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FILED
ALAMEDA COUNTY

JAN 20 2016
 CLERK OF THE SUPERIOR COURT
 By _____ Deputy

6 Attorneys for Defendant
 7 UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND

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

11 LATASHA NAILAH SPEARS WINKFIELD;
 12 MARVIN WINKFIELD; SANDRA
 13 CHATMAN and JAHl McMATH, a minor,
 by and through her Guardian Ad Litem,
 14 LATASHA NAILAH SPEARS WINKFIELD,

Case No. RG15760730

The Honorable Robert B.
 Freedman

14 Plaintiffs,

15 vs.

16 FREDERICK S. ROSEN, M.D.; UCSF
 17 BENIOFF CHILDREN'S HOSPITAL
 OAKLAND (formerly Children's Hospital &
 18 Research Center at Oakland); MILTON
 McMATH, a nominal defendant, and DOES
 19 1 THROUGH 100,

**POST HEARING SUPPLEMENTAL
 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**

20 Defendants.

Date: [January 8, 2016]
 Time: 11:00 a.m.
 Dept: 20
 Date Complaint Filed:
 Trial: N/A

Reservation No. R-1686975

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 25 **POST HEARING SUPPLEMENTAL MEMORANDUM OF POINTS AND**
 26 **AUTHORITIES IN SUPPORT OF UCSF BENIOFF CHILDREN'S HOSPITAL**
 27 **OAKLAND'S DEMURRER TO FIRST CAUSE OF ACTION AND MOTION**
 28 **TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT**

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I.

**THE DETERMINATION OF DEATH MUST BE ACCORDED
FINALITY INDEPENDENT OF COLLATERAL ESTOPPEL**

Statutes are to be construed in a manner consistent with the ordinary meaning of the words used, and in a manner that gives effect to their intended purpose. See e.g. Estate of Griswold (2004) 25 Cal. 4th 904, 910-911. The ordinary meaning of death, the express language of the UDDA, as well as the intended purpose of a determination of death support the need for finality independent of the principles of collateral estoppel.

Consistent with its ordinary meaning, death is final and permanent. Given its ordinary meaning, the express language the Uniform Determination of Death Act requires a finding that the cessation of brain function is *irreversible*. By definition, under the statute, the loss or cessation of brain function must be permanent and incapable of change, the point of no return must have been reached. The determination of death is therefore is a final determination.

As to the intended purpose of the statute, the Court noted that a determination of death permits medical treatment to be withdrawn and organs to be removed for transplant. A declaration of death also permits wills to be probated, insurance proceeds to be distributed, and it permits families to move on. If subject to subsequent change, a determination would serve none of these intended functions.

What good is a determination of death if an individuals' body can be artificially maintained on life support and the individual later declared alive. How could any of the many medical, legal and social consequences of death follow a temporary determination? Also, what if, after six months or two years, the person is re-evaluated, again determined to be brain dead, and continued on life support? These evaluations could presumably continue indefinitely until public and/or private funds were no longer available to provide the necessary care, or cardiac and respiratory functions could no longer be maintained artificially, and the heart stops. This would in effect eliminate brain

1 death as basis for determining death. It would not only be inconsistent with the UDDA, it
2 would place enormous emotional and financial burdens on families and society at large.

3 As the court in Dority v. Superior Court (1983) 145 Cal. App. 3d 273, 278
4 recognized, the determination of death is a medical problem. The court found it
5 completely unnecessary to require the subsequent involvement of courts in this
6 determination in order for it to be final. However, the court also recognized that a
7 judicial review may be required in some cases where there is a showing that a mistake
8 may have been made. Id. at 280. A subsequent review did take place in the present
9 case, and it reaffirmed the initial determination by the physicians. Aside from the
10 principles of collateral estoppel, the subsequent confirmation by this Court supports the
11 recognition of the original determination as final. There is no authority for further
12 litigation of this determination on a case by case basis in medical malpractice actions.

13 As for the need for a fuller factual record, final determinations of death and the
14 subsequent withdrawal of life support and/or removal of organs for transplant are
15 routinely based on the evaluation of a physician, with independent confirmation by a
16 second physician without any court proceedings. Health and Safety Code §§ 7180-
17 7181. Even if review by the court can be justified, this can be properly accomplished
18 without the kind of full-on discovery and presentation of evidence contemplated by
19 plaintiffs' counsel. See Dority v. Superior Court (1983) 145 Cal. App. 3d 273. There is
20 no authority to indicate that extensive discovery and presentation of evidence in an
21 adversarial proceeding is necessary for a determination of death to be final.

22 When a determination of death is sufficient to be considered medically and
23 legally final for purposes of withdrawing life support and removing organs from an
24 individual, there is no reason it should not be final and binding for purposes of
25 determining the standing to sue.

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II.

FINALITY IS AN ESSENTIAL ATTRIBUTE OF DETERMINATIONS OF DEATH, AND IT CAN AND SHOULD BE CONSIDERED IN DETERMINING WHETHER COLLATERAL ESTOPPEL APPLIES

Collateral Estoppel Applies The question of whether Jahi meets the criteria for brain death was determined in December, 2013, when Dr. Fisher and two other physicians found that Jahi had suffered *irreversible* brain death. By definition this meant that according to the accepted medical standards, the point of no return had been reached at that time, and cessation of brain function could no longer be reversed.

