No. 18-1896

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADAM KANUSZEWSKI and ASHLEY KANUSZEWSKI,
as parent-guardians and next friend to their minor children D.W.L.,
R.F.K., and C.K.K.; SHANNON LAPORTE as parent-guardian
and next friend to her minor children, M.T.L. and E.M.O.
and LYNNETTE WIEGAND as parent-guardian and next friend
to her minor children, L.R.W., C.J.W., H.J.W. and M.L.W.

Plaintiffs-Appellants,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES;
NICK LYONS, sued in his official and individual capacities; SANDIP SHAH,
sued in his official and individual capacities; SARAH LYON-CALLO,
sued in her official and individual capacities; MARY KLEYN, sued in
her official and individual capacities; MICHIGAN NEONATAL
BIOBANK, INCORPORATED, aka Michigan Neonatal Biorepository;
ANTONIO YANCEY, sued in his official and individual capacities,

Defendants-Appellees

and

HARRY HAWKINS

Defendant

On Appeal from the United States District Court
for the Eastern District of Michigan – Northern Division
Honorable Thomas L. Ludington, District Judge

BRIEF OF APPELLEE ANTONIO YANCEY
in his individual capacity

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CORPORATE DISCLOSURE STATEMENT

Defendant Dr. Antonio Yancey in his individual capacity is not a corporate entity and, thus, is not required to comply with Fed. R.App.P. 26.1(a).

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant Dr. Antonio Yancey in his individual capacity requests the opportunity to present oral argument to this Court to explain why he is entitled to affirmance of the District Court's dismissal of the First Amended Complaint's claims against him for reasons other than those stated by the District Court. The District Court dismissed the claims against all Defendants because it found, correctly, that Plaintiffs failed to state a claim for any constitutional violation. While the District Court's reasoning applies to Dr. Yancey, he is entitled to affirmance on alternative grounds. A defendant, sued in his individual capacity, may not be held liable under 42 U.S.C. §1983 unless he was personally involved in the alleged unconstitutional activity. Dr. Yancey moved to dismiss on those grounds, but the District Court found it unnecessary to consider that argument, relying instead on its ruling that no constitutional violation had been pled.

If this Court concludes that the District Court erred in ruling that no constitutional violation was pled, it should nevertheless sustain the District Court's dismissal on the grounds raised in Dr. Yancey's motion to dismiss. Since there is no District Court ruling on that motion, this Court may have questions concerning the alternative grounds for upholding the District Court's order as to Dr. Yancey in his individual capacity. Oral argument, therefore, would allow counsel to respond to those questions and to otherwise present the alternative case for affirmance.

JURISDICTIONAL STATEMENT

Defendant Dr. Antonio Yancey in his individual capacity accepts Plaintiffs' jurisdictional statement.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the District Court Properly Dismiss Plaintiffs' First Amended Complaint As To Defendant Dr. Antonio Yancey In His Individual Capacity On The Grounds That Plaintiffs Failed To Plead A Constitutional Violation?

Defendant Answers: Yes.
This Court Should Answer: Yes.

II. Was Dismissal Of The First Amended Complaint As To Defendant Dr. Antonio Yancey In His Individual Capacity Proper On The Alternative Grounds That Plaintiffs Failed To Allege Facts Showing That Defendant Was Personally Involved In The Alleged Unconstitutional Activity?

Defendant Answers: Yes.
This Court Should Answer: Yes.

INTRODUCTION

In their action brought under 42 U.S.C. § 1983, Plaintiffs[1] allege that Defendants violated their constitutional rights by taking small amounts of their blood shortly after their birth, testing it for various diseases and disorders, and storing it for use by researchers at Defendant Michigan Neonatal Biobank. Defendant Dr. Antonio Yancey serves as Director of the Biobank and was sued in his individual capacity as well as his official capacity[2].

