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

FLORENCE WALLACE, ET AL.	:	**CONSOLIDATED TO:**
	:	
Plaintiffs,	:	**CIVIL ACTION NO. 3:09-cv-0286**
	:	
v.	:	
	:	(JUDGE CAPUTO)
ROBERT J. POWELL, ET AL.	:	
	:	
Defendants.	:	

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

WILLIAM CONWAY, ET AL.	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO. 3:09-cv-0291
	:	
v.	:	
	:	(JUDGE CAPUTO)
MICHAEL T. CONAHAN, ET AL.	:	
	:	
Defendants.	:	

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

H.T., ET AL.	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO. 3:09-cv-0357
	:	
v.	:	
	:	(JUDGE CAPUTO)
MARK A. CIAVARELLA, ET AL.	:	
	:	
Defendants.	:	

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

SAMANTHA HUMANIK,	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO. 3:09-cv-0630
	:	
v.	:	
	:	(JUDGE CAPUTO)
MARK A. CIAVARELLA, JR., ET AL.	:	
	:	
	:	
Defendants.	:	

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND CLASS CERTIFICATION

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I. INTRODUCTION

This consolidated case comprising both multi-plaintiff individual cases and putative class action lawsuits has been pending before this Court for over five years.[1] Although Plaintiffs continue to litigate their claims against other defendants, they have now reached a settlement with Defendants PA Child Care, LLC; Western PA Child Care, LLC and Mid-Atlantic Youth Services, Corp. (hereinafter "Provider Defendants), which received preliminary approval from this Court on November 27, 2013. The Master Settlement Agreement ("MSA") provides for a resolution of this litigation against the Provider Defendants in exchange for benefits to the Class including the following:

> The Provider Defendants established a settlement fund of $2,500,000.00. The full amount of the settlement fund will be placed in escrow for the benefit of this settlement once it is approved pursuant to a schedule more fully described in the MSA; and
>
> The net settlement proceeds (after the payment of common benefit attorneys' fees, common benefit litigation expenses, escrow fees and expenses, and any taxes or tax expenses related to the escrow account) shall be distributed pursuant to the plan of allocation previously preliminarily approved by this Court and discussed further below, to 2,019 plaintiffs (both Juvenile Plaintiffs and Parent Plaintiffs).

[1] The case *Florence Wallace, et al. v. Robert J. Powell, et al.*, No. 3:09-CV-0286 (M.D. Pa.) was filed on February 9, 2009. All later filed cases were consolidated to the *Wallace v. Powell* docket and have been proceeding on identical tracks.

The proposed form of Notice ("Notice") of the class action settlement and Proof of Claim form ("POC") were also approved by this Court and were disseminated, in accordance with this Court's Order, by first class mail directly to the last known addresses of all individuals in the settlement classes, along with published notice via the *Times Leader* and the *Citizens Voice*. Finally, Notice was also effectuated by Internet publication. Such a Notice regime complied with Federal Rule of Civil Procedure 23(c)(2) and (e) and the Due Process Clause of the United States Constitution, as it constituted the best notice practicable under the circumstances.

There were **no** objections to the Settlement by any Class Member. In addition, only nine Class Members chose to exclude themselves from the Settlement by opting out. Pursuant to the MSA, Provider Defendants could have exercised their right to withdrawal from the Settlement only if 70 or more Class Members timely opted-out. Since only nine have opted out, Provider Defendants can not and have not exercised that right.

Plaintiffs submit that the proposed settlement is fair, reasonable and adequate and amply satisfies the required standards set forth in *Girsh v. Jepson,* 521 F.2d 153 (3d Cir. 1975). They therefore respectfully request that the Court grant final approval to the Settlement. The proposed Settlement Classes are:

1. all juveniles who appeared before former Luzerne

County Court of Common Pleas Judge Mark A. Ciavarella between January 1, 2003 and May 28, 2008 who were adjudicated or placed by Ciavarella (the "Juvenile Settlement Class"); and

2. all parents and/or guardians of all juveniles who appeared before former Luzerne County Court of Common Pleas Judge Mark A. Ciavarella between January 1, 2003 and May 28, 2008 and who, in connection with their child's adjudication or placement: (i) made payments or had wages, social security or other entitlements garnished or withdrawn; (ii) had costs, fees, interest and/or penalties in their own name; (iii) suffered any loss of companionship and/or familial integrity (the "Parent Settlement Class"), and who were not fully reimbursed as a result of claims made in the Mericle Settlement, defined in the MSA.

should also be certified.

The proposed Settlement Classes clearly satisfy the four elements of Rule 23(a), and the predominance and superiority requirements of Rule 23(b)(3). Finally, Plaintiffs' motion (filed separately) for attorneys' fees and costs in the combined amount of $732,968.36, should be approved as reasonable, considering the time expended by Plaintiffs and their counsel in litigating this case and the superb result obtained.

II. FACTUAL BACKGROUND

A. The Litigation

This class action Settlement involves several multi-plaintiff individual complaints and putative class action complaints brought against the Provider

Defendants and others.[2] These complaints allege, in part, the following causes of action against the Provider Defendants: (1) claims under § 1983 alleging a conspiracy to violate Plaintiffs' constitutional rights (Master Long Form Complaint for Individual Actions ("IC"), Doc. No. 134, Counts III, V; Master Complaint for Class Actions ("CAC"), Doc. No. 136, Counts II, IV); (2) claims alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* (IC Count I; CAC Counts V, VI); (3) claims alleging a conspiracy to violate RICO, 18 U.S.C. § 1964(d) (IC Count II; CAC Count VII); (4) a claim alleging state-law civil conspiracy (IC Count VIII); and (5) a claim alleging state-law false imprisonment (IC Count IX).

The factual bases of these Complaints are now very well known to this Court. As summarized by the Court in its July 3, 2012 Opinion on Plaintiffs' and Provider Defendants' cross motions for summary judgment:

> This civil action arises out of the alleged conspiracy related to the construction of juvenile detention facilities, and subsequent detainment of juveniles in these facilities, orchestrated by two

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[2] The Action that is the subject of this Settlement involves four consolidated cases, two multi-plaintiff individual actions: *Wallace, et al. v. Powell, et al.*, No.3:09-CV-0286 (M.D. Pa.) and *Humanik, et al. v. Ciavarella, et al.*, No. 3:09-CV-0630, and two putative class actions: *Conway, et al. v. Conahan, et al.*, No. 3:09-CV-0291 and *H.T., et al. v. Ciavarella, et al.*, No. 3:09-CV-0357. In addition, the following six cases, while not the subject of this Settlement directly, will be affected by this Settlement: *Clark v. Ciavarella,* No. 09-CV-2535; *Dawn v. Conahan, No.* 10-CV-797; *Belanger v. Ciavarella, No.* 10-CV-1405; *Elia v. Powell,* Nos. 11-CV-0465, 11-CV-0466; and *Gillette v. Ciavarella,* No. 11-CV-0658.

> former Luzerne County Court of Common Pleas judges, Michael Conahan ("Conahan") and Mark Ciavarella ("Ciavarella"). Plaintiffs in this action, juveniles or the parents of juveniles who appeared before Ciavarella, seek redress from the former judges, as well as the individuals and business entities involved in the construction and operation of these facilities, for the alleged unlawful conspiracy and resulting deprivations of Juvenile Plaintiffs' rights.

See Doc. No. 1155, at 3-4.

B. Procedural Background

The first of these consolidated cases, *Wallace v. Powell,* was filed on February 13, 2009 against a number of defendants, including the Provider Defendants; although originally filed as a class action, the *Wallace* complaint was amended in May 2009 to proceed as an action on behalf of a substantial number of individual plaintiffs (both juvenile and parents). *Conway v. Conahan* and *H. T. v. Ciavarella,* both putative class actions, were filed shortly thereafter, again naming as defendants, among others, the Provider Defendants. Thereafter, *Humanik v. Ciavarella* was filed on behalf of single plaintiff Samantha Humanik.[3] These four cases are referred to collectively as the "Civil Actions."

The *Conway* and *H. T.* plaintiffs filed the CAC in June 2009. At the same time, the *Wallace* and *Humanik* plaintiffs filed the IC. Approximately 500 individuals have filed Short Form Complaints incorporating the allegations of the

[3] As stated above, six other cases were subsequently filed and are affected by this settlement. *See supra* note 2.

Master Long Form Complaint. The causes of action asserted in the Civil Actions are essentially the same and are listed above. *See also* Doc. No. 134 (IC) and Doc. No. 136 (CAC). In March 2010, various defendants filed motions to dismiss in *Wallace, Conway, H.T.*, and *Humanik.* After extensive briefing from all parties, on August 24, 2010, this Court denied in large part the motions to dismiss, finding that the Complaints alleged sufficient facts to proceed with the above theories. (*See* Doc. No. 573, hereinafter "Mot. To Dismiss Op.")

