UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

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,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; NICK LYON, sued in his official and individual capacities; DR. SANDIP SHAH, sued in his official and individual capacities; DR. SARAH LYON-CALLO, sued in her official and individual capacities; HARRY HAWKINS, sued in his official and individual capacities; MARY KLEYN, sued in her official and individual capacities; MICHIGAN NEONATAL BIOBANK, INC also known as MICHIGAN NEONATAL BIOREPOSITORY; DR. ANTONIO YANCEY, sued in his official and individual capacities,

Defendants.
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Case No.: 18-cv-10472

Hon. Thomas L. Ludington,
District Court Judge

Hon Patricia T. Morris,
Magistrate Judge

REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OF DR. ANTONIO YANCEY, INDIVIDUALLY

Philip L. Ellison (P74117)
Outside Legal Counsel PLC
Counsel for Plaintiffs
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

Christopher L. Kerr (P57131)
Thomas S. Marks (P69868)
Aaron W. Levin (P81310)
Attorneys for State Defendants
Michigan Department of Attorney General
Corporate Oversight Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-1160

Thomas F. Cavalier (P34683)
Attorney for Dr. Antonio Yancey, in his individual capacity only
Office of the General Counsel
Wayne State University
656 W. Kirby, 4249 FAB
Detroit, MI 48202
(313) 577-2268
thomas.cavalier@wayne.edu

Jerold Lax (P16470)
Jeremy C. Kennedy (P64821)
Attorneys for Michigan Neonatal BioBank, Inc. and
Dr. Antonio Yancey, in his capacity as Director of the Michigan
Neonatal BioBank, Inc. only
Pear Sperling Eggan & Daniels PC
24 Frank Lloyd Wright Drive, Suite D2000
Ann Arbor, MI 48105
(734) 665-4441

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INTRODUCTION

Defendant Dr. Antonio Yancey, in his individual capacity, is entitled to dismissal of the First Amended Complaint (ECF No. 26, "FAC") because the FAC contains insufficient allegations of his personal participation in the claimed constitutional violations or civil conspiracy.[1] Plaintiffs' Response to Dr. Yancey's Motion to Dismiss (ECF No. 37, "Response") sheds no light on the alleged factual basis of Plaintiffs' claims. Instead, the Response mischaracterizes Plaintiffs' claims, fashions "allegations" that are absent from the pleading, and relies on FAC exhibits that undermine Plaintiffs' positions.[2] Thus, this Court should dismiss FAC as it pertains to Dr. Yancey in his personal capacity.

ARGUMENT

I. Plaintiffs Point To No Factual Allegations that Dr. Yancey Personally Participated in the Unconstitutional Activity Alleged In Count II.

The First Amended Complaint alleges that Defendants deprived the Plaintiff Infants of their liberty interest in violation of the Due Process Clause by "the taking of the infant's blood for government seizure without proper informed consent of the Parents[.]" (ECF No. 26, FAC ¶ 99.) The FAC alleges no facts showing that Dr. Yancey

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[1] Dr. Yancey, individually, is also entitled to dismissal of the FAC if this Court grants his motion to dismiss, filed in his official capacity along with Defendant Michigan Neonatal Biobank, on the grounds that the FAC does not state claims for the constitutional violations. Dr. Yancey, individually, could not have participated in the claimed constitutional violations, either directly or under a civil conspiracy theory, if none are pled. Thus, if this Court grants Dr. Yancey's motion to dismiss in his official capacity, it should also dismiss the FAC against Dr. Yancey in his individual capacity.

[2] Plaintiffs even resort to hyperbole and overheated rhetoric to distract this Court from the legal issues. *See, e.g.* Response, ECF No. 37, ID page 651 ("blood on his hands", "horrific case", "stolen newborn blood"), ID page 653 ("Orwellian processes"). The most egregious example of this tactic is Plaintiffs' assertion that Dr. Yancey, in his motion, is "lying" about his involvement in the alleged constitutional infringements. (*Id.*, at ID page 654.) Plaintiffs should know better. A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the Plaintiffs' complaint; it does not rely on statements of fact that could qualify as a "lie". Plaintiffs' gratuitous insult has no place in the record of this Court.

personally participated in the "taking" of the Infants' blood; to the contrary, the "taking" is alleged to be done by a "health professional" who was "conscripted" by the State Defendants. (ECF No. 26, FAC ¶ 35.)

