 235 F.3d at 156. Here, very few Plaintiffs have to date *alleged* a favorable termination of *any* kind, much less a disposition of their state court proceeding "that indicates the innocence of the accused." *Kossler*, 564 F.3d at 187. More importantly, even if the vast majority of

Plaintiffs' state court adjudications (and consent decrees) are ultimately expunged, as contemplated by the Pennsylvania Supreme Court's order dated October 29, 2009,[6] Plaintiffs will still be unable to allege "favorable terminations" within the meaning of *Kossler* and the decisions it relies upon.

Nothing in the Pennsylvania Supreme Court's October 29th Order remotely suggests that Plaintiffs were innocent of the actions that caused them to be adjudicated delinquent. Indeed, nothing in that Order even implies that the sentences of particular juveniles were excessive, in light of what those individuals did, or speculates about sentences other judges might have imposed for such conduct. Nothing in that Order suggests that unrepresented juveniles might have been sentenced differently had they been represented by counsel.

Rather than being concerned with (or attempting to identify) potential injustices suffered by particular juveniles, in light of all the facts surrounding their arrests, the Pennsylvania Supreme Court was concerned about the taint surrounding the proceedings as a whole. It concluded that "given the nature and extent of the taint, this Court simply cannot have confidence that *any* juvenile matter adjudicated by Ciavarella during this period was tried in a fair and impartial manner." October 29th Order at 7. Therefore, the Pennsylvania Supreme Court

[6] The Non-Judicial Defendants believe that the Pennsylvania Supreme Court's October 29th Order, attached hereto as Exhibit A, is an "undisputedly authentic" public record that the Court may properly consider in the context of their motions to dismiss.

"award[ed] the relief suggested by Judge Grim in the interest of justice. . . ." *Id.* at 8. It did not conclude or even suggest – and Judge Grim did not conclude or suggest – that any particular Plaintiff was "actually innocent" or even improperly sentenced.

Here, where Plaintiffs seek compensation in the form of damages associated with being adjudicated delinquent, they cannot go forward under § 1983 absent a determination from the state court system suggesting that the facts of their conduct were such that they should not have been adjudicated delinquent. Plaintiffs do not plead such determinations (and it does not appear they will ever be able to do so). Their § 1983 claims based on their detentions should therefore be dismissed.

b. Probable Cause

The Court need not consider the question of probable cause unless § 1983 plaintiffs first meet the "favorable termination" requirement. *See Kossler*, 564 F.3d at 194.[7] However, even if Plaintiffs alleged or could allege "favorable determinations," they fail to allege that the charges against them in state court lacked probable cause.

The standard for probable cause in the context of § 1983 claims is the same as other contexts. *See Kossler*, 564 F.3d at 194-95 (citing *Wilson v. Russo*, 212

[7] *Kossler* also notes, however, that the Court of Appeals did "not intend to suggest that the favorable termination element should always be addressed prior to the probable cause element." *Id.* at 194.

F.3d 781, 789 (3d Cir. 2000) for the proposition that probable cause exists "if there is a 'fair probability' that the person committed the crime at issue."). Nowhere in either Complaint does any Plaintiff allege that any juvenile arrest lacked probable cause; the averment does not even appear as an unadorned legal conclusion, much less as an allegation accompanied by sufficient facts (as to any plaintiff) to give it adequate substance. For this reason as well, Plaintiffs have failed to assert § 1983 claims upon which relief can be granted in connection with their detentions.

3. Plaintiffs Fail to Allege Injury by Reason of the Constitutional Deprivations They Assert.

Even if Plaintiffs could properly plead the elements of a § 1983 claim sounding in malicious prosecution as contemplated by *Kossler*, or evade the requirements outlined therein, the Complaints still fail to allege any facts to suggest a "but-for" causal relationship between any of the Constitutional violations they allege and the harm for which they seek recovery. Plainly put, Plaintiffs do not plead basic causation with respect to their § 1983 claims. Nowhere does any Plaintiff allege that if she or he had faced an unbiased judge (or, more precisely, a judge whose financial interests did not create a possibility of bias), the sentence imposed on that Plaintiff would have been different. Nowhere does any Plaintiff plead that with representation by counsel, he or she would have been sentenced differently. No Plaintiff alleges that if properly informed of the right to trial, he or she would have exercised that right and/or would not have been sentenced in the

same way (indeed, no plaintiff even pleads that he or she was actually unaware of the right to counsel). The Complaint is bereft of these basic factual allegations with respect to the § 1983 claims asserted therein.

As noted by the Court in *Carey v. Piphus*, "[r]ights, constitutional and otherwise, do not exist in a vacuum." 435 U.S. at 254. Two critical questions are (1) whether Plaintiffs actually engaged in the conduct that caused them to be adjudicated delinquent and (2) how they would have been sentenced by a judge other than Ciavarella. "Where the deprivation of a protected interest is substantively justified but procedures are deficient in some respect, there may well be those who suffer no distress over the procedural irregularities." *Carey*, 435 U.S. at 263. "[T]he injury caused by a justified deprivation, including distress, is not properly compensable under § 1983." *Id.* (footnote omitted).

Plaintiffs here simply fail to allege that their sentences constituted something other than a "justified deprivation," in light of the facts of their own conduct. As a result, Plaintiffs have failed to allege compensable injury under § 1983.

4. Plaintiffs Have Failed to Allege Facts Under Which the Non-Judicial Defendants Could Be Liable Under § 1983.

Even if Plaintiffs had alleged favorable termination and an absence of probable cause, or alleged "but-for" causation, their § 1983 claims against the moving defendants would fail. Only those acting under color of state law can be

directly "liable to the party injured" under § 1983; the statute reaches only those proceeding "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . . ." 42 U.S.C. § 1983. In order for the Plaintiffs to state claims against defendants who are not themselves alleged to be state actors, Plaintiffs must sufficiently allege that each such defendant acted jointly, or conspired, with one or more state actors to deprive plaintiffs of "rights, privileges, or immunities secured by the Constitution and laws. . . ." *Id.*

In order to recover on a claim for civil conspiracy under § 1983, a plaintiff must show "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 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 citation omitted). "[M]ere allegations of joint action or a conspiracy do not demonstrate that the defendants acted under color of state law and are not sufficient to survive a motion to dismiss." *Wallace v. Fed. Judge of U.S. Dist. Ct.*, 311 Fed. Appx. 524, 526 (3d Cir. 2008) (citation and footnote omitted). Rather, "[t]o state a claim for conspiracy under § 1983, plaintiff must claim that, '[t]he private actor. . . wrongfully influenced the state [actor's] decision. . . ." *Panayotides v. Rabenold*, 35 F. Supp. 2d 411, 419-20 (E.D. Pa. 1999) (quoting *Spencer v. Steinman*, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997)).

The question here is whether the Complaints adequately allege facts as to each of the defendants that suggest that the particular defendant reached an agreement with a state actor for the purpose of depriving Plaintiffs of a legal right – their right to an adjudicative body not likely to be biased, their right to counsel, or their right to trial. Despite the prodigious length and detail of the Complaints, the plain and necessary allegation that each defendant specifically understood and agreed that actions would be taken that denied plaintiffs their federally protected rights does not appear.[8] The necessary allegation in support of a § 1983 conspiracy would be a factual allegation, as to each defendant, that the defendant specifically understood and agreed that actions would be taken that denied plaintiffs their federally protected rights. *See McCleester v. Mackel*, Civ. No. 06-120J, 2008 U.S. Dist. LEXIS 27505, at *14 (W.D. Pa. Mar. 27, 2008) (claims of co-conspirator liability for alleged constitutional deprivation dismissed where plaintiff failed to allege that co-conspirators "specifically intended to *cause* (or reasonably should have known that their actions would *cause*)" the particular deprivation). General

[8] As set forth in the standard jury instructions on the point, a plaintiff alleging a conspiracy under § 1983 "must show that members of the conspiracy came to a mutual understanding to do the act that violated" plaintiff's legal rights. Third Circuit Model Civ. Jury Instr. Ch. 4 § 4.4.3 (2009) (available at http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/november2009/4_Chap_4_2009_November.pdf). The Complaints do not even hint, for example, at why the particular defendants might have reached an understanding with the former judges directed at denying plaintiffs their rights to counsel, or their rights to go to trial (absent a knowing waiver).

allegations that defendants formed a conspiracy of silence concerning payments to judges are not tantamount to or a substitute for allegations that each defendant reached a meeting of the minds with a state actor that juveniles would be denied counsel (or any other federally protected right) through the actions of Ciavarella, or that he would otherwise conduct constitutionally inadequate trials of juveniles.

The specific allegations of the Complaints that might fairly be characterized as "conspiracy" allegations differ from defendant to defendant, and are not the subject of this Joint Memorandum. Rather, some or all defendants joining in this Memorandum have filed herewith supplemental memoranda parsing the specific allegations regarding individual defendants, in light of Plaintiffs' legal obligation to plead, in the context of § 1983 claims, that each defendant reached a meeting of the minds with a state actor to deny Plaintiffs their constitutional rights.

5. The Parent Plaintiffs Also Have Failed to State Claims Cognizable Under 42 U.S.C. § 1983 Against any Non-Judicial Defendant.