In the fall of 2010, Plaintiffs and various defendants began an attempt to settle the Civil Actions, but such efforts failed. However, settlement discussions continued with the Defendants Robert K. Mericle and Mericle Construction, Inc. (collectively the "Mericle Parties"), and a partial settlement was ultimately reached. On December 16, 2011, following extensive discovery and arms-length negotiations, Plaintiffs in the Civil Actions signed a settlement agreement (the "Mericle Settlement") with the Mericle Parties. The Court conditionally approved the Mericle Settlement on February 28, 2012 and appointed the law firms of Hangley, Caroselli, Anapol, and JLC as acting Class Counsel on a preliminary basis. (*See* Doc. No. 1084). Class Counsel noticed, processed and administered the Mericle Settlement for the next eight months. A final approval hearing for the Mericle Settlement was held on November 19, 2012. Thereafter, the Court granted final approval of the Mericle Settlement and final certification of the Mericle

Settlement Classes for settlement purposes. (*See* Doc. No. 1268). Additionally, the Court found that Class Counsel adequately represented the Classes for purposes of entering and implementing the Mericle Settlement and satisfied the requirements of Federal Rule of Civil Procedure 23. The Court dismissed the claims against the Mericle Parties with prejudice. (*Id.*)

Contemporaneous with and subsequent to this Court's Order finally approving the Mericle Settlement, discovery was ongoing against the remaining Defendants, including the Provider Defendants. A large volume of documents was produced by Plaintiffs, by the Provider Defendants and by other defendants. Plaintiffs' files from the Luzerne County Juvenile Probation Department have been produced, as have many transcripts of proceedings before Ciavarella. Additionally, 77 local and state police departments produced police records of Plaintiffs. In sum, Plaintiffs' counsel have received and reviewed 251,971 pages, all of which have been converted to electronic media in a searchable database. Depositions have been taken by Plaintiffs of representatives of the Provider Defendants and of Defendant Robert J. Powell.

Outside of the Civil Actions, Plaintiffs have amassed evidentiary material from collateral proceedings that include:

> (a) *In re J.V.R.,* No. 81 M.M. 2008 (Pa.), the King's Bench proceeding initiated in 2008 and revived in January 2009 for the purpose of vacating the adjudications and expunging the records of adjudications of the class of

juveniles adjudicated by Ciavarella from January 2003 through May 31, 2008.

(b) The Inter-Branch Commission on Juvenile Justice hearings held to investigate the failure of the juvenile justice system in Luzerne County and to recommend changes to avoid similar failures in the future.

(c) The criminal trial in *United States v. Ciavarella,* No. 09-028 (M.D. Pa.), held on February 8-16, 2011. Robert K. Mericle and Robert Powell both testified for the government.

(d) The pleas and on-record colloquies of Michael T. Conahan, Robert K. Mericle, and Robert Powell.

Class Counsel also collected relevant information from a private investigator, newspaper and journal articles and conversations with their clients.

In addition to the extensive discovery described above, the Court has considered motions to dismiss, granting them in part and denying them in part; considered and denied motions for summary judgment of the Provider Defendants; and addressed numerous other pretrial and discovery disputes (sometimes by formal motion and other times by conferences, both in person and telephonically) with the parties.

On February 1, 2013, Class Plaintiffs sought class certification for the litigation of all issues of Provider Defendants' liability to Plaintiffs pursuant to Federal Rule of Civil Procedure 23 (b)(3). ("Litigation Class Motion," *See* Doc. No. 1319.) On May 14, 2013, the Court granted Class Plaintiffs' Litigation Class

Motion and, pursuant to Rule 23(g), appointed Hangley, Anapol and JLC as Class Counsel. (*See* Doc. No. 1410.)

C. The Terms Of The Settlement Agreement

1. Background to the Settlement

In 2013, the Parties entered into settlement discussions. After lengthy arms-length negotiations, extensive legal and factual research and due diligence with the assistance of experts, the Parties to the Actions reached a settlement of Plaintiffs' claims against the Provider Defendants. Plaintiffs' Counsel conducted a thorough investigation of the facts and claims that are the subject of the Civil Actions, as described above. Plaintiffs' Counsel evaluated the relevant law and facts to assess the merits of Plaintiffs' claims and the likelihood of success at trial. Based upon their extensive discovery, investigation, and evaluation of the facts and the law, the Plaintiffs and Plaintiffs' Counsel have agreed to settle the Civil Actions pursuant to the provisions of the MSA. This decision is based upon consideration of, *inter alia*, (1) the fairness, reasonableness, and adequacy of the MSA; (2) the substantial risks and uncertainties of protracted litigation and trial, especially in complex actions such as this, as well as the difficulties, delays and risks of adverse results inherent in such litigation; (3) the needs and interests of the Class Members; and (4) the desirability of consummating the MSA promptly, in order to provide effective relief to the Class Members. The Named Plaintiffs and their counsel agree that the

proposed settlement is fair, reasonable, and adequate because it provides substantial benefits to the Class Members, is in the best interests of the Class Members, and fairly resolves the claims alleged in the Civil Action. While denying any liability, the Provider Defendants also consider it desirable that the Actions be settled and ended so as to halt the substantial expense of litigation.

The relief to the Class Members under the proposed settlement includes monetary benefits for both the Juvenile and Parent Settlement Classes. In addition, if a Class Member believes the amount of relief assigned to him or her was wrongly determined, that Class Member may dispute the amount before a Special Master for Allocation Appeals.

2. Basic Benefits

a. Juvenile Settlement Class

Under the proposed settlement, an Allocation Plan was presented to the Court and preliminarily approved by the Court's November 27, 2013 Order. The Allocation Plan provides that each qualifying Juvenile Settlement Class Member ("Juvenile") will receive settlement payment as follows:

- **Probation**: Each qualifying Juvenile who never spent any time in PACC, WPACC, or any other juvenile detention facility as a result of an adjudication by former Judge Ciavarella during the period from January 1, 2003 through May 28, 2008 shall receive one (1) point.

- **Non-PACC/WPACC**: Each qualifying Juvenile who was placed in a detention facility as a result of an adjudication or placement by former Judge Ciavarella during the period from January 1, 2003

through May 28, 2008, but who never spent any time in either PACC and/or WPACC, shall receive two (2) points.

- **PACC/WPACC**: Each qualifying Juvenile who was placed in PACC or WPACC as a result of an adjudication or placement by former Judge Ciavarella during the period from January 1, 2003 through May 28, 2008 shall receive five (5) points.

b. Parent Settlement Class

Under the proposed settlement, an Allocation Plan was presented to the Court and preliminarily approved by the Court's November 27, 2013 Order. The Allocation Plan provides that each qualifying Parent Settlement Class Member ("Parent") will receive settlement payment as follows:

- Each qualifying Parent Settlement Class Member who, as a result of their child's adjudication or placement by former Judge Ciavarella during the period from January 1, 2003 through May 28, 2008, (i) made payments to Luzerne County or had wages, social security or other entitlements garnished or withdrawn by Luzerne County; or (ii) had court-ordered services or pay court-ordered costs, fees, interest, and/or penalties assessed against them or their child, shall receive the actual amount of monies paid, garnished, or withdrawn.

Parent Settlement Class Members will be paid from this Settlement Fund only if they did not already received full reimbursement in the Mericle Settlement. Moreover, the total amount of funds to be paid to Parent Settlement Class Members may be reduced pro rata if the total exceeds the amount allocated to the Parent Settlement Class.

3. The Allocation Plan

The Allocation Plan provides that the Cash Settlement Fund will be divided among qualifying Settlement Class Members. First, court-approved costs and fees will be taken out of the Cash Settlement Fund. The remaining amount will be divided into (1) the Juvenile Fund; (2) the Parent Fund; and (3) the Holdback Fund. Each fund is described below:

- **JUVENILE FUND**. Seventy percent (70%) of the amount remaining in the Cash Settlement Fund will comprise the Juvenile Fund. Each qualifying Juvenile Settlement Class Member will be assigned to a Settlement Category and awarded a number of points as described above. The total number of points for all Juvenile Settlement Class Members will be divided into the Juvenile Fund to determine the monetary value of each point. Each Juvenile Settlement Class Member will receive the value of each point multiplied by his or her points, as determined by his or her Settlement Category.

