



relief can be granted. The Court will defer ruling on Defendants' Motions to Dismiss Counts I, III, VI, and VII of Plaintiff's Complaint.

I. BACKGROUND

Plaintiff alleges the following. In 1996, she discovered that Defendants had devised and perpetrated a fraudulent scheme whereby Defendant Perlberger was able to conceal the true value of his income from both Plaintiff and the Court of Common Pleas of Montgomery County, which had jurisdiction over the Perlbergers' divorce proceedings. (Complaint at ¶ 20(B)(e).) By means of this fraudulent scheme, Defendant Perlberger misrepresented the value of his income by more than half. (Id. at ¶ 20(B)(a).)

As a result of Defendants' fraudulent conduct, the awards for child support and alimony ordered by the Court of the Common Pleas were less than what they would have been if the Court of Common Pleas had known Defendant Perlberger's true income. Consequently, Plaintiff and her two minor children from her marriage with Defendant Perlberger lost more than eighty per cent of their former income and suffered a diminution in their quality of life. (Id. at ¶ 22 and 32.) They also have suffered in a myriad of other ways, including humiliation, loss of self-esteem, anxiety, loss of health, and exacerbation of health problems.

(Id. at ¶¶ 33-40.)

The fraudulent scheme operated as follows. Defendant Perlberger employed his live-in companion, Diane J. Strausser, and paid her a salary reflected on the payroll of his law firm, Perlberger Law Associates. (Id. at ¶ 20(B)(c).) Defendant Perlberger and the Accountant Defendants structured Ms. Strausser's salary to pay Defendant Perlberger's daily expenses so that he could maintain his lavish lifestyle while he continued to represent that he had little personal income of his own. (Id. at ¶ 20(B)(e)(I)-(iii).) By minimizing the amount of income he reported in the divorce proceedings, Defendant Perlberger was able to decrease his financial exposure and liability to Plaintiff. (Id.) For their role in the scheme, the Accountant Defendants received substantial fees, payments, and benefits. (Id. at ¶ 21.)

On or about 1992, when Defendant Perlberger's personal and professional relationship with Ms. Strausser ended, Amy S. Lundy Brennan, an attorney employed by and currently married to Defendant Perlberger, replaced Ms. Strausser as the conduit to shelter Defendant Perlberger's income. (Id. at ¶¶ 23-26.) The Accountant Defendants structured payments to Defendant Brennan in the same manner and to the same end as they had done with the payments to Ms. Strausser. (Id.)

Another component of the fraudulent scheme to decrease the

amount of Defendant Perlberger's reported income in the divorce proceedings involved Defendant Rothenberg, an attorney.

Defendant Rothenberg helped Defendant Perlberger shelter his income by sharing fees and "holding" cases for Defendant Perlberger. (Id. at ¶¶ 30-31.)

## II. LEGAL STANDARD

A claim may be dismissed under Fed.R.Civ.P. 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.; see also Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) (holding that in deciding a motion to dismiss for failure to state a claim, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party").

## III. DISCUSSION

Plaintiff's Complaint contains the following counts against all Defendants: Count 1 for fraud; Count II for conspiracy, 42 U.S.C. §§ 1985 and 1986; Count III for violations of RICO, 18 U.S.C. §§ 1961 and 1962; Count IV for violations of the Federal

Family Support Act of 1988, 42 U.S.C. § 601; Count V for violations of the First and Fourteenth Amendments of the United States Constitution; Count VI for intentional infliction of emotional distress; and Count VII for personal injury. Defendants seek the dismissal of Plaintiff's entire complaint.<sup>2</sup>

A. This Court's Jurisdiction over Plaintiff's Complaint is not Barred by the Domestic Relations Exception

Although the Motion to Dismiss filed by Defendant Perlberger is based on Rule 12(b)(6), not Rule 12(b)(1), the argument that the federal court should not exercise jurisdiction over Plaintiff's Complaint permeates the Motion. The so-called domestic relations exception to federal court jurisdiction applies to cases invoking diversity jurisdiction. McLaughlin v. Pemsley, 876 F.2d 308, 312 (3d Cir. 1989). Plaintiff, however, invokes federal question jurisdiction. 28 U.S.C. § 1331. The Third Circuit has held that "as a jurisdictional bar, the domestic relations exception does not apply to cases arising under the Constitution or laws of the United States." Flood v. Braaten, 727 F.2d 303, 308 (3d Cir. 1984); McLaughlin v.