Plaintiffs acknowledged that the accepted medical standards were properly applied. 1/2/2014 Amended Order Denying the Petition For Medical Treatment at 6:22-7:1, CHO Demurrer Exhibit A. If as the court indicates, plaintiffs are not challenging either those medical standards or the UDDA, then the December 2013 determination that the irreversible cessation of brain function had occurred was a final and permanent determination, and collateral estoppel would apply to the final judgment confirming the determination. Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc. (2014) 231 Cal.App.4th 134, 181 (when fact, condition or status, is fixed and permanent in nature collateral estoppel applies despite subsequent changes).

As to the death certificate, a death certificate does not determine death or the finality of death, that occurs before the certificate is issued. The issuance of a death certificate does however indicate that a determination of death has been made, and that it is intended to be final.

Fairness And Sound Public Policy Favor Finality And Therefore The Application Of Collateral Estoppel As to the lack of discovery and presentation of evidence in the December 2013 court proceedings, the applicable statutes neither require nor contemplate extended proceedings with exhaustive discovery and lengthy presentation of evidence. As noted above, the determination of death is a medical issue and is routinely made by physicians alone without the benefit of any judicial

1 involvement, let alone the kind of extensive litigation contemplated by the plaintiffs.
2 Health and Safety Code § 7181. In those instances where the court does become
3 involved, the proceedings can be expedited. See e.g. Dority v. Superior Court (1983)
4 145 Cal. App. 3d 273, 278. When death can be routinely determined by two physicians
5 and affirmed in an expedited proceeding that permits an individual's life support to be
6 withdrawn, there is little reason to conclude that these procedures are not sufficient to
7 determine that individual's standing to assert a personal injury claim in a tort action.

8 As the Court recognized in its Tentative Ruling, the determination of death serves
9 a number of important public interests by permitting, among other things, the withdrawal
10 of life support and removal of organs. None of these interests would be served by a
11 temporary determination of death.

12 Making a final determination of death in an expedited proceeding is not unfair
13 when these determinations are routinely made without any judicial involvement, and
14 when the expedited proceedings were sufficient to determine actual issues of life and
15 death, and not simply standing to sue. Moreover, the significant public interest in, and
16 need for, *final* determinations of death outweighs whatever interests, if any, may be
17 served by reversing, and thus rendering useless, what is intended to be a final
18 determination.

19
20 Dated: January 19, 2016

GALLOWAY, LUCCHESI, EVERSON
& PICCHI

21
22
23 By:  KAS

24 KAREN A. SPARKS, ESQ.
25 Attorneys for Defendant
26 UCSF BENIOFF CHILDREN'S
27 HOSPITAL OAKLAND
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2 **PROOF OF SERVICE**

3 I declare under penalty of perjury that:

4 I am a citizen of the United States and am employed in the County of Contra Costa. I
5 am over the age of eighteen years and not a party to the within action. My business
address is 2300 Contra Costa Boulevard, Suite 350, Pleasant Hill, CA 94523-2398.

6 On the date set forth below, I caused the attached **Post Hearing Supplemental
7 Memorandum of Points & Authorities in Support of UCSF Benioff's Demurrer to
First Cause of Action** to be served on the parties to this action as follows:

8 **BY MAIL.**

9 I placed a true copy thereof, enclosed in a sealed envelope with postage thereon
10 fully prepaid, in the United States mail at Pleasant Hill, California, addressed to
the parties as set forth on the attached service list. C.C.P. §§1013(a), 2015.5.

11 **BY COURIER SERVICE.**

12 I retained CCX Couriers, Inc. of Pleasant Hill, California, to personally serve a
13 true copy thereof on the parties as set forth on the attached service list. C.C.P.
§§1011, 2015.5.

14 **BY UNITED PARCEL SERVICE.**

15 I retained **UNITED PARCEL SERVICE** to serve by overnight delivery a true copy
16 thereof on the parties as set forth on the attached service list. C.C.P. §§1013(c),
17 2015.5.

18 **BY FACSIMILE TRANSMISSION.**

19 I am readily familiar with this law firm's business practices for collection and
20 processing of documents by way of facsimile. I telefaxed a true copy thereof at
said facsimile number(s) as set forth on the attached service list. C.C.P.
21 §§1013(e), 2015.5 and C.R.C. §2008.

22 **BY PERSONAL SERVICE.**

23 I personally served a true copy thereof on the parties as set forth on the attached
24 service list at . C.C.P. §§1101, 2015.5.

25 Executed on January 19, 2016 at Pleasant Hill, California.

26 
27 Janet Keough
28

1 MCMATH (WINKFIELD) V. CHILDREN'S HOSPITAL
2 ALAMEDA - NORTHERN DIVISION COUNTY SUPERIOR COURT CASE NO.
3 RG15760730

4 SERVICE LIST

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