The § 1983 claims of *all* Plaintiffs fail for the reasons described above. However, the § 1983 claims of the parent-plaintiffs or guardians, (hereinafter referred to collectively as "Parent Plaintiffs") asserted in the Individual Complaint fail for additional reasons to state a claim for which relief may be granted. The first of the parents' claims (Count IV of the Individual Complaint) fails because the parents are merely asserting claims that are derivative of claims of the juveniles.

With respect to the second claim (Count V of the Individual Complaint), which appears to be a claim for interference with familial relations, the parent plaintiffs have not alleged the necessary elements of such a claim.

a. Count IV of the Individual Complaint Fails to State a Claim Upon Which Relief May Be Granted Because the Parent Plaintiffs Are Seeking Relief for Alleged Violations of Their Children's Rights.

In Count IV of the Individual Complaint, the Parent Plaintiffs allege that as a result of the purported violations of the rights of the juveniles (which are alleged at ¶¶ 124(a-m)), they "suffered substantial injuries, damages and special damages not yet fully ascertainable. . . ." Individual Complaint ¶ 126. In this Count, the Parent Plaintiffs do not allege a violation of an independent federal right of their own. Instead, they enumerate the same actions listed in Count III that the Juvenile Plaintiffs claim resulted in constitutional violations of ***their*** rights. The Parent Plaintiffs do not identify a single action taken against them that constituted a violation of their independent constitutional rights.

Courts in this Circuit have made it clear that attempts to seek damages for alleged violations of the constitutional rights of others are derivative claims not permitted under § 1983. *See, e.g., O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973) (affirming dismissal of § 1983 claims by priests who asserted violations of their First Amendment rights because of the purported denial of access to prison for the purpose of preaching, after finding that "a litigant may only assert his own

constitutional rights or immunities" and "one cannot sue for the deprivation of another's civil rights") (citations omitted); *see also Rabold v. "The Syndicate"—Monroe County*, Civ. No. 3:06-2474, 2007 U.S. Dist. LEXIS 242, at *2 (M.D. Pa. Jan. 4, 2007) (Caputo, J.) (finding that "[i]t is quite clear in this Circuit that third parties generally lack standing to bring claims under § 1983 for violation of the constitutional rights of another.") (citations omitted); *see also Stukes v. Knowles*, 229 Fed. Appx. 151, 153 n.1, 2007 U.S. App. LEXIS 15310 (3d Cir. June 27, 2007) (holding that uncle could not sue for the alleged deprivation of the rights of his niece). Because the parent plaintiffs have failed to identify in Count IV a violation of their ***own*** federally protected rights, they have failed to allege a cognizable claim for relief. As a result, Count IV of the Individual Complaint should be dismissed.

b. Count V of The Individual Complaint Fails to State a Claim Upon Which Relief May be Granted because the Parent Plaintiffs Have Not Alleged an Action Directed at the Familial Relationship.

Count V of the Individual Complaint is virtually identical to Counts III and IV, with one notable exception. Specifically, the Parent Plaintiffs allege in Count V that the enumerated actions purportedly taken against the juveniles "caused Parent Plaintiffs to be deprived of their substantive due process right to familial integrity. . . ." Individual Complaint ¶ 135. The few courts that have recognized interference with familial relationships as a cognizable claim under § 1983 have

construed the right very narrowly. For example, the Third Circuit has recognized that there may be a constitutional injury to a parent when state action results in the death of the child. *Estate of Bailey v. York County*, 768 F.2d 503 (3d Cir. 1985) (overruled on other grounds). However, the Third Circuit also has held that "the Due Process Clause only protects against deliberate violations of a parent's fundamental rights – that is, where 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) (emphasis added). It is not sufficient that the purported interference is simply incidental to the state action, but it must be the object of the state action.

Courts in the Third Circuit have been particularly careful to limit the scope of this right when considering the claims of individuals seeking monetary damages pursuant to § 1983. For example, one court held that "[s]tate action affecting parental care and management of offspring, as distinguished from the total destruction of the family relationship, does not constitute a deprivation of the liberty interest for which § 1983 provides substantive redress." *Tilson v. School District of Philadelphia*, Civ. No. 89-1923, 1989 U.S. Dist. LEXIS 12582, at *5 (E.D. Pa. Oct. 24, 1989); *see also 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) (dismissing § 1983 claim of parents based on loss of familial relationship due to molestation of child

by public school employee and expressly declining to extend the right of familial relationships "especially in light of the Third Circuit's reluctance to further expand the ruling in *Bailey*.") (citing *McCurdy*, 352 F.3d at 829); *Rabold*, 2007 U.S. Dist. LEXIS 242, at *2 (holding that plaintiff lacked standing to pursue § 1983 action relating to her adult autistic son who plaintiff alleged should have been treated rather than incarcerated because "parents have no constitutional interest in the lives . . . of their adult children") (citation omitted).

The Third Circuit recently re-affirmed that only actions specifically aimed at interfering with the parent-child relationship should be recognized as cognizable under § 1983. *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 192 (3d Cir. 2009) (dismissing parents' § 1983 claim after finding that plaintiffs "failed to allege, much less adduce competent evidence, that the School District deliberately sought to harm their relationship with [their child], and thus their substantive due process claim fails as a matter of law."). Similarly, in *Doswell v. City of Pittsburgh*, Civ. No. 07-0761, 2009 U.S. Dist. LEXIS 51435 (W.D. Pa. June 16, 2009), the district court dismissed a son's § 1983 claim based on the allegation that the state had interfered with the familial relationship as a result of his father's arrest. Finding that *McCurdy* requires "that the state actions at issue deliberately target the parent-child relationship," the *Doswell* court held that, although the arrest of the father "may have had an incidental or indirect effect on

[the son's] relationship with [the father], this is not adequate to permit [the son's] claim to proceed." *Id.* at *42-43.

Similarly, the Court of Appeals for the Tenth Circuit explained that a § 1983 claim for interference with the familial relationship between parents and children requires more than simply an incidental interference with the relationship, but rather "that an allegation of an intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under section 1983." *Trujillo v. Santa Fe Board of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985) (emphasis added). In *Trujillo*, the court held that plaintiffs, the mother and sister of the decedent, could not pursue a § 1983 claim based on the loss of familial relationship purportedly caused by the wrongful death of their family member because, although the plaintiffs had alleged an intent directed at violating the rights of the decedent, plaintiffs did not allege that the destruction of the family relationship was the intent of the defendants. *Id.*

The Parent Plaintiffs have not alleged in the Individual Complaint that the purported conduct of the parties was intended to interfere with familial relations. At most, the Parent Plaintiffs have alleged that their relationships with their children were collaterally affected as a result of alleged violations of their children's rights. Because Parent Plaintiffs have not alleged a protected interest that has been recognized in this Circuit and because, even if they had, they have

failed to allege that the violation of that purported right was the intent of any defendant, Count V of the Individual Complaint should be dismissed for failure to state a claim.

C. Plaintiffs' RICO Claims Must Also Be Dismissed.

Both the Individual Complaint and the Class Complaint assert civil claims based upon violations of RICO. The Individual Complaint alleges claims under §§ 1962(c) and (d). The Class Complaint alleges RICO violations under §§ 1962(b), (c), and (d). All of these RICO claims must be dismissed, however, because: (1) Plaintiffs lack statutory standing under RICO; (2) Plaintiffs do not adequately allege the existence of a RICO enterprise in the Individual Complaint because the RICO "persons" and the RICO "enterprise" are identical; (3) in both Complaints, Plaintiffs have alleged facts that negate their ability to prove that their alleged RICO enterprises had an existence separate and apart from their respective alleged patterns of racketeering activity; (4) the Class Action Plaintiffs fail to allege facts demonstrating that the RICO Defendants acquired an interest in, or control of, the RICO "enterprise," or that their alleged injuries were caused by the RICO Defendants' acquisition of any such interest or control of the alleged RICO "enterprise"; and (5) no actionable RICO conspiracy exists because Plaintiffs cannot establish an underlying RICO violation.

1. Plaintiffs Lack Statutory Standing to Pursue Their RICO Claims.

To have standing to assert a civil claim under RICO, a plaintiff must make "two related but analytically distinct threshold showings . . . : (1) that the plaintiff suffered an injury to business or property; and (2) that the plaintiff's injury was proximately caused by the defendant's violation of 18 U.S.C. § 1962." *Maio v. Aetna, Inc.*, 221 F.3d 472, 482 (3d Cir. 2000). If a plaintiff does not have standing to assert a RICO claim, the claim must be dismissed. *Allegheny Gen. Hosp. v. Phillip Morris, Inc.*, 228 F.3d 429, 435 (3d Cir. 2000).

Here, both the Individual and Class Plaintiffs lack standing for their RICO claims because their alleged damages are too remote from the alleged RICO violations. In addition, the individual Plaintiffs who were juveniles at the inception of this litigation lack standing to assert RICO claims because, at the time that their complaint was filed, they had not suffered an injury to their business or property. As a result, the Court should dismiss Counts I and II of the Individual Complaint and Counts V, VI, and VII of the Class Complaint for lack of statutory standing.

a. The RICO Claims in Both Cases Should Be Dismissed for Lack of Statutory Standing Because the Alleged RICO Violations Are Not the Proximate Cause of the Harm Alleged By the Plaintiffs.

