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7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF ALAMEDA - NORTHERN DIVISION  
10

11 LATASHA NAILAH SPEARS WINKFIELD; Case No. RG15760730  
MARVIN WINKFIELD; SANDRA  
12 CHATMAN and JAHl McMATH, a minor,  
by and through her Guardian Ad Litem,  
13 LATASHA NAILAH SPEARS WINKFIELD,

14 Plaintiff,

15 vs.

**NOTICE OF DEMURRER, MOTION TO  
STRIKE REQUEST FOR JUDICIAL  
NOTICE; UCSF BENIOFF CHILDREN'S  
HOSPITAL OAKLAND'S DEMURRER TO  
FIRST CAUSE OF ACTION AND MOTION  
TO STRIKE PORTION OF FIRST  
AMENDED COMPLAINT**

16 FREDERICK S. ROSEN, M.D.; UCSF  
BENIOFF CHILDREN'S HOSPITAL  
17 OAKLAND (formerly Children's Hospital &  
Research Center at Oakland); MILTON  
18 McMATH, a nominal defendant, and DOES  
1 THROUGH 100,

19 Defendants.  
20

**Date: January 8, 2016  
Time: 2:00 p.m.  
Dept: 20  
Complaint Filed:  
Trial: N/A**

**Reservation No. R-1686975**

21  
22 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that on the 8th day of January, 2016 at 2:00 p.m. in  
24 Department 20 of the above entitled court, defendant UCSF Benioff Children's Hospital  
25 Oakland will demur to the first cause of action of plaintiffs' First Amended Complaint  
26 pursuant to C.C.P. § 430.10 (e) for failure to state facts sufficient to constitute a cause  
27

1 of action, and will move to strike improper portions of said Complaint pursuant to C.C.P.  
2 § 435-§ 436 as set forth below.

3  
4 **DEMURRER**

5 **First Cause of Action**

6  
7 1. The first cause of action fails to state facts sufficient to constitute a cause  
8 of action for Personal Injury on behalf of Jahi McMath in Jahi has been declared dead  
9 under California law, and she has no standing to sue for personal injury. C.C.P. §  
10 430.10 (e)

11  
12 **MOTION TO STRIKE**


13 **Conditional Language – Wrongful Death Action**

14 1. *"In the event that it is determined that"* [Jahi  
15 succumbed to the injuries causes by the negligence  
16 of the defendants]. First Amended Complaint for  
Damages at 13:27-28.

17 This demurrer and motion will be based on this Notice/ Demurrer/ Motion to Strike, the  
18 accompanying Memorandum of Points and Authorities and Request for Judicial Notice  
19 therein, Exhibits A-G, the Declaration of Joseph E. Finkel, all pleadings and papers on  
20 file herein as well argument and authority that may be presented in Reply or at the time  
21 of the hearing of this matter.

22 Dated: November 23, 2015

23 GALLOWAY, LUCCHESI, EVERSON  
24 & PICCHI

25  
26 By:   
KAREN A. SPARKS, ESQ. #161391  
27 Attorneys for Defendant  
UCSF BENIOFF CHILDREN'S  
28 HOSPITAL OAKLAND

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17 OAKLAND (formerly Children's Hospital &  
Research Center at Oakland); MILTON  
18 McMATH, a nominal defendant, and DOES  
1 THROUGH 100,

19 Defendants.  
20  
21  
22

Case No. RG15760730

The Honorable Robert B.  
Freedman

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF UCSF  
BENIOFF CHILDREN'S HOSPITAL  
OAKLAND'S DEMURRER TO FIRST  
CAUSE OF ACTION AND MOTION TO  
STRIKE PORTIONS OF FIRST  
AMENDED COMPLAINT; REQUEST FOR  
JUDICIAL NOTICE**

**Date: January 8, 2016**

**Time: 2:00 p.m.**

**Dept: 20**

**Complaint Filed:**

**Trial: N/A**

**Reservation No. R-1686975**

23  
24 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
25 **UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND'S DEMURRER TO**  
26 **FIRST CAUSE OF ACTION AND MOTION TO STRIKE PORTIONS OF**  
**FIRST AMENDED COMPLAINT; REQUEST FOR JUDICIAL NOTICE**  
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I.

**INTRODUCTION**

This is a medical malpractice/wrongful death action arising out of the surgical and post-operative care provided to Jahi McMath at Children’s Hospital Oakland in December, 2013. Following defendants’ demurrer to the original complaint, the First Amended Complaint was filed. The amended Complaint again alleges causes of action for personal injury, negligent infliction of emotional distress, and wrongful death.

In December, 2013, this Court found Jahi to be irreversibly brain dead, and legally dead under California law. The determination of death was final, re-litigation of this issue is barred by the rules of collateral estoppel, and the amended allegations of do not fall within the “changed circumstances” exception to those rules. The Hospital therefore demurs again to the first cause of action because Jahi does not have standing to assert a cause of action for personal injury, and also moves to strike the portion of the wrongful death cause of action contemplating the re-litigation of the death issue in this action.