Plaintiffs' claims against Dr. Yancey were correctly dismissed by the District Court because Plaintiffs failed to plead facts sufficient to establish a constitutional violation. Even if the District Court's ruling on the sufficiency of the pleading was in error, its dismissal should still be affirmed as to Dr. Yancey on independent grounds. Those grounds, which were presented in Dr. Yancey's motion to dismiss, are that the First Amended Complaint fails to allege facts showing that Dr. Yancey was personally involved in the alleged constitutional violations. Thus, this Court should affirm the District Court's judgment as to Dr.

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[1] As used in this Brief, the term "Plaintiffs" refers to the plaintiff children who are called "Infants" in the First Amended Complaint. *See* First Amended Complaint, RE No. 26, Page ID # 305, ¶ 19.

[2] Dr. Antonio Yancey is an employee of Wayne State University and serves as the Director of the Michigan Neonatal Biobank. Unless otherwise indicated, "Dr. Yancey" as used in this brief refers to Dr. Antonio Yancey in his individual capacity. "Director Yancey" refers to Dr. Antonio Yancey in his official capacity.

Yancey for the reasons stated by the District Court or for the reasons presented in Dr. Yancey's motion to dismiss.

STATEMENT OF THE CASE

Factual Allegations

Pursuant to Michigan law, small amounts of blood are collected from newborns, shortly after birth, to be tested for disorders, diseases and other health risks. Shortly after birth, health professionals at the hospital in charge of the care of the newborn draw blood from them. (First Amended Complaint ["FAC"], RE No. 26, Page ID # 301, 309, ¶s 4, 35.) The blood samples (or "blood spots") are transmitted to the State Bureau of Laboratories where they are tested for various maladies, disorders and diseases. (FAC, RE No. 26, Page ID # 314-315, ¶s 54 and 55.) After the testing is completed, the blood spots are transferred to the Defendant Michigan Neonatal Biobank, ("Biobank"), whose Director is Defendant Dr. Antonio Yancey, where they are stored indefinitely. (FAC, RE No. 26, Page ID # 308, 315, 320, ¶s 29, 55 and 75.)

Plaintiffs are children who as newborns allegedly had their blood drawn, tested and stored as described above. Their five-count First Amended Complaint, based on 42 U.S.C. § 1983, alleges that the process is constitutionally defective. Plaintiffs allege that the withdrawal of blood from the infant Plaintiffs violated their substantive due process rights under the Fourteenth Amendment because their

parents did not consent to the procedure. In addition, Plaintiffs allege that the withdrawal and retention of the blood violated the infants' Fourth Amendment right to be free from unreasonable searches and seizures.

Dr. Yancey is sued, along with the rest of the Defendants, in Counts II, IV and V. In Count II, Plaintiffs allege that Dr. Yancey deprived them of their right to due process by "the taking of the Infants' blood for government seizure and use without proper informed consent of the Parents." (FAC, RE No. 26, Page ID # 325, ¶ 99.) In Counts IV and V (which are combined in paragraphs 108 through 117 [FAC, RE No. 26, Page ID # 327-329, ¶'s 108-117]), Plaintiffs assert that Dr. Yancey violated their Fourth Amendment rights by "indefinitely" storing their blood spots at the Biobank. (FAC, RE No. 26, Page ID # 327, ¶ 109.) Alternately, Plaintiffs assert that Dr. Yancey and the other Defendants engaged in a civil conspiracy to deprive the Plaintiffs of their Fourth Amendment rights. (FAC, RE No. 26, Page ID # 328, ¶ 113.)

Procedural History

Plaintiffs filed their First Amended Complaint on April 30, 2018. (FAC, RE No. 26.) On May 29, 2018, Defendants filed three separate motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). One motion was filed by the State Defendants (Michigan Department of Health and Human Services, Nick Lyon, Dr. Sandip Shah, Dr. Sarah Lyon-Callo, Harry Hawkins, and Mary Kleyn). (State

Defendants' Motion to Dismiss, RE No. 32). Another motion was submitted by Defendant Michigan Neonatal Biobank, Inc. and its Director Yancey. (Biobank and Director Yancey's Motion to Dismiss, RE No. 33.) A third motion was filed by Dr. Yancey in his individual capacity. (Dr. Yancey's Motion to Dismiss, RE No. 34.) In the last motion, Dr. Yancey argued that Plaintiffs claims against him must be dismissed because the First Amended Complaint did not state facts sufficient to show his personal involvement in the alleged constitutional violations.