In Count I of the Individual Complaint, the Individual Plaintiffs assert a

cause of action against all of the Defendants except Luzerne County, Andromeda House, and Vita pursuant to 18 U.S.C. § 1964(c) as a result of purported violations of 18 U.S.C. § 1962(c). Individual Complaint ¶¶ 84-97. Similarly, in Counts V and VI of the Class Complaint, the Class Action Plaintiffs claim violations of 18 U.S.C. §§ 1962(c) and (b) against defendants Ciavarella, Conahan, Powell, Mericle, Cindy Ciavarella, Barbara Conahan, Mericle Construction, Mid-Atlantic Youth Services ("MAYS"), PACC, WPACC, Pinnacle Group of Jupiter, Vision Holdings, and Beverage Marketing of PA. Class Complaint ¶¶ 748-762. Both sets of Plaintiffs also assert claims for RICO conspiracy liability under § 1964 by reason of violation of § 1962(d). Individual Complaint Count II; Class Complaint Count VII. All of the Plaintiffs' RICO claims should be dismissed for failure to allege legally cognizable causation.

In order for any plaintiff to have standing to recover under § 1964(c), the alleged RICO violation must be the proximate cause of the plaintiffs' injuries. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006). "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*, 547 U.S. at 461. As the Supreme Court recently held, a defendant "cannot escape the proximate cause requirement merely by alleging that the fraudulent scheme embraced all those

indirectly harmed by the alleged conduct. Otherwise our RICO proximate cause precedent would become a mere pleading rule." *Hemi Group, LLC v. City of New York*, 130 S. Ct. 989, 991 (2010). Confirming that the standards enunciated by *Anza* are still applicable, the Court went on to find that "[o]ur precedent makes clear, moreover, that 'the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.'" *Id.* (citing *Anza*, 547 U.S. at 457 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985))). Thus any theory of causation that requires the court to move "well beyond the first step" to determine proximate cause is too indirect and "cannot meet RICO's direct relationship requirement." *Id.* at 989.

Furthermore, merely alleging that the purported predicate acts directly caused the harm to the Plaintiffs is insufficient because "that assertion is a legal conclusion about proximate cause." *Id.* at 992. The Court concluded that although it "has interpreted RICO broadly," the Court has "also held that its reach is limited by the 'requirement of a direct causal connection' between the predicate wrong and the harm." *Id.* at 994 (quoting *Anza*, 547 U.S. at 460).

The Third Circuit considers three factors in evaluating proximate cause: (1) directness of the injury; (2) difficulty in apportioning damages; and (3) the prospect that more immediate victims can be expected to pursue their own claims. *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.* 171 F.3d

912, 933 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000). Dismissal is appropriate at the 12(b)(6) stage if the injury is indirect. *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 444 (3d Cir. 2000); *see also In re Actiq Sales & Mktg. Practices Litig.*, No. 07-4492, 2009 U.S. Dist. LEXIS 43710, at *8 (E.D. Pa. May 22, 2009). Thus, if a plaintiff fails to demonstrate the directness of his or her injury, then the complaint must be dismissed, even if he or she is able to fulfill the other elements of the test, *i.e.*, demonstrate that there is no difficulty in apportioning damages and that the plaintiff is the appropriate enforcer for his or her claim. *See Actiq*, 2009 U.S. Dist. LEXIS 43710, at *8 (citing *Allegheny Gen. Hosp.*, 228 F.3d at 444).

Alleged violations of both § 1962(b) and § 1962(c)[9] require that the plaintiffs' alleged injury be "'the harm caused by [alleged] predicate acts sufficiently related to constitute a pattern, [since] the essence of the violation is the commission of those acts in connection with the conduct of an enterprise'" or, in the instance of § 1962(b), the acquisition of an interest in, or control of, an

[9] Proximate cause under § 1962(d) does not require that the injury result solely from the § 1961 predicate acts. *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169-70 (3d Cir. 1989), *overruled on other grounds by Beck v. Prupis*, 529 U.S. 494 (2000). Instead, under § 1962(d), "either racketeering activity or classic overt conspiracy acts may qualify as 'predicate acts' to a RICO violation" if those acts cause injury. *Id.* This distinction is irrelevant in this case, however, because, as discussed in more detail in this section, Defendants Powell, Mericle, PACC, WPACC, MAYS and Vision did not proximately cause the injury to Plaintiffs through either their overt acts or their alleged racketeering activity.

enterprise. *Anza*, 547 U.S. at 457 (quoting *Sedima*, 473 U.S. at 497) (discussing § 1962(c)); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190 (3d Cir. 1993) (discussing § 1962(b)).[10] In *Anza*, the Supreme Court found that the plaintiff, a competitor of the defendant, failed to plead proximate cause under RICO where the plaintiff alleged that its business was injured when the defendant avoided paying New York state sales tax. *Id.* at 457. The Court reversed the Court of Appeals, explaining that the lower court's reasoning improperly circumvented the proximate cause requirement. *Id.* at 460.

The plaintiff's causation theory in *Anza* asserted that the defendant used the proceeds from its tax fraud to lower its prices and attract more customers, thereby giving it an unfair competitive advantage. *Id.* at 457-58. The Court rejected this theory as a legal matter, explaining first that "[t]he proper referent of the proximate-cause analysis is an alleged practice of conducting [the defendant's] business through a pattern of defrauding the State." *Id.* at 458. Consequently, it concluded that ***the State of New York*** was the "direct victim" of the alleged predicate acts of fraud. "It was the State that was being defrauded and the State

[10] Class Action Plaintiffs' claims for damages under 1964(c) predicated on 1962(b) also fail for lack of standing because the alleged injuries are not the result of the defendants' acquisition or control of the enterprise. *See Lightning Lube*, 4 F.3d at 1190. In this Circuit, courts have held that such injury occurs when "'the owner of an enterprise infiltrated by the defendant as a result of racketeering activities is injured by the defendant's acquisition or control of [the] enterprise.'" *Id.* (citation omitted).

that lost tax revenue as a result." *Id.* The Court recognized that the plaintiff alleged that it had suffered harm from defendant's lower prices, but posited that the defendant could have lowered its prices for reasons unconnected to the fraud, just as the plaintiff's lost sales could have resulted from factors unconnected to the defendant's tax fraud scheme. "Its lowering of prices in no sense required it to defraud the state tax authority." *Id.* at 458-59.

The *Anza* Court also considered the "motivating principle" behind the proximate cause requirement. *Id.* It explained that a court considering the plaintiff's claim would need to engage in "intricate, uncertain inquiries" to determine the plaintiff's damages *but for* the defendant's conduct. *Id.* at 459-60. Furthermore, the State of New York was the "immediate victim" of the alleged RICO violation, so "[i]f the allegations [were] true, the State [could] be expected to pursue appropriate remedies." *Id.* at 460. The Court added that "while it may be difficult to determine facts such as the number of sales [the plaintiff] lost due to [the defendant's] tax practices, it is considerably easier to make the initial calculation of how much tax revenue [the defendant] withheld from the state." *Id.*

Even before *Anza*, the Third Circuit applied similar principles to conclude that sixteen Pennsylvania hospitals lacked standing to pursue RICO claims against tobacco companies because their claims were too remote, their claimed injuries were too indirect, and their claimed damages too speculative. *Allegheny Gen.*

Hosp., 228 F.3d 429. In that case, the hospitals alleged that the tobacco companies engaged in a conspiracy to manipulate the nicotine content in cigarettes and other tobacco products, and they sought to recover their unreimbursed costs for health care they provided to nonpaying patients suffering from tobacco-related diseases. *Id.* The Court explained that the hospitals' damages were too speculative:

> [The hospitals] must demonstrate how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking less dangerous products, how much healthier those smokers would have been if they had taken these actions, and the savings [the hospitals] would have realized by paying out fewer claims for smoking-related illnesses.

Id. at 441 (quoting *Steamfitters*, 171 F.3d at 929). Additionally, the court explained:

> if the [Hospitals] are allowed to sue, the court would need to determine the extent to which their increased costs for smoking-related illnesses resulted from the tobacco companies' conspiracy to suppress health and safety information, as opposed to smokers' other health problems, smokers' independent (i.e., separate from the fraud and conspiracy) decisions to smoke, smokers' ignoring of health and safety warnings, etc. . . . This causation chain is much too speculative and attenuated to support a RICO claim.

Id. at 444 (quoting *Steamfitters*, 171 F.3d at 933). The court thus affirmed the district court's order granting the tobacco companies' motion to dismiss, holding that the hospitals lacked standing because their claims were based on remote and

indirect injuries (and therefore lacked proximate cause). *Id.* at 434; *see also Steamfitters*, 171 F.3d at 934 ("All of these parties – non-smoking Fund participants, unions, union members, employers – can claim to have suffered some injury arising out of the tobacco companies' conduct. At some point, however, the causal link between defendants' actions and the negative effects that eventually result is not proximate enough to meet the prudential requirements for antitrust or RICO standing.").