II.

**APPLICABLE LAW**

C.C.P. § 430.10 sets forth the grounds for demurrer:

The party against whom a complaint ... has been filed may object, by demurrer ... to the pleading on any ... of the following grounds...

(e) The pleading does not state facts sufficient to constitute a cause of action.

(f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

C.C.P. § 435 provides for motions to strike and reads in part as follows:

(b) (1) Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof....

C.C.P. § 436 permits the court in its discretion to strike various improper matters:

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The court may, upon a motion made pursuant to Section 435...

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

The grounds for demurrers and motions to strike must be apparent from the face of the complaint or from matters subject to judicial notice. C.C.P. § 430.30 and § 437.

III.

REQUEST FOR JUDICIAL NOTICE

The Hospital respectfully asks the Court to take judicial notice of:

1) The following records of this Court in *Winkfield v. Children's Hospital Oakland* Case No. RP13707598:

- a. 1/2/2014 Amended Order (1) Denying Petition For Medical Treatment and (2) Granting In Part Application To Seal Portions Of Record [non-substantive amendments to 12/26/2013 Order], Exhibit A.
- b. 1/17/2014 Final Judgment Denying Petition for Medical Treatment, Exhibit B.
- c. 10/3/2014 Writ of Error Corum Nobis And Memorandum Regarding Court's Jurisdiction To Hear Petition for Determination That Jahi McMath Is Not Brain Dead, with accompanying Expert Declarations, Exhibit C 1-6.
- d. 10/6/2014 Order Appointing Dr. Paul Fisher As Court Expert Witness Exhibit D.
- e. 10/6/14 Letter Of Paul Fisher, M.D., with attached American Academy of Pediatrics' Guidelines for the Determination of Brain Death in Infants and Children, Exhibit E.
- f. 10/8/2014 Case Management Order Confirming Petitioner's Withdrawal Of Petition for Writ Of Error Coram Nobis, Exhibit F.

2) The Certificate of Death for Jahi McMath, Exhibit G.



1 Evidence Code § 452 (d) permits the Court to take judicial notice of the records of any  
2 court of this state. Evidence Code § 452 (c) permits the Court to take judicial notice of  
3 official acts of the legislative, executive and judicial departments of the state, including  
4 the filing of death certificates. People v. Terry (1974) 38 Cal. App. 3d 432, 439.

5 Evidence Code § 453 makes judicial notice of these matters mandatory when the  
6 adverse party has been given sufficient notice of the request. Notice is sufficient if given  
7 in the demurrer or motion to strike or in the supporting points and authorities. C.C.P. §  
8 430.70 and § 437.

9 See accompanying Declaration of Joseph E. Finkel In Support of UCSF Benioff  
10 Children's Hospital Oakland's Request For Judicial Notice.

11  
12 **IV.**

13 **JAH I HAS BEEN DECLARED LEGALLY**  
14 **DEAD UNDER CALIFORNIA LAW**

15 **A. THE DETERMINATION OF DEATH IS APPARENT FROM THE COMPLAINT**  
16 **ITSELF**

17 According to the Complaint, Jahi underwent extensive surgery on December 9,  
18 2013. FAC ¶ 11. The defendants allegedly failed to appropriately respond to extensive  
19 post-operative bleeding. The next day a Code Blue was called and continued for 2  
20 hours 33 minutes, during which time defendants allegedly failed to establish an airway,  
21 and this allegedly resulted in inadequate oxygenation. FAC ¶¶ 18-19. On December 13,  
22 2013, plaintiffs were advised that EEG testing showed that Jahi had sustained  
23 significant brain damage, that repeat testing the next day revealed severe brain  
24 damage, that Jahi had been put on an organ donor list, and that life support would be  
25 withdrawn. FAC ¶ 23. Plaintiffs also allege that the Chief of Pediatrics told them that  
26 Jahi was dead. FAC ¶ 24.

1 **B. THE DETERMINATION OF JAHİ'S DEATH WAS FULLY LITIGATED, AND**  
2 **THE FINAL JUDGMENT IN THIS MATTER WAS ISSUED BY THIS COURT IN**  
3 **JANUARY 2014**

4 In December, 2013, plaintiffs petitioned this Court seeking an injunction to  
5 prevent the Hospital from withdrawing Jahi from life support. The Hospital opposed the  
6 Petition arguing the Hospital had no duty to continue any medical interventions because  
7 there had been an irreversible cessation of all brain functions, and thus Jahi was dead  
8 as a matter of law under Health and Safety Code § 7180. 1/2/2014 Amended Order  
9 Denying the Petition For Medical Treatment at 2:7-21, Exhibit A.