The District Court rejected Plaintiffs' constitutional claims, granted the Defendants' motions to dismiss and entered its Judgment dismissing the First Amended Complaint with prejudice on August 8, 2018. (Order Granting Motion to Dismiss, RE No. 50; Judgment RE No. 51.) The District Court did not directly address the motion filed by the Biobank and Director Yancey nor Dr. Yancey's motion to dismiss "[b]ecause the grounds for dismissal provided in the State Defendants' motion are equally applicable to the remaining Defendants[.]" (Order Granting Motion to Dismiss, RE No. 50, Page ID # 828.) Notice of Appeal was filed on August 8, 2018. (RE No. 52.)

SUMMARY OF ARGUMENT

Plaintiffs' claims against Dr. Yancey were properly dismissed. Two separate grounds support dismissal. First, as the District Court found, the withdrawal of the infants' blood without parental consent and the storage of that

blood did not violate substantive due process under the Fourteenth Amendment nor the right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment. A party sued in their individual capacity can be held liable under Section 1983 for only their own unconstitutional conduct. Since the withdrawal and storage of the infants' blood were not unconstitutional activities, the District Court correctly concluded that Dr. Yancey could not be held liable for his claimed participation in those activities.

Second, even if the District Court's ruling on the constitutional claims is incorrect, the claims against Dr. Yancey should still be dismissed because Plaintiffs failed to allege facts showing Dr. Yancey's participation in the alleged violations. Plaintiffs allege that the taking of the infants' blood without the informed consent of their parents was unconstitutional. (FAC, RE 26, Page ID # 325, ¶ 99.) Yet there are no allegations whatsoever that Dr. Yancey participated in the "taking" of their blood, a procedure that was performed by health professionals attending the newborns at the hospital. (FAC, RE No. 26, Page ID # 309, ¶ 35.) Plaintiffs also contend that Dr. Yancey is liable for allegedly violating Plaintiffs' Fourth Amendment right against unreasonable search and seizure because the Biobank stores their blood samples indefinitely. (FAC, RE No. 26, Page ID # 327, ¶ 109.) No facts, however, are alleged that Dr. Yancey authorized, approved or even knew about the storage of their blood at the Biobank. Their claim rests

entirely on Dr. Yancey's supervisory role, but that alone is insufficient to impose liability.

As a back-up theory, Plaintiffs assert that Dr. Yancey and the other Defendants engaged in a civil conspiracy to deprive Plaintiffs of their Fourth Amendment rights. (FAC, RE No. 26, Page ID # 328, ¶ 113.) That claim fails for lack of any alleged facts supporting a civil conspiracy or Dr. Yancey's participation in it.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss pursuant to Fed. Rule Civ. Proc. 12(b)(6) *de novo*. *Newberry v. Silverman*, 789 F.3d 636,640 (6th Cir.2015). A complaint cannot survive a Rule 12(b)(6) motion to dismiss unless it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly*, 550 U.S. at 556). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (*citing Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint . . . has not "show[n] that the pleader is entitled to

relief" and should therefore be dismissed. *Id.* at 679 (*citing* Fed. Rule Civ. Proc. 8(a)(2)).

Significantly, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* at 678; *see also Twombly*, 550 U.S. at 555 ("courts are not bound to accept as true a legal conclusion couched as a factual allegation" (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Therefore, a complaint that merely offers "labels and conclusions"; "a formulaic recitation of the elements of a cause of action"; or "naked assertion[s] devoid of further factual enhancement" is insufficient to survive a motion to dismiss. *Id.* (*citing Twombly*, 550 U.S. at 555, 557).

