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

ELIZABETH MORT and ALEX RODRIGUEZ. Plaintiffs, v. LAWRENCE COUNTY CHILDREN AND YOUTH SERVICES; LAWRENCE COUNTY; CHRISSY MONTAGUE, Lawrence County Children and Youth Services Caseworker; and JAMESON HEALTH SYSTEM, INC. Defendants.	)	Civil Action No. 2:10-cv-01438-DSC

BRIEF IN OPPOSITION TO DEFENDANTS LAWRENCE COUNTY CHILDREN AND YOUTH SERVICES, LAWRENCE COUNTY, and CHRISSY MONTAGUE'S MOTION TO DISMISS

Plaintiffs Elizabeth Mort and Alex Rodriguez, by and through their undersigned counsel, submit this Brief in Opposition to the Motion to Dismiss filed by Defendants Lawrence County Children and Youth Services, Lawrence County (collectively referred to as "LCCYS") and Chrissy Montague ("Defendant Montague" or "Montague"), seeking dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of Plaintiffs' Amended Complaint filed December 1, 2010 (the "Amended Complaint"). For the reasons that follow, this Court should deny the Motion to Dismiss.

INTRODUCTION

On April 26, 2010, Plaintiff Mort consumed an "everything" bagel from Dunkin' Donuts containing, among other ingredients, poppy seeds. Amended Complaint, ¶ 34. Plaintiff Mort was admitted to Jameson Hospital ("Jameson") for labor and delivery two hours later, and shortly afterwards she submitted to a urine drug screen ("UDS") pursuant to Jameson's written

policy – created and carried out in conjunction with LCCYS – requiring all obstetrical patients admitted to maternity care to submit to a UDS ("Jameson's Policy" of the "Policy"). Amended Complaint, ¶¶ 17, 28, 35-36. According to Jameson's Policy, a UDS is considered positive for opiates if the level of opiate metabolites detected in the urine is 300 nanograms/mL or above – which is 1700 nanograms/mL less than the "cut-off" concentration levels for drug tests used in federal workplace drug-testing programs. Amended Complaint, ¶¶ 19, 22. The results of Plaintiff Mort's initial UDS indicated the presence of opiates in her system at an unspecified amount greater than 300 nanograms/mL. Amended Complaint, ¶¶ 22, 38. Pursuant to the Policy, Jameson then performed a confirmatory test on Plaintiff Mort's initial sample,[1] which indicated the presence of morphine at a level of 501 nanograms/mL, approximately 1500 nanograms/mL lower than the aforementioned federal guidelines. Amended Complaint, ¶¶ 22, 38. The amount of morphine in Plaintiff Mort's system was entirely consistent with the amount of morphine expected to be found in a urine sample within hours of eating foods containing poppy seeds. Amended Complaint, ¶ 42.

Pursuant to the Policy, and without informing Plaintiff Mort, Jameson reported the results of Plaintiff Mort's UDS to caseworkers from LCCYS. Amended Complaint, ¶ 25. The results of Plaintiff Mort's urine tests routinely taken throughout her pregnancy were negative for the presence of drugs, and her obstetrician, Nicole Carlson, M.D., did not believe her to be a drug user. Amended Complaint, ¶ 41. Plaintiffs' daughter, Isabella Rodriguez ("Baby Rodriguez"),

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[1] Defendants appear to suggest that Jameson conducted more than one urine drug test of Plaintiff Mort. *E.g.*, Defendants' Brief in Support of Motion to Dismiss at pp. 4, 9, 11. But the Amended Complaint clearly states that Jameson took only one urine sample from Plaintiff Mort shortly after she was admitted and that the sample Mort provided was tested twice using two different methods. Amended Complaint, ¶¶ 36, 38, 42.

was born on April 27, 2010. Amended Complaint, ¶ 31. She was healthy and tested negative for all illicit substances. Amended Complaint, ¶ 48. On April 30, 2010, however, Defendant Montague orally petitioned the Court of Common Pleas of Lawrence County, Juvenile Division, for an *ex parte* order permitting LCCYS to take Baby Rodriguez into emergency protective custody solely on the basis of Jameson's report to LCCYS that Plaintiff Mort had tested positive for opiates. Amended Complaint, ¶ 54. In petitioning for the Order, Defendant Montague, on behalf of LCCYS, alleged, based solely on Jameson's report to LCCYS that Plaintiff Mort had tested positive for opiates, that Baby Rodriguez was without proper parental care and that allowing her to remain in Plaintiffs' home would be contrary to her welfare because she had been exposed to drugs. Amended Complaint, ¶ 55. Neither Defendant Montague nor anyone else from LCCYS interviewed Plaintiffs, any of their family members, or Plaintiff Mort's obstetrician prior to seeking and obtaining the *ex parte* order. Amended Complaint, ¶ 56. Nor did Defendant Montague or anyone else from LCCYS ask for or receive from Jameson the concentration levels of opiate metabolites or morphine detected in Plaintiff Mort's UDS. Amended Complaint, ¶ 46.

The Court granted the petition, and one day after Plaintiffs arrived home from the hospital with Baby Rodriguez, based solely on the results of Jameson's UDS of Plaintiff Mort, Defendant Montague, another LCCYS caseworker, and two police officers arrived unannounced at Plaintiffs' door with a court order to remove Baby Rodriguez. Amended Complaint, ¶¶ 1, 3. LCCYS, by way of Defendant Montague, took Baby Rodriguez and held her in an undisclosed location until May 5, 2010, even though Defendant Montague realized on May 3, 2010, that she and LCCYS had made a mistake in removing Baby Rodriguez from Plaintiffs. Amended Complaint, ¶¶ 67, 78-81. Specifically, after speaking with Plaintiff Mort on May 3, Defendant Montague told Plaintiffs that she did not believe that Plaintiff Mort had used opiates while

pregnant and would ask the court to dismiss the dependency petition. Amended Complaint, ¶¶ 79-81. But when the juvenile court master postponed the hearing, Defendant Montague and LCCYS refused to return Baby Rodriguez to her parents.[2] Amended Complaint, ¶¶ 82-83. Defendants waited until May 5 to return Baby Rodriguez to Plaintiffs. Amended Complaint, ¶ 86. LCCYS then filed a Motion to Dismiss the Dependency Petition on May 6, stating that "[a]fter further investigation, there is no evidence to support illegal drug use by the natural mother, Elizabeth Mort," and the Court granted the Motion on May 10. Amended Complaint, ¶¶ 87-88.