- **PARENT FUND**. Fifteen percent (15%) of the amount remaining in the Cash Settlement Fund will comprise the Parent Fund. Each qualifying Parent Settlement Class Member will be awarded a specific amount of money based on the amount of payments documented in the Records or in records provided by the Parent Settlement Class Members showing payments made in their own names.

  If the total amount of funds to be paid to Parent Settlement Class Members exceeds the total funds in the Parent Fund, Parent Settlement Class Members will be awarded their pro-rata share of the Parent Fund. If the total amount of funds to be paid to Parent Settlement Class Members is less than the total funds in the Parent Fund, the remaining funds will pour over to the Juvenile Fund.

- **HOLDBACK FUND**. Fifteen percent (15%) of the amount remaining in the Cash Settlement Fund will comprise the Holdback Fund. The Holdback Fund will remain in escrow until all final accounting is complete for the Cash Settlement Fund. With written permission from the Court, the Holdback Fund may be used to pay settlement costs and attorneys' fees. The Holdback Fund will also be

> used to pay all costs of the appeal process, described below, and all additional payments to Settlement Class Members resulting from successful appeals. If the funds remaining in the Holdback Fund after payment of all costs, fees, and appeals, total $75,000 or more (3% of the gross Cash Settlement Fund), the remaining funds will be paid to the Juvenile Settlement Class Members in proportion to the number of points assigned to each Juvenile Settlement Class Member. If the funds remaining in the Holdback Fund after payment of all costs, fees, and appeals, total less than $75,000, Class Counsel will seek permission from the Court regarding the distribution of the remaining funds.

See Notice of Class Settlement, a copy of which is attached hereto, made a part hereof and marked Exhibit "A" at 7-8.

A Proof of Claim form, approved by this Court, was disseminated to each potential claimant for whom Class Counsel had an address with the Notice of the Settlement. That form required each Juvenile and Parent choosing to participate in the Settlement to provide necessary information and to provide a release for obtaining relevant records. Based upon the responses of each Claimant and a review of all documentation submitted by the Claimant and/or released at the request of the Claimant, the Claims Committee calculated the points for all Settlement Class Members who timely submitted claim forms. *Id.*

4. Individual Payment Amounts and Appeal Process

If a Claimant believes that the value amount assigned by the Claims Committee was "wrongly determined," the Claimant has the option to appeal the amount to a Court-appointed Special Master for Allocation Appeals. *See* Exhibit

"A" at 8. *See also* November 27, 2013 Order at ¶ 17. In cases where an appeal is lodged by a Claimant, the Notice of Settlement provides:

> The Special Master will re-assess the Claims Committee's decision. This reassessment will include a complete review of your Proof of Claim Form, the information available in the Records, and any additional written documentation provided by you in support of your claim. If appropriate, the Special Master will change the Settlement Category assigned by the Claims Committee under the terms of the Plan of Allocation.

Id. at 8. The Notice of Settlement further states that the "determinations made by the Special Master are final and shall not be subject to any further review or appeal." *Id.*

In order to properly fund the Allocation Appeal Process consistent with the MSA, Class Counsel request that 15% of the Cash Settlement Fund not be distributed, but instead be held back in the Escrow Account for the benefit of any successful Allocation Appellants and the costs associated with the Allocation Appeal Process. *See* "Holdback Fund" Section III(C)(3). The hold back will amount to $265,054.74. In the event that the hold back amount is not fully depleted, the balance will be returned to the Holdback Fund and will be distributed in accordance with the MSA.

As of the date of this filing, the Claims Committee is still working to obtain all necessary records to properly evaluate the validity and potential value amount of each claim that was timely submitted. The Claims Committee estimates that the

letter advising each Claimant of the amount, if any, of his or her proposed payment together with a written explanation of how the payment was determined will be distributed no later than 45 days after the Court issues an Order finally approving this Settlement.

5. Release

In exchange for the relief provided under the MSA, the named Plaintiffs and the Class Members will release and dismiss all claims against the Provider Defendants. The remaining defendants ("Non-Released Parties") shall receive no release or dismissal of any claims as a result of this MSA. In addition, as more fully set forth in the MSA at Section IX, Settlement Class Members agree and covenant not to sue PA Child Care, LLC, Western PA Child Care, LLC and Mid-Atlantic Youth Service, Corp., or any of their affiliates as defined in the MSA, over any matter which was or could have been alleged in these Civil Actions. Furthermore, as more fully set forth in the MSA, Plaintiffs' Counsel agree not to solicit any person for the purpose of representing that person in any matter arising out of the transactions or occurrences described in the Civil Actions against the Provider Defendants. *See* MSA, a copy of which is attached hereto, made a part hereof and marked Exhibit "B" at 15, § IX.

D. Preliminary Approval and Dissemination of Class Notice

On November 27, 2013, this Court preliminarily approved the Settlement and certified a Class for settlement purposes, authorized the issuance of notice to Class Members, including a Proof of Claim Form, set a date and time for the Fairness Hearing, and issued related orders.

1. Approximately 3,795 Notice Packages Mailed

In implementing the Court's preliminary approval order, Class Counsel utilized several methods to disseminate the Class Notice and apprise the Class of the proposed Settlement. Counsel mailed a total of 3,795 copies of the Court-approved Notice of Settlement and Proof of Claim Form to the last known addresses of potential Settlement Class Members by first-class mail, postage pre-paid. The Notice was mailed to all potential Class Members for whom Class Counsel had an address on December 10, 2013. *See* Declaration of Joseph Fantini, a copy of which is attached hereto, made a part hereof and marked Exhibit "C" at ¶ 5. The Claims Committee obtained the last known addresses for potential Class Members from the database used to administer the Mericle Settlement, which was updated with information provided by claimants in the Mericle Settlement. *See* Exhibit "C" at ¶ 4. Notice packages that were returned with no forwarding address totaled 778. Over 215 additional Notice packets were mailed to individuals wishing to make a claim after the December mailing. *Id.* at ¶ 9.

2. Toll Free Call Center Was Established to Answer Questions

Class Counsel also established a toll-free call center (the "Center"). The toll-free call center phone number was included in the Class Notice, and the Center has answered over 1,559 calls. *Id.* at ¶¶ 10-15. Counsel staffed the Center with non-lawyer customer service representatives ("CSRs") who were trained to respond to particular questions from Class Members concerning the litigation and the terms of the Settlement. *Id.* The Center was open to receive calls 24 hours a day, seven days a week. *Id.* When a call was received, the CSR sent an email message with the contact information of each caller and the content of the conversation to the Claims Committee, which would note the call in the Class Members' files and follow-up as described below.

3. Class Counsel Addressed Questions From Class Members

The CSRs were instructed that if callers had questions that were not or could not be answered by the CSRs themselves, they were to provide contact information of the caller to Class Counsel. Caroselli Beachler McTiernan & Conboy; Anapol Schwartz; Hangley Aronchick Segal Pudlin & Schiller; and Juvenile Law Center, acting as Class Counsel, all returned calls from numerous claimants and potential claimants, assisting them in understanding the Settlement and the Proof of Claim form. Finally, Class Counsel assisted claimants and potential claimants in completing forms necessary to obtain relevant documentation to support their claims and to claim the relief provided by the Settlement. *See* Declarations of

Lauren C. Fantini, Esquire, Rebecca S. Melley, Esquire and Emily Keller, Esquire, copies of which are attached hereto, made a part hereof, and marked respectively Exhibits "D," "E," and "F." Class Counsel also informed claimants that they were free to continue to follow-up with Class Counsel for answers to questions at any time in the future when they may require it. Class Counsel anticipates that after Final Approval, they will continue to receive calls regarding the Allocation Plan. *See* Exhibit "C" at ¶ 20.

4. Confirmation of Receipt of Proof of Claim Form

As set forth in the Notice, a Class Member could call into the call center to confirm that their Proof of Claim Form was timely received and whether it was correctly completed. *See* Exhibit "A" at 5. The CSRs would note that a particular Class Member made this specific request, which was then forwarded along to the Claims Committee for review. A Claims Committee member would then review the documentation submitted by the claimant, if any, and return the call to the claimant with information regarding receipt and correctness of the Proof of Claim Form. The Claims Committee member then noted the request and the returned call in the claimant's file.

5. Published Notice

In addition to mailing of the Notice, Class Counsel caused Notice of the Settlement to be published in the *Times Leader* and *Citizens Voice*. Published

Notice of the Settlement appeared in each newspaper once. The Published Notice appeared in the *Times Leader* on December 11, 2013. *See Times Leader* proof of publication, a copy of which is attached hereto, made a part hereof and marked Exhibit "G." The published Notice appeared in the *Citizens Voice* on December 11, 2013. *See Citizens Voice* Affidavit, a copy of which is attached hereto, made a part hereof, and marked Exhibit "H."