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<sup>2</sup>In addition to opposing Defendants' Motions, Plaintiff has filed a document entitled "Plaintiff's Response to Defendants Motion to Dismiss in the Nature of a Motion to Strike for Failure to Specify a Defense and Failure to Disclose Material Facts." (Doc. No. 13.) The Court finds that this request is without merit and therefore denies Plaintiff's request to strike Defendants' Motions.

Pernsley, 876 F.2d 308 at 312-13. Therefore, the Court's jurisdiction is not barred by the domestic relations exception.

B. Plaintiff's Complaint Fails to State a Claim for Conspiracy under 18 U.S.C. §§ 1985 and 1986

A claim for conspiracy to interfere with civil rights can be based on one of three subsections of Section 1985. Although Plaintiff does not specify in Count II of her Complaint which subsection of Section 1985 her conspiracy claim is based on, she states in her Answer to Defendants' Motion that her claim is based on Section 1985(3). (Plaintiff's Memorandum of Law in Support of Plaintiff's Answer in Opposition to Defendants G. Daniel Jones and Jones, Hayward and Lenzi's Motion to Dismiss at 11.)

Section 1985(3) provides in relevant part as follows:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

A Section 1985(3) conspiracy claim must be pled with factual specificity. Robinson v. McCorkle, 462 F.2d 111, 113-14 (3d Cir.), cert. denied, 409 U.S. 1042, 93 S. Ct. 529 (1972). Plaintiff must plead the following elements: (1) a conspiracy; (2) for the purpose of depriving any person or class of person of equal protection of the laws or equal privileges and immunities; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." United Broth. of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 829, 103 S. Ct. 3352, 3356 (1983). To satisfy the second element, Plaintiff must allege that the Defendants were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . ." Griffin v. Breckinridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798 (1971).

Section 1985(3) provides a cause of action for purely private conspiracies and state action is not required. Denchy v. Education and Training Consultants of Pa., Inc., 803 F. Supp. 1055, 1062 (E.D.Pa. 1992). However, when the alleged conspiracy is based on a right that protects against state action, such as the Equal Protection Clause of the Fourteenth Amendment or the First Amendment, then Plaintiff must allege state action to plead

a Section 1985(3) claim. United Broth. of Carpenters and Joiners, 103 S. Ct. at 3357-58.

The only civil rights violations alleged in the Complaint are based on the First and Fourteenth Amendments. Plaintiff has not alleged any state action, nor can she, because none of the named Defendants are state actors. In addition, Plaintiff has failed to allege that she is a member of a protected class or that there was any class-based discrimination against her. Instead, the conspiracy she alleges was aimed at depriving her of certain economic rights while at the same time advancing the economic interests of her ex-husband and the other Defendants. Section 1985(3) "has never been held to apply to private, economically motivated conspiracies." C & K Coal Co. v. United Mine Workers of America, 704 F.2d 690, 700 (3d Cir. 1983).

For these reasons, Plaintiff fails to state a claim based on Section 1985(3). Because Plaintiff's Section 1985(3) claim is fatally defective, Plaintiff's Section 1986 claim fails as well. Section 1986 provides for an action against a party who knows that a Section 1985 violation is going to occur, can prevent it, but fails to do so. Rogers v. Mount Union Borough by Zook, 816 F. Supp. 308, 314 (M.D.Pa. 1993). A Section 1986 claim can only be maintained along with a Section 1985 claim. Id. Therefore, the Court dismisses Count II in its entirety for failure to state a claim upon which relief can be granted.

C. The Court Grants Plaintiff Leave to Amend  
her Complaint as to the RICO Claim

In Count III of the Complaint, Plaintiff alleges that Defendants violated 18 U.S.C. § 1962, but does not identify the subsection(s) of Section 1962 that the Defendants allegedly violated. Defendants also argue that Plaintiff has not adequately identified the "enterprise" involved and the "pattern of racketeering activity" that occurred.

The Court finds that it cannot analyze the sufficiency of Plaintiff's RICO claim, as it is currently pled. For this reason, the Court will defer ruling on Defendants' Motion to Dismiss Plaintiff's RICO claim at this time and will grant Plaintiff leave to amend her complaint as to Count III only. Plaintiff can amend her Complaint by filing a RICO Case Statement with the Court and serving Defendants with a copy of the Statement. The Court's Order setting forth the information to be included in the RICO Case Statement is attached hereto. The Court will deem Plaintiff's RICO Case Statement as an amendment to the Complaint. Upon receipt of Plaintiff's RICO Case Statement, the Court will address Defendants' Motion to Dismiss Count III.