Plaintiffs filed their initial Complaint on October 28, 2010, and on December 1, 2010, Plaintiffs filed the Amended Complaint. On January 17, 2011, Defendants LCCYS and Montague filed a Motion to Dismiss Counts I and II of the Amended Complaint.

As demonstrated below, the Motion should be denied because Plaintiffs have properly pleaded claims for relief or, alternatively, the Motion is premature because discovery has not yet been conducted.

ARGUMENT

I. Standard for granting a motion to dismiss.

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court may look only to the facts alleged in the complaint and its attachments. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept

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[2] Defendants twice assert that the dependency hearing was postponed by agreement of the parties. Defendants' Brief in Support of Motion to Dismiss at pp. 3, 5 n.1. But the Amended Complaint alleges that the juvenile court master refused to hold the hearing on May 3 for reasons unknown to Plaintiffs. Amended Complaint, ¶ 82. Accordingly, Defendants' claim that they agreed to postponement of the hearing is a disputed fact and cannot be considered in deciding a Motion to Dismiss.

as true all well-pleaded allegations of the complaint and view them in the light most favorable to the plaintiff. *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985). "In considering whether the complaint survives a motion to dismiss, we review whether it contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Montville Twp. v. Woodmont Builders*, LLC, No. 05-4888, 2007 U.S. App. LEXIS 18825, at *2 (3d Cir. August 8, 2007) (*citing Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007)). Allegations in the complaint must be "sufficiently detailed to put Defendants on fair notice of the claims against them and to permit Defendants to frame an adequate responsive pleading." *DiNicola v. DiPaolo*, 945 F.Supp. 848, 857 (W.D.Pa. 1996).

The Amended Complaint satisfies the necessary requirements and puts Defendants LCCYS and Montague on fair notice of the claims against them. This Court should deny the Motion to Dismiss.

II. Defendant Montague is not entitled to either absolute or qualified immunity for violating Plaintiffs' Fourteenth Amendment rights by causing their newborn to be removed from their custody without reasonable suspicion of abuse.

1. Defendant Montague is not entitled to absolute immunity for her actions outside the context of the dependency proceeding.

Defendant Montague argues that, as a LCCYS caseworker, she is entitled to absolute immunity for her actions in petitioning for the emergency removal of Baby Rodriguez from Plaintiffs' home based solely on Jameson's report that Plaintiff Mort had tested "positive" for opiates as defined by Jameson's Policy. In making this argument, Defendant Montague incorrectly identifies the basis of Plaintiffs' claims and ignores federal pleading requirements. Absolute immunity protects only those activities undertaken in the context of dependency

proceedings, and plaintiffs have alleged that Defendant Montague's actions outside of those proceedings violated their Fourteenth Amendment parental rights.

Children and Youth Services caseworkers are "entitled to absolute immunity for their actions in petitioning and in formulating and making recommendations to the state court because those actions are analogous to functions performed by state prosecutors . . .." *Ernst v. Child & Youth Services of Chester County*, 108 F.3d 486, 493 (3d Cir. 1997). This absolute immunity is limited to "prosecutorial activities that are intimately associated with the judicial phase of the [court] process." *Id.* at 495, 497 n.7 (citing *Burns v. Reed*, 500 U.S. 478, 493 (1991)); *see also*, *Miller v. City of Philadelphia*, 174 F.3d 368, 376 n.6 (3d Cir. 1999) (same).

The absolute immunity conferred by *Ernst* does not extend to investigative or administrative action taken outside the context of a judicial proceeding. *Ernst*, 108 F.3d at 497 n. 7. "Thus, a caseworker may be liable for conduct taken 'during the investigative phase of a child custody proceeding,' 'or for certain actions taken after a judicial proceeding.'" *Studli v. Crimone*, No. 05-374J, 2007 U.S. Dist. LEXIS 87474, at *10 (W.D. Pa. November 28, 2007) (quoting *Underwood v. Beaver County Children & Youth Servs.*, No. 03-1475, 2005 U.S. Dist. LEXIS 23012, at * 1 (W.D. Pa. October 7, 2005) (citing *Miller*, 174 F.3d at 376 n.6 and *Wilson v. Rackmill*, 878 F.2d 772, 775-76 (3d Cir. 1989)). Accordingly, Defendant Montague is liable for the violation of Plaintiffs' rights that stem from actions taken during the investigative phase of Baby Rodriguez's custody proceeding and subsequent to the removal of Baby Rodriguez. *See* Amended Complaint, ¶¶ 54-58, 79-83.

Regardless of the Court's ultimate determination as to whether Defendant Montague's actions fall outside the scope of absolute immunity, the Motion to Dismiss should be denied because the question of absolute immunity is not appropriately decided at this stage in the

proceedings. Whether a caseworker's actions in removing a child from a parent's home are entitled to absolute immunity is not appropriately decided upon a motion to dismiss, provided "the allegations put forth in plaintiffs' complaint are broad enough to include CYS conduct, policies and practices undertaken in the course of the investigation that are beyond the scope of such protection." *Crawford v. Washington County Children & Youth Servs.*, No. 2:06cv1698, 2008 U.S. Dist. Lexis 6416, at *31 (W.D. Pa. January 29, 2008).