Similarly, in *Longmont United Hospital*, the Third Circuit affirmed the district court's dismissal of a § 1962(c) claim where the plaintiffs were indirect victims of the defendants' Medicare fraud and where the government itself contributed to any alleged injury. *Longmont United Hosp. v. St. Barnabas Corp.*, 305 Fed. Appx. 892 (3d Cir. 2009). In that case, the defendants were "turbo-charging" Medicare claims by reporting inflated treatment costs. *Id.* at 893. The plaintiff, another hospital, theorized that the defendants' scheme reduced the plaintiff's Medicare reimbursements both by increasing threshold costs and decreasing the amount of "Outlier Payments." *Id.* at 894. The court rejected this theory, however, finding that the Centers for Medicare & Medicaid Services ("CMS"), the entity responsible for interpreting the Medicare Act, promulgating and enforcing payments, and administering those payments, "stands between [defendants'] conduct and [plaintiff's] injuries." *Id.* Specifically, CMS's failure to

ensure that the higher payments to defendants were justified, and its decision to raise the qualification threshold for Outlier Payments were the direct cause of the decrease in plaintiff's payments. *Id.* at 895. By failing to scrutinize adequately the defendants' inflated cost reports despite regulations enacted specifically to prevent conduct that the defendants engaged in, the government itself "played a significant role in causing [plaintiff's] alleged injuries." *Id.*

In applying the three factor test articulated in *Steamfitters*, the court concluded: (1) "it would be nearly impossible to ascertain the amount of [plaintiff's] damages attributable to [defendant's] reporting of inflated costs, as opposed to CMS's interpretation of the Medicare Act, promulgation and enforcement of Medicare payment regulations, and administration of the Medicare payment regime"; (2) although an appreciable risk of duplicative recoveries may have existed, that alone would not change the court's disposition; and (3) the government was a direct victim of the alleged fraud and it "has already 'vindicated the laws by pursuing [its] own claims.'" *Id.* (quoting *Anza*, 547 U.S. at 460). Accordingly, as an ("at best") indirect victim, plaintiff in *Longmont United Hospital* lacked standing to pursue its 1962(c) claim. *Id.*

i. Plaintiffs' RICO Injuries Are Indirect and Remote from the Alleged Predicate Acts.

The predicate acts alleged by the Plaintiffs in this case are wire fraud, mail fraud, honest services fraud, and bribery. *See* Individual Complaint ¶ 88; Class

Complaint ¶ 756. However, the harms claimed by the Plaintiffs, such as allegedly unnecessary payments made in connection with detentions, did not arise directly from any of those acts, or any other acts committed by the moving defendants. The alleged acts of wire fraud, mail fraud, and honest services fraud did not defraud the ***Plaintiffs*** or cause them to spend money in reliance thereon. The Individual Plaintiffs allege in their Complaint that these payments 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**,**" not a scheme to deprive the individual plaintiffs (or any other specific individuals) of their property. Individual Complaint ¶ 75 (emphases added); *see also* Class Complaint ¶ 756(b) (alleging that defendants participated in a "a scheme or artifice to defraud ***the citizens of the Commonwealth of Pennsylvania***, including plaintiffs, and to deprive those ***citizens*** . . . of the intangible right of honest services. . . .") (emphases added).

Thus, the Plaintiffs in this case do not allege that they are the direct victims of the asserted predicate acts allegedly committed by the moving defendants. Instead, as was the case in *Anza* and *Longmont United Hospital*, the primary victim of a scheme of the sort alleged by the plaintiffs is the general public. Thus, the Plaintiffs, like the hospital plaintiffs in *Longmont* and plaintiff in *Anza*, are, at best, remote and indirect victims of the predicate acts alleged in the Complaints.

Plaintiffs' alleged damages are further removed from the alleged predicate acts by the fact that Ciavarella "stands between" Plaintiffs and other defendants. No non-judicial defendant had the ability to deny juveniles their rights or order payment for juveniles' detention; only Ciavarella was in a position to do so. Like the CMS in the *Longmont* case, which was responsible for administering and enforcing Medicare payment regulations, Ciavarella was responsible for administering and enforcing the law in his courtroom. His alleged actions in his courtroom, and his alleged failures to act there, are the wrongs for which the Plaintiffs seek compensation. As this Court explained discussing the possible liability of Luzerne County: "there is no direct casual link between the [County's] agreement with PACC and the unconstitutional actions by Ciavarella." Order Denying Motions to Amend, Doc. No. 335 (Notice filed Nov. 20, 2009) ("Amendment Denial") at 27. Here, Ciavarella's acts in his courtroom, which were not necessary to accomplish the alleged predicate acts, are the sole direct casual link to the damages claimed by the Plaintiffs.

To the extent that Plaintiffs seek to recover damages for the predicate acts alleged, their claims are indistinguishable from those that could be asserted by other citizens of the Commonwealth of Pennsylvania or of Luzerne County. In sum, the causal link between the alleged predicate acts and the negative effects that plaintiffs allege is simply not proximate enough to meet the prudential

requirements for RICO standing. *See Steamfitters,* 171 F.3d at 934.

ii. Plaintiffs' Claims Present Difficult Issues Regarding the Apportionment of Speculative Damages.

The Individual Plaintiffs allege damages in the form of garnished wages, taking of public assistance money, seizure of social security benefits and forced payments for incarceration. *See* Individual Complaint ¶ 95. The Class Action Plaintiffs' alleged injuries include payments made to defense attorneys, payments to Luzerne County for placement, court costs and fees, probation fees, and loss of employment, scholarships, and financial aid. *See* Class Complaint ¶ 761. In addition to being too indirect and remote to support RICO standing, Plaintiffs' alleged injuries are also too speculative to sustain RICO standing.

Although it may be possible to determine the amount of the out-of-pocket damages alleged, determining ***whether*** Plaintiffs' claimed damages would have been incurred had Ciavarella complied with every requirement of the law would involve an impermissible degree of speculation. To demonstrate injury, Plaintiffs would have to prove a speculative and attenuated causal chain. Depending on what damages particular plaintiffs claim, they may have to show: (a) that they would not have been adjudicated delinquent but for the defendants' conduct; or (b) that they would not have been sent to PACC or WPACC but for the moving defendants' actions; or (c) that they would not have been sent to PACC or

WPACC, or kept there for a shorter period of time, but for the moving defendants' actions; or (d) that they would not have incurred defense counsel fees, or would not have incurred as much defense counsel fees, if not for the moving defendants' actions; or (e) that they would not have incurred certain court costs and fees if not for the moving defendants' actions; or (f) that they would not have lost their jobs, certain employment opportunities, scholarships, or other financial aid if not for the moving defendants' actions; or (g) that they did not understand their right to counsel and if they had, they would not have elected to waive it; or, finally, perhaps (h) that had they wished to obtain counsel, they would have been able to retain counsel.

Ciavarella had a "no nonsense" attitude and adopted a popular "zero tolerance stance" with juveniles long before the alleged RICO violations between 2003 and 2007. *See* Class Complaint ¶¶ 676-79, 681. There is reason to believe that Ciavarella's allegedly improper actions and decisions in his courtroom were, like the price-lowering activities of the defendant in *Anza*, "in no sense required" to accomplish the alleged predicate acts, and were instead potentially attributable to a variety of factors other than the alleged predicate acts.

Plaintiffs' claims require this Court to engage in the very type of "intricate, uncertain inquiries" to apportion Plaintiffs' damages that the Supreme Court rejected in *Anza* when it held plaintiff's damages there were too remote and

speculative to meet the prudential requirements for RICO standing. *Anza*, 547 U.S. at 459-60. Accordingly, Plaintiffs' RICO claims must similarly be dismissed for lack of standing.

iii. There Are More Appropriate Enforcers of Legal Duties Than the Plaintiffs.

Plaintiffs' RICO claims should also be dismissed for lack of RICO standing because more appropriate enforcers of the law exist and are taking action. Determination of the appropriate enforcer relates to the directness of the injury requirement. *See Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2142 (2008). Here, as discussed above, the Plaintiffs, at most, can only be considered indirect victims of the alleged predicate acts. The Commonwealth has already taken action to vindicate the law and protect the rights of its citizens by: (1) the Pennsylvania Supreme Court assuming plenary King's Bench jurisdiction over the cases of juveniles appearing before the juvenile court in Luzerne County and appointing Special Master Arthur Grim, Senior Judge, Berks County Court of Common Pleas, to issue recommendations and act on its behalf;[11] (2) the Supreme Court adopting Judge Grim's recommendations regarding awarding vacaturs and expungements to affected juveniles;[12] and (3) convening an Interbranch Commission on Juvenile Justice to study the situation in Luzerne County and

[11] Individual Complaint ¶ 77.
[12] *See* Docket Entry No. 323 (Notice filed Oct. 30, 2009).

recommend changes.[13] In addition, the federal government has acted by bringing federal criminal indictments and informations against various individuals involved in the alleged honest services fraud. The Commonwealth and the United States government are more appropriate enforcers of the laws that were allegedly violated by the predicate acts because (a) unlike the Plaintiffs' civil case, the U.S. government's criminal cases based on honest services fraud do not require individualized proof of highly speculative monetary damages; (b) the King's Bench proceedings initiated by the Pennsylvania Supreme Court are capable of awarding relief to the Plaintiffs; and (c) the Interbranch Commission on Juvenile Justice is capable of recommending and implementing legislative, administrative, and regulatory changes to improve the juvenile justice system.

For all of the reasons set forth above, Plaintiffs' claimed injuries are too indirect, too remote from the predicate acts alleged, and too speculative to provide Plaintiffs with statutory standing for their RICO claims. Accordingly, Counts I and II of the Individual Complaint and V, VI, and VII of the Class Complaint must be dismissed.

b. The Juvenile Plaintiffs In The Individual Case Lack Standing Under 18 U.S.C. § 1964(c) Because They Have Failed To Allege That They Suffered An Injury To Their Business Or Property.