Under these well-established standards, Plaintiffs' First Amended Complaint was correctly dismissed as to Dr. Yancey.

ARGUMENT

The lower court correctly dismissed Plaintiffs' claim that Dr. Yancey is liable for the constitutional violations alleged in Count II and combined Counts IV and V. Dismissal was proper because, first, the alleged taking and storage of the blood without parental consent is not unconstitutional. Thus, Dr. Yancey cannot be held liable under Section 1983 for his claimed participation in that conduct. Second, even if Plaintiff's properly plead their constitutional claims, the First Amended Complaint is bereft of allegations that Dr. Yancey was personally

involved in the alleged violations. As a result, Plaintiffs' claims against Dr. Yancey fail.

I. The District Court Correctly Dismissed The Claims Against Dr. Yancey Because Plaintiffs Failed To Properly Plead That The Taking And Storage Of The Infants' Blood Was An Unconstitutional Activity.

The pleading requirements for a § 1983 individual capacity case are clear. "To state a cognizable claim against an individual under § 1983, ' a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by the person acting under color of state law." *Heyerman v. County of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012) (*quoting Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006)). As this Court explained, "[p]ersons sued in their individual capacities under § 1983 can be held liable based only on their own unconstitutional behavior." *Id.* "Personal involvement is necessary to establish section 1983 liability." *Heyerman,* 680 F.3d at 647 (*quoting Murphy v Grenier*, 406 F.App'x 972, 974 (6th Cir. 2011)). The alleged personal involvement must be specific to that defendant. "[P]ersonal liability 'must be based on the actions of that defendant in the situation that the defendant faced, and not based on any problems caused by the errors of others, either defendants or non-defendants.'" *Heyerman,* 680 F.3d at 647 *(quoting Gibson v. Matthews*. 926 F.2d 532, 535 (6th Cir. 1991)).

The District Court concluded that the alleged taking and storage of the infants' blood was not a violation of substantive due process or the Fourth Amendment's prohibition against unreasonable searches and seizures. The lower court dismissed the claims against Dr. Yancey because there was no properly pled constitutional activity in which he could participate. As the Appellee Briefs of the State Defendants and of the Biobank and Director Yancey[3] will show, the District Court's ruling on the pleading issue is correct. Thus, the lower court's dismissal of the claims against Dr. Yancey should be affirmed for the reasons stated by the lower court.

II. Alternatively, The District Court's Dismissal Of The Claims Against Dr. Yancey Should Be Affirmed Because There Are No Factual Allegations That He Was Involved In The Alleged Unconstitutional Activity.

Even if this Court concludes that Plaintiffs properly pled unconstitutional activity, this Court may affirm the District Court's dismissal of the claims against Dr. Yancey on other grounds. As this Court observed in *Dixon v. Clem*, 492 F.3d 665, 673 (6th Cir. 2007) *quoting Abercrombie & Fitch Stores, Inc. v Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002), "we 'may affirm on any grounds supported by the record even if different from the reasons of the district court.'" The record in this case amply supports Dr. Yancey's argument, made to the

[3] Dr. Yancey joins in the Appellee Brief of the Michigan Neonatal Biobank and Director Yancey.

District Court, that the claims against him (Counts II, IV and V) should be dismissed because the First Amended Complaint fails to allege facts that he was personally involved in the alleged unconstitutional activity. Thus, the District Court's dismissal of the claims against Dr. Yancey should be affirmed on those alternative grounds.

A. There are no Factual Allegations that Dr. Yancey was Involved Personally in the Unconstitutional Activity Alleged in Count II.