Plaintiffs fail to address this gap in their allegations. Instead, they attempt to dodge it by mischaracterizing their own allegations and by making up new ones. They say that Dr. Yancey violated Plaintiff Infants' liberty interest by "causing the transfer of the newborns' blood samples to the Biobank and then sell [*sic*] the samples to third-party businesses or third-party bio-sample brokers for use by for profit companies and others far beyond any consent received (if any)." (ECF No. 37, Response, ID p, 15)(internal record citations omitted). But the FAC does not ground its Due Process Claim on Dr. Yancey "causing the transfer of the newborn blood samples" for the stated purpose, but on the *taking* of the blood samples without informed consent.

Furthermore, the FAC does not assert that Dr. Yancey caused the transfer of the blood samples to the Biobank. Plaintiffs cite Exhibit R and paragraphs 98 and 99. Only paragraph 98 concerns a transfer of the blood samples, and it refers merely to the "transferring [of the] blood samples from Defendant Michigan Department of Health and Human Services to the Defendant Michigan Neonatal Biobank[.]" (ECF No. 26, FAC ¶ 98.) Paragraph 98 does not suggest that Dr. Yancey "caused" the blood transfer; to the contrary, it implies that the transfer was made by the Michigan Department of Health and Human Services ("MDHHS").

Plaintiffs cannot repair the hole in their pleading by stitching in allegations made out of whole cloth. Therefore, Count II should be dismissed as to Dr. Yancey in his individual capacity.

II. Plaintiffs Identify No Factual Allegations that Dr. Yancey was Personally Involved in the Unconstitutional Activity Alleged in Counts IV and V.

Plaintiffs have failed to specify the factual allegations showing that Dr. Yancey personally participated in the alleged Fourth Amendment violation or in the alleged civil conspiracy to violate such rights. Therefore, Counts IV and V must be dismissed.

A. Fourth Amendment Claim.

The alleged Fourth Amendment violation is the "indefinite search and seizure of the blood of the Infants" without the "actual and informed consent of the Infants or their Parents." (ECF No. 26, FAC ¶109.) The FAC does not allege facts showing that Dr. Yancey directly participated in that activity. Plaintiffs' arguments to the contrary fail.

First, Plaintiffs argue that Dr. Yancey "routinely and unlawfully caused the illegal collection of samples of blood from all or nearly all newborn babies in Michigan at the time of birth . . . without the knowing and/or informed consent of the Parents," citing paragraph 33 of the First Amended Complaint. (ECF No. 37, Response pp. 11-12.) *See also* ECF No. 37 Response p. 6 (asserting that Dr. Yancey is "searching or causing the searching of the newborn's blood for information . . . ", but without citing any allegations in the FAC.) Paragraph 33 does not allege that the collection of blood samples from newborns was caused by Dr. Yancey. Rather, it alleges that this activity was engaged in by "certain" Defendants, without specifying which ones. It is clear from the FAC, however, that the blood was collected by "a health professional in charge of the care of each newborn" who was "conscripted" to do so by the State Defendants, not by Dr. Yancey. (ECF No. 26 FAC, ¶¶ 36, 38, 39.)

Second, Plaintiffs contend that Dr. Yancey is "conducting (or authorizing the conducting of) these medical tests on the newborns' blood." (ECF No. 37, Response,

p.6.) Plaintiffs cite paragraphs 98 and 99 of the FAC, but nothing is alleged there about "medical tests." Moreover, the FAC plainly alleges that the tests are conducted by the "Bureau of Laboratories with the Defendant MICHGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES *under the custody and control of the STATE OFFICIALS DEFENDANTS*" and "*under [their] authority[.]*" (ECF No. 26, FAC ¶¶ 54, 55; emphasis supplied.)

Finally, Plaintiffs contend that Dr. Yancey violated their Fourth Amendment rights by storing their blood samples "indefinitely". (*See* ECF No. 37, Response, pp. 11-12.) But the FAC asserts that the indefinite storage of the blood spots was done under the authority of the State. The storage (and the seizure and testing) of the blood samples was an "undertaking" of MDHHS and the State Officials Defendants. *See* ECF No. 26, FAC ¶ 52. *See also* ECF No. 26, FAC ¶ 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." (ECF No. 26, FAC ¶ 60; emphasis supplied.)