The Individual Plaintiffs who were juveniles at the time of the filing of their

[13] *See* Docket Entry No. 283 (Notice filed Sept. 10, 2009).

original Complaints also lack statutory standing to bring RICO claims because they have not alleged injuries to their business or property. A plaintiff must have suffered an injury to his or her "business or property by reason of a violation of section 1962" in order to recover damages under RICO. 18 U.S.C. § 1964(c). Thus, if a plaintiff has not alleged injury to his or her person or property, then he or she does not have standing to pursue a RICO claim. *Maio*, 221 F.3d at 482; *see also Hearns v. Parisi*, 548 F. Supp. 2d 132, 137 (M.D. Pa. 2008); *Meeks-Owens v. FDIC*, Civ. No. 3:07-CV-059, 2009 U.S. Dist. LEXIS 72020, at *5 (M.D. Pa. Aug. 13, 2009) (Caputo, J.). "Thus, 'a showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest.'" *Id.* (quoting *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70 (9th Cir. 1994)). Because injuries to intangible property interests are not recoverable, injury to reputation, injury to emotional well-being, physical harm, and the economic aspects of such personal injuries are not recoverable. *Frey v. Maloney*, 476 F. Supp. 2d 141, 161 (D. Conn. 2007) (standing lacking under RICO where juvenile alleged emotional harm and reputational damage as well as inability to do paid yard work as a result of court order restricting him to interior of residence).

Here, the Individual Plaintiffs who were juveniles at the time of the filing of their original Complaints have failed to allege any damage to their business or property. The Individual Complaint only alleges financial injuries to the parent

plaintiffs and those juvenile plaintiffs who had reached the age of majority by the time of the filing of the action, because only those Plaintiffs – and not the minor Juvenile Plaintiffs themselves – were required to make payments related to the detention of the Juvenile Plaintiffs. Individual Complaint ¶¶ 95-96. Accordingly, because the Juvenile Plaintiffs have not alleged any damage to their business or property, they lack standing to pursue any RICO claims, and Counts I and II of the Individual Complaint should also be dismissed to the extent that those Counts include claims by Plaintiffs who had not reached the age of majority at the time that Complaint was filed.[14]

2. The Individual Plaintiffs' Substantive RICO Claims Must Be Dismissed Because the RICO Persons and RICO Enterprise Are Identical in the Individual Plaintiffs' Complaint.

Count I of the Individual Complaint, which alleges a violation of 18 U.S.C. § 1962(c) against all the Defendants except Brulo, Vita, County of Luzerne, and Andromeda House, also must be dismissed because the alleged RICO "persons" and the alleged RICO "enterprise" are identical. Under 18 U.S.C. § 1962(c), it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through

[14] The initial complaint in *Conway v. Conahan, et al.*, Civ. No. 3:09-CV-00286-ARC, was filed on February 13, 2009. The Individual Plaintiffs' complaints have subsequently been consolidated.

a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). Section 1962(c) "requires conduct by a '*person* employed by or associated with any *enterprise.*'" *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc.*, 46 F.3d 258, 262 (3d Cir. 1995) (quoting 18 U.S.C. § 1962(c)). As a result, "to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name."[15] *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001); *see also Jaguar Cars*, 46 F.3d at 268 (liability under § 1962(c) "requires a claim against defendant 'persons' acting through a distinct 'enterprise.'").

Where, as is the case in the Individual Complaint, the RICO "enterprise" and the RICO "persons" are identical, the plaintiffs have not pleaded a RICO § 1962(c) violation. *Healthguard of Lancaster, Inc. v. Gartenberg*, Civ. No. 02-2611, 2004 U.S. Dist. LEXIS 4437, at *6-7 (E.D. Pa. Mar. 4, 2004) (granting motion for summary judgment and noting that "Federal courts have required a showing of distinctiveness between the enterprise and the individuals who are allegedly controlling the enterprise."); *see also Kaiser v. Stewart*, Civ. No. 96-6643, 1997 U.S. Dist. LEXIS 12788, at *9 (E.D. Pa. Aug. 19, 1997) (granting motion to

[15] A "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). An "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

dismiss claim under § 1962(c) and finding that "[t]he overlap between the wrongdoers and the enterprise is complete. ***Where the wrongdoers and an association in fact enterprise are identical, we conclude that the [plaintiff], by definition, cannot satisfy the distinctiveness requirement of § 1962(c)***.") (emphasis added).

Here, the Individual Plaintiffs describe the RICO enterprise in the Individual Complaint as consisting entirely of an association-in-fact of the RICO defendants/persons:

> ***There is the association-in-fact of all RICO Defendants*** for the purpose of constructing juvenile detention centers, ordering juveniles to be placed in those centers in violation of their basic constitutional rights for RICO Defendants' own enrichment and profit as an "enterprise" within the definition of RICO (the "Association-In-Fact Enterprise"). ***The Association-In-Fact Enterprise was created, controlled and conducted by all RICO Defendants*** for the purposes hereinbefore described. ***All RICO Defendants are Defendants for purposes of the Association-in-Fact Enterprise.***"

Individual Complaint ¶¶ 85-86 (emphases added). Here, as in *Healthguard* and *Kaiser*, the enterprise and the RICO defendants are "identical" and thus "there can be no violation of RICO." *See Healthguard*, 2004 U.S. Dist. LEXIS 4437, at *7 (citation and quotation marks omitted). Consequently, the court should dismiss the Individual Plaintiffs' § 1962(c) claim against the moving defendants.

3. All Plaintiffs' § 1962(C) Claims Fail Because They Have Alleged Facts That Negate the Requirement That the RICO

Enterprise Has Any Existence Separate and Apart From the Pattern of Racketeering Activity.

As discussed above, Count I of the Individual Complaint and Count V of the Class Complaint both allege a violation of 18 U.S.C. § 1962(c) premised on a theory that certain Defendants or their activities constituted an association-in-fact enterprise. Individual Complaint ¶¶ 85-86; Class Complaint ¶ 751. These Counts must be dismissed because Plaintiffs will not be able to prove the existence of an enterprise that existed separate and apart from the RICO Defendants' alleged pattern of racketeering activity. More specifically, the Plaintiffs plead facts that ***negate*** the existence of an enterprise ***separate*** and apart from the pattern of racketeering activity. Unlike corporations, limited liability companies, or persons, associations-in-fact are not entitled to a judicial presumption that they constitute an enterprise, and thus the Plaintiffs must adequately plead evidence of the RICO enterprise's structure and the existence of conduct by the RICO enterprise other than committing the pattern of predicate acts alleged.

To state a claim for relief under 18 U.S.C. § 1962(c), a plaintiff must allege facts showing "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). "The 'enterprise' is not the 'pattern of racketeering activity', it is an entity separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583 (1981). To establish that the defendants constitute an

association-in-fact enterprise, plaintiffs must show: (1) "an ongoing organization, formal or informal;" (2) that "the various associates function as a continuing unit;" and (3) that the enterprise exists "separate and apart from the pattern of activity in which it engages." *Id.* at 583. Further, the Third Circuit construed *Turkette* to require proof "that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions." *United States v. Irizarry*, 341 F.3d 273, 286 (3d Cir. 2003) (quoting *United States v. Pelullo*, 964 F.2d 193, 211 (3d Cir. 1992)).

a. Plaintiffs Have Pleaded Facts That Negate the Existence of an Association-In-Fact RICO Enterprise.

At the pleading stage, plaintiffs are generally not required to satisfy the *Turkette* factors. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 789 (3d Cir. 1984); *Pappa v. Unum Life Ins. Co. of Am.*, Civ. No. 3:07-CV-0708, 2008 U.S. Dist. LEXIS 21500, at *11 (M.D. Pa. Mar. 18, 2008) (Caputo, J.). However, a Complaint may properly be dismissed if the pleadings affirmatively negate any of the required elements of an enterprise, or if the allegations are insufficient to permit the inference of the existence of the required elements. *Actiq*, 2009 U.S. Dist. LEXIS 43710, at *12 (citing *Seville*, 742 F.2d at 790 n.5); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1412 (3d Cir. 1993); *see also Freedom Medical Inc. v. Gillespie*, 634 F. Supp. 2d 490, 504 (E.D. Pa. 2007).