As an initial matter, Defendant Montague mischaracterizes the allegations set forth in the Amended Complaint by asserting that Plaintiffs' claims are based solely on Defendant Montague's seeking the *ex parte* order to remove Baby Rodriguez from their custody and on her failure to procure additional medical evidence of Plaintiff Mort's alleged drug use. Defendants' Brief in Support of Motion to Dismiss, pp. 9-12. The allegations set forth in the Amended Complaint are broad enough to include, and do specifically relate to, Defendant Montague's conduct undertaken outside the course of the dependency proceeding, which is beyond the scope of absolute immunity. Plaintiffs allege that Defendant Montague's investigative phase was limited to her receiving notification from Jameson that Plaintiff Mort had tested "positive" for opiates under Jameson's negligently drafted Policy, created in conjunction with LCCYS, and that she subsequently removed Baby Rodriguez from Plaintiffs' home based solely on the report from Jameson and without reasonable suspicion of past or imminent abuse. Amended Complaint, ¶¶ 54-60. Plaintiffs further allege that Defendant Montague failed to return Baby Rodriguez to them after realizing she made a mistake in filing the dependency petition, depriving them of custody of their daughter for two additional days. Amended Complaint, ¶¶ 78-86.

Plaintiffs' allegations are analogous to those in *Crawford*, in which the Western District held that a complaint sufficiently alleged that a caseworker's actions were beyond the scope of absolute immunity. The *Crawford* plaintiffs alleged, in general, that:

> CYS and its directors were grossly negligent in training administrators and caseworkers to conduct investigations based on suspicion of child neglect and abuse, which in turn resulted in grossly inadequate investigation into plaintiffs' home life and parenting practices. The deficient investigation assertedly occurred because defendant CYS maintains unconstitutional customs, policies, and practices relative to the investigation of child abuse ... .

2008 U.S. Dist. Lexis 6416, at *2. The *Crawford* defendants argued that they were entitled to absolute immunity for their actions in terminating the plaintiffs' parental rights and sought a motion to dismiss the plaintiffs' claims. *Id.* at *30. The Court refused to dismiss the claims, explaining that, "although a number of [the caseworker's] activities may ultimately prove to be 'intimately associated' with the judicial process, and therefore enjoy immunity, such a determination can only appropriately be made after the record has been properly developed and the precise factual basis for plaintiffs' § 1983 claim becomes explicitly clear." *Id.* at * 31 - *32.

Bowser v. Blair County Children and Youth Services, 346 F.Supp.2d 788 (W.D. Pa. 2004), the sole case cited by Defendant Montague in support of her absolute-immunity claim, is not to the contrary. The *Bowser* plaintiffs claimed that caseworkers violated their rights by taking custody of their minor child. *Id.* at 792. But the court found that because the removal of the child was carried out pursuant to a court order, it was entitled to absolute immunity. *Id.* at 793-94. In this case, however, Plaintiffs do not challenge Defendant Montague's actions in petitioning the court or removing Baby Rodriguez from the home pursuant to the *ex parte* order. Instead, the Amended Complaint alleges that Defendant Montague violated Plaintiffs' rights in her investigative phase by relying solely upon Jameson's report of the drug-test results, despite

her subjective knowledge regarding deficiencies in Jameson's procedures for conducting the tests, in her decision to open the case, *see Ernst*, 108 F.3d at 497 n.7 (explaining that court is "unwilling to accord absolute immunity to 'investigative or administrative' actions taken by child welfare workers outside the context of a judicial proceeding" and citing decision to open and investigate case as example of investigative or administrative action), and further violated Plaintiffs' rights by failing to return their newborn to them when she realized that the sole reason for removing Baby Rodriguez – the allegedly positive drug test – was without foundation. Because Plaintiffs have alleged sufficient facts to show that their rights were violated by actions that Defendant Montague took outside the context of the dependency proceeding – and thus not entitled to absolute immunity – Defendant Montague's Motion to Dismiss should be denied.

2. Defendant Montague is not entitled to qualified immunity because, by interfering in Plaintiffs' relationship with their child absent any reasonable suspicion of abuse, she deprived Plaintiffs of their clearly established parental rights.

Defendant Montague is not entitled to qualified immunity because her actions violated Plaintiffs' clearly established rights under the Fourteenth Amendment to the care, custody, and control of their infant child. A reasonable caseworker who receives a report from a hospital that the mother of a newborn tested positive for opiates would know that she has a duty to investigate the hospital's report and the parents' ability to care for the child before removing the child from her parents in order to avoid violating the parents' Fourteenth Amendment rights. A reasonable caseworker would also know that it violates parents' Fourteenth Amendment rights to refuse to return a child to her parents once the initial basis for the removal proves false.

"[W]here a government official has violated the constitution, he may be shielded from liability by qualified immunity if the constitutional right was not clearly established at the time of the violation." *Long v. Holtry*, 673 F. Supp. 2d 341, 350 (M.D. Pa. 2009). "Government

officials are immune from suit in their individual capacities unless, 'taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right' and 'the right was clearly established at the time of the objectionable conduct.'" *Giles v. Kearney*, 571 F.3d 318, 325 (3d Cir. 2009) (*quoting Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "A right is clearly established if the contours of the right are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Long*, 673 F.Supp. 2d at 350 (*quoting Saucier*, 533 U.S. at 202); *Giles*, 571 F.3d at 325.

Courts implement a two step process in deciding whether a government actor is entitled to qualified immunity. Under the first step, "the court must determine whether the facts alleged show that the defendant's conduct violated a constitutional or statutory right." *Williams v. Bitner*, 455 F.3d 186, 190 (3d Cir. 2006). Next, the court must then determine "whether the constitutional or statutory right ... was 'clearly established.'" *Williams*, 455 F.3d at 190.[3] In order for a right to be clearly established, its meaning must be clear enough that a reasonable official would understand that his actions were in violation of that right. *Studli*, 2007 U.S. Dist. LEXIS at *13.

(i) *Defendant Montague violated Plaintiffs' Fourteenth Amendment parental rights.*

A plaintiff alleges a violation of his substantive due process rights when he raises factual allegations that the state actors have removed his child from his custody and care without an objectively reasonable suspicion of abuse in a manner that shocks the conscience. *Croft v.*

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[3] Courts are free to exercise discretion in choosing which prong of the analysis to decide first. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009); *see Beckinger v. Twp. of Elizabeth*, 697 F. Supp. 2d 610, 626 (W.D. Pa. 2010) ("The Supreme Court has recognized that a court evaluating a defendant's claim of qualified immunity will often find it beneficial to first decide whether the plaintiff can establish an actionable violation of a federally protected right.").