10 The Court considered Declarations and/or testimony from Dr. Robert  
11 Heidersbach and Dr. Robin Shanahan, the physicians at CHO who made the initial  
12 diagnosis of irreversible brain death. 1/2/2014 Amended Order Denying the Petition For  
13 Medical Treatment at 2:21-3:2, Exhibit A. The Court appointed Dr. Paul Fisher, Chief of  
14 Child Neurology at Stanford University School of Medicine, to serve as an independent  
15 physician. Dr. Fisher also examined Jahi and testified as to his findings. *Id.* at 5:14-6:5.  
16 The American Academy of Pediatrics' Guidelines for the Determination of Brain Death  
17 in Infants and Children setting forth the accepted standards for determining brain death  
18 in children were admitted, as well as the examination notes of Dr. Shanahan and Dr.  
19 Fisher. *Id.* at 6:4-17. Dr. Shanahan and Dr. Fisher both testified that Jahi was brain  
20 dead under the accepted medical standards. *Id.* at 7:1-2 and 7:21-22. *Counsel for*  
21 *Petitioner stipulated that Dr. Fisher had conducted his examination and made the brain*  
22 *death diagnosis according to accepted standards. Id.* at 6:22-7:1.

23 The Court specifically stated that in order to decide the issue presented by the  
24 Petition, it *necessarily had to determine whether Jahi was legally dead.* 1/2/2014  
25 Amended Order Denying the Petition For Medical Treatment 3:24-25, Exhibit A. The  
26 Court found by clear and convincing evidence that Jahi was legally dead according to  
27 accepted medical standards and denied the plaintiffs' Petition for Medical Treatment. *Id.*  
28

1 at 16:9-22. A Final Judgment on the merits was entered. 1/17/2014 Final Judgment  
2 Denying Petition for Medical Treatment, Exhibit B.

3 The Hospital again asks the Court to take judicial notice of the 1/2/2014  
4 Amended Order Denying the Petition For Medical Treatment at 2:7-21, Exhibit A and  
5 the 1/17/2014 Final Judgment Denying Petition for Medical Treatment, Exhibit B, as well  
6 as judicial notice of the fact that the issue of whether Jahi is legally dead has been fully  
7 litigated, necessarily decided, and finally determined in a prior action between the same  
8 parties. Request for Judicial Notice and Declaration of Joseph E. Finkel.

9 **C. A DEATH CERTIFICATE WAS ISSUED**

10 A Death Certificate was also issued, and the Hospital again asks the Court to  
11 take judicial notice of the Certificate. Certificate of Death, Exhibit G. At the very least,  
12 issuance of a Death Certificate permits the Court to take judicial notice of the fact that a  
13 determination of death was made, that it was considered final, and that in California,  
14 Jahi is legally dead.

15  
16 **V.**

17 **A DETERMINATION OF DEATH IS INTENDED TO BE FINAL  
AND MUST BE FINAL TO SERVE ITS INTENDED PURPOSE**

18 Health and Safety Code § 7180 governs the determination of death in California  
19 and reads as follows:

20  
21 (a) An individual who has sustained either (1) *irreversible*  
22 cessation of circulatory and respiratory functions, or (2) *irreversible*  
23 cessation of all functions of the entire brain, including the brain  
stem, is dead. A determination of death must be made in  
accordance with accepted medical standards. [Emphasis added]

24 (b) This article shall be applied and construed to effectuate its  
25 general purpose to make uniform the law with respect to the subject  
of this article among states enacting it.

26 (c) This article may be cited as the Uniform Determination of  
Death Act.

27 Health and Safety Code § 7180 adopts the Uniform Determination of Death Act without  
28 change. Statutes are to be construed in a manner consistent with the ordinary meaning

1 of the words used, and in a manner that gives effect to their intended purpose. See e.g.  
2 Estate of Griswolds v. See (2004) 25 Cal. 4<sup>th</sup> 904, 910-911.

3 Consistent with its ordinary meaning, death is irreversible and final. And to serve  
4 its intended purpose, a determination of death must be final. The determination of death  
5 permits medical treatment to be withdrawn (see 1/17/2014 Final Judgment Denying  
6 Petition for Medical Treatment, Exhibit B), and organs to be removed for transplant (see  
7 Health and Safety Code § 7151.40). A declaration of death also permits wills to be  
8 probated, insurance proceeds to be distributed, and it permits families to move on. The  
9 determination must therefore be final. It is unclear what, if any, meaning or use a  
10 reversible declaration of death would have, and in fact the Uniform Determination of  
11 Death Act, expressly requires the *irreversible* cessation of all brain functions.

