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8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 JAHl MCMATH, a minor; NAILAH
13 WINKFIELD, an individual, as parent, as
guardian, and as next friend of JAHl McMath,
14 a minor

15 Plaintiffs,

16 v.

17 STATE OF CALIFORNIA;
18 COUNTY OF ALAMEDA, et al

19 Defendants.

Case No. 3:15-cv-06042 HSG

**PLAINTIFF’S OPPOSITION TO
MOTION TO DISMISS FILED BY
CHILDREN’S HOSPITAL AND DR.
FREDERICK ROSEN**

Date: August 4, 2016

Time: 2:00 p.m.

Action Filed: December 23, 2015

Trial Date: None Set

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I. OVERVIEW OF CASE AND OF RELIEF REQUESTED

In this action, Plaintiffs request that this Court, for the first time in any forum, examine overwhelming medical evidence that Jahi McMath *currently* exhibits function of numerous portions of her brain. Plaintiffs request injunctive and declaratory relief which will not necessarily affect the rights of the Intervening. This case was filed on December 23, 2015. Five months later, after this Court had been extensively briefed and had already entertained oral argument in the matter. Intervening Defendants Frederick S. Rosen, M.D., and UCSF Benioff Children’s Hospital of Oakland (“CHO”) filed the instant Motion to Dismiss (“MOTION”). The reason for Intervening Defendants’ delay in moving to intervene and in filing this motion is unclear, since neither Intervenor has asserted any basis for their motion which was not available to them five months ago. This Court repeatedly has been informed of the closed cases which preceded the instant litigation, as well as the medical malpractice case, in what they unabashedly call the *Damages Litigation*. In the damages litigation Defendants have denied that they owed any duty of care to Jahi, denied that they were negligent in the care they rendered Jahi, and deny that there is any causation which caused Jahi any harm yet they state that, in that case, the issue of Jahi’s present status will be determined. It is most probable, as in most medical negligence actions, Intervenor will move for summary judgment For a medical negligence jury to even consider Jahi’s current brain function, the plaintiff’s attorney in that case (not the attorney in this action)¹ must demonstrate each of the liability elements, duty, breach and causation before the issue of damages might lead to the question of Jahi’s current status of alive or dead would be considered. Therefore, if the Intervenor can establish that plaintiff s cannot meet there burden of proof or production as to any element of their cause of action (duty, no breach, or causation), the Alameda Superior Court *will never address the issue of Jahi’s brain function*, the sole focus of the proceedings before this Court.

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¹ Plaintiff’s attorney in this action (Dolan), at the inception of the probate proceedings, specifically stated that he would not involve himself in any malpractice action that might be brought because he did not want anyone to claim that his motivation in fighting for Jahi was motivated by a desire to increase damages so as to benefit financially. Indeed Dolan has provided, and continues to provide, all legal assistance *pro bono*.

1 In this action, Jahi McMath seeks declaratory (a judicial declaration that she is alive) and
2 injunctive (injunctions requiring the named defendants to correct her facially invalid and
3 factually inaccurate death certificate) relief. For the purposes of ruling on this MOTION, this
4 Court must accept all of Plaintiffs' factual allegations as true. The COMPLAINT repeatedly
5 alleges that Jahi currently exhibits signs of brain function. (COMPLAINT, ¶¶ 100, 101, 102,
6 109, 111-116, 124-152). Plaintiff does not, and will not, ask the Court to determine whether
7 Judge Grillo's December, 2013, decision was correct or not. A critical fact that the Court is by
8 now assuredly aware of is that the December 2013 proceedings were on a "rocket docket" and
9 all took place while Jahi was in an acute state of trauma, post the hypoxic event, without
10 nutrition or care designed to improve her health status.² The Court also should be aware that no
11 child who has ever been diagnosed as Brain Dead has survived like Jahi. The parents are, as
12 CHO tried with WINKFIELD, pressured to donate their children's organs, or to end treatment
13 before there is an opportunity for the swollen brain to recover some function.

14 In deciding whether or not to dismiss this action, the Court therefore must assume that
15 Jahi's claims and accompanying evidence (in the form of the evidence to the COMPLAINT), are
16 true and demonstrate that Jahi *currently* exhibits that Jahi has brain function. Such claims and
17 evidence are inconsistent with Jahi *currently* being dead per California Health and Safety Code
18 Section 7180 (hereinafter "§7180"). As such, in ruling on this MOTION, this Court must assume
19 that, in fact, Jahi is alive.

20 In requesting dismissal at this stage, Intervenors therefore request this Court to reach the
21 merits of the case without providing her due process (one of the very claims in this action) and
22 summarily dismiss her plea that this Court, applying federal law, declare her alive and enjoin
23 (mandate) the named defendants, in this action (who were not defendants in any prior action) so
24 as to correct her invalid and inaccurate death certificate. Incongruously the Intervening
25 Defendants argue that equity requires this Court to dismiss Jahi's requests and to abstain from
26 examining new evidence regarding Jahi's current state of brain function and to allow a child

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28 ² Judge Grillo issued an Order that Defendants had to keep Jahi on a ventilator but did not have to increase the level of care they were providing to Jahi such as performing the tracheostomy or placement of a feeding tube.

1 who, for the purposes of the MOTION, at this stage of the proceedings, must be assumed to be a
2 live citizen of the United States, denied recognition of her most basic human right – her
3 Constitutional³ right to life. (MOTION, p. 20.)

4 Based on the facts pled in the COMPLAINT, Jahi McMath currently is alive under the
5 law of the United States. As such, she has an “inalienable right” to life and a Constitutional
6 right to travel freely within the United States. In particular, she has a right to travel with her
7 mother back to the place of her birth and into the bosom of her family. Plaintiff Nailah
8 Winkfield (WINKFIELD), Jahi’s mother, has traveled an exhaustive road seeking to obtain due
9 process. She should be afforded, on behalf of her daughter, that fundamental right.

10 WINKFIELD repeatedly has presented this evidence to the named Defendants and
11 repeatedly has requested review of the facts demonstrating Jahi’s neurologic activity. The
12 named Defendants repeatedly have denied her, as they seek to do again here, *any due process*.
13 The Intervening Defendants have interjected themselves in this proceeding for the sole purpose
14 of preventing this Court from examining, for the first time, the overwhelming medical evidence
15 which indicates that numerous portions of her brain currently are functioning, so that Jahi will
16 continue to be continued to be, erroneously, characterized as dead, for the sole purpose of
17 minimizing their possible exposure to monetary damages. (Alameda County Superior Court
18 Case Number RG15760730). That case has been pending for over a year, and no evidence of
19 Jahi’s brain function has yet been considered, or is scheduled to be entertained, in that action.
20 Indeed, in that action, they are currently petitioning the trial and appellate courts to dismiss her
21 claims of damages attendant to her need for care as a live person.

22 Despite Intervening Defendants’ mischaracterization of this proceeding, this is not a
23 request for this court to act as a court of appeal. Nor is it an attempt to have a Federal Court
24 countermand a state, or federal, court order. Plaintiffs do not seek “three potentially conflicting
25 judgments by three different courts” (MOTION, p. 1). Only one judgment was ever entered. The
26 issue in that case (the December 2013 case) was whether the Intervenors had to provide Jahi
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28 ³ The rights to *life*, liberty, and the pursuit of happiness.

1 with medical care, whether they had the right to disconnect her from the ventilator, thereby
2 killing her, and whether WINKFIELD had the right to remove her daughter from their hospital
3 before they had an opportunity to do so. Once WINKFIELD obtained the right to remove Jahi,
4 the other actions were (as more fully explained below) abandoned and deemed moot.

5 **PROCEDURAL HISTORY**

6 Plaintiffs initially sought relief from the judicial system in order to prevent CHO from
7 removing Jahi from life support, to provide her medical care and/or to remove her before she was
8 disconnected from life support. In a flurry of legal activity during December, 2013, and January,
9 2014, they achieved Jahi's removal to a hospital where she was provided with the care which
10 rehabilitated her neurologic condition.

11 **A. The Hearings Which Allowed Jahi's Family To Remove Her From Children's** 12 **Hospital Of Oakland**

13 On December 12, 2103, Jahi McMath suffered catastrophic but partially reversible brain
14 a catastrophic brain injury because Intervenors allowed her to exsanguinate after undergoing
15 surgery at CHO. Soon thereafter, CHO declared Jahi brain dead and notified her family that they
16 intended to remove Jahi from the ventilator, thereby causing her certain cardio-pulmonary death
17 within minutes. In order to prevent this removal of necessary life support, on December 20,
18 2013, WINKFIELD filed an emergency petition with the Probate Court seeking a temporary
19 restraining order. (Case number RP-13-707598). This petition requested four things: (1) that Jahi
20 not be removed from the ventilator that allowed her heart to pump oxygenated blood to her body,
21 (2) that CHO be required to continue the *status quo* as regarded the supportive care that Jahi was
22 receiving, (3) that CHO be required to place a gastric feeding tube and a tracheostomy tube to
23 facilitate her later care and (4) that before Intervenors could kill her WINKFIELD be allowed to
24 move her to a hospital that would treat her as if she was alive. . That court enjoined CHO from
25 withdrawing Jahi's ventilator support and ordered it to continue to provide the care it had been
26 providing while deterring that CHO did not have to provide any additional medical treatment
27 (the tracheostomy and feeding tube) that would allow her to be transferred. Once the immediate
28 threat to her daughter's life was removed by the TRO, WINKFIELD turned her attention to

1 transporting Jahi to the state of New Jersey, which recognizes a religious belief exception in its
2 Uniform Determination of Death Act statute.

3 Subsequent to issuing the initial TRO, the Probate Court, Judge Grillo, took testimony
4 from Dr. Paul Fischer, its appointed expert. That Court on December 26, 2013, without explicitly
5 ruling that Jahi's death was "irreversible,"⁴ found that Jahi at that time "had suffered brain death
6 and was deceased as defined under Health and Safety Code sections 7180 and 7181." *No*
7 *evidence regarding Jahi's neurological function has been heard by any court subsequent to*
8 *this hearing, two years ago.* That is the essence of her current claims.

9
10 On December 30, 2013, WINKFIELD filed a complaint in the U.S. District Court for the
11 Northern District of California (case number 4:13-cv-05993-SBA), seeking more time to move
12 Jahi from CHO. Judge Sandra Brown Armstrong granted WINKFIELD's request in part,
13 enjoining CHO from removing Jahi's ventilator and appointing Magistrate Judge Donna M. Ryu
14 to conduct a mediation, so as to reach a settlement as to the terms under which WINKFIELD
15 could remove her daughter from CHO.⁵ Judge Ryu scheduled a settlement conference for
16 January 3, 2014. In that mediation terms for Jahi's removal were established and the parties
17 went back to Judge Grillo who provided additional time so a healthcare facility could be
18 identified that would receive Jahi and provide her the treatment CHO had refused, the very
19 treatment (9 months of hospitalization) which has led to Jahi's current status where she has some
20 neurologic function which demands that she have her determination of death reviewed and
21 corrected by this Court. At that time, after Plaintiffs had achieved their objective of preventing
22 CHO from removing Jahi from life support and had transferred her to another hospital which
23 treated her as a human (rather than as a "corpse," as CHO referred to her), WINKFIELD,
24 dismissed the federal action voluntarily and *without prejudice* before the opposing party had
25 even served an answer since, by that time, the issue was moot, No evidence was ever considered

26 ⁴ Defendants mischaracterize Judge Grillo's determination that she was irreversibly brain dead. He merely, with the
27 limited evidence presented at the time of the expedited proceeding, as Jahi was deteriorating from lack of basic care,
28 including nutritional support that had been denied her from early December, that there was, at that time, evidence
demonstrating that Jahi had suffered total, and irreversible, loss of all neurologic activity.

⁵ CHO had insisted that Jahi could not be removed from CHO as it would be medically improper for WINKFIELD
to remove Jahi while she was dead.

1 by the court in this federal proceeding and the dismissal therefore no preclusive effect, or basis
 2 for this Court to find collateral estoppel/res judicata bars the instant action. Indeed, *the Federal*
 3 *Court dismissed the federal action as moot.* (Exhibit A to Ingram Declaration.)

4 On or about the same date (December 30, 2013), as described in the Intervenor’s
 5 MOTION, WINKFIELD also filed a Petition for Writ of Mandate in the Court of Appeal. This
 6 court granted a temporary stay to Plaintiffs, which – along with the settlement facilitated by
 7 Judge Ryu – allowed WINKFIELD to remove Jahi from the state. *The Court of Appeals never*
 8 *considered any evidence of Jahi’s neurological function because Jahi had been removed from*
 9 *the state and, as the Intervening Defendants indicate, “the Petition was deemed moot”* (Exhibit
 10 B to Ingram Declaration, also referenced in MOTION at p.7).