Westmoreland County Children & Youth Serv., 103 F.3d 1123, 1125-26 (3d. Cir. 1997); *accord Miller*, 174 F.3d at 375. Removing a child from her parents' custody based solely on a policy which presumes that the child is in imminent danger of abuse from both parents if she is born to a mother who tests positive for an illicit substance shocks the conscience, especially when the entity reporting the positive result uses arbitrarily low cut-off levels and fails to account for any foods that may have caused the positive result. *See Doe v. Fayette County Children & Youth Servs.*, No. 8-823, 2010 U.S. Dist. LEXIS 123637, *33 - *34 (W.D. Pa. November 22, 2010) (applying the "shocks the conscience standard" and holding that "[a]utomatically terminating **any and all** contact between a parent and child based solely on a protocol that presumes when a parent has been indicated as a perpetrator of sexual abuse of a minor (whether his child or not) all other minors are at imminent risk of danger, is too broad, unreasonable, ignores alternatives, is inflexible and completely devoid of assessments on a case-by-case basis. It is an arbitrary abuse of power.") (emphasis in original). Failing to return a child to her parents after realizing that the removal was based on false allegations also shocks the conscience because the state has no basis for continued interference in the parent-child relationship in the absence of an objectively reasonable suspicion that the child has been abused or is in imminent danger of abuse. *See Croft*, 103 F.3d at 1125-26.

The Amended Complaint alleges that Defendant Montague removed Baby Rodriguez from Plaintiffs' custody based solely on the results of a drug test administered to Plaintiff Mort under the negligently drafted drug-testing Policy and in doing so presumed that Baby Rodriguez would be in imminent danger of abuse if she were permitted to live with her parents. Defendant Montague conducted no independent investigation into Jameson's allegation regarding Plaintiff Mort's allegedly positive drug test and ignored the fact that Jameson uses arbitrarily low cut-off

levels to determine whether a patient has tested "positive." Amended Complaint, ¶¶ 54-58. Moreover, at no point during her "investigation" did Defendant Mort interview Plaintiffs, their family members, or Plaintiff Mort's obstetrician to determine whether Plaintiffs were capable of caring for Baby Rodriguez. Defendant Montague's reliance on Jameson's report of Plaintiff Mort's single positive prenatal drug test – despite her admitted knowledge of the deficiencies of Jameson's procedure in conducting the tests[4] – combined with her failure to do even a minimal investigation to determine whether Baby Rodriguez was at risk of abuse if she lived with her parents shocks the conscience. Similarly, Defendant Montague's failure to return Baby Rodriguez to her parents immediately upon realizing that the drug test was wrong and she had made a mistake in removing her shocks the conscience. Setting forth these facts, the Amended Complaint sufficiently alleges a violation of Plaintiffs' substantive due process right to the care and custody of their child.

(ii) *Plaintiffs' constitutional right to the care, custody, and control of their child absent objectively reasonable suspicion of abuse is clearly established.*

The Third Circuit has "adopted a broad view of what constitutes an established right of which a reasonable person would have known." *Hayes v. Erie County Office of Children & Youth*, 497 F. Supp. 2d 684, 699 (W.D.Pa. 2007) (quoting *Burns v. County of Cambria, Pa.*, 971 F.2d 1015, 1024 (3d Cir.1992)) (citations and quotation marks omitted). Third Circuit law establishes that a caseworker violates parents' Fourteenth Amendment rights if she removes a child from her parents' custody without objectively reasonable suspicion that the child is in imminent danger of abuse if she remains with her parents. *See Croft*, 103 F.3d at 1126.

[4] Defendant Montague was aware of the deficiencies in the Policy, evidenced by her admission to Plaintiff Mort and Mort's father that LCCYS had experienced problems with Jameson in the past. Amended Complaint, ¶ 80.

Contrary to Defendants' contention, a report from a hospital that a single prenatal drug test of a newborn's mother was positive for opiates, without more, does not create an **objectively reasonable suspicion** that the newborn is in imminent danger of abuse if she lives with her parents, especially when the caseworker knows or should have known that the hospital uses an arbitrarily low cut-off level to determine whether a test is positive. While a positive prenatal drug test may justify an investigation to determine whether a newborn is in danger of abuse, it cannot, without more, justify the removal of a child from the custody of both of its parents. It is clearly established that governmental actions that infringe upon fundamental parental rights must be based on more than a presumption that a class of parents are unfit. *See Stanley v. Illinois*, 405 U.S. 645, 656-67 (1972) (although "[p]rocedure by presumption is always cheaper and easier than individualized determination," when "the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child").

The Amended Complaint alleges that Defendant Montague violated Plaintiffs' substantive due process rights by removing their child based solely on the results of a drug test administered pursuant to a negligently drafted drug-testing policy utilizing extremely low cut-off levels. The requirement that a caseworker have objectively reasonable and individualized suspicion that a child is in imminent danger of abuse prior to removing the child from her parent's custody is clearly established. Defendant Montague removed Baby Rodriguez without any suspicion of abuse. Accordingly, Defendant Montague is not entitled to qualified immunity.

III. The allegations in the Amended Complaint that Baby Rodriguez was taken into custody pursuant to LCCYS' custom, policy or practice of removing newborns from their parents based solely on a positive prenatal drug test state a claim against LCCYS for violating Plaintiffs' Fourteenth Amendment rights to the care and custody of their daughter.