12 The Uniform Determination of Death Act not only requires a determination that  
13 the cessation of all brain function be irreversible, it explicitly or implicitly recognizes and  
14 depends on the fact that "...the medical profession has developed techniques for  
15 determining if loss of brain function while cardiorespiratory support is administered.  
16 Those are the techniques are to be set out in the accepted medical standards for  
17 determining irreversible brain death. See UDDA, and National Conference of  
18 Commissioners on Uniform State Laws, Prefatory Note ¶ 2, 12A U.L.A. (Masters Ed.  
19 2008), Determination of Death Act pp.778, Exhibit H.

20  
21 VI.

22 **THE DETERMINATION OF JAHİ'S DEATH IS NOW FINAL,  
23 NOTHING IN THE FIRST AMENDED COMPLAINT REQUIRES  
OR PERMITS PLAINTIFFS TO RE-LITIGATE THIS ISSUE**

24 **A. WHEN FACTS OR STATUS ARE FIXED AND PERMANENT IN NATURE, THE  
25 "CHANGED CIRCUMSTANCES" EXCEPTION TO COLLATERAL ESTOPPEL  
DOES NOT APPLY**

26 The principles of *res judicata*, and more specifically collateral estoppel, bar the  
27 re-litigation of an issue decided in a prior proceeding if: 1) the issue was actually  
28

1 litigated and necessarily decided in the prior proceeding; 2) the issue previously decided  
2 is identical to the one to be re-litigated in the present proceeding; 3) the party against  
3 whom collateral estoppel is asserted was a party, or in privity to a party, in the prior  
4 proceeding, and 4) the previous proceeding resulted in a final judgment on the merits.  
5 See e.g. Daar & Newman v. VRL Intern (2005) 129 Cal. App. 4th 482, 489. All these  
6 requirements have been met. Part IV B above.

7 Plaintiffs, however, contend that the principles of collateral estoppel do not bar  
8 the re-litigation of the death issue because there are subsequent events that bring this  
9 case within the changed circumstance exception to collateral estoppel. In opposition to  
10 the Hospital's previous Demurrer, plaintiffs cited to the following explanation of this  
11 exception:

12 It is clear that if facts and circumstances change after the  
13 first case is final, they are no longer "identical" by the time  
14 the second case rolls along. "[T]he estoppel effect of a  
15 judgment extends only to the facts in issue as they existed at  
16 the time the prior judgment was rendered." (citation omitted.)  
17 "Some issues are not static, that is, they are not fixed and  
18 permanent in their nature. When a fact, condition, status,  
19 right, or title is not fixed and permanent in nature, then an  
20 adjudication is conclusive as to the issue at the time of its  
21 rendition, but is not conclusive as to that issue at some later  
22 time." (Ibid., citing Lunt v. Boris (1948) 87 Cal.App.2d 694,  
23 695 [197 P.2d 568].)

24 Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc. (2014) 231  
25 Cal.App.4th 134, 181. Thus the exception applies *only* when the fact or status at issue  
26 is *not* fixed and permanent in nature, and the defense has found no authority, applying  
27 the exception to a determination of death.

28 Changed circumstances in some cases may permit the re-litigation of an issue,  
but this is not true when the issue is irreversible brain death.<sup>1</sup>

1 The Court previously asked what would happen if Jahi were to walk into Court and speak. But the UDDA (Health and Safety Code § 7180) and the accepted standards for determining irreversible brain death apply in those instances when respiration and circulation are maintained artificially, and neurological testing is required to determine if the brain has irreversibly ceased to function. It is the neurological determination of brain death that is at issue here and in the prior proceedings. If Jahi were to walk into Court, there would be no need for Neurology experts and Neurological testing. *These* new facts would not only fall outside the scope of the prior proceedings, they would fall outside the scope of the UDDA.

1 **B. IRREVERSIBLE BRAIN DEATH DETERMINED ACCORDING**  
2 **TO ACCEPTED MEDICAL STANDARDS IS, BY DEFINITION,**  
3 **FINAL, FIXED AND PERMANENT**

4 The question of whether Jahi no longer meets the criteria for brain death was  
5 already fully and finally determined in December, 2013, when Dr. Fisher and two other  
6 physicians found that Jahi had suffered *irreversible* brain death. This was a final, fixed,  
7 and permanent determination as a matter of accepted medical fact and as a matter of  
8 law.

9 When someone is found to be irreversibly brain dead, by definition, it means that  
10 the medical knowledge and clinical experience upon which the accepted medical  
11 standards for determining the irreversible brain death depend have determined that  
12 there is *no medical possibility* of change. When the determination of *irreversible* brain  
13 death was made, the possibility of a future change in status was ruled out *at that time*.

14 The question of whether Jahi no longer meets the criteria for brain death has  
15 already been answered in December 2013, and the answer is No. The October 2014,  
16 proceedings and the Complaint in the present case are simply continuing expert  
17 disputes over an issue that has already been decided.