11 Before CHO would release Jahi’s body, they required that the Alameda County Coroner
 12 take possession of Jahi and then transfer her to WINKFIELD. (See Declaration of Christopher B
 13 Dolan in support of this Opposition at ¶ 3, hereinafter “Dolan Dec.”) To remove Jahi from CHO
 14 the Coroner required a “Disposition Permit,” be issued. (Dolan Dec. at ¶ 4.)⁶ A disposition permit
 15 allows a family to remove a body for religious preparation and ceremony. To obtain the
 16 Disposition Permit the Public Health Official had to first issue a Death Certificate. (Dolan Dec.
 17 at ¶ 5.) The designated/appointed Health Official, Dr. Mantu Davis, was not available and the
 18 Acting Public Health Official originally indicated that she would not issue a Death Certificate or
 19 a disposition permit as Jahi was on life support and was not therefore eligible for the issuance of
 20 a Death Certificate or a Disposition Permit. (Dolan Dec. at ¶¶ 6, 7, 8.) WINKFIELD and
 21 DOLAN spoke with the Acting Official who reluctantly issued the Death Certificate which
 22 WINKFIELD accepted under protest and a Disposition Permit was subsequently issued. (Dolan
 23 Dec. at ¶ 9.) Dr. Davis never signed the Death Certificate. His name was the result of an
 24 automatically generated, computer printed, identification. (See *Death Certificate*, Exhibit C to
 25 Ingram Declaration.) The Acting Public Health Official did not sign the Death Certificate. Part
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27 ⁶ There was no established procedure for this process of removing a person who was on life support. It, as with
 28 everything, was a matter of first impression. The process was fashioned as part of the mediated settlement achieved
 by the Federal Mediation which was later adopted and endorsed by Judge Grillo (*Id.* at ¶ 9.)

1 of the Plaintiff's claim in this lawsuit is that the Death Certificate is incomplete, and therefore,
2 under statute is not enforceable. It was not signed by any attending physician (as required) and it
3 stated no cause of death instead saying "pending." (See Death Certificate, Exhibit C to Ingram
4 Declaration, "Physician's Certification," "Cause of Death.") Defendants Davis and The County
5 of Alameda refused to rescind the Death Certificate, or provide any process by which Plaintiff
6 could present evidence or be heard. This is the basis for the Complaint and Cause of Action
7 against them. (Dolan Dec. at ¶ 11.) After the disposition permit was obtained, Jahi was removed
8 from CHO and was transported to a hospital where she could receive such care. (Dolan Dec. at ¶
9 12.) Soon thereafter, the initial Probate Court proceeding was closed as WINKFIELD had
10 achieved her objective: the removal of her Daughter. (Dolan Dec. at ¶ 13, 14.) A judgment in
11 that matter was entered on January 17, 2014, after Jahi's death certificate was issued and after
12 Jahi had left the state. (Exhibit E to State Defendants' Motion to Dismiss, Document 36-2, p,
13 22.) This final judgment of the Probate Court was not appealed subsequent to its entry, since
14 Plaintiffs had achieved their goal of keeping Jahi alive and *thus the Probate Court's ruling was*
15 *in all practicality a moot question.*

16 **B. When Jahi Showed Signs Of Neurological Improvement, Her Mother Sought**
17 **Judicial Review Of New Evidence Regarding Her Present Condition.**

18 By the fall of 2014, Jahi had shown signs of improving neurological function in many
19 portions of her brain, including the motor cortex; the auditory cortex; the hypothalamus; the
20 pituitary region; and the brainstem. These signs included intermittent purposeful movements, the
21 ability of her nervous system to regulate her temperature and heart rate, reactions to the presence
22 and voice of her mother, and the onset of menstruation. (Dolan Dec. at ¶ 16.) Having seen this
23 change in her daughter's neurological condition, WINKFIELD filed a Writ of Error Corum
24 Novis, an arcane proceeding seeking to have Judge Grillo review and consider the multiple
25 declarations from competent physicians who had examined Jahi, after she had been released
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1 from the Hospital in New Jersey, with an EEG and MRI.⁷ This Writ does not require the Court to
2 have a hearing or receive evidence. It merely is used to provide the Court an opportunity to
3 declare that had it had it been in possession of the evidence at the time of its original decision, it
4 would have reached a different decision.

5 Once WINKFIELD filed this petition, Dr. Fischer was consulted as the court's previously
6 appointed expert. Without providing any analysis or declaration, and in an entirely conclusory
7 fashion, Fischer said that the newly supplied evidence did not change his opinion.
8 WINKFIELD's attorney asked the Court to permit him and the doctors who had examined Jahi
9 and reviewed the objective evidence so the matter could potentially be determined by the
10 medical practitioners. He then attempted to contact Dr. Fischer, in order to arrange an
11 opportunity for the court's expert to discuss Jahi's condition with the numerous physicians who
12 had examined Jahi during the nine months which had elapsed since Dr. Fischer's pronouncement
13 in December, 2013, that Jahi had suffered "irreversible cessation of function of the entire brain."
14 When this attempt at communication failed, WINKFIELD filed a motion to continue the
15 proceedings, to allow Dr. Fischer and the medical experts who had seen Jahi during the
16 preceding nine month period of her care, stabilization and recovery,⁸ "an opportunity for a frank
17 and unscripted dialogue with the experts who are opining that the newly obtained evidence
18 supports a finding that Jahi is not brain dead" (Exhibit D to Ingram Declaration, p. 2). As Dr.
19 Fischer was unwilling or unable to engage in this dialogue, and the very limited nature of the
20 Writ of Error Corum Novis which does not provide for a full and fair hearing on the matter but,
21 instead, a cursory review of new evidence to see if it would have altered the judge's
22 order/judgment had it been known at the time of the previous decision. There is no requirement
23 that the judge grant a trial on the merits in this procedure. *This proceeding was terminated*

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25
26 ⁷ The New Jersey Hospital, not wanting to be caught up in the highly controversial issue of Jahi's treatment, would
not perform these examinations so Jahi was tested at Rutgers Medical Center immediately upon her discharge from
the New Jersey Hospital (which has requested to remain anonymous). (Dolan Dec. at ¶ 17.)

27 ⁸ Plaintiff does not argue that Jahi has had a complete recovery: WINKFIELD is aware that her daughter has
28 suffered severe brain damage, but H&S 7180 is binary and does not account for degree of recovery, or quality of
life, it's some (any evidence at all) or none. Jahi has some.

1 *without the presentation of any evidence⁹ regarding Jahi's neurological condition and without*
 2 *any ruling that Jahi at that time, in 2014, her then present condition would alter the diagnosis*
 3 *of death was "brain dead." This proceeding is closed and has no preclusive effect on any of*
 4 *the parties.*

5 **C. Having Observed Continued Improvement In Jahi's Condition, Her Mother**
 6 **Seeks Administrative Review of Jahi's Facially and Factually Defective Death**
 7 **Certificate, In Order To Allow Them To Move Back To California.**

8 As Jahi continued to show neurological improvement. WINKFIELD, with the assistance
 9 of counsel, also sought the rescission through administrative means of Jahi's death certificate so
 10 that they could rejoin their family. As described in detail in the Complaint (¶¶ 121-189),
 11 Plaintiffs' counsel then began an administrative odyssey to try and have Jahi's death certificate
 12 corrected. These administrative steps were undertaken because during the time when the Writ of
 13 Error Corum Novis was being pursued, Alameda County Counsel, at one hearing in that matter,
 14 informed Plaintiffs' Counsel that there was nothing that the County could do to change the Death
 15 Certificate, as the Certificate had been already "sent to Sacramento." and therefore any relief
 16 relating to the Death Certificate would have to come from the California Department of Health.
 17 (Dolan Dec. at ¶¶ 19, 20.) As elaborated *supra* Plaintiff's counsel then went to The Bureau of
 18 Vital Records, in Sacramento, only to be told that the County Public Health Officer (Dr. Davis)
 19 was the one who would have to change the Death Certificate. (Dolan Dec. at ¶21). Dolan spoke
 20 to Dr. Davis who said that the matter would have to be addressed by County Counsel. (Dolan
 21 Dec. at ¶ 22; Exhibit F to Ingram Declaration; Exhibits H-L to COMPLAINT) Dolan then
 22 contacted Alameda County Counsel David Nefouse who ultimately, without any hearing or
 23 process, summarily refused to provide a hearing or consider the Plaintiff's evidence. (Dolan Dec

24
 25 ⁹ It is Plaintiff's understanding that Dr. Fischer never even viewed the video evidence of Jahi responding to
 26 commands from her mother, the evidence showing her heart rate climbing as her mother, speaking to her, began
 27 crying, the EEG, the MRI, or the other proffered evidence. There is strong evidence of Dr. Fischer having a bias as
 28 he pronounced Jahi dead and, if she now isn't, he may suffer embarrassment and or lose credibility\face by
 admitting that Jahi is now alive. It should be noted that Plaintiff is not seeking a determination that Dr. Fischer did
 not have a basis for his diagnosis, with the limited information he had and while Jahi's brain had suffered significant
 trauma and swelling: plaintiff now is seeking relief that *now, in 2016, Jahi has brain function and is not dead.*

1 at ¶ 23; Exhibit F to Ingram Declaration; Exhibit L to Complaint) Plaintiffs had run full circle as
2 each agency, department, and official passed the buck without ever so much as providing a
3 hearing. That is why we have this suit and are suing *these defendants*. Intervenor medical
4 malpractice problems, and defenses, have no bearing on the instant issues. Plaintiffs in this
5 action request that this Court *for the first* time consider the overwhelming scientific evidence
6 that for the past year and a half, Jahi has exhibited function of numerous portions of her brain
7 and therefore is a living person, per § 7180.

8 Thus, having had their request rejected at both the state and county levels by the named
9 defendants in this action, Plaintiffs sought redress for the violation of their federal rights in this
10 venue. Plaintiffs in this action request that this Court for the first time consider the overwhelming
11 scientific evidence that for the past year and a half, Jahi has continued to exhibit function of
12 numerous portions of her brain and therefore is a living person, per § 7180. (Exhibit E to Ingram
13 Declaration, videos of Jahi McMath exhibiting purposeful movement, filmed during February
14 and May, 2016.)

15 The instant action seeks federal remedies for the violation of Jahi's federal constitutional
16 and statutory rights. It seeks injunctive and declaratory relief from the State and County
17 Defendants who have violated Jahi's right to due process and other rights under color of law.
18 This operative complaint does not include a single cause of action upon which any court has
19 ruled at any time. It does not include a single cause of action which currently is pending before
20 any court.

21 **D. The Medical Malpractice Action, Referred To By Defendants as “The Damages**
22 **Litigation.”**

23 Over a year ago, Jahi and members of her family, through entirely different lawyers,
24 initiated a medical negligence action in Alameda Superior Court. This medical malpractice case
25 has had a tortured procedural history, as the Intervenor Defendants have taken every step
26 possible to delay that court's hearing the facts surrounding Jahi's injury, including
27 unsuccessfully making many of the same arguments they again have raised in the instant
28 MOTION. The Intervenor finally answered that Complaint, after their second demurrers were

1 denied. As stated *supra*, the defendants not only deny liability, therefore never reaching
2 damages, they are actively seeking to bar any presentation or consideration on that point.
3 Currently, the demurrer of another defendant, with the same allegations raised before by the
4 other two defendants, is scheduled to be heard this August. Intervenor Rosen filed and was
5 granted a motion under California Code of Civil Procedure § 166.1 for immediate appellate
6 review of two specific questions which are procedural as to what may be considered by the State
7 Court judge (who is not Judge Grillo. The Presiding Judge had the opportunity and ability to
8 reassign the mater to Judge Grillo but did not do so.) As a result, no meaningful progress has
9 been made in moving the Damages Litigation case forward despite its having been filed months
10 before the instant matter. No evidence of Jahi's neurological function has been presented to that
11 court and it is questionable whether it will ever be presented in that forum. No date for argument
12 has been scheduled. It is entirely within the Appellate Court's purview to summarily, without
13 argument, deny the Writ. Plaintiffs seek Due Process in this action not an uncertain, contingent,
14 possibility that the issue of Jahi's current status will ever be considered, much less heard in the
15 Damages Litigation. Basic human rights should not be contingent on some theoretical future
16 action by the State Court, which will not be able to give Plaintiffs any of the relief requested
17 from this Court.

18 **E. Summary of Prior and Ongoing Actions**

19 Plaintiffs are not forum shopping. In no other forum has there been any hearing of
20 Plaintiff's evidence of Jahi's living status. In no other forum have Plaintiffs ever alleged that the
21 Death Certificate is invalid or that she was denied due process by the State and County. In no
22 other forum has the conduct of these Defendants been examined. In no other forum have
23 Plaintiffs sought the declaratory and injunctive relief requested in the instant case. ***Plaintiffs are***
24 ***not seeking federal review of a prior state order***, as no state court has ever taken up the issue of
25 Jahi's current neurological function. Again Plaintiff does not seek to overturn Judge Grillo's
26 Order, she just wants Due Process to present evidence that the irreversibility contemplated by
27 Health and Safety Code 7180, has occurred.