District Courts in the Third Circuit have dismissed RICO claims on the

grounds that the plaintiff's pleadings have negated the existence of a RICO enterprise that existed beyond committing the alleged predicate acts. For example, in *Actiq*, the court dismissed the complaint because, *inter alia*, it did not allege the existence of an enterprise "separate and apart from the pattern of activity in which it engage[d]." 2009 U.S. Dist. LEXIS 43710, at *14. Because the plaintiffs alleged that "'the enterprise was created precisely to make it appear to the public that Defendant did not have a hand in any discussions or promotion of off-label use,'" the court concluded that the plaintiffs "have affirmatively negated that which they attempt to prove, namely that the enterprise existed beyond committing the alleged predicate acts." *Id.* Similarly, in *Parrino v. Swift*, Civ. No. 06-0537 (DRD-SDW), 2006 U.S. Dist. LEXIS 40361, at *6-7 (D.N.J. June 19, 2006), the court dismissed a RICO claim where the complaint, which alleged an association-in-fact enterprise that was involved in an "ongoing scheme to defraud plaintiffs and to unlawfully obtain money by means of false and fraudulent representations," negated the existence of an enterprise that was separate and apart from the pattern of racketeering activity. 2006 U.S. Dist. LEXIS 40361, at *6-7. More recently, in *300 Broadway v. Martin Friedman Assocs.*, Civ. No. 08-5514 (KSH), 2009 U.S. Dist. LEXIS 95069, at *16-17 (D.N.J. Oct. 13, 2009), the court dismissed a RICO claim where the complaint described the alleged RICO enterprise as an association-in-fact with "a common goal of appropriating assets from the

[plaintiffs], from the federal and state government, and from other parties" on the ground that the pleadings negated the existence of an enterprise that is separate and apart from the pattern of activity in which it engaged. 2009 U.S. Dist. LEXIS 95069, at *16-17. "There is no other identity or characteristic attributed to the Enterprise and as such, it is indistinguishable from what it was formed to do." *Id.* at *17.

Similarly, in *McClure Enters. v. Fellerman*, the court dismissed a complaint where the plaintiff alleged that the sole purpose of the enterprise was to commit the alleged fraud. *McClure Enters. v. Fellerman*, Civ. No. 3:06cv353, 2007 U.S. Dist. LEXIS 35374, at *4 (M.D. Pa. May 15, 2007). The court explained that the fact that the various parties performed various separate activities "to achieve an overall fraud . . . . does not equate with an enterprise **separate and apart** from the pattern of racketeering activity." *Id.* (emphasis in original). Further, the court noted that the plaintiff failed to allege that the enterprise had any "function wholly unrelated to the racketeering activity" or that it had an existence beyond that necessary to commit the predicate acts. *Id.* (citation and quotation marks omitted). The court concluded "[t]he sole reason the defendants were associated in the alleged 'enterprise' was to commit the criminal acts to achieve the ultimate goal." *Id.*; *see also Clark v. Douglas*, No. 06-40364, 2008 U.S. App. LEXIS 113, at *5 (5th Cir. Jan. 4, 2008) (affirming district court's dismissal of a RICO claim where the

pleadings amounted to an allegation that "the association-in-fact between the defendants existed uniquely to defraud [plaintiff] and the trust of their investment; it did not exist separate and apart from the pattern of racketeering activity").

Here, the Class Plaintiffs allege the existence of a single RICO enterprise consisting of an association-in-fact of various defendants. Class Complaint ¶ 751. The Individual Plaintiffs allege a single RICO enterprise consisting of an association-in-fact of "all RICO Defendants." Individual Complaint ¶¶ 85-86. Rather than allege facts that demonstrate that some legitimate business was conducted by the alleged association-in-fact RICO enterprises, the Plaintiffs affirmatively allege facts that negate the potential existence of enterprises separate and apart from their alleged patterns of racketeering activity. Specifically, they allege that the association-in-fact enterprises committed the predicate acts of wire fraud and mail fraud in order to conceal the predicate acts of honest services fraud and bribery (*i.e.*, the compensation to Ciavarella and Conahan). *See* Class Complaint ¶ 759; Individual Complaint ¶¶ 92-93. Thus, as was the case in *Actiq* and *McClure*, the alleged association-in-fact enterprises, according to the Complaints, were created solely and expressly for the purpose of concealing and preventing the discovery of the payments to Ciavarella and Conahan—that is, for the purpose of committing the predicate acts and avoiding prosecution. Thus, since Plaintiffs' pleadings have affirmatively negated the existence of an enterprise

that exists separate and apart from the alleged pattern of racketeering activity, Count I of the Individual Complaint and Count V of the Class Complaint must be dismissed.

b. Plaintiffs Have Not Sufficiently Pled The Existence Of An Association-In-Fact Enterprise To Allow A Reasonable Inference Of An Organizational Structure Separate And Apart From The Pattern Of Activity In Which It Engaged.

Even if the Court concludes that the Complaints have not *negated* the existence of an enterprise separate and apart from the pattern of racketeering activity, Count I of the Individual Complaint and Count V should nevertheless be dismissed because Plaintiffs fail to allege sufficiently RICO enterprises with organizational structures separate and apart from the activities in which they engaged.

Courts may "'reasonably assume that individuals and corporations have an organizational structure, are continuous, and have an existence separate and apart from any alleged pattern of racketeering activity.'" *Freedom Med.*, 634 F. Supp. 2d at 504 (quoting *Price v. Amerus Annuity Group Co.*, MDL No. 1712, 2006 U.S. Dist. LEXIS 35980, at *9 (E.D. Pa. June 2, 2006)). If, however, the alleged RICO enterprise has no legal existence and is instead an association-in-fact, it "cannot reasonably be assumed to satisfy the elements of an enterprise and the allegations of the complaint must therefore receive greater scrutiny." *Id.* at 505.

In *Freedom Medical*, the Court described three elements that must be pleaded with regard to association-in-fact enterprises. First, there "must be allegations allowing an inference that 'some sort of structure exists within the group for the making of decisions . . .' or 'some mechanism for controlling and directing the affairs of the group on an on-going rather than ad hoc basis.'" *Id.* at 505 (quoting *Riccobene*, 709 F.2d at 222). "Allegations that merely state that individual members of the association-in-fact performed particular roles and were aware of each other's activities are not enough to establish an organizational structure." *Id.* (citing *Price*, 2006 U.S. Dist. LEXIS 35980, at *8). Second, the complaint must allege facts sufficient to infer "that the defendants occupied continuing positions within the group consistent with the organizational structure alleged." *Id.* at 506 (citation omitted). Finally, the complaint must allege facts showing "an existence beyond that necessary to commit the predicate offenses." *Id.* (citation omitted).

Similarly, in *Actiq*, the court explained that in order to allege the existence of an association-in-fact enterprise, "at a minimum, Plaintiffs must identify the enterprise and provide details about its structure in more than vague terms." 2009 U.S. Dist. LEXIS 43710, at *12 (citing *Seville*, 742 F.2d at 790 n. 5). Thus, in addition to the fact that the complaint negated the ability to prove that the enterprise existed for some reason other than the commission of the predicate acts,

the court also dismissed the complaint because there was insufficient evidence that the RICO enterprise had an organizational structure. *Id.* at *12-14. The court explained that "the mere statement that individuals performed a [*sic*] particular roles and were aware of each other's roles will not suffice." *Id.* at *13-14. Additionally, merely stating that the members of an association-in-fact "created and maintained systematic links for a common purpose," does not sufficiently identify the structure of the enterprise. *Id.* at *13.

Here, as in *Freedom Medical*, Plaintiffs allege an association-in-fact, so the existence of a RICO enterprise may not be presumed. Furthermore, as in *Actiq*, neither the Class Plaintiffs nor the Individual Plaintiffs have alleged facts providing details about the structure of the alleged association-in-fact in more than vague terms. Also as in *Actiq*, both of the Complaints insufficiently plead the existence of an association-in-fact RICO enterprise because they identify the alleged enterprise in vague terms and rest on conclusory statements. *See* Individual Complaint ¶ 86 ("There is the association-in-fact of all RICO defendants for the purpose of constructing juvenile detention centers, ordering juveniles to be placed in those centers in violation of their basic constitutional rights for RICO Defendants' own enrichment and profit as an 'enterprise'. . . . The Association-In-Fact Enterprise was created, controlled, and conducted by all RICO Defendants. . . ."); Class Complaint ¶¶ 753-57 (alleging the purpose of the

enterprise and the commission of certain acts, but failing to identify any kind of organizational structure). These vague and conclusory statements do not satisfy the pleading requirements for an association-in-fact. Therefore, Count I of the Individual Complaint and Count V of the Class Complaint must be dismissed. *Cf.* Amendment Denial at 31 (explaining that Plaintiffs' allegations that "'[t]he Luzerne County Commission[er]s . . . were willful participants in joint activity and or jointly engaged' in the conspiracy . . . [is a] legal conclusion . . .[that is] insufficient without factual allegations which would support it." (citing *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009)).

4. Class Plaintiffs Have Failed to State a Claim Under 1962(b) Because They Have Not Alleged That the Association-In-Fact Gained Control of an Interest in a RICO Enterprise as a Result of Racketeering Activity or That Plaintiffs Suffered an Injury That Resulted From Defendants' Acquisition of Interest or Control of the Enterprise.

Count VI of the Class Complaint purports to allege violations of 18 U.S.C. § 1962(b). Class Complaint ¶¶ 763-769. This Count must be dismissed, however, because, in addition to the fact that Plaintiffs have alleged facts that negate the existence of an association-in-fact RICO enterprise and fail to identify any kind of organizational structure, as set forth above, the Class Plaintiffs also have not alleged (a) that the moving defendants gained an interest or control over a RICO enterprise as a result of racketeering activity, or (b) that the Plaintiffs suffered any injury as a result of the Defendants' acquisition or control of the alleged

association-in-fact enterprise.