LCCYS and the County contend that they cannot be held responsible for the violation of Plaintiffs' Fourteenth Amendment rights because the actions of Defendant Montague and other LCCYS employees comported with constitutional requirements. Although Defendants couch this argument in terms of municipal liability, they never actually deny that they have a custom, policy or practice of removing newborns based solely on the results of their mothers' prenatal drug tests. More importantly, defendants do not deny that the Amended Complaint sufficiently and plausibly alleges that Baby Rodriguez was removed from her parents pursuant to such a policy. Indeed, Plaintiffs have alleged specific facts demonstrating that the removal of Baby Rodriguez was carried out according to an LCCYS custom, policy, or practice.[5] Instead, Defendants focus only on whether the allegations in the Amended Complaint show that Plaintiffs suffered a deprivation of their Fourteenth Amendment rights.[6]

Plaintiffs have alleged sufficient facts to state a claim that Defendants LCCYS, and Montague violated their Fourteenth Amendment substantive due process rights to the care,

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[5] "To satisfy the pleading standard, [plaintiffs] must identify a custom or policy, and specify exactly what that custom or policy was." *McTernan v. City of York*, 564 F.3d 636, 658 (3d Cir. 2009). Plaintiffs have specifically pleaded that Defendant Montague's actions in removing Baby Rodriguez from Plaintiffs' custody were done in conformity with an LCCYS custom, policy, or practice that requires caseworkers to file dependency petitions whenever they receive a report from a hospital or other medical professional that a mother's prenatal drug test was positive for an illicit substance. Amended Complaint, ¶¶ 89-93.

[6] Defendants refer to "parents' First Amendment liberty interests in familial integrity" on more than one occasion in their brief. Defendants Brief in Support of Motion to Dismiss at p. 17. Because Plaintiffs did not make a First Amendment claim, they assume that Defendants intended to refer to the Fourteenth Amendment.

custody, and control of their daughter. In order to avoid dismissal, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). Plaintiffs have alleged sufficient facts to show that the state actors removed their child from their custody and care pursuant to an LCCYS custom, policy or practice and without an objectively reasonable suspicion of abuse in a manner that shocks the conscience. *See Miller*, 174 F.3d at 375; *Croft*, 103 F.3d at 1125-26.

The right of a parent to care for his children "is perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme Court]." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Croft*, 103 F.3d at 1125. The Due Process Clause of the Fourteenth Amendment protects the relationship between parent and child and encompasses both "the interest of a parent in the companionship, care, custody, and management of his or her children," *Stanley*, 405 U.S. at 651, and children's "corresponding familial right to be raised and nurtured by their parents," *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002). In determining whether a parent's substantive due process rights have been violated by state actors such as LCCYS and Defendant Montague, courts "balance the fundamental liberty interest of the family unit with the compelling interests of the state in protecting children from abuse," focusing on "whether the information available to the defendants at the time would have created an objectively reasonable suspicion of abuse justifying the degree of interference" with the parental rights. *Croft*, 103 F.3d at 1125-26. Such interference is justified only when "reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Id.* at 1125.

In support of their contention that the removal of Baby Rodriguez did not violate Plaintiffs' substantive due process rights, Defendants cite to case law which is inapposite to the facts of this case. For example, in *Patterson v. Armstrong County Children & Youth Servs.*, 141 F. Supp. 2d 512 (W.D. Pa. 2001), various school officials reported the plaintiff to Armstrong County Children and Youth Services ("ACCYS") based on her daughter's conversation with a guidance counselor regarding a fight that she and her mother had that morning and based on various scrapes and bruises on the daughter's person. *Patterson*, 141 F.Supp.2d at 516. ACCYS placed the child in protective custody, and she was ultimately removed to her father's home. *Patterson*, 141 F.Supp.2d at 517. The abuse charges against the *Patterson* plaintiff were dropped as unfounded, and the plaintiff argued that her substantive due process rights had been violated. The court held that no violation occurred, as the child's report to the guidance counselor and her scrapes and bruises created a reasonable suspicion that she had been abused. *Id.* at 521.

No such evidence creating a reasonable suspicion of abuse exists in this case.[7] Neither LCCYS nor Defendant Montague questioned Plaintiffs, their family members, or Plaintiff Mort's obstetrician about Plaintiff Mort's alleged drug use or the Plaintiffs' ability to care for Baby Rodriguez. Amended Complaint, ¶¶ 45, 57. Nor did they perform any investigation into Baby

[7] Pennsylvania law does not include a fetus or unborn child in the definition of "child" for the purposes of determining whether child abuse has occurred. *See Commonwealth v. Kemp*, 18 Pa. D. & C.4th 53 (Ct. Comm. Pl. Westmoreland Cty. 1992); 23 Pa. Cons. Stat. § 6303.

Rodriguez's home environment or Plaintiffs' parenting skills.[8] Amended Complaint, ¶ 54. At the time that LCCYS and Defendant Montague acted to remove Baby Rodriguez from Plaintiffs' home, the only evidence available to them was that Plaintiff Mort tested positive for opiates under a policy utilizing cut-off levels significantly lower than those used by the federal government. Amended Complaint, ¶¶ 52, 54-58. LCCYS was aware of the nature of the cut-off levels, due to its role in creating Jameson's drug-testing policy. Amended Complaint, ¶ 28.

Unlike *Patterson* and the remaining cases cited to by Defendants, a recent Western District case, *Doe v. Fayette County Children & Youth Servs.*, No. 8-823, 2010 U.S. Dist. LEXIS 123637 (W.D. Pa. November 22, 2010), is analogous. In *Doe*, on a motion for summary judgment, the Court considered the constitutionality of a policy adopted by Fayette County Children & Youth Services ("FCCYS") that prohibited parents indicated by FCCYS as perpetrators of sexual abuse from having any contact with their children until they successfully