28 The only pending lawsuit involving either Plaintiff is the Damages Litigation, which does

1 not involve any of the named Defendants in the instant matter and does not seek any of the relief
2 sought herein. It has been ongoing for more than a year and is still at the demurrer stage. No
3 evidence has been presented to that court about Jahi's brain function, and no hearings having
4 been scheduled for the submission of such evidence. No decision by this Court will have any
5 unfair effect on any party in the medical malpractice case, since each defendant therein has had
6 an opportunity to intervene herein.

7 II. MOTION TO STRIKE

8 Fed. R. Civ. P. 12(d) requires that if prior to a Rule 12 motion,

9 "matters outside the pleadings are presented to and not excluded by the court, the
10 motion must be treated as one for summary judgment under Rule 56. All parties
11 must be given a reasonable opportunity to present all the material that is pertinent
12 to the motion."

13 In the instant matter, the Defendants have submitted voluminous material to this Court,
14 requesting that this Court take judicial notice thereof. When matters outside the challenged
15 document (in this case the Complaint) are presented, the Court must either exclude the additional
16 material and decide the matter based on the Complaint alone or convert the motion to dismiss to
17 a motion for summary judgment under Rule 56. *Friedl v. New York*, 210 F.3d 79, 84 (2d Cir.
18 2000); see also Wright & Miller Federal Practice & Procedure, § 1366 (3d Ed.).

19 In the instant matter, Defendants urge this Court to consider many matters not contained
20 in the challenged pleading and apparently expect this Court to wade through hundreds of pages
21 of hearsay prior to making a determination of whether or not Plaintiffs have properly pled any of
22 their causes of action. However, only materials which are a part of the complaint may be
23 considered in a motion to dismiss. See *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)
24 (overruled on other grounds by *Galbraith v. Santa Clara*, 307 F.3d 119 (9th Cir. 2002)); see also
25 *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992); *MacArthur v. San Juan*, 309 F.3d 1216, 1221
26 (10th Cir. 2002); *Schmitz v. Mars, Inc.*, 261 F.Supp.2d 1226, 1229 (D. Or. 2003) (citing *Cooper*
27 *v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997)). In contrast, Documents incorporated by reference
28

1 as part of a complaint are not considered matters outside the pleadings, as they are a part of the
2 challenged pleading itself. *In re: Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 986
3 (9th Cir. 1999). As such, it is proper for this Court to consider the medical material incorporated
4 by reference into Plaintiffs' Complaint when considering the instant motion.

5 Therefore, Plaintiffs request that this Court limit its consideration to material contained in
6 the Complaint and attached documentation.

7 8 **III. Legal Standard**

9 Dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is a disfavored
10 remedy and may only be granted in extraordinary circumstances. *Broam v. Bogan*, 320 F.3d
11 1023 (9th Cir. 2003); *United States v. Redwood*, 640 F.2d 963,966 (9th Cir. 1981). On this
12 motion, all allegations of material fact must be accepted as true and construed in the light most
13 favorable to Plaintiffs. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-8 (9th Cir. 1996); *In re*
14 *Silicon Graphics, Inc. Sec Litig.*, 183 F.3d 970, 983 (9th Cir. 1999). The Court must also draw all
15 reasonable inferences in favor of the non-moving party. *Ashcroft v. Iqbal*, 556 U.S. 662, 668
16 (2009); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

17 If this Court finds the Complaint inadequate, it should "freely give leave to amend when
18 there is no undue delay, bad faith, dilatory motive, undue prejudice to the opposing party by
19 virtue of.... the amendment, [or] futility of the amendment." Fed.R.Civ.P. 15(a); *Foman v. Davis*,
20 371 U.S. 178, 182 (1962).

21 **IV. ARGUMENT**

22 A. This Court Should Exercise Its Authority Under The Declaratory Judgment Act To 23 Adjudicate Plaintiffs' Petitions For Declaratory Relief

24 Plaintiffs in their declaratory judgment action seek simply (1) "a judicial declaration that
25 JAHl McMath is not [at this time] dead and that her Death Certificate is inaccurate, facially
26 deficient, and invalid," and (2) a declaration that "JAHl McMath has exhibited by acceptable
27 medical standards clear signs of brain function subsequent to December 23, 2013, and that she
28

1 does not have irreversible cessation [of] all functions of the entire brain, including the brain
2 stem.” (COMPLAINT, § § 295, 303.)

3 *Neither of these two questions has ever been examined by any other court;* neither
4 question will necessarily be decided in any pending state court proceeding; neither question can
5 be more efficiently resolved in a state court, will create unnecessary entanglement of federal and
6 state matters, or can be properly characterized as “mere procedural fencing, in the sense that the
7 action is merely the product of forum-shopping” (*United Capitol Ins. Co. v. Kapiloff*, 155 F.3d
8 488, 493 (4th Cir.1998)). *Plaintiffs do not seek to re-litigate the condition of Jahi’s brain*
9 *function in 2013, over two years ago*, but instead request this Court to be the first court to
10 consider whether or not, as of this date, Jahi exhibits some function of some portion of her brain.
11 This is clear, as Jahi’s current brain function and not her function two years ago, forms most of
12 the factual basis of the COMPLAINT (see, e.g., COMPLAINT, ¶¶ 14-17, 20, 100, 101, 102, 109,
13 111-116, 124-152, 187, 191, 198, 199, 200, 204).

14 Contrary to Intervenor’s apparent implication, not one of the numerous closed cases has
15 any bearing whatsoever on these questions, since each of them was closed years ago, and thus
16 the evidence of Jahi’s current brain function, upon which this Court’s decision must be based,
17 did not even exist during the pendency of those closed cases. Furthermore, Intervenor’s
18 mischaracterize the facts when they call the instant proceeding “an archetypal reactive
19 proceeding ... under *Continental Cas. Co. Inc.* and *R.R. Street & Co.*” Reactive litigation, as
20 described in detail in *Continental*, is litigation *filed by the defendant* in “non-removable state
21 court action presenting the same issues of state law.” This petition for declaratory relief was filed
22 by the *plaintiffs* because this is the most appropriate forum for this declaratory action, since the
23 medical malpractice case very likely may be resolved without any finding whatsoever regarding
24 Jahi’s current state of brain function. At a minimum – the jury in the malpractice case will have
25 to rule on Duty, Breach, and Causation before it possibly reaches the issue of Jahi’s current
26 neurological status.

26 Intervenor Defendants cite the *Wilton/Brillhart* doctrine as a reason to dismiss Plaintiffs’
27 declaratory action. However, this doctrine requires that “another suit [be] pending in a state court
28 presenting the same issues, not governed by federal law, between the same parties.” *Brillhart v.*

1 *Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942). *The medical malpractice case does not*
2 *present the same issues as the instant matter, nor does it involve the same parties.* The
3 *Brillhart* Court also required an enquiry as to “whether the claims of all parties in interest can
4 satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined,
5 [and] whether such parties are amenable to process in that proceeding.” *Id.* See also *Wilton v.*
6 *Seven Falls Co.*, 515 U.S. 277, 283 (1995). These threshold requirements are not met in the
7 instant matter, since none of the defendants initially named in the instant matter was or could
8 have been named by the plaintiffs in the ongoing state medical malpractice case, nor have these
9 defendants gratuitously sought intervention in the malpractice case.

10 Furthermore, even if the instant matter met the threshold for abstention under *Brillhart*,
11 there is a strong presumption against abstention in declaratory judgment actions. See *Gov’t*
12 *Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998). As described below, Plaintiffs
13 submit that the *Brillhart* factors as well as this presumption support a denial of the Defendants’
14 MOTION and support this Court’s retaining jurisdiction over the pending declaratory action.

15 1. *The Court Will Not Needlessly Determine State Law Issues if it Maintains*
16 *Jurisdiction Over the Plaintiff’s Declaratory Action*

17 The first *Brillhart* factor, that a court should avoid needless determination of state law
18 issues, weighs in favor of denying the MOTION. See *Dizol, supra*, 133 F.3d 1220, 1225 (9th Cir.
19 1998). Plaintiffs seek consideration and resolution of Federal issues arising out of Federal Law.
20 The pending medical malpractice case, as discussed above, may never lead to any judicial
21 determination of the current state of Jahi McMath’s brain function. If and when such a
22 determination may occur is unclear, but the malpractice case has been pending for over a year,
23 that case is still at the demurrer stage, and absolutely no fact finding regarding Jahi’s
24 neurological condition has been conducted.

25 2. *The Plaintiff Has Not Engaged in Forum Shopping*

26 The second *Brillhart* factor, that a court should discourage parties from filing
27 declaratory actions as way to forum shop, also weighs in favor of denying the MOTION. The
28

1 Plaintiffs have sought redress of the deprivation of *federal constitutional and statutory rights* in
2 a federal forum because a federal bench trial is the most appropriate setting for an adjudication of
3 these claims. Seeking redress for the violation of *Federal* statutes and the deprivation of *Federal*
4 *Constitutional Rights* in a Federal Court is not forum shopping.

5
6 *3. Duplicative Litigation Is Not Likely if the Court Maintains the Plaintiff's*
7 *Declaratory Judgment Action*

8 Intervenor's state that there is a "very high risk of duplicative litigation" (MOTION, p.
9 14), since "In the currently pending Damages Action in Alameda Superior Court, the Court of
10 Appeal is presently considering the issue of whether McMath should be **permitted to re-litigate**
11 **the issue of whether she is dead under California law.**" (*Id. emphasis added.*) (The issue
12 actually presented in that matter is whether Jahi *was* dead in 2013 and does that determination
13 have preclusive effect on her receiving a hearing on, or determination of , whether she *is dead.*)
14 Plaintiffs do not seek through this declaratory action to *re-litigate* any issue whatsoever. Plaintiffs
15 seek through this declaratory action to have a court to adjudicate *for the first time* the current
16 status of Jahi's brain activity. Intervenor's Defendants seem to misunderstand or to misstate the
17 only factual issue before this Court: what is Jahi's *current neurological status*. This Court can
18 rule on this issue without reexamining any evidence ever presented to any court at any time. The
19 instant action does not seek *re-litigation* of any issue whatsoever.

20
21 *4. The Other Factors Considered by The Ninth Circuit Support This Court's*
22 *Retaining Jurisdiction Over This Declaratory Action*

23 The Ninth Circuit examines numerous factors, in addition to the three Brillhart factors
24 cited by the Intervenor's, in evaluating the appropriateness of a declaratory relief action: 1)
25 whether the declaratory relief action will settle all aspects of the controversy; 2) whether the
26 declaratory relief action will serve a useful purpose in clarifying the legal relations at issue; 3)
27 whether the declaratory relief action is being sought for the purposes of procedural fencing or to
28 obtain a "res judicata" advantage; and 4) whether the use of a declaratory relief action will result

1 in an entanglement between the Federal and State Court systems. It also considers the
2 convenience of the parties and the availability and relative convenience of other remedies.
3 (*Dizol, supra*, 133 F.3d 1220 at 1225 n. 5 (quoting *American States Ins. Co. v. Kearns*, 15 F.3d
4 142, 145 (9th Cir.1994) (J. Garth, concurring))).

5 Each of these factors weigh in favor of this Court’s retaining jurisdiction over this
6 Declaratory Relief action. The request for a declaratory judgment by this Court will settle all
7 aspects of the controversy between Plaintiffs and the named defendants: it will serve a useful
8 purpose in clarifying the legal question at issue, namely whether Jahi McMath *currently* exhibits
9 signs of brain function. Plaintiffs have not sought this declaratory relief for the purposes of
10 procedural fencing or to obtain a “res judicata” advantage – they have pursued this action in
11 order to vindicate Jahi’s most essential right to life and in order to allow Jahi and her mother to
12 move back to their home in California. *See Plum Creek Timber Co. v. Trout Unlimited*, 255 F.
13 Supp. 2d 1159, 1166-67 (D. Idaho 2003); *Dizol, supra*, 133 F.3d 1220, 1233 (9th Cir. 1998).

14 No entanglement between the Federal and State Court systems will occur because no
15 State or County Defendant is a party to the Damages Litigation and because answering the
16 questions raised in this declaratory action is not *necessary* to achieving an outcome (through
17 settlement or verdict) in the that action. Again, the Medical Malpractice case will require a
18 finding of Duty, Breach, and Causation before the jury will even consider the issue of Jahi’s
19 current status and its effect if anything on the damages Intervenor will have to pay Jahi and her
20 mother. Finally, there is no inconvenience to any party of litigation in this forum (in fact, the
21 Intervenor have insisted upon being involved in the instant litigation over Plaintiffs’ objection),
22 and *this declaratory action is the most readily available and convenient of all available*
23 *remedies, since it can focus entirely on the primary issue at question* (does Jahi currently
24 exhibit some brain function) without having to take into account the Intervenor’s negligence or
25 the dollar damages that this negligence has caused to Jahi and her family.
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1 B. The Pullman Abstention Doctrine Does Not Justify Dismissal Of This Case or A
2 Stay In The Proceedings

3 Intervening Defendants, by joining in the State and County Defendants’ motions to
4 dismiss, apparently assert that the Pullman abstention doctrine applies to this case. State
5 Defendants did not raise this abstention principle in their 12(b)(6) motion, and County
6 Defendants devoted only three sentences to this complex, discretionary doctrine. As a result,
7 Plaintiffs did not address this issue in depth in their opposition to the State and County
8 Defendants’ motions. During Oral Argument, this Court questioned the parties regarding
9 *Pullman’s* applicability to this case. As described below, this discretionary abstention principle is
10 not applicable to the instant proceedings. Even if it were, this Court should not exercise its
11 discretion to abstain under *Pullman*, given the likelihood of unnecessarily complicating the state
12 medical malpractice case and the fundamental nature of the constitutional rights involved here.
13 See *City of Houston v. Hill*, 482 U.S. 451, 467–68 (1987); see also *Harman v. Forsennius*, 380
14 U.S. 528, 535 (1965); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 63–64 (1st Cir. 2003) (noting that
15 the delay involved in abstention is problematic where First Amendment rights are implicated).