Under § 1962(b), it is "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(b). Unlike § 1962(c), which prohibits the ***operation*** of an enterprise through a pattern of racketeering activity, § 1962(b) focuses on the ***acquisition*** of an enterprise. *See Jaguar Cars*, 46 F.3d at 267. Thus, to prevail on a § 1962(b) RICO claim, a RICO plaintiff must *specify* a defendant's interest or control in the enterprise and must allege a "nexus between the interest [acquired] and the alleged racketeering activities." *Lightning Lube*, 4 F.3d at 1190-91. Further, a plaintiff must allege an injury from the defendant's acquisition of an interest in or control of the enterprise, in addition to an injury from the predicate acts. *Id.* at 1190.

a. Plaintiffs Have Not Sufficiently Pled How the Alleged Racketeering Activities Caused the Moving Defendants to Acquire an Interest or Control in the Enterprise.

An association-in-fact enterprise presents a unique problem for a plaintiff alleging injuries under § 1962(b) because it is difficult to imagine how one would acquire an interest in, or control of, an association-in-fact as a result of racketeering activity. Since the Plaintiffs allege that the moving defendants are both (a) part of the association-in-fact enterprise and (b) acquirers of interests in, or

control over, the association-in-fact, the Plaintiffs' allegations are similar to fact patterns found in cases where a corporation is alleged to be both the RICO "person" and the RICO "enterprise" under § 1962(b). The Third Circuit has recognized that it is "difficult to understand how a corporation can acquire or maintain an interest in itself through a pattern of racketeering activity," and, moreover, it has not hesitated to affirm the dismissal of § 1962(b) claims where the plaintiffs have failed to allege how the defendants' purported acquisition of some or all an enterprise led to their damages. *See Lightning Lube*, 4 F.3d at 1190-91 (affirming summary judgment on § 1962(b) claim where plaintiff failed to allege how the acquisition of interest and control of the enterprise by defendants caused injury to plaintiff) (citation omitted).

A plaintiff's § 1962(b) claim must contain more than conclusory allegations and blanket assertions tracking the statutory language regarding the defendants' acquisition of an interest in and control of an enterprise. *See Kaiser*, 1997 U.S. Dist. LEXIS 12788, at *5 (dismissing § 1962(b) claim asserted against defendants for whom only conclusory assertions were made regarding their acquisition of an interest or control of the enterprise). Thus, where a plaintiff alleges that the defendants engaged in racketeering activities but cannot establish that those activities resulted in gaining control or interest in the RICO enterprise, the § 1962(b) claim should be dismissed. *See Cottman Transmission Sys., LLC v.*

Kershner, 536 F. Supp. 2d 543, 560 (E.D. Pa. 2008) (dismissing § 1962(b) claim and finding "it must be established firmly that there is a nexus between the [acquired] interest and the alleged racketeering activities.") (quoting *Lightning Lube*, 4 F.3d at 1190).

Furthermore, alleging "control" over a RICO enterprise requires more than participation in the operation or management of the enterprise. *Flood v. Makowski*, Civ. No. 3:CV-03-1803, 2004 U.S. Dist. LEXIS 16957, at * 28 (M.D. Pa. Aug. 24, 2004) (Caputo, J.) (granting motion to dismiss § 1962(b) claim). A person "controls" a RICO enterprise when he or she has significant power over the functioning of the enterprise, comparable to that of a majority shareholder or someone with managerial control. *Id.* An "interest" in a RICO enterprise must rise to the level of a proprietary interest. *Id.*

Here, in support of their § 1962(b) claim, the Class Action Plaintiffs make only broad and general allegations that the Defendants:

> acquired and maintained interests in and control of the enterprise identified in paragraphs 664 and 665[16] . . . through their pattern of racketeering activity in violation of 18 U.S.C. § 1962(b).
>
> They did so through a pattern of violations of 18 U.S.C. §§ 1343 and 1346 and 18 Pa. Const. Stat. § 4701(a)(1) and (3) in constructing juvenile detention facilities, namely [PACC] and WPACC]; in contracting with

[16] Moving defendants believe Plaintiffs intended to refer to paragraphs 751 and 752 of the Class Complaint as those are the paragraphs that identify the enterprise.

> Luzerne County to use those juvenile detention facilities; and in keeping the beds at [PACC] and [WPACC] full.

Class Complaint ¶¶ 764-765. Like the plaintiffs in *Kaiser*, Plaintiffs do not describe any of the Moving Defendants' interests in, or control over, the alleged RICO enterprise, nor do they explain how the alleged racketeering activities of the moving defendants resulted in the gaining of control or interest in the RICO enterprise. This lack of explanation is particularly significant because Class Plaintiffs' allegations in support of their § 1962(b) claim are, on their face, implausible. For example, the Class Plaintiffs allege:

- that all seven (7) of the members of the association-in-fact enterprise acquired or gained control over ***their own*** association-in-fact enterprise through racketeering activity (Class Complaint ¶¶ 751, 864);
- that all defendants to Plaintiffs' § 1962(b) claim – "along with others known and unknown" – ***acquired "control"*** over the seven-member RICO enterprise (Class Complaint ¶ 764);
- that all defendants named in the Class Plaintiffs' § 1962(b) claim – a group that includes both persons and entities alleged to have ***paid*** monies as part of the alleged racketeering activities and persons and entities alleged to have ***received*** monies as part of the alleged racketeering activities – ***acquired*** interests in, or control over, the seven-member RICO enterprise (Class Complaint ¶¶ 764, 707-712).

Accordingly, since the Class Complaint (a) fails to identify the nature of the proprietary "interest" that each of the moving defendants acquired in the RICO enterprise, (b) fails to explain how the moving defendants acquired a proprietary "interest" in an association-in-fact, (c) fails to identify the managerial-level

"control" that each of the moving defendants acquired or maintained over the association-in-fact enterprise, or (d) fails to explain how the moving defendants could be both the "controllers" of the association-in-fact enterprise and the "controlled" members of the association-in-fact enterprise, Class Plaintiffs' allegations are insufficient to support a claim under § 1962(b).

b. Plaintiffs Have Not Sufficiently Pled How They Were Injured as a Result of the Alleged Racketeering Activities That Caused the Moving Defendants to Acquire an Interest or Control in the Enterprise.

Class Plaintiffs' § 1962(b) claim also fails because Plaintiffs have not pleaded how they suffered injury as a result of the defendants' alleged "acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts [themselves]." *Lightning Lube*, 4 F.3d at 1190. If a § 1962(b) claim simply restates the same injury that a § 1962(c) claim is meant to remedy, the § 1962(b) injury is insufficient to state a claim. *Id.* at 1191 (concluding that the plaintiffs' alleged injury "clearly is insufficient because it merely parrots the same injury that [S]ection 1962(c) is meant to remedy and fails to explain what additional injury resulted from the person's interest or control of the enterprise."); *see also Flood*, 2004 U.S. Dist. LEXIS 16957, at * 29-30 (dismissing § 1962(b) claim where plaintiff alleged the same injury as his § 1962(c) claim).

In this Circuit, courts have held that an injury as a result of the defendants'

acquisition and control over a RICO enterprise occurs when "the owner of an enterprise infiltrated by the defendant as a result of racketeering activities is injured by the defendant's acquisition or control of [the] enterprise." *Lightning Lube*, 4 F.3d at 1190 (quoting *Casper v. Paine Webber Group, Inc.*, 787 F. Supp. 1480, 1494 (D.N.J. 1992)). The typical victim of the racketeering activity in a § 1962(b) claim is the enterprise itself. *Kaiser*, 1997 U.S. Dist. LEXIS 12788, at *3 (citing *National Org. for Women v. Scheidler*, 510 U.S. 249 (1994)).

Here, the Class Plaintiffs only generally allege that they were harmed "by reason of each defendants' acquisition and maintenance of interests in and control of the enterprise." Class Complaint ¶¶ 766-67. This bare-bones allegation does not establish how the alleged acquisition of an interest in the association-in-fact RICO enterprise harmed the Plaintiffs. Like the plaintiffs in *Lightning Lube* and *Flood*, the Class Plaintiffs' alleged injury in the § 1962(b) claim is insufficient because it merely repeats the same harms alleged as damages in their § 1962(c) claim. *Compare* Class Complaint ¶ 761 (listing claimed injuries in the § 1962(c) claim) *with* ¶ 768 (listing claimed injuries in the § 1962(b) claim). Because the Class Plaintiffs have not met their burden in pleading any injury that resulted from Defendants alleged acquisition and control of the RICO enterprise, and because the Class Plaintiffs have not alleged any injury separate from that sustained from the alleged predicate acts, the Class Plaintiffs' § 1962(b) claim (Count VI of the Class

Complaint) must be dismissed.

5. All of The Plaintiffs' RICO Conspiracy Claims Fail Because Plaintiffs Fail to Plausibly Aver a Conspiracy, Because Defendants' Did Not Proximately Cause Plaintiffs' Alleged Harm, and Because the Underlying Allegations Do Not Set Forth a Valid Claim for a Rico Violation.

Count II of the Individual Complaint alleges that the moving defendants conspired to violate § 1962(c), and Count VII of the Class Complaint similarly alleges that the moving defendants conspired to violate §§ 1962(b) and (c). These RICO conspiracy claims must be dismissed because: (1) Plaintiffs' allegations of multiple conspiracies are not plausible as to the moving defendants; (2) Plaintiffs lack statutory standing to bring claims;[17] and (3) Plaintiffs' underlying allegations fail to state valid claims for violations of RICO.

a. Plaintiffs' RICO Conspiracy Counts Must Be Dismissed Because Plaintiffs Fail to Plausibly Allege The Involvement of the Moving Defendants in Any Conspiracy Other Than to Commit Honest Services Fraud.