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[8] Defendants inexplicably contend that "[t]he plaintiffs do not allege facts which demonstrate that no investigation occurred or that CYS failed to take any other action." Defendants' Brief in Support of Motion to Dismiss at p. 16. In fact, the Amended Complaint contains the following allegations regarding LCCYS' failure to conduct any investigation into Jameson's report of the drug test results or the Plaintiffs' ability to care for their child: "LCCYS did not investigate in any manner whether Plaintiff Mort's positive drug test could be a 'false positive' due to Plaintiff Mort's ingestion of certain foods or medicines" (¶ 44); "LCCYS did not ask for or receive from Jameson the concentration levels of opiate metabolites or morphine detected in either Plaintiff Mort's initial positive UDS or the positive confirmation test" (¶ 46); "At no point before discharge was either Plaintiff Mort and/or Plaintiff Rodriguez visited by anyone from ... LCCYS and questioned about drug use or their ability to care for their child" (¶ 52); "LCCYS did not interview Plaintiff Mort, Plaintiff Rodriguez, or any of their family members prior to seeking and obtaining an emergency *ex parte* Order to remove Baby Rodriguez from her parents' custody" (¶ 56); "LCCYS made no effort to contact Plaintiff Mort's obstetrician, Dr. Carlson, nor did they attempt to obtain copies of Plaintiff Mort's medical records, including the results of her urine drug tests during her pregnancy, prior to seeking and obtaining an emergency *ex parte* Order to remove Baby Rodriguez from her parents' custody" (¶ 57); "LCCYS conducted absolutely no investigation of Plaintiff Mort or Plaintiff Rodriguez prior to alleging that Baby Rodriguez was without proper parental care or seeking an emergency *ex parte* Order to remove Baby Rodriguez from her parents' custody" (¶ 58); and after obtaining the Order, "neither of the LCCYS caseworkers ... conducted any investigation or viewed Baby Rodriguez's room" (¶ 66).

completed treatment even if there was no evidence that they had abused their own children. *Id.* at *30. Under that policy, FCCYS barred the plaintiff from all contact with his children even though the only abuse he was accused of committing was a consensual sexual relationship with an unrelated 16-year-old girl. *Id.* at *8 - *9. Like the LCCYS policy at issue in this case, the FCCYS policy required caseworkers to separate children from their parents where there was no evidence that the children had been abused and based solely on a presumption that a particular act by the parent placed his children at imminent risk of abuse.

Applying the "shocks the conscience" standard, the Court in *Doe* held that there was "no genuine issue of material fact that the Protocol of prohibiting all contact with any child until such time that an indicated perpetrator of sexual abuse successfully completes treatment shocks the conscience." *Id.* at *30. The Court explained that the egregiousness of the constitutional violation stemmed from the lack of any individualized suspicion of abuse:

> [u]nder FCCYS' Protocol, there is no ability for a caseworker to make a considered judgment to determine if the child is at 'imminent risk of sexual abuse.' It simply assumes that if a person is an indicated perpetrator of sexual abuse, all children are at imminent danger of abuse without reasonable and articulable evidence giving rise to a reasonable suspicion that the child is at imminent danger of abuse and, then, completely severs all contact between parent and child. There is zero room for individualized consideration of the facts of each case or whether limited contact in some form may be warranted. While FCCYS has a compelling interest in protecting children from imminent danger of abuse, the ends cannot justify the means.

Id. at *30-31.

In this case, the Amended Complaint sets forth facts that are analogous to FCCYS' actions in *Doe* and are sufficient to state a claim that the Defendants have violated Plaintiffs' substantive due process rights by removing their child without reasonable suspicion of past or

imminent abuse in a manner that shocks the conscience. Specifically, the Amended Complaint alleges the following:

- Defendants removed Baby Rodriguez from Plaintiffs' custody based solely on the results of a negligently drafted drug test which maintains cut-off levels for opiates and morphine that are approximately 1700 and 1500 nanograms/mL lower than those used by the federal government for federal workplace drug-testing programs. Amended Complaint, ¶¶ 3-4, 19-22;

- Defendants had no evidence that Baby Rodriguez had been abused or was in imminent danger of abuse, and neither LCCYS nor Defendant Montague questioned either Plaintiff Mort of Plaintiff Rodriguez about drug use or their ability to care for their child. Amended Complaint, ¶ 52;

- Neither LCCYS nor Defendant Montague interviewed any of Plaintiffs' family members prior to removing Baby Rodriguez from Plaintiffs' custody. Amended Complaint, ¶ 56; and

- Neither LCCYS nor Defendant Montague made any effort to contact Plaintiff Mort's obstetrician, Dr. Carlson, nor did they attempt to obtain copies of Plaintiff Mort's medical records, which would have revealed the results of drug tests performed during her pregnancy, all of which were negative. Amended Complaint, ¶ 57.

The facts in the Amended Complaint are sufficient to allege that the only information on which Defendants based their decision to file the *ex parte* petition to the Juvenile Court requesting that LCCYS be permitted to take into protective custody and detain Baby Rodriguez was the report from Jameson that Plaintiff Mort's prenatal drug test was positive for opiates under Jameson's testing guidelines. Because a single positive prenatal drug test of an infant's mother – particularly one like Jameson's with a high probability of false positives – does not provide an objectively reasonable suspicion that the infant is in imminent danger of abuse justifying the removal of that infant from both of her parents, Plaintiffs have stated a claim for the violation of their Fourteenth Amendment parental rights. Therefore, Defendants' Motion to Dismiss should be denied.

IV. Plaintiffs state a claim for federal conspiracy.

LCCYS also claims that the Amended Complaint does not adequately set forth a conspiracy to violate Plaintiffs' constitutional rights. In support of this contention, LCCYS contends that there can be no conspiracy because Plaintiffs have not alleged that a constitutional violation has occurred. Further, LCCYS adopts the argument and analysis set forth in Jameson's Motion to Dismiss and Brief in Support thereof to contend that there is no conspiracy because Plaintiff has not set properly set forth a claim for conspiracy.

Taking each contention in turn, for the reasons cited above in Sections II and III, Plaintiffs' Amended Complaint clearly alleges that a constitutional violation has occurred.

In response to LCCYS' second contention adopting Jameson's arguments, Plaintiffs' Amended Complaint more than meets the requirements for stating a claim for conspiracy against both LCCYS and Jameson for the reasons set forth below.

A. Plaintiffs' allegations that LCCYS and Jameson had a pre-arranged plan to subject obstetrical patients to drug tests so that LCCYS could remove newborns from their parents based solely on the results of those tests state a claim against LCCYS and Jameson under 42 U.S.C. § 1983.