16 *Pullman* abstention applies when federal constitutional claims arise from unsettled
17 issues of state laws. It is a *discretionary* principle, which allows federal courts to choose to
18 abstain from exercising their jurisdiction over a matter, to prevent federal courts from predicting
19 what state courts would decide, ***so that state courts are afforded the first opportunity to***
20 ***interpret state law***. “The [*Pullman*] doctrine contemplates that deference to state court
21 adjudication only be made where the issue of state law is uncertain. If the state statute in
22 question, although never interpreted by a state tribunal, is not fairly subject to an interpretation
23 which will render unnecessary or substantially modify the federal constitutional question, it is the
24 duty of the federal court to exercise its properly invoked jurisdiction.” *Harman v. Forsennius*,
25 380 U.S. 528, 534-35 (internal citations removed). Here, Plaintiffs do not claim that §7180 is
26 unclear, only that Jahi does not meet its criteria for “brain death.”

27 Because “Congress imposed the duty upon all levels of the federal judiciary to give due
28 respect to a suitor's choice of a federal forum for the hearing and decision of his federal

1 constitutional claims,” *Pullman abstention is available only in narrowly limited, special*
 2 *circumstances*. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). “It is better practice, in a case
 3 raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss.”
 4 *Zwickler*, 389 U.S. at 244 n. 4.

5 *Pullman* abstention generally is appropriate ***only if three conditions are met***: (1) the
 6 complaint “requires resolution of a sensitive question of federal constitutional law; (2) the
 7 constitutional question could be mooted or narrowed by a definitive ruling on the state law
 8 issues; and (3) the possibly determinative issue of state law is unclear.” *Potrero Hills Landfill,*
 9 *Inc. v. Cnty. of Solano*, 657 F.3d 876, 888–89 (9th Cir.2011) (quoting *Spoklie v. Mont.*, 411 F.3d
 10 1051, 1055 (9th Cir.2005)).¹⁰ Proper application of these conditions is meant to ensure federal
 11 courts defer “to state court interpretations of state law” while avoiding “‘premature constitutional
 12 adjudication’ that would arise from ‘interpreting state law without the benefit of an authoritative
 13 construction by state courts’.” *Id.* (quoting *Gilbertson v. Albright*, 381 F.3d 965, 971 n. 6 (9th
 14 Cir.2004) (en banc)) (internal quotation marks omitted). *See also Harris v. Arizona Indep.*
 15 *Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1066-67 (D. Ariz. 2014), *aff’d*, 136 S. Ct. 1301
 16 (2016).

17 Applying the Ninth Circuit’s current formulation of the *Pullman* factors, it is clear that
 18 *Pullman* abstention does not apply to the instant matter. First, this Court need resolve no
 19 “sensitive question of federal constitutional law” in order to rule on many of Plaintiffs’ causes of
 20 action. ***Instead, this court need only, for the first time, consider a narrow factual question:***
 21 ***does Jahi McMath currently exhibit some brain activity?***

22 Next, there is no reason to anticipate a timely “definitive ruling on [any] state law
 23 issues” which will “moot or narrow” any constitutional issue raised in the instant matter. *Potrero*
 24

25
 26 ¹⁰ Note that the first of these three criteria differs from that cited by the County Defendants in their motion to
 27 dismiss (that motion cited an outdated Ninth Circuit case, *Fireman’s Fund Ins. Co. c. City of Lodi*, 302 F3d. 928 (9th
 28 Cir. 2002)). This distinction is telling in this instant matter, since at its heart this proceeding focuses on a question of
 fact – does Jahi McMath currently exhibit function of any portion of her brain. Although Jahi’s constitutional rights
 have been violated by the named defendants, the root of this lawsuit is the preceding relatively simple to answer
 question of fact.

1 *Hills*, 657 F.3d 876, 888–89 (9th Cir.2011). Again, this case centers on a question of fact, not
2 one of law. There is one pending state case, the medical malpractice case against the Intervening
3 Defendants. That case depends on whether or not the medical malpractice Plaintiffs can prove
4 Duty, Breach, Causation, and Damages. Most malpractice cases settle without any adjudication
5 of any facts whatsoever.¹¹ As such, ***the state malpractice court is unlikely to moot or narrow***
6 ***any issue whatsoever raised in the instant proceedings.***

7 Finally, no “possibly determinative issue of state law is unclear.” *Id.* § 7180 is clear. It
8 requires “irreversible cessation of all functions of the entire brain, including the brain stem” to
9 determine brain death. The fact that Jahi currently exhibits function of numerous portions of her
10 brain indicates that, per § 7180, Jahi is not dead. No clarification of this statute is needed in order
11 for this Court to grant the declaratory and injunctive relief sought in the instant proceedings.

12 Finally, even if this Court were to find that all three of the Pullman factors apply here,
13 ***abstention would be inappropriate here since it would be likely to lead to prolonged litigation***
14 ***and unnecessarily to complicate the state court medical malpractice action.*** Invoking *Pullman*
15 "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of
16 its exercise." *Harrison v. NAACP*, 360 U.S. 167, 177 (1959). Should this Court find that *Pullman*
17 applies, the instant proceedings would be stayed but not dismissed. Plaintiffs would be required
18 to litigate any “unclear issues” of state law in a state court but would be required to ask the state
19 court presiding in a jury trial over a medical malpractice issue to construe all such issues in light
20 of the numerous federal issues pending in this forum. See Charles Alan Wright et al., *Federal*
21 *Practice & Procedure* § 4243 (3d ed.) (2007). This would unnecessarily complicate the
22 proceedings in an already complex case, which has gone on for over a year without the
23 presentation of any evidence, in which a demurrer is pending, and which has already led to one
24 interlocutory appeal. ***Invoking this discretionary principle therefore would be antithetical to***
25 ***principle of conservation of judicial resources.*** A stay in the instant matter would not likely

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27 ¹¹ Of all medical malpractice cases filed, less than eight percent of those cases are disposed of by a judge or
28 jury. Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads*
(National Center for State Courts 2010) at 26; U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench
and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009).

1 resolve any of the issues pending before this Court; it would unnecessarily complicate a state
2 court proceeding; and it likely would leave this Court facing exactly the same factual question
3 years from now, after the resolution of the medical malpractice case. The only certainty is that,
4 during this prolonged period, Jahi McMath will continue to be denied her most fundamental
5 basic human right – the recognition of her existence as a living human being.

6 C. The Probate Court’s Ruling In January, 2014, Does Not Have Preclusive Effect
7 Regarding Plaintiff’s Current State Of Brain Function

8
9 1. *The Issues of Estoppel and of the Finality of a Determination of Death Have*
10 *Already Been Rejected by the Alameda County Superior Court.*

11 ***Intervening Defendants were aware when they filed this MOTION that the Alameda***
12 ***County Superior Court had rejected the same estoppel arguments that they now are making***
13 ***for a second time to this Court.*** Intervening Defendants’ arguments in essence assert two
14 propositions: (1) the 2013 probate action has an estoppel effect which precludes this Court from
15 considering Plaintiffs’ petition for declaratory and injunctive relief, and (2) any determination of
16 death under § 7180 is final and not subject to later reexamination, no matter what new evidence
17 of brain function arises thereafter. They ignore the fact that Plaintiffs did not pursue all available
18 appeals at the time because the issues before the Probate Court and the Court of Appeals
19 (through the Petition for Writ of Mandate) became moot for all practical purposes as soon as Jahi
20 left the state.

21 Judge Robert B. Freedman rejected both of these arguments in his March 15, 2016, Order
22 denying Intervenor CHO’s Demurrer and Motion to Strike Complaint (Exhibit G to Ingram
23 Declaration, Order of Judge Freedman, hereinafter “FREEDMAN ORDER”). Judge Freedman
24 explicitly considered all of the arguments that the Intervenors have recycled in the instant
25 Motion. Applying California law, Judge Freedman found them lacking. Regarding the purported
26 estoppel effect of the probate action, he ruled:

27 [T]he court is not persuaded that it would be appropriate to determine the collateral
28 estoppel effect of the amended order and judgment in [the probate action] at the
pleading stage, based solely on the allegations in the FAC and the matters of which
judicial notice is taken. Collateral estoppel is an affirmative defense as to which

1 the defendants bear a "heavy" burden of proof (Kemp Bros. Const., Inc. v. Titan
2 Elec. Corp. (2007) 146 Cal.App.4th 1474, 1482.) There are at least some aspects of
3 the collateral estoppel determination that may require a more developed factual
4 record. The court has concerns, for example, about whether the factual
5 determinations in the context of the expedited probate petition - which was filed
6 for the purpose of determining whether CHO should be ordered to continue
7 providing medical care to Jahi - should necessarily be binding on Jahi in a civil
8 lawsuit for damages brought on her own behalf. There are circumstances in which
9 "[a] new determination of the issue is warranted by differences in the quality or
10 extensiveness of the procedures followed in the two courts or by factors relating to
11 the allocation of jurisdiction between them." (Rest.2d Judgments § 28(3).) Here,
12 the prior expedited petition did not involve the same type of discovery and
13 presentation of evidence as is involved in a civil action. (ORDER, p. 1-2.)

14 In doing so, Judge Freedman emphasized that "California law on issue preclusion permits
15 'reexamination of the same questions between the same parties where in the interim the facts
16 have changed or new facts have occurred which may alter the legal rights of the parties.' (City of
17 Oakland v. Oakland Police and Fire Retirement System (2014) 224 Cal.App.4th 210, 230.) Jahi
18 has included new allegations in the FAC as to such changed circumstances. Such allegations are
19 to be taken as true on demurrer. (See, e.g., Aubry v. Tri-City Hospital Dist. (1992) 2 Ca1.4th
20 962, 966-967.) The court is hesitant to determine that, at the pleading stage, there is no factual
21 issue as to whether the facts have changed or new facts have occurred."

22 Judge Freedman also addressed the Intervenors' arguments regarding the alleged
23 "finality" (MOTION, p. 1, 2, 9, 10, 11, 21) and "irreversibility" (MOTION, p. 22) of a
24 determination of death under § 7180. Judge Freedman found that "California law on issue
25 preclusion permits reexamination of the same questions between the same parties where in the
26 interim the facts have changed or new facts have occurred which may alter the legal rights of the
27 parties." (FREEDMAN ORDER, p. 2, internal citation and quotation removed) and held that:

28 "As to the asserted finality of a determination of death under Health and Safety
Code sections 7180 and 7181, the court does not find the authority cited by CHO
sufficient for the court to determine, at the pleading stage, that the determination
made in the context of Winkfield's probate petition is to be accorded finality for
any and all other purposes, independent of considerations of collateral estoppel
discussed above. ... The court is not persuaded by CHO's argument that Plaintiffs
are "improperly asking this court or a jury to reject the accepted medical standards
used to determine irreversible brain death." Plaintiffs are not, by way of this action,

1 expressly seeking any redetermination or reversal of the matters in the prior
2 probate proceeding or seeking to apply standards other than those set forth in the
3 UDDA. Instead, they have brought a civil action independent of the prior
4 proceeding, which includes a cause of action asserted on Jahi's behalf. CHO, as the
5 party moving for dismissal of that cause of action, bears the burden of showing
6 that it is insufficient or barred as a matter of law, and the court determines that
7 CHO has not met this burden at the pleading stage, based solely on the allegations
8 and matters of which the court takes judicial notice.” (FREEDMAN ORDER, p. 2-
9 3.)

10 The instant matter, as with every aspect of this case, raises issues of first impression. The
11 only California Superior Court judge to analyze these issues at a recently applied California law
12 demurrer stage, Judge Freedman, ruled that dismissal was not appropriate. He rejected each one
13 of the Intervening Defendants’ arguments regarding estoppel, finality, and equity even before
14 they filed they Intervened in the instant action. If anyone is forum shopping it is
15 Intervenor/Defendants who seek this Court to rule in a manner inconsistent to Judge
16 Freedman’s order.