6. **Website**

In addition to mailing and publishing the Notice of the Settlement as described above, Class Counsel also maintained an internet site containing the Notice at www.kidswinsettlement.com. This site was first made available to the public on December 16, 2011, when Class Counsel filed the Motion for Preliminary Approval of the Mericle Settlement. On December 16, 2013, the Court-approved Notice, Proof of Claim form, and other settlement documents relating to the Provider Defendant Settlement were posted to the website. Specifically, the site contains copies of the following: the MSA; Proof of Claim Form; Authorization to Release Records, Mailed Legal Notice of the Class Action Settlement; Published Legal Notice of the Class Action Settlement; and the November 27, 2013 Order preliminarily approving the Class Action Settlement. Since December 3, 2013, the site has received 2,552 visits. *See* Exhibit "C" at ¶ 27.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

The standard for reviewing a proposed class action settlement is whether the settlement is "fair, adequate and reasonable." *Walsh v. Great Atlantic & Pacific Tea Co.,* 726 F.2d 956, 965 (3d Cir. 1983). Evaluation of whether the proposed class settlement is fair and reasonable in the Third Circuit rests upon the following nine factors set forth in *Girsh v. Jepson,* 521 F.2d 153 (3d Cir. 1975):

> (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater settlement; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund in light of the attendant risks of litigation.

Id. at 157; *see also Detroit v. Grinnell Corp.,* 495 F.2d 488, 463 (2d Cir. 1973).

The Third Circuit's policy is to encourage settlement of complex litigation, citing the "overriding public interest in settling and quieting litigation, particularly in class actions" so as to conserve substantial judicial resources. *In re Warfarin Sodium Antitrust Litigation,* 212 F.R.D. 231, 254 (D. Del. 2002) (quoting *In re General Motors Pick-up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 785 (3d Cir. 1995)); *see also In re School Asbestos Litig.,* 921 F.2d 1330, 1333 (3d Cir. 1990) (Third Circuit's policy is to encourage settlement of complex litigation that otherwise could linger for years). That policy is particularly important here, where the litigation has already taken over five years and embraces thousands of

individuals, most of whom were minors at the time the alleged acts complained of took place. In the absence of this settlement, the parties would face additional litigation and, consequently, uncertainty. This Settlement brings meaningful relief to thousands of individuals while recognizing the risks of going forward against the Provider Defendants and preserving their rights and causes of actions against the Non-Released Parties.

There is an initial presumption of fairness for the settlement if the court finds that: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Warfarin,* 212 F.R.D. at 254. Each of these requirements is clearly met in this case.

First, the Settlement Agreement was reached after protracted arm's length negotiations for many months, including a failed mediation with an experienced mediator. Thereafter, the parties continued their arm's length negotiations, without the assistance of a mediator, through numerous face-to-face meetings and teleconferences. The rounds of failed mediation took place in Washington, D.C. and Philadelphia, Pennsylvania. Thereafter, the Parties' ceased negotiations. Following final approval of the Mericle Settlement, the Parties recommenced their arms length negotiations without the assistance of a mediator. These negotiations took place over many months and included confirmatory discovery of accounting

records and their evaluation by a forensic accountant retained by Plaintiffs. *See* Expert Report and Curriculum Vitae of Stephen J. Scherf, CPA, a true and correct copy which is attached hereto, made a part hereof and marked Exhibit "N."

Second, Class Counsel have engaged in extensive discovery, including the exchange of extensive written discovery, the review of hundreds of thousands of pages of documents, and the exchange of Plaintiff Fact Sheets for certain of the Class Members. The depositions of representatives of Provider Defendants also took place.

Third, Plaintiffs' counsel have extensive experience in similar matters. The Caroselli firm's concentration has been the representation of plaintiffs in all forms of class actions, mass tort actions, personal injury matters, civil rights claims, insurance bad faith claims, and complex litigation in state and federal courts. *See* biographies of William R. Caroselli, Esquire and David S. Senoff, Esquire, a copies of which are attached hereto, made a part hereof and marked Exhibit "I."

The Anapol Schwartz firm, particularly Sol Weiss, concentrates his practice in complex civil litigation, including class actions and mass torts. Specifically, Mr. Weiss and the Anapol firm have been involved in numerous pharmaceutical cases, product liability cases, securities litigation, including RICO claims, as well as a variety of other types of cases. Recently Mr. Weiss was named co-lead counsel in a class action against the National Football League and others regarding head

trauma sustained by professional football players. *See* Biography of Sol Weiss, Esquire, a copy of which is attached here to, made a part hereof, and marked Exhibit "J."

The Juvenile Law Center ("JLC") has been at the forefront of protecting and defending children's legal rights since 1975, and has litigated a number of class-action lawsuits involving children's constitutional rights over more than three decades. JLC also sought and received equitable relief in the Pennsylvania Supreme Court on behalf of these juvenile victims as early as April 2008. Additional information about JLC and attorney Marsha L. Levick is attached hereto, made a part hereof, and marked Exhibit "K."

Hangley Aronchick Segal Pudlin & Schiller ("Hangley") has worked as co-counsel with JLC from before the filing of their complaint in this Court in February 2009. Hangley's litigation department is highly regarded, with attorneys' concentrations including complex commercial litigation, constitutional litigation, and criminal defense and investigations. The firm's attorneys have expertise in bringing and defending class action suits in federal and state courts. Hangley shareholder Daniel Segal has functioned as liaison counsel in this action for the past three years. Additional information about Hangley and Mr. Segal is attached hereto, made a part hereof, and marked Exhibit "L."

Finally, after providing the Notice of Class Action Settlement, Proposed Settlement and Fairness Hearing to the Class Members through first-class mail, print publication and via the internet, not a single item of correspondence that could be interpreted as an objection has been received – out of a class of approximately 3,910. In addition, only 9 timely POCs were returned wherein Class Members sought to exclude themselves from the Settlement. Accordingly, the reaction of the Class is that there are no objections and only 9 opt-outs, or less than a 1% opt-out rate. Thus, the opinion of experienced Class Counsel and the response by the Class strongly favor approval of the proposed Settlement by the Court.[4]

A. The Court Has Jurisdiction to Rule on the Settlement

1. This Court Has Subject Matter Jurisdiction Over All Claims

As a preliminary matter, the Court has federal-question subject matter jurisdiction under 28 U.S.C. § 1331 for the claims in Plaintiffs' Complaints that arise under both the Civil Rights Act of 1871, 42 U.S.C. § 1983 and under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq*. In addition, pursuant to 28 U.S.C. § 1367(a) this Court has supplemental jurisdiction over the state law claims of civil conspiracy and false imprisonment.

[4] As discussed below, the opinion of Professor Lynn Baker, an ethics expert retained by Class Counsel, also powerfully supports the approval of the Settlement as fair and reasonable.

The state law claims emanate from the same common nucleus of facts as the civil rights and RICO claims and are part of the "same case or controversy." *See generally United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); 28 U.S.C. § 1367(a). Accordingly, this Court has jurisdiction over all claims asserted by the Plaintiffs.

2. This Court Has Personal Jurisdiction Over All Class Members

a. Based on Dissemination of Class Notice

The Court has personal jurisdiction over the Plaintiffs and the absent Class Members as a result of the notice that was provided to all absentee Class Members, which informed the absentee Class Members of the nature of the litigation and provided them with the opportunity to be heard as well as the opportunity to withdraw from the class. *See In re Prudential Insurance Co. of Am. Sale Practice Litig. Agent Actions*, 148 F.3d 283, 306 (3d Cir. 1998) *cert. denied*, 525 U.S. 1114 (1999) ("*Prudential II*") (citing *Phillips Petroleum v. Shutts,* 472 U.S. 797, 811-12 (1985)). "The combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class satisfy the due process requirements of the Fifth Amendment. Consequently, silence on the part of those receiving notice is construed as tacit consent to the court's jurisdiction." *Id.*

b. Proper Notice Has Been Provided to the Class

Proper notice has been provided to the Class, because the Notice was comprehensive and clear and widely disseminated to the Class. Federal Rule of Civil Procedure 23(e) provides that "Notice of the proposed dismissal or compromise (of a class action) shall be given to all class members in such manner as the court directs." Federal Rule of Civil Procedure 23(c)(2) provides that in any class action maintained under subdivision (b)(3), the court shall direct to the class members the best notice practicable under the circumstances, including individual notice to all class members who can be identified through reasonable effort.