Count II of the First Amended Complaint asserts that Dr. Yancey deprived Plaintiffs of their liberty interest in violation of the Due Process Clause "[b]y undertaking the taking of the Infants' [i.e., Plaintiffs] blood for government seizure and use without proper informed consent of the Parents [.]" (FAC, RE No. 26, Page ID # 325, ¶ 99.) Dr. Yancey, however, was not involved in the "taking of the infants' blood." According to the First Amended Complaint, the blood was drawn from Plaintiffs, not by Dr. Yancey, but by "a health professional in charge of the care of each newborn infant or at the birth of an infant[.]" (FAC, RE No. 26, Page ID # 309, ¶ 35.) The health professionals were "conscripted" to draw the Plaintiffs' blood by Defendant Michigan Department of Health and Human Services and the Defendant State of Michigan officials. *Id.* There are no allegations whatsoever that the State drafted Dr. Yancey to personally participate in "the taking of the Infants' blood". Thus, Dr. Yancey was entitled to dismissal of

Count II.

B. There are no Factual Allegations that Dr. Yancey was Involved Personally in the Unconstitutional Activity Alleged in Counts IV and V.

Combined Counts IV and V allege that Dr. Yancey (and the other Defendants) violated Plaintiffs' constitutional rights under the Fourth Amendment and engaged in a civil conspiracy to deprive Plaintiffs of those rights. The constitutional violation is alleged to be the "indefinite search-and-seizure of the blood of the Infants, for no reasonable and rationale [sic] basis when undertaken without the actual and informed consent of the Infants or their Parents[.]" (FAC, RE No. 26, Page ID # 327, ¶ 109.) Plaintiffs, however, allege no facts showing that Dr. Yancey personally participated in the "indefinite" storage of Plaintiffs' blood spots at the Biobank.

1. Dr. Yancey is not liable for the alleged unconstitutional storage of Plaintiffs' blood spots at the Biobank.

Dr. Yancey's liability for the storage of Plaintiffs' blood spots is based on "his role as director of Defendant MICHIGAN NEONATAL BIOBANK" where, by virtue of that position, he has the "custody and control" of the blood spots. (FAC, RE No. 26, Page ID # 316, 320, 328, ¶s 61, 76, 114). Dr. Yancey, however, cannot be held individually liable merely because he is the director of the facility where the blood spots are stored.

"Supervisory officials are not liable in their individual capacities unless they 'either encouraged the specific incident of misconduct or in some other way directly participated in it." *Heyerman*, 680 F.3d at 647 (*quoting Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982)). Merely being in charge of the facility in which the blood spots are stored is insufficient to support a § 1983 claim. *See Porter v. Louisville Jefferson Cty. Metro. Gov't*, 2014 U.S. Dist. LEXIS 168669 at *15 (W.D. Ky. Dec. 5, 2014)("simply pointing to the fact that [municipal corrections department director][was] in charge of the [facility] does not state a § 1983 claim.")(brackets supplied). *See also Gill v. Mooney*, 824 F.2d 192, 196 (2d. Cir. 1987)("Dismissal of a section 1983 claim is proper where, as here, the plaintiff 'does no more than allege that [defendant] was in charge of the prison.'" (*quoting Williams v. Vincent*, 508 F.2d 541, 546 (2d Cir. 1974)). Rather, supervisory liability "must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act.'" *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (*quoting Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 206 (6th Cir. 1998)). *See also Watson v Mohr*, 2017 U.S. Dist. LEXIS 205479 (S.D. Ohio Dec. 14, 2017)("A defendant must, therefore, play more than a passive role in the alleged violation or show mere tacit approval of the actions in question.") "At a minimum, a plaintiff must show that the official at least implicitly authorized,

approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Heyerman,* 680 F.3d at 647.

There are no allegations whatsoever that Dr. Yancey either implicitly authorized, approved or knowingly acquiesced in the storage of the Plaintiffs' blood spots at the Biobank. Plaintiffs merely allege that he had "custody and control" of the Plaintiffs' blood by virtue of being the Biobank's director. But that is insufficient to impose individual liability. "Section 1983 liability . . . cannot be premised solely on a theory of respondent superior or *the right to control employees*." *Heyerman*, 680 F.3d at 647 (emphasis supplied). Similarly, an allegation of "custody" falls short. *See Blackwell v. Madison Cty.*, 2016 U.S. Dist. LEXIS 2903, *9 (W.D. Tenn. Jan. 11, 2016)(dismissing § 1983 action against Sheriff for violation of Eighth Amendment where the plaintiff alleged that "the care and custody of inmates is delegated to the Sheriff . . . and his designees pursuant to State law."). There is not even an allegation that Dr. Yancey was aware that the Plaintiffs' blood was stored at the Biobank, and, even if there were such an allegation, it would be insufficient. *See Leary v. Daeschner*, 349 F.3d 888, 903 (6th Cir. 2003) ("[S]imple awareness of employees' misconduct does not lead to supervisor liability.").