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2. *There Are Medical, Equitable, and Legal Bases Upon Which Plaintiffs’ Claims
Should Be Litigated*

Intervening Defendants themselves admit that “California courts are not obligated to
apply collateral estoppel ... ‘if new facts or changed circumstances have occurred since the prior
decision’” (MOTION, p. 20). Here, *the circumstances have changed*, as Jahi has shown signs of
brain function during the two years since the 2013 litigation. The Intervenor characterize the
instant proceedings as “relitigation of death,” again misstating the posture of the instant
proceedings, *which seek, for the first time, to litigate the current state of Jahi’s brain function*,
as well as the restoration of her civil rights as a human being, not simply as a dead “body,” as
Intervenor repeatedly and callously refer to her (MOTION, pp. 3, 7, 10, 22).

a) Medical Basis

In December, 2013, Dr. Paul Fischer, a court-appointed expert, determined at that time
that Jahi had no demonstrable brain function and testified that in his opinion Jahi would never
recover any such function. The court-appointed expert likely testified to the best of his ability as

1 a physician. Judge Grillo, in good faith, relied on that testimony, and ruled that as of that date,
2 the proper legal standard had been met to declare Jahi brain dead per pertinent statute.

3 However, Dr. Fischer did not, and could not, accurately foretell the future. Jahi is the first
4 child to have been declared brain dead who has survived this long and demonstrated intact brain
5 matter, gone into puberty, and has electrical activity in her brain and an ability to respond to
6 commands. Fortunately, as documented by numerous physicians, nurses, respiratory technicians,
7 and family members, Jahi has, during the intervening twenty-nine months, repeatedly and
8 consistently exhibited brain function, as described in the COMPLAINT. Any qualified physician
9 who today examines Jahi and her medical record should be able to verify the *present* numerous
10 signs of brain function.

11 As such, *Jahi does not currently meet California's (or, in fact, any state's) definition of*
12 *"brain death."* Medical predictions of patients' future clinical courses are by their very nature
13 speculative. Dr. Fischer's **forecast** of Jahi's future brain function, in 2013, while being his best
14 prediction with the information available to him and Jahi being in acute distress, has been, as are
15 many forecasts (even the weather) proven to be erroneous. Every medical diagnosis is subject to
16 reassessment and modification based on future observations. The current observations, and tests,
17 by Jahi's doctors, nurses, paramedical professionals, and family members provide an ample
18 medical basis for a judicial determination of Jahi's current level of brain activity.

19 b) Legal Basis

20 Both California and Federal law provide a legal basis upon which the discovery of new
21 facts, which were not available to the parties during an earlier proceeding, may call for
22 "reexamination of the same questions between the same parties where in the interim the facts
23 have changed or new facts have occurred which may alter the legal rights of the parties" (*City of*
24 *Oakland v. Oakland Police and Fire Retirement System* 224 Cal.App.4th 210, 230 (2014)) (Cited
25 by Judge Freedman in his ORDER, p. 2). Fed. R. Civ. P. 60(b) states in part that "On motion and
26 just terms, the court may relieve a party or its legal representative from a final judgment, order,
27 or proceeding for the following reasons: ...(2) newly discovered evidence that, with reasonable
28 diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."

c) Equitable Basis

The equitable basis upon which this Court may and should allow these proceedings to go forward is obvious. Based on the pleadings: A little girl was declared brain dead two years ago. She does not currently meet the statutory definition of brain death. The named defendants, despite having the ability to do so, refuse to correct a facially invalid and factually inaccurate government document. Only because of this refusal, this little girl and her mother must live in exile thousands of miles from their loved ones. This Court has jurisdiction over the parties. This Court has the inherent equitable power to right this wrong. And so it should.

Judge Freedman articulated this equitable principle in his ORDER: “even where the traditional elements of collateral estoppel (privity, finality and necessary determination of identical issue in prior adjudication) are met, there is also an "equitable nature of collateral estoppel" such that the doctrine is to be applied "only where such application comports with fairness and sound public policy." (*Smith v. Exxon Mobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414.) The court believes it would be premature to determine and apply such considerations based solely on the allegations and matters of judicial notice before it, without a more fully developed factual record.” (FREEDMAN ORDER, p. 4.)

Despite Intervening Defendants’ arguments to the contrary, this Court has ample medical, legal, and equitable bases upon which to allow the instant matter to proceed. There is also a moral imperative, this is not an issue of money or property. It is an issue of human dignity, human rights, and the right to life itself.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Intervening Defendants’ motion to dismiss and that this Court not stay this matter pending the outcome of the state medical malpractice trial. In the event that this Court finds that Plaintiffs has failed to state a claim upon which relief can be granted, Plaintiffs request that they be allowed to amend the operative Complaint.

Dated: June 3, 2016

THE DOLAN LAW FIRM

By: /s/ Christopher B. Dolan

CHRISTOPHER B. DOLAN

Attorney for Plaintiffs

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1 Christopher B. Dolan (SBN 165358)
Aimee E. Kirby (SBN 216909)

2 **THE DOLAN LAW FIRM**
1438 Market Street
3 San Francisco, California 94102
4 Tel: (415) 421-2800
5 Fax: (415) 421-2830

6 Attorneys for PLAINTIFF
7 JAHl MCMATH, a minor
and NAILAH WINKFIELD

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 JAHl MCMATH, a minor; NAILAH
13 WINKFIELD, an individual, as parent, as
guardian, and as next friend of JAHl McMath,
14 a minor

15 Plaintiffs,

16 v.

17 STATE OF CALIFORNIA;
18 COUNTY OF ALAMEDA, et al

19 Defendants.

Case No. 3:15-cv-06042 HSG

**DECLARATION OF CHRISTOPHER B.
DOLAN IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO INTERVENING
DEFENDANTS' MOTION TO DISMISS**

Date: May 12, 2016
Time: 2:00 p.m.

Action Filed: December 23, 2015
Trial Date: None Set

1 I, Christopher B. Dolan, declare the following to be true:

2
3 1. I am an attorney licensed to practice in the State of California. I am the Principal at The
4 Dolan Law Firm, counsel of record for the Plaintiffs in this matter. I have personal knowledge of
5 the matters stated herein, and could and would testify as stated if called as a witness.

6 2. I make this declaration in support of Plaintiffs Opposition to the Intervening Defendants'
7 Motion to Dismiss.

8
9 3. In January of 2014, following a short but fevered legal battle (I was lead counsel for
10 Plaintiffs), Nailah Winkfield obtained the right to have her daughter released from Children's
11 Hospital Oakland. However, CHO required that, prior to releasing Jahi's to her mother, that the
12 Alameda County Coroner take legal possession of Jahi to transfer her custody to her mother.

13
14 4. After entering into an agreement in January, 2014, to move Jahi from Children's
15 Hospital, Nailah Winkfield, Jahi's mother, was informed that in order to do that, the coroner
16 required a "disposition permit," a document which allows a family to remove a body for
17 religious preparation and ceremony.

18
19 5. At that time, Nailah Winkfield was informed that the "disposition permit" could not be
20 issued unless a death certificate first was issued.

21
22 6. The designated/appointed Health Official, Defendant Mantu Davis, was not available at
that time.

23
24 7. Nailah Winkfield and I then spoke to the acting Health Official, requesting the issuance
25 of a death certificate for Jahi McMath.

26
27 8. The acting Public Health Official initially refused to issue a death certificate or a
28 disposition permit, because Jahi was on life support and therefore was not eligible for the
issuance of a death certificate.

1 9. Neither Alameda County nor CHO had an established procedure for the process of
2 removing a person who was on life support.

3 10. The acting Health Official, having been informed of all the pertinent matters, reluctantly
4 issued a death certificate for Jahi McMath, which Nailah Winkfield accepted under protest, and a
5 “disposition permit” was subsequently issued.
6

7 11. This is the basis for the Complaint and Cause of Action against Defendant Davis and
8 The County of Alameda is that they refused to rescind the Death Certificate, or provide any
9 process by which Plaintiff could present evidence or be heard.

10 12. Following her release from Children’s Hospital Oakland Jahi was flown to New Jersey
11 where she was admitted to a hospital where she was able to receive the medical care that
12 Children’s’ Hospital Oakland had denied her.
13

14 13. Removing Jahi from CHO was Nailah Winkfield’s goal in the Probate Court proceeding
15 presided over by Judge Grillo.

16 14. Once Jahi had been moved to New Jersey, the Probate Court action was closed, since the
17 Plaintiffs’ goal had been achieved and the issues of that case were moot.
18

19 15. After receiving adequate medical care at this hospital, Jahi began to show signs of
20 neurological recovery, as documented by numerous physicians.

21 16. These signs ultimately although not immediately included intermittent purposeful
22 movements, the ability of her nervous system to regulate her temperature and heart rate, reactions
23 to the presence and voice of her mother, and the onset of menstruation.
24

25 17. However, due to the controversial nature of the issues surrounding Jahi’s transfer, the
26 hospital to which Jahi initially had been transferred declined to perform extensive neurological
27 testing. Such testing eventually was performed at Rutgers Medical Center after Jahi’s discharge
28 from the first New Jersey hospital.

1 18. Subsequent to being informed of Jahi's improving neurological status, I sought on behalf
2 of Plaintiffs to have her death certificate rescinded or corrected through administrative
3 procedures through both Alameda County and the State of California.

4 19. I initially attempted to seek this relief in Alameda County, as the death certificate had
5 been issued by the county medical examiner.

6 20. I was informed by an attorney at the office of Alameda County Counsel during a hearing
7 on the petition for a Writ of Error Corum Novis that there was nothing that the County could do
8 to change the Death Certificate, as the Certificate had been already "sent to Sacramento." and
9 therefore any relief relating to the Death Certificate would have to come from the California
10 Department of Health.
11

12 21. I then contacted the California Bureau of Vital Records in Sacramento and was informed
13 that the County Public Health Officer (Dr. Davis) was the one who would have to change the
14 Death Certificate.
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16 22. I then contacted Dr. Davis, who informed me that the matter would have to be addressed
17 by County Counsel.
18

19 23. I then contacted Alameda County Counsel David Nefouse who ultimately, without any
20 hearing or process, summarily refused to provide a hearing or consider the Plaintiffs' evidence.
21

22 I declare under the penalty of perjury, according to the laws of the State of California, that
23 the foregoing is true and correct. Executed in New York, New York, on the date indicated below.
24

25
26
27 Dated June 3, 2016

28 Signed: /s/Christopher Dolan

Christopher B. Dolan

1 Christopher B. Dolan (SBN 165358)
Aimee E. Kirby (SBN 216909)

2 **THE DOLAN LAW FIRM**
1438 Market Street
3 San Francisco, California 94102
4 Tel: (415) 421-2800
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6 Attorneys for PLAINTIFF
7 JAHl MCMATH, a minor
and NAILAH WINKFIELD

8 UNITED STATES DISTRICT COURT
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12 JAHl MCMATH, a minor; NAILAH
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14 a minor

15 Plaintiffs,

16 v.

17 STATE OF CALIFORNIA;
18 COUNTY OF ALAMEDA, et al

19 Defendants.

Case No. 3:15-cv-06042 HSG

**DECLARATION OF CHRISTOPHER B.
DOLAN IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO INTERVENING
DEFENDANTS' MOTION TO DISMISS**

Date: May 12, 2016
Time: 2:00 p.m.

Action Filed: December 23, 2015
Trial Date: None Set

1 I, Christopher B. Dolan, declare the following to be true:

2
3 1. I am an attorney licensed to practice in the State of California. I am the Principal at The
4 Dolan Law Firm, counsel of record for the Plaintiffs in this matter. I have personal knowledge of
5 the matters stated herein, and could and would testify as stated if called as a witness.

6 2. I make this declaration in support of Plaintiffs Opposition to the Intervening Defendants'
7 Motion to Dismiss.
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5 “disposition permit” was subsequently issued.
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7 11. This is the basis for the Complaint and Cause of Action against Defendant Davis and
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11 where she was admitted to a hospital where she was able to receive the medical care that
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27 testing. Such testing eventually was performed at Rutgers Medical Center after Jahi’s discharge
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19 23. I then contacted Alameda County Counsel David Nefouse who ultimately, without any
20 hearing or process, summarily refused to provide a hearing or consider the Plaintiffs' evidence.
21

22 I declare under the penalty of perjury, according to the laws of the State of California, that
23 the foregoing is true and correct. Executed in New York, New York, on the date indicated below.
24

25
26
27 Dated June 3, 2016

28 Signed: /s/Christopher Dolan

Christopher B. Dolan

1 Christopher B. Dolan (SBN 165358)
Aimee E. Kirby (SBN 216909)
2 **THE DOLAN LAW FIRM**
1438 Market Street
3 San Francisco, California 94102
4 Tel: (415) 421-2800
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5 Attorneys for PLAINTIFF
6 JAHl MCMATH, a minor
7 and NAILAH WINKFIELD

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 JAHl MCMATH, a minor; NAILAH
13 WINKFIELD, an individual, as parent, as
guardian, and as next friend of JAHl McMath,
14 a minor

15 Plaintiffs,

16 v.

17 STATE OF CALIFORNIA;
18 COUNTY OF ALAMEDA, et al

19 Defendants.

Case No. 3:15-cv-06042 HSG

**DECLARATION OF ALTON INGRAM
IN SUPPORT OF PLAINTIFFS'
REQUEST FOR JUDICIAL NOTICE**

Date: August 4, 2016

Time: 2:00 p.m.