18 **C. PLAINTIFFS ARE IMPROPERLY ASKING THIS COURT OR A JURY IN THIS**  
19 **CASE TO REJECT THE ACCEPTED MEDICAL STANDARDS USED TO**  
20 **DETERMINE IRREVERSIBLE BRAIN DEATH**

21 During the December 2013 proceeding before Judge Grillo, plaintiffs  
22 acknowledged that the American Academy of Pediatrics' Guidelines set out the  
23 accepted medical standard for determining irreversible brain death and stipulated that  
24 Dr. Fisher had appropriately conducted the brain death examination according to the  
25 accepted medical standards, even though they disagreed with his conclusion that Jahi  
26 was irreversibly brain dead. See 1/2/2014 Amended Order Denying the Petition For  
27 Medical Treatment at 6:22-7:1, Exhibit A.

1 If plaintiffs were contending that Dr. Fisher in some way erred back in  
2 December, 2013, further litigation on that issue would clearly be barred by the rules of  
3 collateral estoppel because Jahi's condition in December, 2013 was fully litigated and  
4 finally determined.

5 Although not entirely clear, based the plaintiffs' October 2014 attempt to have  
6 declared "not brain dead," they appear be contending that they have new evidence  
7 establishing that Jahi no longer meets the criteria for brain death, that the accepted  
8 medical standards applied in December, 2013 were incapable of determining if the  
9 irreversible cessation of all brain functions has occurred, and that she was not really  
10 brain dead at that time.

11 In October, 2014, nine months after Jahi was determined to be legally dead  
12 under California law, plaintiffs filed a Writ of Error Corum Nobis And Memorandum  
13 Regarding Court's Jurisdiction To Hear Petition for Determination That Jahi McMath Is  
14 Not Brain Dead on the grounds they had irrefutable evidence that Jahi no longer meets  
15 the accepted criteria for brain death, the same thing they are alleging in this case.  
16 Plaintiffs' papers included the Declarations from plaintiffs' experts. Writ of Error Corum  
17 Nobis And Memorandum Regarding Court's Jurisdiction To Hear Petition for  
18 Determination That Jahi McMath Is Not Brain Dead; Declarations of Philip De Fina,  
19 Ph.D., Calixto Machado M.D., Charles J. Prestigiacoma M.D., Elena B. Labkovsky  
20 Ph.D., and Alan Shewmon M.D. Exhibit C 1-6.

21 One of those experts, Dr. Alan Shewmon, explains that even though Jahi is  
22 clearly not brain dead now, he has no doubt that at the time of the original diagnosis,  
23 she fulfilled the diagnostic criteria for brain death that had been correctly and rigorously  
24 applied in December, 2013. He then goes on to state:

25 A likely explanation for the discrepancy (in fact the only  
26 explanation I can think of) is that (1) *the standard clinical*  
27 *diagnostic criteria are not as absolutely, 100% reliable as*  
28 *commonly believed,* and (2) the radionuclide blood flow  
studies are not sensitive enough to distinguish no flow from  
low flow.... [Emphasis added]

1 Declaration of Alan Shewmon M.D. at page 3 ¶ 4, Exhibit C 6. Dr. De Fina expresses a  
2 similar view, stating in part:

3 I personally have seen only one other case such as Jahi  
4 McMath's wherein a person pronounced brain dead, and  
5 confirmed by more than five (5) United States Doctors was,  
6 *with more sensitive testing, of the type performed on Jahi  
McMath*, found at a date remote from the insult to the brain,  
determined to have brain activity.... [Emphasis added

7 Declaration of Phillip De Fina Ph.D., Exhibit C 2. Plaintiffs are disputing the validity  
8 and/or reliability of the American Academy of Pediatrics' Guidelines for Determining  
9 Irreversible Brain Death In Children and Infants, even though plaintiffs acknowledge  
10 they are *the accepted* standards for determining brain death in children.

11 The American Academy of Pediatrics' Guidelines were developed by a task force  
12 that included the Society of Critical Care Medicine (section on Critical Care and section  
13 on Neurology), the American Academy of Pediatrics, and the Child Neurology Society,  
14 and are broadly accepted by the medical community as the standard for determining  
15 irreversible brain death in children. 10/6/2014 Letter of Paul Fisher M.D., Exhibit D at  
16 ¶¶3, 4, and 16-18.

17 It is not within the province of courts and juries to reject the American Academy  
18 of Pediatrics Guidelines, nor is it up to the courts to determine what the accepted  
19 medical standards *should* be, or to otherwise second guess the Academy and the  
20 members of the medical community that developed and accepted its Guidelines.

21 If plaintiffs believe they have evidence showing that the accepted Guidelines are  
22 incapable of determining if irreversible cessation of all brain function has occurred, they  
23 must address their concerns to the American Academy of Pediatrics, to those who  
24 developed and the Guidelines, and to the broader medical community that accepted the  
25 Guidelines. If plaintiffs' experts and the research foundation (IFBR) with which they are  
26 associated have been unable to convince the medical community to accept their  
27 position on the determination of brain death in children, it is not up to courts or juries to  
28 decide the issue on a case by case basis.