Here, the parties have provided individual first class mailed notice to all reasonably identifiable Class Members, based on last known addresses in the Luzerne County records. The Notice was also available to the Class Members on an internet web site maintained by Class Counsel as well as through published notice in two separate newspapers.

The content of the proposed Notice, and the proposed method of dissemination of the Notice, fulfilled the requirements of Federal Rule of Civil Procedure 23 (e) and Rule 23 (c) (2) and the Due Process Clause of the United States Constitution. The Court found that the Mailed Notice, subject to modification, and the Settlement Hearing provide appropriate notice to the conditionally certified Settlement Classes. *See* November 27, 2013, Order Conditionally Certifying Settlement Class and Preliminarily Approving Proposed

Settlement at ¶ 8(a). The Notice advised each Class Member that (a) the court will exclude the member from the Settlement Class if the member so validly requests by a specified date; (b) the judgment, whether favorable or not, will include all Class Members who do not validly request exclusion; and (c) any Class Member who does not validly request exclusion may, if the member desires, enter an appearance through counsel, as required by Rule 23(c)(2). The Notice package included all of the information and deadlines needed to make an informed decision regarding participation in the settlement. Furthermore, the dissemination of the notice by first class mail and publication, complies with the due process requirements of the United States Constitution and the Federal Rules of Civil Procedure.

Notice of this class action settlement by first class mail alone to the identifiable Class Members satisfies Rule 23's notice requirements. There is a plethora of authority for the proposition that notice by mail only is sufficient. In *Fleury v. Richemont North America, Inc.,* 2008 U.S. Dist. LEXIS 88166 (N.D. Cal. 2008), notice was successfully mailed to about 75,000 out of 85,957 class members, and the court found that additional notice by publication was not required, noting that "'[i]ndividual mailings, even when only calculated to reach one third of prospective plaintiffs, and even without supplemental publication in newspapers, has been found to constitute adequate notice.'" *Id.* (quoting *Gonzalez*

v. City of New York, 396 F. Supp. 2d 411, 418 (S.D.N.Y. 2005); also citing *Grunin v. International House of Pancakes,* 513 F.2d 114, 121 (8th Cir. 1975) (concluding that additional "notice by publication was unnecessary in this case for due process purposes and probably would have been of little value in alerting members of the class and subclass that were previously uninformed")).

The district court in *Peters v. National R.R. Passenger Corp.,* 966 F.2d 1483, 1486 (D.D.C. 1992), held that it is beyond dispute that notice by first class mail alone ordinarily satisfies Rule 23(c)(2)'s requirement that Class Members receive "the best notice practicable under the circumstances," even though the mail is not 100% reliable. *Id.* (citing *Trist v. First Federal Sav. & Loan Ass'n,* 89 F.R.D. 1, 2 (E.D. Pa. 1980)); *see also Jenkins v. Raymark Indus., Inc.,* 109 F.R.D. 269, 281 (E.D. Tex. 1985), *aff'd,* 782 F.2d 468 (5th Cir. 1986); *Steiner v. Equimark Corp.,* 96 F.R.D. 603, 614 (W.D. Pa. 1983); *Piel v. National Semiconductor Corp.,* 86 F.R.D. 357, 375 (E.D. Pa. 1980); *Unicorn Field Inc. v. Cannon Group, Inc.,* 60 F.R.D. 217 (S.D.N.Y. 1973).

In *Berland v. Mack,* 48 F.R.D. 121 (S.D.N.Y. 1969), the district court held that notice by publication in addition to notice by first-class mail was cost prohibitive, and that if the percentage of unidentified members proved to be small, notice by mail to all 16,000 identifiable class members may be "reasonably certain to reach *most* of those interested." (emphasis in original).

Notice of class action settlement by first class mail alone was also approved and deemed adequate in *Weiss v. Tenney Corp.,* 47 F.R.D. 283, 294 (S.D.N.Y. 1969); *Moreno v. AutoZone, Inc.,* 2007 U.S. Dist. LEXIS 98250 (N.D. Cal. Dec. 6, 2007); *Sharer v. Tandberg, Inc.,* 2006 U.S. Dist. LEXIS 85480 (E.D. Va. Nov. 22, 2006); *Galloway v. Southwark Plaza Ltd. P'ship,* 2003 U.S. Dist. LEXIS 20212 (E.D. Pa. Oct. 28, 2003); and *Brandt v. Owens-Illinois, Inc.,* 62 F.R.D. 160, 166 (S.D.N.Y. 1974). Based on these cases, it is clear that in this case, notice by mailing, newspaper publication and internet publication is adequate.

B. The Settlement Satisfies the *Girsh* Factors

Whether the Settlement is fair, reasonable and adequate is based on an analysis of the MSA under the factors set forth in *Girsh v. Jepson,* 521 F.2d 153, 156-57 (3d Cir. 1975). The factors set forth in *Girsh,* to be analyzed on a motion for final approval of a settlement, include (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of

the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Girsh,* 521 F.2d at 157.

In assessing the fairness of a proposed settlement, the Court should be careful not to substitute its image of an ideal settlement for the compromising parties' views and should guard against demanding too large a settlement based on its view of the merits of the litigation. *See Varacallo v. Mass. Mutual Life Ins. Co.,* 226 F.R.D. 207, 236 (D.N.J. 2005). Thus, in applying the *Girsh* factors, "the issue is whether the settlement is adequate and reasonable, not whether one could conceive of a better settlement." *Id.*

An analysis and application of the *Girsh* factors to the Settlement here leads to a determination that this Settlement is fair, reasonable and adequate, and should receive final court approval. *See Boone v. Philadelphia,* 668 F. Supp.2d 693 (E.D. Pa. 2009) (approving settlement of civil rights action).

1. <u>Complexity, Expense and Likely Duration of the Litigation</u>

"Where the complexity, expense and duration of litigation are significant, the Court will view this as weighing in favor of settlement." *Varacallo v. Mass Mut. Life Ins. Co.,* 226 F.R.D. 207, 236 (D.N.J. 2005). The MSA here provides financial benefits to the Class more quickly than litigation of the numerous complex and complicated issues involved in this case could an especially important aspect considering that many of the Class Members were juveniles at the time of -

the alleged constitutional violations and other bad acts. When the complexity of the issues involved and the expense and duration of the litigation are considered in light of the composition of the Class, the advantages to an early and certain resolution are clear. At trial, Plaintiffs would face the task of proving the unconstitutionality of the events that took place in Ciavarella's courtroom, plus the asserted conspiracy that led up to those events and the alleged participation of the Provider Defendants in causing the Juvenile Plaintiffs' constitutional harm. With regard to the settling defendants, that would be complex, expensive and risky. These facts make settlement with these defendants the best option under the first *Girsh* factor. *See Boone*, 668 F. Supp.2d 693, 712.

2. The Reaction of the Class to the Settlement

"This factor attempts to gauge whether members of the class support the settlement." *Varacallo,* 226 F.R.D. at 237. Here, out of the over 3,910 potential class members, **none** have objected. A low number of objectors compared to the number of potential class members creates a strong presumption in favor of approving the settlement. *Boone*, 668 F. Supp.2d at 712, *citing In re Cendant Corp. Litigation*, 264 F.3d 201, 234-35 (3d Cir. 2001). Moreover, only 9 class members chose to opt-out of the class. Accordingly, the reaction of the Class is that there are no objections and only 9 opt-outs, or less than a 1% opt-out rate. The fact that no potential class members objected to the settlement (and that few opted

out) supports a finding of general acceptance of the settlement within the class. *See id.*

3. Stage of Proceedings and Amount of Discovery

The third factor, the stage of the proceedings and the amount of discovery, weighs in favor of acceptance of the Settlement. Post-discovery settlements are more likely to reflect the true value of the claim. *Boone*, 668 F. Supp.2d 693, 712 *citing Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993). In the present case, the settlement was achieved well into the procedural history of the case. From the initial filing to the point of preliminary approval of the settlement, the matter was vigorously litigated on both sides for almost exactly four years. There has been extensive discovery in this action, including the production of over 200,000 pages of documents, production of hundreds of Plaintiff Fact Sheets, numerous depositions, and extensive additional investigations that the parties have undertaken to render themselves sufficiently informed to make a determination about the fairness of the Settlement. The Court has considered motions to dismiss, motions for summary judgment, certification of a litigation class, and numerous other disputes between the Parties. In addition, specifically with regard to this Settlement, confirmatory discovery occurred through the use of a forensic accountant. *See* Exhibit "N."

Given this extensive record, it is clear that it was not until the parties and their lawyers had "a clear view of the strengths and weaknesses of their cases," *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986), that settlement negotiations even began to culminate in the agreement now proposed.