Furthermore, the First Amended Complaint squarely places the responsibility for storage on the State. The storage (and the seizure and testing) of

the blood samples was an "undertaking" of MDHHS and the State Officials Defendants. *See* FAC, RE No. 26, Page ID # 314, ¶ 52. *See also* FAC, RE No. 26, Page ID # 316, ¶ 62 ("[E]very Infant in this legal action has their seized blood spots on the above-described DBS cards *stored by Defendant MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES[.]*")(Emphasis supplied.) The "MICHIGAN DEPARTMENT OF PUBLIC HEALTH *retained* the remaining blood spots *indefinitely* via a complicated arrangement with Defendant MICHIGAN NEONATAL BIOBANK." (FAC, RE No. 26, Page ID # 316, ¶ 60; emphasis supplied.)

These allegations that the State "retained" or "stored" the blood spots "indefinitely" are reinforced by the Exhibits to the First Amended Complaint. Exhibit B states that the "*DCH* [Department of Community Health] will maintain, or *cause to be stored*, newborn screening dried blood spots *indefinitely*." (FAC, Exhibit B, RE No. 26-3, Page ID # 336; emphasis supplied.) The DCH "retains *qualified ownership* of the DBS [dried blood spot] *while in storage*." (FAC, Exhibit B RE No. 26-3, Page ID # 336; emphasis supplied.) This "qualified ownership" gives DCH significant control over the disposition and use of the specimens. "The DCH may release part of the residual DBS upon written request of the individual for research studies or other uses. The DCH may release part, or all, of the de-identified specimen for NBS quality assurance and test development

or public health or medical research[.]" *Id.* The DCH will also "reserve part of the specimen solely for the use of the individual or parent/guardian" and develops "[r]etention schedules for DBS collected for other tests[.]" *Id.*

Exhibit K explains that the BioTrust for Health is "a program run by the Department of Health and Human Services to oversee the storage and use of Michigan's blood spots that remain after newborn screening is completed." (FAC, Exhibit K, RE No. 26-12, Page ID # 366.) It further points out that "MDHHS is responsible for the blood spot samples, holding them 'in trust' for future research." *Id.* Indeed, a MDHHS brochure advises parents that "[y]ou must contact MDHHS if you do not want blood spots stored for any reason after newborn screening." (FAC, Exhibit J, RE No. 26-11, Page ID # 364.) It also clarifies who has control over the research using the blood spots: "MDHHS approves the study" and "MDHHS selects the blood spots." (*Id.* Page ID # 365.)

In light of these allegations and the documentation offered by Plaintiffs, the First Amended Complaint cannot be plausibly read to assert that it is Dr. Yancey who is personally responsible for storing Plaintiffs' blood spots indefinitely. Thus, Plaintiffs have failed to plead facts showing that Dr. Yancey is liable for the alleged unconstitutional "indefinite storage" of Plaintiffs' blood spots.

2. Dr. Yancey is Not Liable for the Alleged Deprivation of Plaintiffs' Fourth Amendment Rights on a Civil Conspiracy Theory.