1 **D. THE UDDA MAKES IRREVERSIBLE BRAIN DEATH A BASIS FOR**  
2 **DETERMINING DEATH AS A MATTER OF LAW, AND THE LAW IS NOT**  
3 **SUBJECT TO CHANGE BY THE COURTS**

4 If plaintiffs are contending that brain death is inherently reversible, or that it is not  
5 possible to determine when irreversible cessation of brain function has occurred, or they  
6 otherwise intend to challenge "irreversible brain death" as a valid basis for determining  
7 death, they would in effect be improperly asking the Court to reject the basic provisions  
8 of the Uniform Determination of Death Act (UDDA).

9 The Uniform Determination of Death Act was drafted by both legal and medical  
10 authorities, it reflects accepted biomedical practice, it has the approval of both the ABA  
11 and AMA, and it has been adopted by over 30 jurisdictions. National Conference of  
12 Commissioners on Uniform State Law, 12A U.L.A. (Masters Ed., 2008) Determination of  
13 Death Act pp. 777-779, Exhibit H.

14 The UDDA establishes irreversible loss of brain function as a means of  
15 determining death, and is premised on the irreversible nature of the loss, and the ability  
16 of accepted medical standards to determine whether irreversible cessation of brain  
17 function has occurred. It is not up to this Court or a jury in this case to reweigh the facts  
18 and findings underlying the Uniform Determination of Death Act or to decide whether  
19 brain death can or should be used as a basis for determining death. See Schabarum v.  
20 California Legislature (1998) 60 Cal.App.4th 1205, 1219; C.C.P. §1858.

21 Any concerns the IFBR and the plaintiffs may have about the efficacy of brain  
22 death as a basis for determining death should be addressed to those who drafted the  
23 law and the legislatures that enacted it, not to the Court or the jury in this case.

24 **VII.**

25 **THE DEATH CERTIFICATE ALLEGATIONS IN THE AMENDED COMPLAINT**  
26 **SIMPLY AFFIRM THE FINAL JUDGEMENT ISSUED BY JUDGE GRILLO**

27 Again, the Hospital asks the Court to take judicial notice of the issuance of a  
28 Death Certificate, and therefore of the fact that a determination of death was made, that

1 it was considered final, and that in California Jahi is legally dead. Certificate of Death,  
2 Exhibit G, Request for Judicial Notice.

3 The issuance of the Death Certificate affirmed the finding of death, and is not  
4 itself a subsequent event that would justify re-litigating the death issue. Even assuming  
5 arguendo that the voiding or amending of the Death Certificate would bring this matter  
6 within the scope the "changed circumstances" exception to the rules of collateral  
7 estoppel, it appears from the complaint that this did not happen. In ¶¶ 27- 30 of the first  
8 amended complaint, plaintiffs allege that they petitioned the State of California to void or  
9 amend the Death Certificate. They were informed the State had no standing to take  
10 such an action, and were directed to the Coroner who issued the Certificate. They  
11 allege that in June, 2015, they petitioned Dr. Muntu Davis, the Health Office for  
12 Alameda County Care Serve Agency as well as the Alameda County Registrar of Births  
13 and Deaths, with requests to void the Certificate, and that Dr. Davis did not respond.  
14 Plaintiffs do not allege what if any response they received from the County Coroner or  
15 the County Registrar. FAC ¶¶ 27-30. Plaintiffs allege that there are a number of  
16 deficiencies in the Death Certificate, but they were apparently not sufficient to warrant  
17 voiding or amending the Certificate.

18 Despite plaintiffs' efforts, the Death Certificate still remains in effect almost two  
19 years after it was issued.

## 20 VIII.

### 21 THE FIRST CAUSE OF ACTION FAILS TO STATE FACTS 22 SUFFICIENT TO ESTABLISH THAT JAHİ HAS STANDING TO SUE

23 The first cause of action is titled "For Personal Injuries On Behalf Of Jahi  
24 McMath." Complaint for Damages at 9:18-20. Jahi is legally dead under California law,  
25 and personal injury causes of action belonging to a decedent at the time of death can  
26 only be maintained by the decedent's personal representative, or if none, a successor in  
27 interest. C.C.P. § 377.30.

1 As the decedent, Jahi McMath cannot maintain a cause of action to recover for  
2 her injuries, and the first cause of action therefore fails to state facts sufficient to  
3 constitute a cause of action. *California Practice Guide, Civil Procedure Before Trial* ¶  
4 2.77 (complaint filed by person without standing to sue subject to general demurrer).