As in *General Motors*, 55 F.3d at 813, the parties had a tremendous "appreciation of the merits of the case before negotiating." The extensive motion, discovery and related practice has been more than sufficient to enable the parties to be "fully aware of the strengths and weaknesses of their case" and to make "an informed decision as to the fairness and reasonableness of the settlement." *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 308 (W.D. Pa. 1997). Furthermore, as in *Varacallo*, the settlement discussions themselves took many months of hard-fought negotiations, including face-to-face meetings and telephone conferences to come to an arms-length agreement. *Varacallo*, 226 F.2d at 238. The third *Girsh* factor therefore also weighs heavily in favor of granting final approval to this Settlement.

4. Risks of Establishing Liability and Damages and Maintaining the Class Action Through Trial

Set against the significant benefits that can be made available to the Class quickly through the proposed settlement, is the daunting, time-consuming, and risky alternative continued litigation against the Provider Defendants. Not only could it take additional time for Plaintiffs to litigate this case to an ultimate

conclusion, but future unknown rulings of this Court and the appellate court demonstrate the attendant risks of litigation.

Plaintiffs anticipate that many additional issues of law and fact would be vigorously disputed in the trial of this case against the Provider Defendants. The attendant risks, as well as the likely duration of litigation, certainly support final approval of this settlement, especially considering the age of this case at this point.

5. Range of Reasonableness and Attendant Risks of Litigation

Most important in the consideration of the reasonableness of the settlement is the fact that the terms of the settlement effectively and substantially address each allegation precipitating the filing of this suit against the settling defendants. All Class Members, parents and juveniles alike, who were victimized by Ciavarella, Conahan and their scheme to violate plaintiffs' constitutional rights will receive significant benefits.

The reasonableness of the Settlement in light of the best possible recovery as against the Provider Defendants (and the attendant risks against those defendants) support approval of this Settlement. The reasonableness of a proposed settlement depends in part on a comparison of the present value of the damages the plaintiffs would recover from the settling defendants if successful, discounted by the risks of not prevailing. *Boone*, 668 F. Supp.2d at 712 *citing In re General Motors*, 55 F.3d at 806.

Plaintiffs retained forensic accounting expert Stephen J. Scherf, CPA/ABV/CFF, CDBV, CFE, CICA, CIRA, CVA. Mr. Scherf's experience includes business valuation, fraud investigations, bankruptcy, and litigation matters. Mr. Scherf's analysis concluded that within a reasonable degree of professional certainty that the proposed settlement amount and payment schedule was fair and reasonable given the Provider Defendants' financial condition. *See* Exhibit "N."

Plaintiffs also retained as an ethics expert Professor Lynn A. Baker, the Frederick M. Baron Chair in Law at the University of Texas School of Law where she has taught since 1997, and where she also serves as Co-Director of the Center on Lawyers, Civil Justice and the Media. *See* Declaration and Curriculum Vitae of Lynn A. Baker, copies of which is attached hereto, made a part hereof, and collectively marked Exhibit "M" at 3.

One of Professor Baker's principal academic interests has been ethical issues in group litigation and settlement, including issues surrounding the allocation of settlement proceeds. She regularly teaches a survey course on Professional Responsibility, which includes substantial discussion of these issues. She also often teaches a seminar (titled "Mega-Settlements") which focuses on large-dollar, complex settlements, and which involves extended, in-depth discussion of allocation issues in both mass tort and class action settings. She has frequently

appeared as an invited speaker on these issues at symposia, conferences, and continuing legal education programs. Her scholarly publications on these issues include: *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 Va. L. Rev. 1465 (1998) (with Charles Silver); *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733 (1997) (with Charles Silver); and *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. Tex. L. Rev. 227 (1999) (with Charles Silver). These publications have been cited by numerous commentators and courts, and in leading treatises including the ALI's PRINCIPLES OF AGGREGATE LITIGATION (2010). *Id.* at 3-4.

Professor Baker has served as an expert or consultant on ethical and/or allocation issues in dozens of large-dollar, large-group settlements, including the proposed BP class action settlement pending in the U.S. Court of Appeals for the Fifth Circuit, the $4.5 billion nationwide Vioxx settlement in 2007, the $1.27 billion nationwide Fen-Phen class action settlement in 2006, numerous settlements involving various other pharmaceuticals (including Yaz/Yasmin, hormone replacement therapy, Paxil, Avandia, Seroquel, Gadolineum, Rezulin, Zyprexa, Ortho Evra, Bextra, Celebrex), and many settlements involving asbestos, silica, MTBE, and other toxins. She has served as an expert in various settlements in connection with *In re WorldCom, Inc. Securities Litigation*, and in connection with class action settlements in twelve states involving alleged wage and hour violations

by Wal-Mart. *Id.* at 4. Professor Baker also served as an expert, and provided an expert report, in the Mericle Settlement.

Professor Baker opines that the Settlement is fair and reasonable in all respects and states:

- The proposed $2,500,00 settlement was agreed to on September 25, 2013, more than four years after the first of these consolidated cases was filed and after extensive arms-length negotiations and due diligence. As a cash settlement with minimal reversion of funds to the Defendants, the proposed settlement takes the form most favorable to the settlement Class.

- The high rate of participation of Juvenile and Parent class members, together with the small number of opt outs and the absence of any objecting class members, suggests that the class members themselves consider the settlement fund allocation plan, as detailed in both the class settlement notice, to be fair and reasonable.

- The proposed settlement fund allocation plan is fair, reasonable, appropriate to the circumstances of the proposed class settlement, and consistent with accepted allocation practices in group settlements involving large numbers of plaintiffs.

- Insofar as she is aware, no basis exists for finding the proposed settlement fund allocation plan unfair, unreasonable, or not appropriate to the circumstances of the proposed class settlement.

Id. at 2-3.

Since the Settlement yields additional monetary benefits over and above what the Settlement Class Members received in the Mericle Settlement – effectively addressing every allegation precipitating the filing of the suit against the Provider Defendants without the risk that there would be no recovery from the

Provider Defendants at the end of a long road – a Class Member's recovery exceeds the value of the best possible recovery from the relevant defendants discounted by the risks of litigation. *See Varacallo*, 226 F.R.D. at 240. The relief offered by the Settlement here – providing additional monetary relief – clearly falls within the range of reasonableness when considering the best possible recovery, the attendant risks of litigation and the ability of the Settling Defendants to withstand a greater judgment. *See Prudential II*, 148 F.3d at 322 (noting that the negative effect of a greater judgment on defendant's credit rating favors settlement).

IV. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

The legitimacy of settlement classes was confirmed by the United States Supreme Court in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997). The Supreme Court determined there that the terms of a proposed settlement are relevant to a class certification analysis in large part because settlement alleviates the need to address potential management problems that might arise were the case to be tried. *Id.* at 619-20. The Supreme Court reiterated the "dominant factor" that governs such a Rule 23 analysis – "whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Id.* at 621.

Facts and evidence support the finding that the proposed class satisfies all four requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Plaintiffs submit that there is sufficient basis for final certification of the class for settlement purposes. The Settling Defendants submit that the Supreme Court's decision in *Amchem* effectively eliminates the need to consider and make findings - in the context of a class settlement - on predominance issues that relate to an initiated class action. Finally, the parties here concur that, for settlement purposes, a class action is a superior method for the fair and efficient adjudication of this controversy through settlement.

A. Numerosity

The numerosity requirement is a fairly low threshold. *See In re Rent-Way Sec. Litig.,* 218 F.R.D. 101, 112 (W.D. Pa. 2003). Rule 23(a)(1) simply requires a finding that "the class is so numerous that joinder of all members is impracticable." While there is no precise number for establishing numerosity, the Third Circuit has held that Rule 23(a)(1) is generally satisfied where the number of potential claimants exceeds forty. *Stewart v. Abraham,* 275 F.3d 220 at 226-27 (3d Cir.

2001); *see also Peil v. Speiser,* 97 F.R.D. 657, 658-59 (E.D. Pa. 1983) (holding that common sense assumption that class numbered in the thousands in a securities action was sufficient to satisfy the numerosity requirement of Rule 23(a). Here, because each of the proposed Settlement Classes includes thousands of individuals, this requirement is easily met.

B. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. Commonality is likewise a low threshold, requiring merely that there be at least one common issue of law or fact. *See Duhaime v. John Hancock Mut. Life Ins. Co., 177* F.R.D. 54, 63 (D. Mass. 1997); ALBA CONTE AND HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS 4th § 3.10 (2002). As such, courts have routinely ruled that where the lawsuit is based on an alleged "common scheme of deception" or "common or standardized conduct," commonality necessarily exists. *Elkins v. Equitable Life Ins. Co.,* 1998 U.S. Dist. LEXIS 1557, at *47-*50 (M.D. Fla. 1998); *Duhaime, 177* F.R.D. at 63.