Action Filed: December 23, 2015

Trial Date: None Set

1
2 I, Alton Ingram, declare the following to be true:

3
4 1. I am a legal clerk employed at The Dolan Law Firm, counsel of record for the Plaintiffs
5 in this matter. I have personal knowledge of the matters stated herein, and could and would so
6 testify as stated if called as a witness.

7 2. I make this declaration in support of Plaintiffs' Request for Judicial Notice.

8
9 3. Attached hereto and referenced in the Opposition as Exhibit A is a document titled
10 "ORDER TO SHOW CAUSE RE DISMISSAL." This is a minute order issued by The US
11 District Court for the Northern Division, Judge Sandra Brown Armstrong on January 22,
12 2014, which dismissed the case number C 13-59993 SBA as "moot." (Highlighted portion of
13 Exhibit A, p. 3.)

14
15 4. Attached hereto and referenced in the Opposition as Exhibit B is an order issued by The
16 Court of Appeal of the State of California First Appellate District, on January 6, 2014, which
17 dismissed the Petition for Writ of Mandate and/or Prohibition as "moot." (Highlighted portion
18 of Exhibit B, p. 2.)

19
20 5. Attached hereto and referenced in the Opposition as Exhibit C is a "Death Certificate"
21 which was issued to Jahi McMath. This Exhibit is a true and correct copy of the original
22 document.

23
24 6. Attached hereto and referenced in the Opposition as Exhibit D is a document titled
25 "Petitioner's Notice of Motion and Motion to Continue Hearing to Present Additional
26 Evidence to Address Letter of Dr. Paul Fischer; Request for Evidentiary Hearing and
27 Opportunity to Examine Dr. Fischer." This is a motion filed by Plaintiff Latasha Winkfield on
28 October 8, 2014, in Alameda Superior Court case number RP 13-707598 which requested that

1 the Court permit an opportunity for a frank and unscripted dialogue with the experts, and Dr.
2 Fischer, who are opining that the new obtained evidence supports a finding that Jahi is not
3 brain dead. (Highlighted portion of Exhibit D, p.2.)

4 7. Referenced in the Opposition as Exhibit E are two videos. I have been informed that the
5 video titled "Moving Finger On Demand" was taken by Nailah Winkfield, on May 30, 2016,
6 and that Sandra Chatman, Jahi's grandmother, and Nurse Sharleen Bangura were present at
7 the time when the video was shot. I have been informed that the video titled "Sliding Hand off
8 Bed on Demand" was taken by Nailah Winkfield, on February, 2016, and that two nurses,
9 Alanna Broszeit and Armand Nguetsop, were present at the time when the video was shot.
10 These files could not be served via the electronic filing system. They are being provided to the
11 Court and to opposing counsel via U.S. Mail on this date.

12 8. Attached hereto and referenced in the Opposition as Exhibit F are compiled exhibits
13 from the original complaint (H-L) where County Counsel ultimately, without any hearing or
14 process, summarily refused to acknowledge the deficiencies with the Death Certificate and/or
15 the evidence presented.

16 9. Attached hereto and referenced in the Opposition as Exhibit G is a document titled
17 "Order Demurrer and Motion to Strike Complaint Denied." This is a true and correct copy of
18 an order issued by Judge Robert B. Freedman on March 14, 2016, which denied Intervening
19 Defendant CHO's second demurrer in Alameda County Superior Court Case Number
20 RG15760730 (the Damages Trial).

21 I declare under the penalty of perjury, according to the laws of the State of California, that
22 the foregoing is true and correct.
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Executed in San Francisco, California on the date indicated below.

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Dated: June 3, 2016

Signed: /s/ Alton Ingram

Alton Ingram

Exhibit A

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

LATASHA WINKFIELD, an individual
parent and guardian of Jahi McMath, a minor,

Plaintiff,

vs.

CHILDREN'S HOSPITAL OAKLAND, Dr.
David Durand M.D. and DOES 1 through 10,
inclusive,

Defendants.

Case No: C 13-5993 SBA

**ORDER TO SHOW CAUSE RE
DISMISSAL**

Plaintiff Latasha Winkfield filed the instant declaratory and injunctive relief action in this Court seeking an order requiring Defendants Children's Hospital Oakland ("CHO") and its Chief of Pediatrics, Dr. David Duran, to maintain her daughter Jahi McMath ("Jahi") on a ventilator until such time as she is transferred from CHO to another care facility, and to install gastric and tracheostomy tubes to facilitate the transfer. On January 5, 2014, Jahi was transferred from CHO to Plaintiff. For the reasons that follow, the Court hereby directs Plaintiff to show cause why the instant action should not be dismissed for lack of subject matter jurisdiction.

I. BACKGROUND

On or about, December 9, 2013, Jahi went into cardiac arrest shortly after undergoing a tonsillectomy and related procedures at CHO. Thereafter, Jahi was placed on a ventilator. Tragically, the resulting lack of oxygen to Jahi's brain resulted in irreversible brain death, and she was declared legally deceased by two CHO physicians within days of her surgery. Over Plaintiff's strenuous objection, CHO sought to remove Jahi from the ventilator, claiming that she was "dead" and that no further medical treatment was

1 warranted. Upset with the treatment Jahi was receiving, Plaintiff sought to transfer Jahi
2 from CHO and requested that the hospital maintain her on a ventilator until such time as an
3 alternative facility could be secured. In addition, Plaintiff requested that CHO perform a
4 tracheostomy on Jahi and fit her with a gastric tube to facilitate the transfer. CHO refused
5 these requests, which prompted Plaintiff to file suit.

6 On December 20, 2013, Plaintiff filed a Complaint in the Alameda County Superior
7 Court against CHO and Dr. Duran along with an ex parte application for temporary
8 restraining order (“TRO”) to enjoin CHO from removing Jahi from the ventilator and to
9 compel CHO to install a gastric tube and tracheostomy tube. Alameda Cnty. Case No. RP-
10 13-707598. The superior court granted the injunction to maintain Jahi on a ventilator, but
11 denied Plaintiff’s other requests. The court subsequently conducted an evidentiary hearing,
12 which included testimony from an independent, court-appointed physician from the
13 Stanford University School of Medicine, and ultimately concluded that Jahi was legally
14 deceased. Separately, the court extended the TRO until December 30, 2013.

15 On December 30, 2013, during the pendency of the state court action, Plaintiff filed
16 the instant action in this Court against CHO and Dr. Durand. The Complaint alleges five
17 claims for relief: (1) violation of the free exercise clause of the First Amendment;
18 (2) violation of the right to privacy under the Fourth Amendment; (3) violation of the right
19 to privacy under the Fourteenth Amendment; (4) violation of section 504 of the
20 Rehabilitation Act of 1973 (“RA”), 29 U.S.C. § 794; and (5) violation of the Americans
21 with Disabilities Act (“ADA”), 42 U.S.C. § 12101, et seq. The Complaint seeks
22 declaratory and injunctive relief to preclude the “removal of ventilator support and
23 mandating introduction of nutritional support, insertion of a tracheostomy tube, gastric
24 tube, and to provide other medical treatments ... to promote [Jahi’s] maximum level of
25 improvement and provision of sufficient time for Plaintiff to locate an alternative facility to
26 care for her child in accordance with her religious beliefs.” Compl. at 15.

27 On January 2, 2014, Plaintiff filed a motion for preliminary injunction seeking to
28 maintain Jahi on a ventilator and to compel CHO to insert Jahi with a gastric tube and a

1 tracheostomy tube. On the same date, the Court referred the parties to a Magistrate Judge
2 of this Court for an emergency mandatory settlement conference to take place on January 3,
3 2014, at 11:00 a.m. Dkt. 10, 11.

4 Early in the day on January 3, 2014, the parties appeared in state court in connection
5 with Plaintiff's parallel state court action, and reached an agreement to transfer custody of
6 Jahi to Plaintiff. Thereafter, the parties attended the settlement conference with the
7 Magistrate Judge, and, after extensive negotiations, reached an agreement to effectuate the
8 transfer of Jahi from CHO. Pursuant to the parties' agreements, CHO released Jahi to
9 Plaintiff, who accepted custody and responsibility for Jahi on the evening of January 5,
10 2014. Dkt. 16.

11 **II. DISCUSSION**

12 "Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins.
13 Co. of Am., 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this
14 limited jurisdiction . . . and the burden of establishing the contrary rests upon the party
15 asserting jurisdiction." Id. (internal citations omitted). A federal court has an independent
16 duty to assess whether federal subject matter jurisdiction exists, whether or not the parties
17 raise the issue. See United Investors Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960,
18 967 (9th Cir. 2004).

19 **A. MOOTNESS**

20 Under Article III of the United States Constitution, judicial power is limited to
21 "Cases" and Controversies." Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009).
22 "The doctrine of standing is one of several doctrines that reflect this fundamental
23 limitation." Id. For constitutional standing to exist, there must be the "irreducible
24 constitutional minimum" of an injury-in-fact. Lujan v. Defenders of Wildlife, 504 U.S.
25 555, 560 (1992). An injury-in-fact is "an invasion of a legally protected interest which is
26 (a) concrete and particularized ... and (b) actual or imminent, not conjectural or
27 hypothetical." Id. (internal citations and quotation marks omitted). While standing is
28 determined based on the facts as they existed at the time the complaint was filed, an actual

1 controversy must exist at all stages of review, and a claim becomes moot and non-
2 justiciable if the requisite personal interest captured by the standing doctrine “ceases to
3 exist at any point during the litigation.” Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 425
4 (9th Cir. 2008).

5 In the instant case, it is questionable whether a live controversy remains in this case.
6 The only relief sought in the Complaint is to compel CHO to maintain Jahi on a ventilator
7 and to perform certain medical procedures to facilitate her transfer from CHO. On January
8 5, 2013, CHO transferred custody, care and control of Jahi to Plaintiff. Now that Jahi no
9 longer is at CHO, the relief sought by Plaintiff appears to be moot. See, e.g., Dilley v.
10 Gunn, 64 F.3d 1365, 1368 (9th Cir. 1995) (holding that the transfer of an inmate to a
11 different prison facility mooted his individual equitable claims absent a showing that there
12 is a reasonable expectation that the inmate would return to the facility).

13 **B. ROOKER-FELDMAN**

14 Separate and apart from the issue of mootness, the Court may lack jurisdiction under
15 the Rooker-Feldman doctrine. “Rooker-Feldman is a powerful doctrine that prevents
16 federal courts from second-guessing state court decisions by barring the lower federal
17 courts from hearing de facto appeals from state court judgments[.]” Bianchi v. Ryaarsdam,
18 334 F.3d 895, 898 (9th Cir. 2003). “It is a forbidden de facto appeal under Rooker-
19 Feldman when the plaintiff in federal district court complains of a legal wrong allegedly
20 committed by the state court, and seeks relief from the judgment of that court.” Noel v.
21 Hall, 341 F.3d 1148, 1164 (9th Cir. 2003)). The fact that plaintiff is bringing constitutional
22 claims does not preclude application of the doctrine where the claims are “inextricably
23 intertwined” with the state court’s ruling. See Bianchi, 334 F.3d at 900 n.4 (“It is
24 immaterial that Bianchi frames his federal complaint as a constitutional challenge to the
25 state courts’ decisions, rather than as a direct appeal of those decisions. The Rooker-
26 Feldman doctrine prevents lower federal courts from exercising jurisdiction over any claim
27 that is ‘inextricably intertwined’ with the decision of a state court, even where the party
28

1 does not directly challenge the merits of the state court's decision but rather brings an
2 indirect challenge based on constitutional principles.”¹

3 Here, the state court ruled that CHO had shown by clear and convincing evidence
4 that Jahi “had suffered brain death and was *deceased* as defined under Health and Safety
5 Code 7180 and 7181,” and on that basis, denied Plaintiff's request for a TRO. Straus Decl.
6 Ex. 26 at 14 (emphasis added). Although this action does not directly challenge that
7 finding, it appears to do so indirectly. Plaintiff alleges that section 7180 is unconstitutional
8 because it deprives her of the right to render medical decisions affecting her child. To the
9 extent that this Court agrees with Plaintiff, such a finding would seriously undermine the
10 state court's ruling, which expressly relied on section 7180 to find that Jahi is deceased and
11 correspondingly deny Plaintiff's request for immediate injunctive relief. At a minimum,
12 the claims herein appear to be “inextricably intertwined” with the state court action, thereby
13 triggering application of the Rooker-Feldman doctrine.² Doe v. Mann, 415 F.3d 1038,
14 1041 (9th Cir. 2005) (where Rooker-Feldman applies, a federal court “must also refuse to
15 decide any issue raised in the suit that is ‘inextricably intertwined’ with an issue resolved
16 by the state court in its judicial decision.”).