To plead a valid claim for RICO conspiracy under § 1962(d), a plaintiff must aver a plausible conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity. *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989), *overruled on other grounds by Beck v. Prupis*, 529 U.S. 494 (2000). Additionally, to satisfy the pleading requirements for a conspiracy

[17] Plaintiffs' lack of RICO standing is addressed in Section IV, *supra*.

under § 1962(d), a "plaintiff must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." *Id.* at 1166. The plaintiff must also plead an "agreement to commit predicate acts and knowledge that the acts were part of a pattern of racketeering activity." *Id.* at 1166-67. Although Congress enacted RICO with the intent that "a series of agreements that . . . would constitute multiple conspiracies could under RICO be tried as a single enterprise conspiracy," the predicate conspiracy and the RICO conspiracy remain "distinct offenses with entirely different objectives." *United States v. Irizarry*, 341 F.3d 273, 293 n.7 (3d Cir. 2003) (citations and internal quotation marks omitted). Thus, "a person may join a predicate conspiracy and agree to commit a substantive offense but not be RICO co-conspirator and not commit a RICO substantive offense." *Id.*

To allege a RICO conspiracy, the complaint must allege facts to support both the defendant's agreement and his or her knowledge. *Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir. 1991), *overruled on other grounds by Jaguar Cars*, 46 F.3d at 260-61. Thus, in *Glessner* the Court upheld the dismissal of the plaintiffs' § 1962(d) claims where the plaintiffs did not allege agreement and knowledge, but instead argued that agreement and knowledge could be inferred. *Id.*

Similarly, if the facts show only that the defendant was a member of a conspiracy other than the one charged, then that defendant cannot be liable under §

1962(d). The Civil Model Jury Instructions for RICO claims in the Third Circuit refer to the Fifth Circuit's Model Jury Instructions for RICO. *See* Third Circuit Civil Model Jury Instructions, App. Two, *available at* http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/Appendix-Two.pdf. The Fifth Circuit Model Jury Instruction for § 1962(d) provides:

> 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, you 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.

The RICO civil jury instruction has parallels to the criminal law doctrine of variance. In that context, to ascertain "whether a series of events constitutes a single conspiracy or separate and unrelated conspiracies," courts in this Circuit employ a three-part test: (1) whether there was a common goal among the conspirators; (2) whether the agreement requires the continuous cooperation of the conspirators; and (3) the extent to which the participants overlap. *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989) (citations and quotation marks omitted). In *Kelly*, analyzing the second factor, the Court considered whether the actions of one group were "necessary or advantageous to the success of another aspect of the

scheme or to the overall success of the venture." *Id.* (citations and quotation marks omitted).

Here, the Individual Plaintiffs fail to allege knowledge and agreement by the moving defendants; they simply allege that the "RICO Defendants conspired with one another to commit the violations of § 1962 alleged herein." Individual Complaint ¶ 99. For their part, the Class Plaintiffs baldly allege that "[t]he defendants knew that their predicate acts were part of a pattern of racketeering activity, and the defendants agreed to the commission of those acts to further the schemes described in Counts V and VI." Class Complaint ¶ 774. Bald and unsupported allegations do not satisfy the pleading requirements for a RICO conspiracy. *See Glessner*, 952 F.2d at 714; *cf.* Amendment Denial at 31 ("While the Individual Plaintiffs allege '[t]he Luzerne County Commission[er]s . . . were willful participants in joint activity and or jointly engaged' in the conspiracy, this legal conclusion is insufficient without factual allegations that would support it. 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.") (citation omitted). As a result, the § 1962(d) Counts should be dismissed.

b. Plaintiffs' RICO Conspiracy Counts Must Be Dismissed Because Plaintiffs Failed to Adequately Plead Any Substantive RICO Violation.

Plaintiffs' claims for damages from a RICO conspiracy under § 1962(d) should also be dismissed because Plaintiffs have failed to allege sufficiently an underlying RICO violation. A plaintiff must show that at least one of the co-conspirators violated an underlying substantive RICO provision. *See Lum v. Bank of America*, 361 F.3d 217, 227 n. 5 (3d Cir. 2004) (upholding dismissal of § 1962(d) claim where plaintiff failed to adequately plead any substantive RICO violation). If all of the substantive RICO claims fail, then the RICO conspiracy claim also fails. *Lightning Lube*, 4 F.3d at 1192.

Here, as discussed at length above, in addition to Plaintiffs' failure to allege proximate cause and other problems with Plaintiffs' statutory RICO standing, Plaintiffs substantive claims under § 1962(c) fail because: (1) the RICO "persons" and RICO "enterprise" are identical in the Individual Complaint; and (2) neither Complaint pleads, nor can plead, that the alleged enterprise exists separate and apart from the pattern of racketeering. Further, Class Plaintiffs' § 1962(b) claim also fails because: (1) the Class Complaint fails to allege, and cannot allege, that the moving Defendants gained control of a RICO enterprise through a pattern of racketeering activity; and (2) the Class Complaint fails to allege, and cannot allege, any injury resulting from the Defendants' acquisition or control over the asserted

enterprise. For these reasons, Plaintiffs cannot show that even one co-conspirator violated an underlying substantive RICO provision, and the § 1962(d) conspiracy claims in both of Plaintiffs' Complaints must be dismissed.

D. The Individual Plaintiffs' Civil Conspiracy Claim Fails to State A Claim Because it Fails to Allege Malice.

In Count VIII of the Individual Complaint, the Individual Plaintiffs assert a civil conspiracy claim against a number of defendants under Pennsylvania common law. The Court must dismiss this civil conspiracy claim because it fails to allege the element of malice.

To prevail on a civil conspiracy claim under Pennsylvania law, a plaintiff must show: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." *Gen. Refractories v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003) (quoting *Strickland v. Univ. of Scranton*, 700 A.2d 979, 987-88 (Pa. Super. Ct. 1997)). Additionally, "[p]roof of malice is an essential part of a cause of action for conspiracy." *Spitzer v. Abdelhak*, Civ. No. 98-6475, 1999 U.S. Dist. LEXIS 19110, at *9 (E.D. Pa. Dec. 15, 1999) (citing *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466 (Pa. 1979)).

An action for civil conspiracy "will lie only where ***the sole purpose of the conspiracy***" was to injure the plaintiffs. *Id.* (emphasis added) (citing *Thompson*

Coal, 412 A.2d at 472). 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. Sept. 3, 2009); *see also Spitzer*, 1999 U.S. Dist. LEXIS 19110, at *9 (granting motion to dismiss civil conspiracy claim where the plaintiff alleged that the purpose of the conspiracy was for the defendant to benefit itself personally and professionally). Thus, where a plaintiff's case relies on the theory that the defendants "acted for their business advantage and benefit" a civil conspiracy claim is "not [] tenable because [p]laintiffs' evidence belies the notion that [d]efendants acted without a business motive, but purely out of malice." *Id.* (dismissing civil conspiracy claim)*; see also Guaranty Towers, LLC v. Cellco Partnership*, Civ. No. 1:CV-07-0554, 2007 U.S. Dist. LEXIS 65819, at *6 (M.D. Pa. Sept. 6, 2007) (granting motion to dismiss civil conspiracy claim where the plaintiffs' theory of the claim stated that the defendants acted to obtain more revenue).

Here, the Individual Plaintiffs allege that Defendants "committed the overt acts in furtherance of the common purpose of the conspiracy which is more fully described in paragraphs 81 and 88." Individual Complaint ¶ 162. Paragraph 81 alleges that Defendants entered into an agreement "for their own personal enrichment and profit." Paragraph 88(D) further alleges that the conspiracy

ensured "increased profits and revenues . . . and increased return on investment and/or other remuneration . . . ." Indeed, instead of alleging that the moving defendants acted with malice toward Plaintiffs, Plaintiffs repeatedly assert that the purpose of the conspiracy was for the defendants' "own enrichment and profit." Individual Complaint ¶ 88; *see, e.g.*, Individual Complaint ¶¶ 33-34, 37, 41-55, 88(D)-(E). Accordingly, since Plaintiffs have failed to allege that the defendants acted solely out of malice toward Plaintiffs, the Court must dismiss Count VII of the Individual Complaint for failure to state a claim for which relief can be granted.

IV. CONCLUSION

For the foregoing reasons, and for the reasons explained in supplemental briefs accompanying this Common Brief in Support of Motion to Dismiss the Complaints, the Plaintiffs' claims alleging: (1) violations of 42 U.S.C. § 1983, (2) violations to the Racketeering Influenced and Corrupt Organization Act and Conspiracy to violate the Racketeering Influenced and Corrupt Organization Act, and (3) Civil Conspiracy should be dismissed.

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CERTIFICATE OF SERVICE

I, Matthew J.D. Hogan, do hereby certify that a true and correct copy of the JOINT MEMORANDUM IN SUPPORT OF CERTAIN DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINTS UNDER FED. R. CIV. P. 12(b)(6) was filed electronically on 22nd day of March 2010 and is available for viewing and downloading from the ECF system. A copy was also delivered *via* ECF or U.S. mail to all counsel of Record and any *pro se* parties.

Dated: March 22, 2010

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