D. Plaintiff's Complaint Fails to State a Claim for  
Violations of the Federal Family Support Act of 1988

Plaintiff bases Count IV of her Complaint on the Federal Family Support Act, 42 U.S.C. § 601 et seq. This Act establishes a cooperative federal-state monetary assistance program to provide aid to families with dependent children. In reviewing the allegations that form the basis of this claim, the Court finds it very difficult to discern how Defendants have allegedly violated the Federal Family Support Act. Nevertheless, whatever the exact nature of Plaintiff's claim, the Court has found no authority to support the proposition that a private cause of action against third parties, such as the named Defendants, exists under the Act.

The legion of cases brought under this Act are against the U.S. Secretary of Health and Human Services and/or a state human services agency that participates in the AFDC program. See Rosado v. Bowen, 698 F. Supp. 1191 (D.N.J. 1987). The only cases the Court has found that address the existence of a private cause of action do so in the context of the creation of rights under the Act that are or are not enforceable under 42 U.S.C. § 1983. See Stanberry v. Sherman, 75 F.3d 581 (10th Cir. 1996); Maynard v. Williams, 72 F.3d 848 (11th Cir. 1996). In both of these cases, the Plaintiffs, AFDC recipients, sued the state agencies that were participants in the AFDC program.

Because Count IV of Plaintiff's Complaint fails to state a claim upon which relief can be granted, the Court dismisses Count

IV.

E. Plaintiff's Complaint Fails to State a Claim for Violations of the First and Fourteenth Amendments

In Count V of the Complaint, Plaintiff alleges that the fraudulent acts of Defendants deprived her of her right to petition guaranteed by the First Amendment. (Complaint at ¶ 63.) Plaintiff's Fourteenth Amendment claim is for denial of equal protection. (Id. at ¶ 65.) As discussed in Section B above, First Amendment and Fourteenth Amendment claims require state action. Because state action is neither pled nor exists, the Court dismisses Count V in its entirety for failure to state a claim upon which relief can be granted.

F. Plaintiff's State Law Claims

Plaintiff's Complaint includes state claims for fraud, intentional infliction of emotional distress, and personal injury. Original diversity jurisdiction over these state law claims does not exist because complete diversity of citizenship of the parties is lacking. 28 U.S.C. § 1332. Therefore, the Court's jurisdiction over these claims must be based on principles of supplemental jurisdiction. 28 U.S.C. § 1367(a). The Court will defer ruling on the question of supplemental jurisdiction over Plaintiff's state claims until after the Court

has received Plaintiff's RICO Case Statement.

G. Plaintiff's Complaint is not Barred under the Doctrines of Res Judicata or Collateral Estoppel

On October 15, 1996, Plaintiff filed a Petition to Vacate or Strike Divorce Decree in the Court of Common Pleas of Montgomery County. An evidentiary hearing was held on August 1, 1997 in the Court of Common Pleas on Plaintiff's Petition. Plaintiff withdrew the Petition with prejudice, and a court order was issued to that effect on August 1, 1997.

After Plaintiff withdrew with prejudice her Petition, Defendant Perlberger filed a two-page supplemental brief in which he argues that Plaintiff's case is now barred by res judicata against him and by collateral estoppel against the other defendants. The Court finds that Defendants have failed to demonstrate that Plaintiff's Complaint is barred under the doctrine of res judicata as to Defendant Perlberger. As explained by the Pennsylvania Supreme Court, "the doctrine of res judicata requires the occurrence of four elements. . . (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made." City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh, 522 Pa. 44, 54, 559 A.2d 896,

901 (1989). Defendants have failed to prove these four essential elements.

Collateral estoppel, also called issue preclusion, forecloses the re-litigation in a later action of an issue of fact or law that was "actually litigated" in the prior proceeding. 522 Pa. at 55, 559 A.2d at 901.

Collateral estoppel applies if (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

Id., citing Philadelphia Marine Trade Association v. International Longshoreman's Association, 453 Pa. 43, 308 A.2d 98 (1973). Based on the information provided to the Court by Defendants, Defendants have failed to demonstrate that any issues of fact or law should be collaterally estopped. Therefore, the Court denies Defendants' request to dismiss Plaintiff's Complaint on res judicata or collateral estoppel grounds.

For the reasons set forth above, the Court will dismiss Counts II, IV, and V of Plaintiff's Complaint for failure to state a claim upon which relief can be granted. The Court will defer ruling on Defendants' Motion to Dismiss Counts I, III, VI, and VII of Plaintiff's Complaint.

An appropriate Order follows.