5 IX.

6 **THE HOSPITAL MOVES TO STRIKE THAT PORTION OF THE WRONGFUL DEATH**  
7 **CAUSE OF ACTION CONDITIONING IT ON A RE-DETERMINATION OF DEATH**

8 Courts have recognized the importance of striking substantively defective  
9 portions of a complaint:

10 ...[I]n some cases a portion of a cause of action will be  
11 substantively defective on the face of the complaint. Although a defendant may not demur to that portion, in such  
12 cases, the defendant should not have to suffer discovery and navigate the often dense thicket of proceedings in summary  
13 adjudication. ... [W]hen a substantive defect is clear from the face of a complaint ... a defendant may attack that portion of  
14 the cause of action by filing a motion to strike (citations omitted)....

15 PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1682. The Hospital moves to  
16 strike those portions of the Complaint that are inconsistent with the determination that  
17 Jahi is legally dead.

18 The wrongful death cause of action begins with the conditional phrase "*In the*  
19 *event that it is determined that* Jahi succumbed to the injuries caused by the negligence  
20 of the defendants." FAC 13:27. The conditional phrase improperly contemplates a  
21 subsequent re-determination of death in this action, and it should be stricken.

22 X.

23 **PLAINTIFFS HAVE TWICE FAILED TO HAVE THIS COURT DETERMINE**  
24 **THAT JAHİ IS NOT DEAD, AND ARE NOW IMPROPERLY SEEKING A**  
25 **MORE FAVORABLE FORUM IN WHICH TO RE-LITIGATE THIS ISSUE**

26 In their amended complaint plaintiffs allege four events that occurred after the  
27 Final Judgment was entered in January 2014 which they believe are irrefutable  
28 evidence that Jahi is no longer brain dead. They allege that a September 26, 2014 MRI

1 shows vast areas of “structurally and relatively preserved brain” that are inconsistent  
2 with brain death. FAC ¶ 31. They allege a September 26, 2014 MRA/MA angiogram  
3 demonstrates intracranial blood flow. FAC ¶ 32. In addition, plaintiffs allege the onset of  
4 menarche in August 2014 which they allege is evidence of hypothalamic activity. FAC  
5 ¶¶ 33-34. Finally, they allege there is evidence of intentional responses to verbal  
6 commands and stimuli. FAC ¶ 35.

7 All four of the allegedly new facts and contentions in the amended complaint  
8 were before Judge Grillo in October of 2014. Writ of Error Corum Nobis And  
9 Memorandum Regarding Court’s Jurisdiction To Hear Petition for Determination That  
10 Jahi McMath Is Not Brain Dead, Exhibit C1; Declaration of Philip De Fina, Ph.D., at ¶¶  
11 20-22, 27-28, 29, 30, Exhibit C2. Declaration of Calixto Machado M.D. ¶¶ 14, 15, 18,  
12 Exhibit C3; Declaration of Charles J. Prestigiacomma M.D. ¶¶ 7, 8, Exhibit 4, Elena B.  
13 Labkovsky Ph.D. ¶¶ 13-14, Exhibit C5, and Declaration of Alan Shewmon M.D. at 2-3,  
14 Exhibit C6.

15 In October, 2014, Judge Grillo again appointed Dr. Paul Fisher as the Court’s  
16 expert, despite the objections of plaintiffs. 10/6/2014 Order Appointing Dr. Paul Fisher  
17 As Court Expert Witness, Exhibit D. Dr. Fisher submitted a letter to the Court  
18 responding to the issues raised by plaintiff’s experts and disputing their findings and  
19 conclusions. 10/6/2014 Letter Of Paul Fisher, M.D., Exhibit E. Plaintiffs first moved to  
20 continue the hearing on the Petition, but then dropped the matter altogether. 10/8/2014  
21 Case Management Order Confirming Petitioner’s Withdrawal Of Petition for Writ Of  
22 Error Coram Nobis at 3:3-10, 4:21-22, Exhibit F. They elected instead to continue this  
23 litigation in their medical malpractice action.

24 When plaintiffs dropped their Petition in October 2014, they may have thought  
25 they would have a stronger case if they waited until they could have the Death  
26 Certificate voided or amended. They may have thought that with time, more changes  
27 would occur to further support their contention that Jahi was not dead. But the Death  
28 Certificate has not been voided or amended, and there have been no changes.

1 Although they could have and should have returned to Judge Grillo, it appears they  
2 elected instead to put their case before a different judge and the jury in their medical  
3 malpractice action, in the hope of obtaining a more favorable outcome.

4 A Final Judgment declaring Jahi legally dead under California law has been  
5 entered, it is fixed and permanent, and not subject to change. But if this issue were to  
6 be re-litigated, the matter began and should be continued before Judge Grillo.

7  
8 See also UCSF Benioff Children's Hospital Oakland's Joinder in The Demurrer  
9 and Notice of Related Case and Application To Order Cases Related filed by co-  
10 defendant, Frederick S. Rosen M.D.