LCCYS explicitly adopts Jameson's argument that Plaintiffs fail to plead a claim under 42 U.S.C. § 1983 for federal conspiracy. A private party may recover under § 1983 "against any person acting under color of state law who deprives the party of his or her constitutional rights." *Collins v. Christie*, No. 06-4702, 2007 U.S. Dist. LEXIS 61579, *7-8 (E.D.Pa. August 22, 2007). To state a claim under §1983, the actor "'must be deemed to have engaged in a conspiracy with state actors, **or** to have been willful participants in joint activity with them in order to be subjected to suit under 42 U.S.C. § 1983.'" *Sershen v. Cholish*, No. 3:07-CV-1011, 2008 U.S. Dist. LEXIS 15678, at *13 (W.D.Pa. February 29, 2008) (quoting *Beckerman v. Weber*, No. 1:06-CV-1334, 2007 U.S. Dist. LEXIS 58092, at *5 (M.D.Pa. Aug. 9, 2007) (emphasis added)

(noting that although joint activity and "conspiracy" are often both present in the same case, the two tests for state action are distinct). Under either test, "'[t]he inquiry is fact-specific.'" *Id.* (quoting *Groman v. Twp. of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995)); *see also Crissman v. Dover Downs Entm't Inc.*, 289 F.3d 231, 234 (3d Cir. 2002) (en banc) (noting that "the facts are crucial"). In order to plead a conspiracy sufficient to establish state action, a plaintiff must plead only "enough factual matter (taken as true) to suggest that an agreement was made," or, stated otherwise, "plausible grounds to infer an agreement." *Twombly*, 550 U.S. at 556. The complaint must allege facts relating to joint rather than unilateral action. *See Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 178-179 (3d Cir. 2010); *Sershen*, No. 3:07-CV-1011, 2008 U.S. Dist. LEXIS 15678, at *23.

Here, the Amended Complaint sufficiently states a claim against LCCYS and Jameson under 42 U.S.C. § 1983 through either conspiracy or joint action.

1. Plaintiffs adequately state a claim for federal conspiracy.

LCCYS and Jameson's sole argument with respect to Plaintiffs' conspiracy claim is that Plaintiffs fail to allege that Jameson and LCCYS conspired to actually remove Plaintiffs' child from their custody. This contention is short-sighted and misunderstands the nature of Plaintiffs' conspiracy claim as well as the requirements under federal pleading standards. In order to plead a conspiracy sufficient to establish state action, a plaintiff must plead only "enough factual matter (taken as true) to suggest that an agreement was made," or, stated otherwise, "plausible grounds to infer an agreement." *Twombly*, 550 U.S. at 556.

While merely furnishing evidence of a patient's positive urine drug screen to LCCYS would not rise to the level necessary to suggest an agreement was made between LCCYS and Jameson, the Amended Complaint includes "enough factual matter (taken as true) to suggest that

an agreement was made," or stated otherwise, "plausible grounds to infer an agreement," between LCCYS and Jameson whereby Jameson created and carried out a policy, in coordination with LCCYS, of drug-testing all obstetrical patients and reporting positive results to LCCYS in order to further LCCYS' unconstitutional policy of separating newborns from mothers who test positive for illicit substances. *Twombly*, 550 U.S. at 556. More specifically, the Amended Complaint alleges that:

- Jameson has a policy of subjecting all obstetrical patients to urine drug tests that is not required by any state or federal law (¶¶ 17-18);
- Under that policy, Jameson notifies LCCYS whenever an obstetrical patient tests positive for an illicit substance (¶¶ 25-26);
- Jameson's policy of reporting all maternity patients with confirmed positive drug-test results to LCCYS is not required under any federal or state law or regulation (¶ 27);
- LCCYS has a working relationship with Jameson through its affiliation with the Children's Advocacy Center, which is based at Jameson's South Campus (¶ 30);
- Jameson's policy of subjecting all obstetrical patients to drug tests and informing LCCYS of positive results was created and carried out in cooperation with LCCYS (¶ 28);
- The purpose of Jameson's drug-testing policy is to further the goals of LCCYS, not provide medical care to patients (¶ 4);
- Jameson was aware that it was LCCYS' policy to remove a newborn whenever Jameson disclosed to LCCYS that a prenatal drug test of the infant's mother was positive (¶ 29); and
- The joint actions of LCCYS and Jameson in developing such Policy and performing drug tests at cut-off concentrations outside of recognized levels and in notifying LCCYS of any positive result "resulted in the removal of Plaintiffs' child from their custody without reasonable suspicion that she had been abused or was in imminent danger of abuse." (¶¶ 17-30, 101).

Viewed as a whole and taken as true, the allegations of cooperation, understanding and agreement between LCCYS and Jameson in the development and implementation of Jameson's Policy, drug-testing procedures and notification procedures demonstrates that Plaintiffs have pleaded "enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 553. Therefore, the Amended Complaint appropriately pleads a conspiracy under § 1983 against LCCYS and Jameson. *See Abbott v. Latshaw*, 164 F.3d 141, 147-48 (3d Cir. 1998) ("a private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts 'under color of state law' for purposes of § 1983"); *see Croft v. Westmoreland County Children & Youth Svcs.*, 103 F.3d 1123, 1126 (3d Cir. 1997) (absent objectively reasonable suspicion of abuse justifying degree of interference with parents' rights, governmental intrusions into parent-child relationship are arbitrary abuses of power).