These allegations that the State "retained" or "stored" the blood spots "indefinitely" are reinforced by Plaintiffs' Exhibits. Exhibit B states that the "*DCH* [Department of Community Health] will maintain, or *cause to be stored*, newborn screening dried blood spots *indefinitely*." (ECF 26-3 ID Exhibit B, p. 336; emphasis supplied.) 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." (ECF 26-12.) It further points out that "MDHHS is responsible for the blood spot samples, holding them 'in trust' for future research." *Id.* In light of these allegations and the documentation offered by Plaintiffs, the FAC cannot be plausibly read to assert that it is Dr. Yancey who is responsible for storing the blood spots indefinitely.

Nevertheless, Plaintiffs persist in arguing that Dr. Yancey is liable because the blood samples are in his "custody and control." (*See* ECF No. 37, Response, p. 12.) Again, Plaintiffs' Exhibits defeat their contention. Exhibit B provides that the DCH "retains *qualified ownership* of the DBS [dried blood spot] *while in storage*." (ECF 26-3 Exhibit B, ID page 336; emphasis supplied.)[3] 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 J, 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." (ECF 26-11, Exhibit J ID page 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.* at ID page 365.

[3] Plaintiffs state that "oddly, the Michigan Department of Health and Human Services asserts 'qualified ownership' over the blood spots while in the custody and control of Dr. Yancey." (ECF No. 37, Response, p.3 n. 4.) The only "oddity" here is that Plaintiffs rely on exhibits that flatly contradict their allegation that Dr. Yancey has custody and control over the blood samples.

B. Civil Conspiracy

Plaintiffs have failed to plead facts sufficient to state a civil conspiracy claim against Dr. Yancey in his individual capacity. Initially, the FAC expressly alleges that the civil conspiracy claim is against Dr. Yancey in his *official* capacity. "For the purposes of this case, the Infants, by their Parents, allege that Defendant DR. ANTONIO YANCEY is a state actor or is otherwise liable via *civil conspiracy* under 42 U.S.C. § 1983 *by his role as director of the Defendant MICHIGAN NEONATAL BIOBANK*." (ECF No. 26, FAC ¶ 114; emphasis supplied.) Thus, Plaintiffs posit Dr. Yancey's civil conspiracy liability on actions in his official, not individual, capacity.

Furthermore, Plaintiffs have simply failed to establish that the FAC alleges the civil conspiracy with sufficient specificity. For the most part, Plaintiffs continue to refer to the "conspiracy" in conclusory terms such as the "conspiratorial agreement", "joint enterprise", or "joint action". (ECF No. 37, Response, p. 12.) The only specifics Plaintiffs offer to show an agreement among the Defendants is the Grant Agreement attached as Exhibit Q to the FAC. (ECF No. 26-18, FAC, Exhibit Q.) Exhibit Q, however, does not purport to be an agreement among the Defendants, but between MDHHS and Wayne State University. (ECF 26-18 Exhibit Q ID page 383.) Moreover, the Grant Agreement is completely silent on the indefinite seizure and storage of the blood samples without informed consent, which is the alleged constitutional violation."[4] The only reference in the agreement to blood spots is the "project" title, which reads:

[4] Nor do Plaintiffs point to any allegations of Dr. Yancey's involvement in the "conspiracy". Apparently relying on Exhibits I, N, and R, concerning the pricing of blood samples, Plaintiffs contend that "Dr. Yancey's conspiratorial role was to indefinitely store the blood samples unless or until the samples could be dispossessed of by sale (and at a profit)." (ECF No. 37, Response, p.10.) Nothing in the FAC assigns this role to Dr. Yancey. Defendants' alleged "overt act" is "indefinitely causing the leftover blood . . . to be . . . seized and stored indefinitely[,]" with no mention of "dispossessing" of the samples by "sale" or otherwise. (ECF No 26, FAC ¶ 113.) Furthermore, Exhibit B indicates that the Department of Community Health "causes" the indefinite storage.

"Biobank Management – Newborn Screening Residual Sample Dried Blood." (ECF 26-18, Exhibit Q, ID page 424.)

CONCLUSION

For the reasons set forth above and in his Motion to Dismiss and supporting brief, Dr. Yancey requests that this Court dismiss the First Amended Complaint as it pertains to him in his individual capacity.

Respectfully submitted,

WAYNE STATE UNIVERSITY
OFFICE OF THE GENERAL COUNSEL

By: /s/ Thomas F. Cavalier
Thomas F. Cavalier (P34683)
Attorney for Dr. Antonio Yancey, in his Individual capacity only
656 W. Kirby, 4249 F.A.B.
Detroit, MI 48202
(313) 577-2268

Date: July 3, 2018

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email disclosed on the Notice of Electronic Filing on July 3, 2018.

Dana Rudnicki