"The commonality requirement will be satisfied if the named plaintiffs share at least one question of law or fact with the grievances of the prospective class." *Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994). There is no requirement that all class members share all issues of law and fact, and factual differences among class members do not defeat certification. *Id.* (citing *Eisenberg v. Gagnon,* 766 F.2d 770

(3d Cir. 1985)); *see also In re IKON Office Solutions, Inc.,* 191 F.R.D. 457, 463 (E.D. Pa. 2000). Given that one common issue will satisfy the commonality requirement, it is easily met. *Baby Neal,* 43 F.3d at 56. The questions of law and fact involved in proving a RICO claim satisfy the commonality requirement of Rule 23(a)(2). *Rodriguez v. McKinney,* 156 F.R.D. at 112, 114 (E.D. Pa. 1994).

In the present case, the allegations in the complaints raise the following common issues relating to liability of the defendants, including the Provider Defendants:

- Whether defendants acted in conspiracy with each other;
- Whether the actions of the private-party defendants, allegedly taken in concert with Ciavarella and Conahan, rendered defendants state actors for purposes of § 1983;
- Whether defendants either conspired to construct the PACC and WPACC facilities and fill them through violations of Plaintiffs' rights, or conspired to set in motion a series of acts that they reasonably knew or should have known would cause Ciavarella to violate Plaintiffs' rights;
- Whether Plaintiffs' detentions in the PACC and WPACC facilities were unlawful;
- Whether various defendants organized an association-in-fact enterprise;
- Whether various defendants participated in the conduct or the affairs of the enterprise through a pattern of racketeering activity.

Thus, the commonality element is satisfied.

C. The Plaintiffs' Claims Are Typical of Those in the Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality is satisfied where the named plaintiffs' claims and those of the absent Class Members arise from the same course of conduct that give rise to the same legal theories. *Baby Neal,* 43 F.3d at 57-58; *Eisenberg,* 766 F.2d at 786. Typicality exists even where there may be differences in the types of injury among named plaintiffs and the Class Members, so long as those injuries arise from the same course of conduct. *See Baby Neal,* 43 F.3d at 58. "The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Prudential II,* 148 F.3d at 311 (citing *Baby Neal,* 43 F.3d at 57). So long as the cause of the disparate injuries is a common wrong, typicality is satisfied. *Id.* at 312 (citing *Baby Neal,* 43 F.3d at 58). Cases that challenge the same unlawful conduct that affects both the named plaintiffs and the members of the class satisfy typicality. *Baby Neal,* 43 F.3d at 58.

Like all other members of the Juvenile Settlement Class, the gravamen of the class representatives' Complaint is that, as a result of the alleged corrupt scheme, Ciavarella and Conahan had an undisclosed financial interest and conflict-of-interest in adjudicating children delinquent and sending them to placement. And like all other Juvenile Settlement Class Members, when the Juvenile Settlement

Class Representatives appeared before Ciavarella, they were denied their right to an impartial tribunal. As a result, their adjudications were unconstitutional.

Likewise, like all other members of the Parent Settlement Class, the Parent Settlement Class Representatives assert RICO claims based on the alleged conspiratorial conduct of all defendants, resulting in their payment of court fees, fines, interest, penalties or other sums.

Because the Settlement Class Members within each class rely on identical theories of liability, the typicality requirement is met regardless of any factual differences among class members. "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *See Newton v. Merrill Lynch, Pierce, Fenner & Smith,* Inc., 259 F.3d 154, 184 (3d Cir. 2001) (internal quotes omitted).

D. Adequacy of Representation

Rule 23(a)(4) requires a finding that "the representative parties will fairly and adequately protect the interests of the class." Adequacy of representation is a two-pronged analysis, first, to test the qualifications of counsel to represent the class and, second, to uncover conflicts between the named parties and the class they seek to represent. *Prudential II,* 148 F.3d at 312-13. As to the first question, the Plaintiffs' attorneys must be qualified, experienced and generally able to

conduct the proposed litigation. *Hoxworth v. Blinder, Robinson & Co., Inc.,* 980 F.2d 912, 923 (3d Cir. 1992); *accord Wetzel v. Liberty Mut. Ins. Co.,* 508 F.2d 239, 247 (3d Cir. 1975), *cert. denied,* 421 U.S. 1011 (1975). As to the second prong, Plaintiffs must have no interests that are antagonistic to the class. *Id.*

As to the first prong, Class Counsel have a wealth of relevant experience and are fully capable of conducting the litigation on behalf of the Class, as described above. *See supra* Section III; *see also* Exhibits "I"-"L"(providing descriptions of the four firms).

As to the second prong, Plaintiffs have no conflicts with the Members of the two Classes, as their claims arise from the same course of conduct and seek the same remedies. As the Third Circuit Court of Appeals has noted, there is much overlap between the commonality, typicality and adequacy of representation requirements. *Eisenberg,* 766 F.2d at 786. Because Plaintiffs are challenging the same alleged unlawful conduct and seeking the same relief as other Class Members, the second prong is satisfied. *Id.* The proposed class satisfies the adequacy of representation requirement posed by Rule 23(a)(4) and, thus, satisfies all requirements of Rule 23(a).

E. Rule 23(b)(3) – Superiority and Predominance

Rule 23(b)(3) requires that the court find "that the questions of law or fact common to Class Members predominate over any questions affecting only

individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the Class Members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against Class Members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."

Certification of the proposed class for settlement purposes is appropriate under Rule 23(b)(3) in light of the U.S. Supreme Court's decision in *Amchem Prods. v. Windsor,* 521 U.S. 591 (1997), in which the Court held that issues of predominance as they affect manageability do not apply to certification of Settlement Classes, and in light of the fact that acceptable procedural safeguards have been incorporated into the proposed settlement. Therefore, Plaintiffs do not have to satisfy the manageability standard contained in Fed. R. Civ. P. 23(b)(3)(D). *See Amchem Prods.,* 521 U.S. at 620; *see also In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortgage Loan Litig.,* 418 F.3d 277, 299 (3d Cir. 2005).

1. Superiority

In determining whether a class action is superior to other available methods of adjudication, the Court may consider that (i) there is no indication that any class

members have any interest in the individual prosecution of their actions; (ii) there are very few other pending actions against defendants brought by members of the class; and (iii) the forum is the most efficient and desirable location to resolve the issues in this lawsuit. The Class here includes juveniles and their parents frequently of modest means; their claims of constitutional harms and RICO violations, while substantial to them, simply do not provide sufficient incentive for individual prosecution in light of the costs of litigation and the magnitude of expected recovery. *See In re Prudential Insurance Co. of Am. Sal Practice Litig. Agent Actions*, 962 F. Supp. 450, 522-24 (D.N.J. 1997), *aff'd,* 148 F.3d 283 (3d Cir. 1998) (*"Prudential I"*). Courts regularly focus on the economic barriers to individual actions as a primary reason for finding superiority in the class action. *Id.*

The absence of viable alternative means for Plaintiffs to pursue their claims, coupled with the predominance of the common issues presented by those claims, renders treatment of this matter as a class action superior as a matter of law. *See Prudential I,* 962 F. Supp. at 525 (discussing that courts regularly hold that where there no effective alternative to class action, it is clearly superior). And, that there have been few individual suits outside of this consolidated litigation, in light of the thousands of affected juveniles and parents, also supports a finding of superiority. *Id.* at 524 (citing *Bentowski v. Marfuerza Compania Martima, S.A.,* 70 F.R.D. 401, 405 n.10 (E.D. Pa. 1976)). A class action is not only the fairest and most efficient

method of adjudication, it is, in reality, *the* only method of adjudication. *Id.* at 524-25. A class is superior here, as in *Barel v. Bank of America,* 255 F.R.D. 393 (E.D. Pa. 2009), and *Prudential,* because it provides a forum for Class Members unlikely to bring separate claims, while at the same time leaving members free to opt-out and pursue their own actions, if they wish. *See Barel,* 255 F.R.D. at 400.