17 C. STANDING

18 Finally, it appears that Plaintiff lacks standing to bring claims under section 504 of
19 the RA or the ADA, which proscribe discrimination on account of the plaintiff's disability.
20 In her Complaint, Plaintiff does not allege that *she* is disabled. Rather, the pleadings allege
21 that *Jahi* is disabled due to her brain injury, and that Defendants are violating the respective
22 Acts through their attempt to remove Jahi from the ventilator. Compl. ¶¶ 60, 65, 76. Thus,
23 the only person alleged to have a disability is Jahi, who is not a party. Though Plaintiff

24
25 ¹ The Ninth Circuit has applied the Rooker-Feldman doctrine to interlocutory state
26 court decisions. Doe & Associates Law Office v. Napolitano, 252 F.3d 1026, 1030 (9th
27 Cir.2001) (applying doctrine to state court denial of motion to quash.

28 ² The fact that the relief sought by Plaintiff from this Court is identical to relief
sought in state court also supports application of the Rooker-Feldman bar. Bianchi, 334
F.3d at 900 (noting that in determining the applicability of Rooker-Feldman, the court must
pay close attention to the relief sought by the federal-court plaintiff.”).

1 identifies herself in the pleadings as Jahi's mother and guardian, she has neither requested
2 to be nor been appointed by the Court as Jahi's guardian ad litem and therefore cannot
3 assert any claims vicariously on Jahi's behalf. See Fed. R. Civ. P. 17(c)(2) (requiring a
4 court to "appoint a guardian ad litem—or issue another appropriate order—to protect a
5 minor or incompetent person who is unrepresented in an action."); Prince v. Fremont Police
6 Dept., No. C 13-1366 SBA, 2013 WL 3157925 (N.D. Cal. June 20, 2013) (dismissing §
7 1983 claims filed by parents based on violations of their children's constitutional rights
8 because parents were not appointed as guardians ad litem). Thus, Plaintiff appears to lack
9 standing to bring claims under the RA and ADA.

10 III. CONCLUSION

11 The record suggests that the Court may not or no longer have subject matter
12 jurisdiction to consider the merits of Plaintiff's claims. Before dismissing the action,
13 however, the Court will afford Plaintiff an opportunity to demonstrate why the instant
14 action should not be dismissed for lack of jurisdiction. Accordingly,

15 IT IS HEREBY ORDERED THAT the parties shall meet and confer regarding the
16 issues discussed above. To the extent that the parties agree that subject matter jurisdiction
17 is lacking, or if Plaintiff no longer desires to pursue her claims in this action, the parties
18 shall submit a stipulation for dismissal, pursuant to Federal Rule of Civil Procedure 41. If
19 no agreement is reached, Plaintiff shall show cause, in writing, why the instant action
20 should not be dismissed for lack of subject matter jurisdiction, as set forth above. The
21 stipulation for dismissal or Plaintiff's written response to this Order shall be filed by no
22 later than February 7, 2014. Defendant shall file its response to Plaintiff's memorandum, if
23 any, by February 14, 2014. The parties' respective memoranda shall not exceed ten (10)
24 pages in length. The Court will deem the matter under submission upon the filing of
25 Defendant's memorandum.

26 IT IS SO ORDERED.

27 Dated: January 22, 2014

28 
SAUNDRA BROWN ARMSTRONG
United States District Judge

Exhibit B

A140590

Christopher B. Dolan
1438 Market Street
San Francisco, CA 94102

PUBLIC INFORMATION (our website address is www.courts.ca.gov)

Pursuant to California Rules of Court, Rule 8.70 and Misc. Order 13-1 (Eff. 5/1/13), the First District Court of Appeal requires the filing of an original and 3 paper copies and the submission of an electronic copy of the following documents:

- Appellant's Opening Brief
- Respondent's Brief
- Appellant's Reply Brief
- Amicus Curiae Brief
- Petition for Rehearing
- Answer to Petition for Rehearing
- Answer to Amicus Curiae Brief
- Letter Brief
- Petition for Writ of Habeas Corpus
- Petition for Supersedeas
- Petition for Writ of Mandate, Prohibition or Certiorari
- Petition for Extraordinary Writ
- Petition for Writ of Review (WCAB, PUC, ALRB, PERB)
- Opposition, Reply, Answer, Return or Traverse
- Service Copy of Petition for Review (1 copy and electronic copy)
- Supporting documents if bound separately (original and electronic copy)
- Exhibits if bound separately (original and electronic copy)

Pursuant to California Rules of Court, Rule 8.70 and Misc. Order 13-1 (Eff. 5/1/13), the First District Court of Appeal requires the following documents be filed electronically in lieu of submission of any paper copies:

- Civil Case Information Statement
- Certificate of Interested Entities or Persons
- First Application for Extension of Time (Civil, Criminal, Juvenile)
- Stipulation for Extension of Time (Civil Case)
- Notice of Change of Address
- Substitution/Association of Attorney (Civil Case)
- Request for Oral Argument
- Service Copy of Omission Letter to Superior Court
- Appellant's brief pursuant to People v. Wende
- Appellant's brief pursuant to Conservatorship of Ben C.
- Appellant's brief pursuant to In re Phoenix H.

pet

adsv

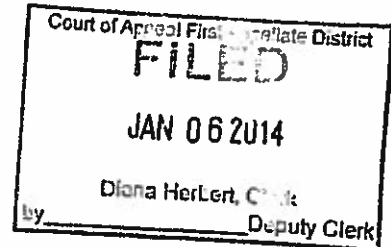
COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

J.M. et al.,
Petitioners,
v.
THE SUPERIOR COURT OF ALAMEDA
COUNTY,
Respondent;
CHILDREN'S HOSPITAL & RESEARCH
CENTER AT OAKLAND,
Real Party in Interest.

A140590

(Alameda County
Super. Ct. No. RP13707598)



BY THE COURT:¹

The petition for writ of mandate and/or prohibition, together with the request for an emergency stay, is hereby denied as moot in light of the fact petitioner J.M. has been removed from Children's Hospital by her family.

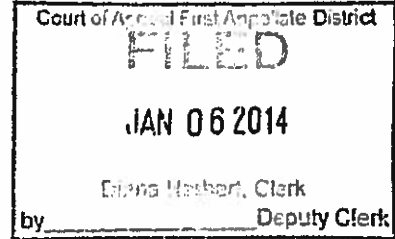
Date: JAN 06 2014

DONDERO, J. Acting P.J.

¹ Before Dondero, Acting P.J., Banke, J., and Becton, J., Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE



J.M. et al.,
Petitioners,
v.
THE SUPERIOR COURT OF ALAMEDA
COUNTY,
Respondent;
CHILDREN'S HOSPITAL & RESEARCH
CENTER AT OAKLAND,
Real Party in Interest.

A140590
(Alameda County
Super. Ct. No. RP13707598)

BY THE COURT:¹

Petitioner's motion to seal the entire record is granted in part and denied in part. The motion to seal is granted with respect to those portions of the Reporter's Transcript relating to the testimony of Drs. Fisher and Shanahan taken in-chambers by the superior court on December 24, 2013, and ordered sealed by the superior court in its Amended Order filed on January 2, 2014, and which should have been filed under seal in this court by petitioner. (See California Rules of Court, rule 8.46(c).) The motion to seal is denied with respect to the remainder of this court's file in this matter.

Date: JAN 06 2014 DONDERO, J. Acting P.J.

¹ Before Dondero, Acting P.J., Banke, J., and Becton, J., Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Exhibit C

STATE OF CALIFORNIA
CERTIFICATION OF VITAL RECORD

OFFICE OF CLERK-RECORDER
COUNTY OF ALAMEDA
OAKLAND, CALIFORNIA

CERTIFICATE OF DEATH

3201301008821

1. NAME OF DECEASED - FIRST (Print)		2. MIDDLE (Print)		3. LAST (Print)	
JAHH		KELIS		MCMATH	
4. DATE OF BIRTH (month/day/year)					
10/24/2000					
5. SEX (Print)		6. AGE (Print)		7. RACE (Print)	
M		13		AFRICAN AMERICAN	
8. BIRTH STATE/PROVINCE/COUNTRY		9. SOCIAL SECURITY NUMBER		10. EVER IN U.S. ARMED SERVICES	
CA		608-23-1015		<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
11. MARRIAGE STATUS		12. DATE OF MARRIAGE		13. MARITAL EXEMPTION	
NEVER MARRIED		12/12/2013		1500	
14. OCCUPATION - Type of work for most of life. DO NOT USE RETIRED					
STUDENT					
15. NAME OF SCHOOL OR UNIVERSITY (e.g., primary school, high school, college, university, etc.)					
E.C. REEMS ACADEMY					
16. YEARS IN SCHOOL (Print)					
7					
17. DECEASED'S RESIDENCE (Street and number, or location)					
2742 75TH AVE					
18. CITY		19. COUNTY		20. STATE/PROVINCE/COUNTRY	
OAKLAND		ALAMEDA		CA	
21. INFORMANT'S NAME, RELATIONSHIP					
NAILAH WINKFIELD, MOTHER					
22. ADDRESS OF DECEASED (Street and number, city or town, state and zip)					
2742 75TH, OAKLAND, CA 94605					
23. NAME OF DECEASED'S FATHER (Print)		24. MIDDLE		25. LAST (Print)	
MILTON		DELMAR		MCMATH	
26. NAME OF DECEASED'S MOTHER (Print)		27. MIDDLE		28. LAST (Print)	
LATASHA		NAILAH		SPEARS	
29. DECEASED'S DATE (month/day/year)		30. PLACE OF FINAL RESIDENCE (Street and number, city or town, state and zip)			
01/06/2014		3237 ARNOLD AVE, SALINA, KS 67401			
31. TYPE OF DECEASE		32. EXAMINATION OF DECEASED		33. RECORD NUMBER	
REMOVAL		NOT EMBALMED		-	
34. NAME OF DECEASED'S DECEASED		35. SIGNATURE OF LOCAL RECORDER		36. DATE (month/day/year)	
LATASHA SPEARS-WINKFIELD		MUNTU DAVIS, M.D.		01/03/2014	
37. PLACE OF DEATH					
38. COUNTY		39. STREET		40. CITY	
ALAMEDA		747 52ND STREET		OAKLAND	
41. CAUSE OF DEATH					
PENDING INVESTIGATION					
42. SIGNATURE AND TITLE OF DEPUTY CORONER					
JESSICA D HORN					

002381866

CERTIFIED COPY OF VITAL RECORD
STATE OF CALIFORNIA, COUNTY OF ALAMEDA



This is a true and exact reproduction of the document officially registered and placed on file in the office of the Alameda County Clerk-Recorder

APR 22 2014

Patricia O'Connell
PATRICK O'CONNELL
ALAMEDA COUNTY CLERK-RECORDER

DATE ISSUED

This copy is not valid unless prepared on an engraved border displaying the date, seal and signature of the Clerk-Recorder.



Exhibit D



ORIGINAL

1 Christopher B. Dolan (SBN 165358)
2 THE DOLAN LAW FIRM
3 The Dolan Building
4 1438 Market Street
5 San Francisco, CA 94102
6 Telephone: (415) 421-2800
7 Facsimile: (415) 421-2830
8
9 Attorneys for Plaintiff
10 LATASHA WINKFIELD

FILED
ALAMEDA COUNTY
OCT 08 2014

CLERK OF THE SUPERIOR COURT
By:  Deputy

11
12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION

15 LATASHA WINKFIELD,

16 Plaintiff,

17 v.

18 CHILDREN'S HOSPITAL, et al.

19 Defendants.

RPB
Case No.: PR13-707598

PETITIONER'S NOTICE OF MOTION AND
MOTION TO CONTINUE HEARING TO
PRESENT ADDITIONAL EVIDENCE TO
ADDRESS LETTER OF DR PAUL FISCHER;
REQUEST FOR EVIDENTIARY HEARING
AND OPPORTUNITY TO EXAMINE DR
FISCHER

Reservation No: R-1559164

20 On October 6, 2014, the Court appointed Dr. Paul Fischer, pursuant to Evidence Section 720,
21 as a court expert in this matter that involves brain death. Dr. Fischer prepared and presented a letter to
22 the court stating that, although the evidence presented by Petitioner, provided by independent experts
23 in brain death, including Dr. Calixtor Machado who has held six international conferences on the
24 subject of brain death, was backed by objective evidence, Dr. Fischer stated that certain tests were not
25 done to his satisfaction or to a standard he indicates is necessary for him to consider that Jahi is brain
26 dead.

27
28
THE
DOLAN
LAW FIRM
30 CALIFORNIA
31 UNIVERSITY MICRO
32 INTERNATIONAL
SAN FRANCISCO,
CA
TEL: (415) 421-2800
FAX: (415) 421-2830

1
MOTION TO CONTINUE HEARING TO PRESENT ADDITIONAL EVIDENCE TO ADDRESS LETTER OF
DR PAUL FISCHER REQUEST FOR EVIDENTIARY HEARING AND OPPORTUNITY TO EXAMINE DR
FISCHER

FAKED

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Given Dr. Fischer's expression that there are deficiencies in the Petitioner's proffered evidence. Petitioner would like an opportunity to request that the physicians, and neuroscientists who have examined her would undertake some of the testing which Dr. Fischer says is missing such as the on-site serial neurological evaluations radio nucleotide cerebral blood flow brain scan, etc.

