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**Superior Court of California, County of Alameda**  
**Rene C. Davidson Alameda County Courthouse**

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Spears  <p style="text-align: right;">Plaintiff/Petitioner(s)</p> VS.  Rosen  <p style="text-align: right;">Defendant/Respondent(s) (Abbreviated Title)</p>	No. <u>RG15760730</u>  Order  Demurrer to the First Amended Complaint Overruled
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The Demurrer to First Amended Complaint, filed by Defendant Frederick S. Rosen, M.D., on November 23, 2015, as to which Defendant UCSF Benioff Children's Hospital Oakland ("CHO") filed a joinder on November 25, 2015, was set for hearing on 01/29/2016 at 02:00 PM in Department 20 before the Honorable Robert B. Freedman. A tentative ruling was published directing counsel to appear.

The matter was argued and submitted, and good cause appearing therefor, IT IS HEREBY ORDERED as follows:

Dr. Rosen's demurrer overlaps to a considerable extent with that of CHO. The court's determinations and reasoning as to CHO's demurrer apply equally to Dr. Rosen's demurrer, which is **OVERRULED** for the reasons set forth in that separate order. CHO's joinder in the instant demurrer is **GRANTED**.

Dr. Rosen's demurrer raises some additional arguments, however, which the court addresses below.

First, the court is not persuaded that the doctrine of "judicial estoppel" provides an independent basis for sustaining the demurrer. This doctrine requires, among other things, that the party "has taken two positions" and "was successful in asserting the first position." (Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 183.) The matters of which Dr. Rosen requests judicial notice from the probate matter, Case No. RP13-707598, reflect that Plaintiff Latasha Nailah Spears Winkfield ("Winkfield") took the position that her daughter, Jahi McMath ("Jahi"), is not brain dead but was unsuccessful in asserting that position. The court does not believe that Winkfield's stated intention to seek a further hearing in that proceeding, which Winkfield subsequently abandoned, constitutes a basis for application of judicial estoppel in the present civil lawsuit, particularly as the instant demurrer challenges a cause of action by Jahi rather than Winkfield. Dr. Rosen has not demonstrated that Jahi's cause of action depends on a determination inconsistent to one that was successfully determined in her favor in the prior probate proceeding.

Second, the court is not persuaded that "Judge Grillo has exclusive jurisdiction of Plaintiff's claim that Jahi McMath has standing to state a cause of action for personal injuries." (Memo., p. 13.) Judge Grillo issued orders and a judgment in the probate proceeding, finally adjudicating Winkfield's petition for an order requiring CHO to continue providing medical services to Jahi. Judge Grillo is not a civil direct calendar judge and there has been no order assigning this civil action to him. To the contrary, on January 8, 2016, Judge Ioana Petrou, the Chief Supervising Judge - Civil Division, issued an order addressing Dr. Rosen's Notice of Related Case filed on November 23, 2015, in which she determined that the cases "shall not be ordered related."

Thus, the circumstances are distinguishable from those in *Williams v. Superior Court* (1939) 14 Cal.2d 656, 662-663, in which the Court stated that "where a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned."

In addition to the fact that the instant civil action has not been assigned to Judge Grillo, this action is not in the nature of a petition to interfere with or vacate Judge Grillo's order. Instead, it is a civil action in which Jahi has pleaded a civil cause of action for medical malpractice. Whether such a cause of action is barred for lack of standing, whether on collateral estoppel or other grounds, is an issue for the court hearing the civil action to determine.

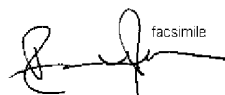
Third, the court is not persuaded that this action should be stayed until Case No. RP13-707598 is "resolved." (Memo., p. 14.) The probate petition is already finally resolved. The fact that Judge Grillo issued a Case Management Order on October 8, 2014, stating that "[i]f petitioner elects to seek relief in this case, then petitioner may request a CMC at a later date in this case" at which "the court will decide whether to set the matter for further hearing," does not establish that Judge Grillo retained jurisdiction over any matter - civil action or otherwise - relating in any way to Jahi, nor would he likely have the authority to do so. To the contrary, his order expressly states that "[i]f petitioner elects to file a different case, then any CMC regarding proceedings in that case should be held in that case" and that a notice of related case is to be filed. Though Winkfield did not file such a notice of related case, Dr. Rosen did so, and Judge Petrou ordered that "the cases shall not be ordered related" as discussed above.

Dr. Rosen's Request for Judicial Notice, filed on November 23, 2015, and Plaintiffs' Request for Judicial Notice, filed on January 5, 2016, are GRANTED, but the court does not take judicial notice of the truth of factual matters asserted, or of the binding nature of determinations made, in the attached exhibits and makes no determination as to their materiality to the instant demurrer.

Dr. Rosen shall have 14 days after the date reflected in the clerk's declaration of service of this order in which to file and serve an answer to the First Amended Complaint.

Dr. Rosen's Request for Question Certification Under Code of Civil Procedure Section 166.1, filed on January 27, 2016, is GRANTED IN PART. The court has issued a separate order setting forth its belief that there are controlling questions of law involved in the instant order as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation. (See C.C.P. § 166.1.)

Dated: 03/14/2016

A handwritten signature in black ink, appearing to read "Robert B. Freedman". The signature is written in a cursive style. To the right of the signature, the word "facsimile" is printed in a small, sans-serif font.

Judge Robert B. Freedman

SHORT TITLE:

Spears VS Rosen

CASE NUMBER:

RG15760730

ADDITIONAL ADDRESSEES

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