Plaintiffs' attempt to hold Dr. Yancey individually liable for the alleged Fourth Amendment violation on a civil conspiracy theory fares no better. A civil conspiracy is "an agreement between two or more persons to injure another by unlawful action." *Revis v Meldrum*, 489 F.3d 273, 290 (6th Cir. 2007). To establish a civil conspiracy, a "plaintiff must show that (1) a 'single plan" existed; (2) defendants 'shared in the general conspiratorial objective' to deprive the plaintiff of his constitutional rights; and (3) 'an overt act was committed in furtherance of the conspiracy that caused [the plaintiff's] injury'." *Webb v. United States*, 789 F.3d 647, 670 (6th Cir. 2015) (*quoting Hooks v Hooks*, 771 F.2d 935, 944 (6th Cir. 1985)(brackets supplied in *Webb*)). Civil conspiracy claims must be pled with particularity. "It is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987).

Plaintiffs failed to satisfy the pleading requirements for a civil conspiracy. Their allegations of a civil conspiracy are in paragraph 113 of the First Amended Complaint. (FAC, RE No. 26, Page ID # 328, ¶ 113.) There, Plaintiffs allege that Defendants acted "via a plan" and "shared general conspiratorial objectives" to deprive the Plaintiffs of their Fourth Amendment rights. *Id.* Plaintiffs offer no details of the "plan" nor any facts showing that Defendants "shared" the alleged

"conspiratorial objective" or "agreed" to violate Plaintiffs' constitutional rights. They simply recite the elements of a civil conspiracy. But a complaint that merely offers "labels and conclusions"; "a formulaic recitation of the elements of a cause of action"; or "naked assertion[s] devoid of further factual enhancement" cannot survive a motion to dismiss. *Iqbal,* 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 555, 557).

Moreover, paragraph 113 (FAC, RE No. 26, Page ID # 328, ¶ 113) alleges no facts whatsoever showing that Dr. Yancey was personally involved in the alleged conspiracy. As noted above, personal liability must be "based on the actions of *that* defendant" and not on the actions of others. *Heyerman*, 680 F.3d at 647 (*quoting Gibson v. Matthews*. 926 F.2d 532, 535 (6th Cir. 1991)) (emphasis *supplied*). Here, Plaintiffs allege no facts showing that Dr. Yancey participated in a "single plan" to deprive Plaintiffs of their Fourth Amendment rights, "shared" with the other Defendants a conspiratorial objective to do so or otherwise "agreed" with them to deprive Plaintiffs of their rights. Without such factual allegations, Plaintiffs' civil conspiracy claim against Dr. Yancey fails.

CONCLUSION

This Court should affirm the District Court's dismissal of the First Amended Complaint as to Dr. Yancey. There are two separate grounds for affirmance. First, the District Court correctly held that Plaintiffs did not properly plead a constitutional violation. Second, Plaintiffs failed to plead facts showing that Dr. Yancey was personally involved in the alleged unconstitutional conduct. Thus, the District Court correctly granted Dr. Yancey's motion to dismiss.

RELIEF REQUESTED

Dr. Antonio Yancey, in his individual capacity, requests that this Court affirm the District Court's Judgment.

CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit rule 32(a)(7)(C) and Sixth Circuit rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of the Sixth Circuit rule 32(a)(7)(B).

This brief has been prepared in proportional typeface using Times New Roman 14-point font. The principal brief, including headers and footnotes, contains 5409 words according to the Word Count feature in the Microsoft Word program, being less than 13,000 words.

The undersigned understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limitations may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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In his individual capacity

CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of records at their email address(es) of record.

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DESIGNATION OF RELEVANT

DISTRICT COURT DOCUMENTS

RE.	PageID Range	Description of the Document
26	#300-453	First Amended Complaint, including Exhibits A-R
26-3	#336-337	First Amended Complaint, Exhibit B
26-11	#364-365	First Amended Complaint, Exhibit J
26-12	#366	First Amended Complaint, Exhibit K
32	#477-532	Motion to Dismiss (State Defendants)
33	#583-624	Motion to Dismiss (Biobank)
34	#625-644	Motion to Dismiss (Yancey)
45	#696-741	Response to Motion to Dismiss
50	#825-846	Opinion
51	#847	Judgment
52	#848	Notice of Appeal