2. Predominance

For a class to be certified under Rule 23(b)(3), the Court must find that the common questions of law and fact predominate over individualized issues. "To evaluate predominance, the Court must determine whether the efficiencies gained by class resolution of the common issues are outweighed by individual issues presented for adjudication." *Varacallo,* 226 F.R.D. at 231 (quoting *Prudential I,* 962 F. Supp. at 511). A common scheme of deception satisfies the predominance requirement of Rule 23(b) where there are uniform misrepresentations and omissions. *See Prudential II,* 148 F.3d 283 (3d Cir. 1998). "Courts have readily held that even a few common issues can satisfy this requirement where their resolution will significantly advance the litigation." *Varacallo,* 226 F.R.D. at 231.

a. Liability for § 1983 Violations

If the claims were tried, proof of Settling Defendants' liability to the Juvenile Settlement Class Members for § 1983 violations, including conspiracy to violate § 1983, would be directed to whether (1) the Settling Defendants acted in

conspiracy with each other and in concert with Ciavarella and Conahan - *i.e.,* under color of law - to deprive Juvenile Settlement Class Members of their constitutional rights, and (2) these actions caused violations of Juvenile Class Members' constitutional rights. *See generally* Mot. to Dismiss Op., at 9-14 (describing elements of section 1983 claims).

Plaintiffs' proffered evidence of the claimed § 1983 violations would therefore focus exclusively on *Settling Defendants'* conduct, and not on the conduct of the individual juveniles. Further, Settling Defendants' alleged conduct identically affected each member of the class: as a result of the Settling Defendants' allegedly unlawful and conspiratorial conduct, each Juvenile Settlement Class Member appeared before an identically partial tribunal, and each allegedly had his or her rights violated by identical, class-wide conduct in violation of the Constitution. As the Pennsylvania Supreme Court already determined, there was a "systematic failure" of "fundamental process" in Ciavarella's courtroom. Order, at 4, *In re: Expungement of Juvenile Records* No. 81 MM 2008 (Pa. Oct. 29, 2009); *see also* Mem. Op., Doc. No. 1222, at 5 n.2 (Oct. 31, 2012) (explaining that the Court has already "determined that Plaintiffs sufficiently established a violation of their rights to an impartial tribunal"). This Court already found violation of right to impartial tribunal. *See* July 3, 2012 Order (Doc. No. 1155).

b. Liability for Civil RICO Claims

The RICO claims of the Settlement Class Members, like the § 1983 claims, center on *Settling Defendants'* alleged involvement in a scheme to build and operate private, for-profit juvenile detention facilities and to fill those facilities for the purpose of ensuring substantial monetary gains for the defendants. Settling Defendants' alleged RICO liability again turns on significant, common issues of fact and law, focusing on *Settling Defendants'* alleged conduct, conduct common as to all Settlement Class Members.

For each Settlement Class Member, the question of whether the RICO statute was violated turns on the following common issues of fact and law: (1) the existence of an enterprise affecting interstate commerce; (2) defendants' alleged association with the enterprise; and (3) defendants' alleged participation in the conduct or the affairs of the enterprise through a pattern of racketeering activity. *See* Mot. to Dismiss Op. at 25. Here, as in *McMahon Books, Inc. v. Willow Grove Assocs.,* 108 F.R.D. 32, 39 (E.D. Pa. 1985), another RICO case, the "same acts of. . . fraud will be proffered by plaintiffs to establish a pattern of racketeering activity applicable to all of plaintiffs' claims," and "[a]ll of the issues concerning a violation of section 1962(c) appear to be common to the claims of all class members." The same is logically true of the § 1962(d) conspiracy claims; the question of whether defendants "conspire[d] to violate" § 1962(c) focuses solely

on the alleged conduct of defendants, and is common to all Settlement Class Members.

Although, if this case were tried, individual issues might arise in the course of establishing the damages suffered by individual Settlement Class Members, those issues do not predominate in the context of all the common issues and facts relevant to the RICO claims. *See, e.g., In re Am. Investors Life Ins. Co. Annuity Marketing & Sales Practices Litig.,* 263 F.R.D. 226, 236 (E.D. Pa. 2009); *see also* Doc. No. 1222, at 28.

The allegations made and facts cited by Plaintiffs easily satisfy any standard set forth in the *Hydrogen Peroxide Antitrust Litigation* which may apply in a settlement context, which would obligate the district court to "delve beyond the pleadings" and make a "rigorous examination of the facts" to determine whether a class should be certified. *In re Hydrogen Peroxide Antitrust Litigation.,* 552 F.3d 305, 316 (3d Cir. 2008). *Hydrogen Peroxide* poses no obstacle to class certification here, especially considering that the holding there requiring the district court to consider all relevant evidence concerning the predominance requirement was expressly limited to matters touching on this requirement that were "genuinely disputed." *Id.* at 325-26. The court in *Barel v. Bank of America,* which certified a settlement class after the decision in *Hydrogen Peroxide* was rendered, stated that: "'predominance tests whether proposed classes are sufficiently cohesive to warrant

adjudication by representation.'" *Barel,* 255 F.R.D. at 399 (quoting *Amchem,* 521 U.S. at 623). According to the Court in *Barel,* this predominance inquiry should focus on a common course of conduct by which the defendant may have injured class members. *Id.* (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 314 (3d Cir. 1998).[5] In *Prudential II,* the Third Circuit upheld certification of a settlement class, holding that the district court's finding that common issues predominated was not merely presumed, but was supported by the record and demonstrated in its opinion. *Prudential II,* 148 F.3d at 315. In its predominance determination, the Third Circuit Court focused primarily on plaintiffs' allegation that Prudential engaged in a common course of conduct - through similar misrepresentations and a common scheme of non-disclosure - by which it defrauded millions of life insurance policy holders, and held that purchasers had a common interest in determining whether the defendant's course of conduct was actionable. *Id.* at 314. As in *Prudential,* Defendants' alleged tactics provides the single central issue that had been lacking in *Georgine. Id.*

In the present case, the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. Accordingly, the predominance element is also easily satisfied here, as confirmed by this Court

[5] In *Barel,* the predominance requirement was satisfied by showing that all class members were subjected to the same practice of the defendant – obtaining their credit reports without authority.

in its final approval order in the Mericle Settlement and its May 14, 2013 order certifying a litigation class. *See* May 14, 2013 Order (Doc. No. 1410).

V. CLASS MEMBERS SHOULD BE BOUND BY THE RELEASE

Because the absent Class members have been provided with reasonable notice of the class action, afforded the opportunity to be heard and participate in the litigation, afforded the opportunity to opt out and provided adequate representation, this Court has jurisdiction over the absent class members that comports with due process. *See Phillips Petroleum v. Shutts,* 472 U.S. 797, 808-812 (1985). For those absent Class Members who chose to remain in the Class and did not opt out, they have consented to the Court's jurisdiction and will be bound by any class action judgment entered by this Court. *Id.* Consequently, the absent Class members will be bound by any release pursuant to a settlement this Court approves. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 261 F.3d 355, 366 (3d Cir. 2001) (holding that judgment pursuant to class action settlement can bar later claims based on allegations underlying claims in settled class action). The release in this matter will preclude claims that were not presented - and perhaps could not be presented - in this class action. *Id.* (citing *TBK Partners, Ltd. v. Western Union Corp.,* 675 F.2d 456, 460 (2d Cir. 1982)); *see also Brooks v. Wachovia Bank, N.A.,* 2007 U.S. Dist. LEXIS 68079 (E.D. Pa. 2007). The release will also preclude claims over which this Court has no subject matter jurisdiction if

the state claim arises from the same nucleus of operative facts as those claims over which it does have subject matter jurisdiction. *Id.* This rule "'serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that prevent relitigation of settled questions at the core of a class action.'" *In re Prudential,* 261 F.3d at 366 (quoting *Grimes v. Vitalink Communications Corp.,* 17 F.3d 1553, 1563 (3d. Cir. 1994)).

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs request that their unopposed Motion for Final Approval of the Class Action Settlement and for Certification of a Settlement Class be granted and that the Court enter an order granting final approval of the Settlement substantially in the form of Order attached to Plaintiffs' Motion.

Respectfully submitted,

Dated: May 30, 2014

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CERTIFICATION OF CONCURRENCE PURSUANT TO LOCAL RULE 7.1

I, David S. Senoff Esquire, do hereby certify that I sought concurrence for the within Motion from each and every party who has standing to object to this motion and all of said parties concur in this motion.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

I, David S. Senoff, attorney for Juvenile Plaintiffs, hereby certify, pursuant to the Court's April 28, 2014 Order that the foregoing brief complies with the page limit established by said Order. The brief does not exceed 15,000 words as indicated by the word count function of Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I, David S. Senoff, Esquire, hereby certify that, a true and correct copy of the Brief in Support of Plaintiffs' Unopposed Motion for Final Approval of Settlement and Class Certification, was filed electronically on May 30, 2014 and is available for viewing electronically. Additionally, the foregoing Motion was served by First Class Mail upon the following *pro se* parties:

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