In an analogous case from the Western District of Pennsylvania cited by Defendant Jameson in its Brief and adopted by LCCYS, *DiNicola v. DiPaolo,* 945 F.Supp. 848, 857 (W.D.Pa. 1996), a complaint sufficiently alleged conspiracy through "specific facts to withstand dismissal" where it contained allegations that a private individual/hypnotist cooperated with police officers to implant a false memory in the mind of a potential witness to a crime for which the plaintiff was the primary suspect, in order to use the information to bring criminal charges against the plaintiff. *DiNicola*, 945 F.Supp. at 853. The complaint specifically alleged, *inter alia* that: (1) the police officers cooperated with the hypnotist and gave information and instructions to the hypnotist prior to the hypnosis; (2) the hypnosis session was "highly suggestive and otherwise done in violation of generally accepted standards of hypnosis of witnesses for forensic purposes"; and (3) as a result of the hypnosis, the witness adopted a new

memory of the events, which was the "product of hypnosis and the plan and agreement among the defendants to bring false criminal charges against the plaintiff." *Id.* at 857. Relying on these allegations, the *DiNicola* court held that the complaint was "sufficiently detailed to put Defendants on fair notice of the claims against them and to permit Defendants to frame an adequate responsive pleading." *Id.* Further, the court noted that it would be premature to dismiss the claim at such an early stage in the proceedings and added that further development of the record would be beneficial. *Id.*

Application of the holding in *DiNicola* to the present facts warrants the same result. Similar to the complaint in *DiNicola*, Plaintiffs' Amended Complaint alleges that (1) LCCYS and Jameson agreed and cooperated in developing Jameson's Policy to require the hospital to notify LCCYS of any positive prenatal drug test result regardless of whether the hospital had a reasonable suspicion of abuse or imminent abuse; (2) the drug test performed by Jameson was performed for the purpose of carrying out LCCYS' unconstitutional policy of removing newborn children from their parents and not for any medical or legal reason and violated generally accepted standards by using unreasonably low cut-off concentration levels; and (3) as a result of Jameson's report of Plaintiff Mort's drug test results to LCCYS, LCCYS removed Plaintiffs' child from their custody, which was the foreseeable and intended outcome of LCCYS' and Jameson's plan to identify babies born to mothers with positive prenatal drug tests and separate them from their parents. As in *DiNicola*, these allegations are not unilateral or conclusory and are more than sufficient to place Defendants on notice of the claims against them.

The only case relied upon by Defendants, *Great Western,* is inapplicable to the present situation. In that case, as opposed to *DiNicola*, the complaint's allegations were solely conclusory describing only "unilateral action on the part of certain [state actors]" with no

allegations relating to any agreement or joint activity between the state actor and the private party. *Great Western*, 615 F.3d at 179. Here, as described above in detail, there are numerous allegations relating to an agreement and/or cooperation between Jameson and LCCYS to develop its Policy, perform drug tests of all maternity patients, and report all positive test results to LCCYS. Those actions resulted in the removal of Plaintiffs' child from their custody. Therefore, Plaintiffs' allegations are not conclusory and the Amended Complaint sufficiently pleads a claim for conspiracy against Jameson and LCCYS.

2. Plaintiffs set forth facts sufficient to infer a claim of joint participation between Jameson and LCCYS.

In addition to setting forth a sufficient claim for conspiracy, the Amended Complaint also sets forth the elements necessary to sustain recovery under a theory of joint participation between LCCYS and Jameson. "In considering whether the complaint survives a motion to dismiss, we review whether it contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Montville Twp. v. Woodmont Builders, LLC*, No. 05-4888, 2007 U.S. App. LEXIS 18825, at *2 (3d Cir. August 8, 2007) (citing *Twombly*, 550 U.S. at 562).

Plaintiffs have met the requirements to allege the necessary level of joint participation and collaboration between Jameson and LCCYS because they have alleged the existence of a pre-arranged plan between Jameson and LCCYS to separate newborn children from their mothers when Jameson determines that the mother has tested positive for an illicit substance. *See Cruz v. Donnelly*, 727 F.2d 79, 80 (3d Cir. 1984); *see also*, *Great Western*, 615 F.3d at 178-79 (citing *Twombly*, 550 U.S. at 556)("plaintiff must simply plead "enough facts to raise a reasonable evidence of illegal agreement"). "[W]hen the state creates a system permitting private parties to substitute their judgment for that of a state official or body, a private actor's

mere invocation of state power renders the party's conduct actionable under § 1983." *Cruz*, 727 F.2d at 81-82. "In order to establish the necessary level of joint participation and collaboration, the plaintiff must allege: the existence of a pre-arranged plan [between the state actor and the private party] by which the [the state actor] substituted the judgment of private parties for their own official authority." *Collins*, No. 06-4702, 2007 U.S. Dist. LEXIS 61579, at *10. The critical issue is "whether the state, through its agents or laws, has established a formal procedure or working relationship that drapes private actors with the power of the state." *Cruz*, 727 F.2d at 80.

In *Cruz*, the Third Circuit considered whether the operators of a retail food store and its employees jointly participated with the police in a manner actionable under § 1983. The *Cruz* complaint alleged that the private parties accused the plaintiff of shoplifting and ordered the police to conduct a strip-search of the plaintiff, and that the police subsequently conducted the requested strip-search "without probable cause and only because of racial discrimination." 727 F.2d at 79-80. The Third Circuit held that in order to find that the private parties acted under color of state law, the complaint had to set forth allegations suggesting that "(1) the [state actor has] a pre-arranged plan with the [private party] and (2) under the plan, the [state actor] will [act] without independently evaluating the presence of probable cause." *Id.* at 81.

The Amended Complaint sets forth allegations suggesting that LCCYS and Jameson had a pre-arranged plan. Amended Complaint, ¶¶ 3, 4, 17-30, 128, 100-09. The Amended Complaint also sets forth allegations that, under Jameson's Policy, LCCYS would routinely remove children from the care and custody of their parents without performing its own independent investigation to establish the presence of probable cause. Amended Complaint, ¶¶ 3, 44, 46, 47, 52, 54, 56-58. Therefore, the Amended Complaint has set forth allegations

sufficient to find that LCCYS jointly participated with Jameson pursuant to a combination, agreement or understanding to remove Plaintiffs' child from their home without reasonable suspicion of past or imminent child abuse, in violation of Plaintiffs' fundamental right to the care and custody of their child.

CONCLUSION

For the reasons above, Plaintiffs Elizabeth Mort and Alex Rodriguez respectfully submit that the Court should deny the Motion to Dismiss.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within Brief in Opposition to Defendant Lawrence County Children and Youth Services, Lawrence County and Chrissy Montague's Motion to Dismiss was served this 23 day of February, 2011, via the Court's electronic transmission facilities pursuant to Fed. R. Civ. P. 5(b)(3) and Local Rule 5.5 upon the following:

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