11  
12 Dated: November 23, 2015

GALLOWAY, LUCCHESI, EVERSON  
& PICCHI

13  
14  
15 By:   
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17 Attorneys for Defendant  
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7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF ALAMEDA - NORTHERN DIVISION  
10

11 LATASHA NAILAH SPEARS WINKFIELD; Case No. RG15760730  
MARVIN WINKFIELD; SANDRA  
12 CHATMAN and JAHl McMATH, a minor,  
by and through her Guardian Ad Litem,  
13 LATASHA NAILAH SPEARS WINKFIELD,

14 Plaintiffs,

15 vs.

16 FREDERICK S. ROSEN, M.D.; UCSF  
BENIOFF CHILDREN'S HOSPITAL  
17 OAKLAND (formerly Children's Hospital &  
Research Center at Oakland); MILTON  
18 McMATH, a nominal defendant, and DOES  
1 THROUGH 100,

19 Defendants.  
20  
21

**DECLARATION OF JOSEPH E. FINKEL  
IN SUPPORT OF UCSF BENIOFF  
CHILDREN'S HOSPITAL OAKLAND'S  
DEMURRER TO FIRST CAUSE OF  
ACTION AND MOTION TO STRIKE  
PORTIONS OF FIRST AMENDED  
COMPLAINT AND REQUEST FOR  
JUDICIAL NOTICE**

**Date: January 8, 2016  
Time: 2:00 p.m.  
Dept: 20  
Complaint Filed:  
Trial: N/A**

**Reservation No. R-1686975**

22  
23 I, Joseph E. Finkel, declare as follows:

24 1. I am an attorney at law duly licensed to practice before all the Courts of  
25 the State of California and a member of the law firm of Galloway, Lucchese, Everson &  
26 Picchi, attorneys of record for defendant UCSF BENIOFF CHILDREN'S HOSPITAL  
27 OAKLAND in the above entitled matter.  
28

1           2.     The Hospital asks the Court to take judicial notice of the following  
2 documents from the Court's file in *Winkfield v. Children's Hospital Oakland* Case No.  
3 RP13707598, true and correct copies of which are attached hereto:

- 4           a.     1/2/2014 Amended Order (1) Denying Petition For Medical Treatment and  
5                 (2) Granting In Part Application To Seal Portions Of Record [non  
6                 substantive amendments to 12/26/2013 Order], Exhibit A.
- 7           b.     1/17/2014 Final Judgment Denying Petition for Medical Treatment, Exhibit  
8                 B.
- 9           c.     10/3/2014 Writ of Error Corum Nobis And Memorandum Regarding  
10                Court's Jurisdiction To Hear Petition for Determination That Jahi McMath  
11                Is Not Brain Dead, with accompanying Expert Declarations, Exhibit C 1-6.
- 12           d.     10/6/2014 Order Appointing Dr. Paul Fisher As Court Expert Witness  
13                Exhibit D.
- 14           e.     10/6/14 Letter Of Paul Fisher, M.D., with attached American Academy of  
15                Pediatrics' Guidelines for the Determination of Brain Death in Infants and  
16                Children, Exhibit E.
- 17           f.     10/8/2014 Case Management Order Confirming Petitioner's Withdrawal  
18                Of Petition for Writ Of Error Coram Nobis, Exhibit F.

19           2) The Certificate of Death for Jahi McMath, Exhibit G.

20           3.     A copy of the Certificate of Death for Jahi McMath issued by the Alameda  
21 County Clerk on January 13, 2014 is attached here as Exhibit G. The social security  
22 number in Box 10 has been redacted by defense counsel. The Hospital has also joined,  
23 and incorporated all papers filed in support of, co-defendant, Frederick S. Rosen M.D.'s,  
24 demurrer, including a certified informational copy of the Certificate of Death issued by  
25 the Alameda County Clerk on May 14, 2015.


26           3.     The Hospital notes that Exhibit C6, the October 3, 2014 Declaration of  
27 Alan Shwemon M.D., does not appear to have been included with the other  
28

1 Declarations of plaintiff's experts in their October 3, 2014, Writ of Error Corum Nobis,  
2 Exhibit C1. However, the Court provided this Declaration to Dr. Fisher for review, so it  
3 was a part of the Court record and was relied upon by both parties. 10/6/2015 Letter of  
4 Dr. Paul Fisher ¶ 1, Exhibit D.

5 4. A copy of the Uniform Determination of Death Act, 12A *Uniform Laws*  
6 *Annotated* (Masters Ed. 2008) is also attached as Exhibit H for the convenience of the  
7 court and counsel.

8 I declare under the penalty of perjury under the laws of the State of California  
9 that the foregoing is true and correct.

10 Executed this 23 day of November, 2015 at Pleasant Hill, California

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15 Joseph E. Finkel  
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