As these matters involve matters of scientific, medical and neurologic knowledge, far beyond that of Petitioner's counsel and/or perhaps the Court itself (stated only because the court appointed Dr. Fischer as an expert) Petitioner would, in an effort to try and remove this discussion from the usual adversarial system involved with court process, request the Court would permit, and Dr. Fischer would accept, an opportunity for a frank and unscripted dialogue with the experts who are opining that the newly obtained evidence supports a finding that Jahi is not brain dead. Such a open and candid dialogue would, in the end, provide a better opportunity for consensus on some or all of the points of disagreement.

Petitioner requests that the court grant Petitioner the opportunity for an evidentiary hearing with live, or telephonic, testimony wherein the petitioner would have no more than four hours to present highly reputable expert testimony from some of the world's most respected neurologists to (not available at the time of the original, fast paced, hearing so as to fully inform and assist the court. In this hearing, on this new evidence, the Petitioner suggests that the court might wish to ask the experts, directly, the basis of their opinions so as to be fully informed on this most important matter before reaching a decision. Petitioner requests for four weeks to provide the requested information as Dr. Defina is in Europe and the Middle East and Dr. Machado is in Cuba (but can travel to the U.S. for scientific and humanitarian reasons.)

Finally, should the Court deny Petitioner the requests above, Petitioner requests the ability to have witnessed appear on Thursday, telephonically (as Petitioner's Counsel informed the court last week, several of these witnesses are out of the country and the others are in the East Coast and Chicago and the right to examine Dr. Fischer, as was provided in the former hearing in December.

**THE
DOLAN
LAW FIRM**
100 CALIFORNIA STREET
SUITE 1000
SAN FRANCISCO,
CA
94102
TEL: (415) 421-2800
FAX: (415) 421-2330

**MOTION TO CONTINUE HEARING TO PRESENT ADDITIONAL EVIDENCE TO ADDRESS LETTER OF
DR PAUL FISCHER REQUEST FOR EVIDENTIARY HEARING AND OPPORTUNITY TO EXAMINE DR
FISCHER**

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Hopefully the Court recognizes that Petitioner, by suggesting the open communication between the neurologists and neuroscientists, and the opportunity for the court to hear testimony and cross examine any witness it so desires, is trying to provide the court not facts filtered by advocacy, but, instead a pool of information from which the court can reflect and craft a full understanding. Petitioner is confident that upon a more in-depth analysis the court will be persuaded that had it the information now available it could not have found, by a standard of clear and convincing evidence, that Jahi McMath is brain dead.

Electronically signed this 7th day of October, 2014

Christopher B Dolan Esq.

**THE
DOLAN
LAW FIRM**
MEMBER
OF THE DOLAN HEARING
TALAMON GROUP
SAN FRANCISCO,
CA
94102
TEL: (415) 431-2820
FAX: (415) 431-2820

1 Christopher B. Dolan, Esq. (SBN 165358)
2 THE DOLAN LAW FIRM
3 1438 Market Street
4 San Francisco, California 94102
5 Tel: (415) 421-2800
6 Fax: (415) 421-2830

7 Attorneys for Plaintiff
8 LATASHA WINKFIELD

9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 LATASHA WINKFIELD, an individual
12 parent and guardian of Jahi McMath, a
13 minor

Case No. PR13-707598

14 Plaintiff,

PROOF OF SERVICE

15 v.

16 CHILDREN'S HOSPITAL & RESEARCH
17 CENTER AT OAKLAND, Dr. David
18 Durand M.D. and DOES 1 through 10,
19 inclusive

20 Defendants.

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PROOF OF SERVICE

Latasha Winkfield v. Children's Hospital & Research Center at Oakland, et al.
Alameda County Superior Court Case No. PR13-707598

I, Guillermo Bustillo, declare that:

I am employed in the County of San Francisco, State of California. I am over the age of 18, and am not a party to this action. My business address is 1438 Market Street, San Francisco, California 94102. On October 7, 2014, I served:

PETITIONER'S MOTION TO CONTINUE HEARING TO PRESENT ADDITIONAL EVIDENCE TO ADDRESS LETTER OF DR PAUL FISCHER; REQUEST FOR EVIDENTIARY HEARING AND OPPORTUNITY TO EXAMINE DR FISCHER

PETITIONER'S OBJECTION TO THE APPOINTMENT OF DR PAUL FISCHER AS COURT APPOINTED EXPERT

in said cause addressed as follows:

Douglas C. Straus Brian W. Franklin Noel M. Caughman ARCHER NORRIS A Professional Law Corporation 2033 North Main St., Suite 800 Walnut Creek, Ca. 94596-3759 Facsimile: (925) 930-6620 dstraus@archemorris.com alster@archemorris.com bfranklin@archemorris.com	<i>Attorneys for Defendant Children's Hospital & Research Center at Oakland</i>
David Nefouse Andrea Weddle Alameda County Sheriff's Office Coroner's Bureau 480 4th Street Oakland, CA 94607 david.nefouse@acgov.org andrea.weddle@acgov.org	<i>Alameda County Coroner's Office</i>
California Department of Public Health Office of Legal Services 1415 L Street Sacramento, CA 95814	<i>California Department of Public Health</i>

/XX/ (BY OVERNIGHT MAIL) By enclosing a true copy of the documents in a Fedex envelope addressed to the above recipient(s), sealing and depositing the envelope, with delivery fees prepaid or provided for, and instructions to deliver overnight, at a box maintained by Federal Express in San Francisco, California following ordinary business practices.

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/XX/ (BY ELECTRONIC MAIL) Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above.

// (BY MAIL) By placing a true copy thereof enclosed in a sealed envelope. I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at San Francisco, California, following ordinary business practices.

// (BY PERSONAL SERVICE) By placing a true copy thereof enclosed in a sealed envelope. I caused each such envelope to be delivered by hand to the addressee(s) noted above.

// (BY PROFESSIONAL MESSENGER SERVICE) By placing a true copy thereof in a sealed envelope, and causing said envelope to be delivered by professional messenger service to the addressee(s) listed above.

// (BY FACSIMILE) I caused the said document to be transmitted by facsimile machine to the number indicated after the addressee(s) noted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 7, 2014, at San Francisco, California.

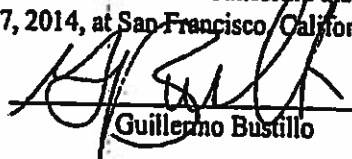

Guillermo Bustillo

Exhibit E

**PLAINTIFF WILL PROVIDE A CD IN
THE COURT'S COURTESY COPY
CONTAINING THE VIDEOS FOR
EXHIBIT "E"**

Exhibit F

Exhibit H

From: Guillermo Bustillo [REDACTED]
Sent: Tuesday, September 01, 2015 3:05 PM
To: Nefouse, David, County Counsel
Subject: Jahl McMath

Mr. Nefouse,

Please find attached a letter dated June 18, that was sent to Dr. Muntu Davis along with the material that was submitted to the California Department of Public Health.

We submitted the material to the CDPH in May and was told by them that only the coroner can amend the Death Certificate. We then sent a copy of all the documents that are attached to Dr. Muntu Davis. I called to follow up with Dr. Davis and was told I would have to follow up with your office regarding this request.

I believe you spoke with Mr. Dolan, and requested that we send you a copy of the attached material.

As usual, should you have any questions, please contact Chris Dolan by email at [REDACTED] or by phone at (415) 421-2800.

Regards,

Guillermo

-



Exhibit I



Fwd: Jahl McMath

From: Guillermo Bustillo <[redacted]>
Date: Thursday, September 10, 2015
Subject: Jahl McMath
To: "Dickey, Scott, County Counsel" <Scott.Dickey@acgov.org>

Mr. Dickey,

I just wanted to check in and see if you had the opportunity to review the material that was submitted to Mr. Nefouse on Sept 1st. If you could get back to us as soon as possible re our request, it would be greatly appreciated.

Regards,
Guillermo

On Fri, Sep 4, 2015 at 4:55 PM, Nefouse, David, County Counsel <david.nefouse@acgov.org> wrote:

Mr. Bustillo,

Thank for your email (and letter that arrived today). I believe the information you sent over to me was initially requested by Dr. Muntu Davis in his last correspondence with your office. As such, I am forwarding your email to Deputy County Counsel Scott Dickey (cc'ed on this email), who works with Dr. Davis and the Alameda County Public Health Department.

Kind regards,

David Nefouse



L. David Nefouse |
Deputy County Counsel
Office of the County
Counsel
1221 Oak Street, Suite
490 | Oakland, California
94612
510-272-8700 | Direct
Line 510-272-3813 |
Facsimile No. 510-272-
5020
david.nefouse@acgov.org

From: Guillermo Bustillo (mailto:[redacted])
Sent: Tuesday, September 01, 2015 3:05 PM
To: Nefouse, David, County Counsel
Subject: Jahl McMath

Mr. Nefouse,

Please find attached a letter dated June 18, that was sent to Dr. Muntu Davis along with the material that was submitted to the California Department of Public Health.

We submitted the material to the CDPH in May and was told by them that only the coroner can amend the Death Certificate. We then sent a copy of all the documents that are attached to Dr. Muntu Davis. I called to follow up with Dr. Davis and was told I would have to follow up with your office regarding this request.

I believe you spoke with Mr. Dolan, and requested that we send you a copy of the attached material.

As usual, should you have any questions, please contact Chris Dolan by email at [REDACTED] or by phone at (415) 421-2800.

Regards,

Guillermo

-

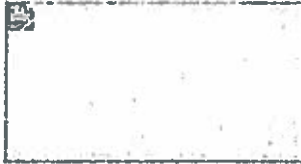


Exhibit J

Exhibit K



Fwd: McMath

From: Chris Dolan <[REDACTED]>
Date: Wednesday, September 23, 2015
Subject: McMath
To: "Nefouse, David, County Counsel" <david.nefouse@acgov.org>, Scott.Dickey@acgov.org

Mr. Nefouse,

I understand that you have forwarded my request to Mr. Dickey, unfortunately, I have been able to reach him via email or by phone. It has been several weeks since we provided the requested information to have Jahj McMaths death certificate revised or rescinded. We respectfully request a response within a week.

Regards,
Chris Dolan

Exhibit L



OFFICE OF THE COUNTY COUNSEL

1221 Oak Street, Suite 450, Oakland, California 94612-4296
Telephone (510) 272-6700 Facsimile (510) 272-5020

DONNA R. ZIEGLER
COUNTY COUNSEL

October 9, 2015

VIA ELECTRONIC AND UNITED STATES MAIL

Christopher B. Dolan, Esq.
Dojan Law Firm
1438 Market St.
San Francisco, CA 94102
[REDACTED]

RE: Jahi McMath's Death Certificate

Dear Mr. Dolan:

The Alameda County Sheriff's Office, Coroner's Bureau (the "Coroner") and the Alameda County Public Health Department, by and through counsel, provide this joint response to your September 1, 2015 request to have the Coroner and/or Public Health Department "rescind, revise, change, or invalidate" the death certificate that was issued for Ms. Jahi McMath on January 3, 2014 (the "Request").

After reviewing the legal materials you provided with your Request (specifically, at the bottom of page 8 through page 12 of the 90 pages provided in the Request), the Coroner and Public Health Department find no basis to make any changes to and/or nullify or rescind the death certificate of Ms. McMath.¹ Indeed, nothing in your legal materials demonstrates that the Coroner and/or Public Health Department failed to properly issue the death certificate for Ms. McMath under the California Health and Safety Code.

And, critically, on January 17, 2014, Alameda County Superior Court Judge Evelio M. Grillo issued a judgment finding Jahi McMath to be brain dead pursuant to California Health and Safety Code sections 7180, 7181 (the "Judgment"). Your office initially attempted to appeal the judgment in January 2014 to no avail. In October 2014, your office once again attempted to challenge the judgment, however, you withdrew your writ prior to any hearing taking place on that matter. Any opportunity to overturn the Court's holding that Jahi McMath is brain dead has long expired, and that judgment is now the final and controlling authority on this question. Accordingly, the Coroner and Public Health Department have no legal basis to "rescind, revise, change, or invalidate" the death certificate for Ms. McMath.

As always, the Coroner and Public Health Department reserve all rights. Please contact me (510-272-3813) or my colleague K. Scott Dickey (510-272-6712) if you have any questions.

Our clients extend their sympathies to the family and friends of Ms. McMath.

¹ It should be noted that the death certificate for Ms. McMath was issued after you, Mr. Dolan, on behalf of the McMath family, requested that the Coroner issue the death certificate following the December 28, 2013 order by the Court finding that Ms. McMath was brain dead in accordance with the California Health and Safety Code sections 7180, 7181.

Mr. Christopher B. Dolan
October 9, 2015
Page 2

Very truly yours,

DONNA R. ZIEGLER
County Counsel

By



L. David Nefouse
Deputy County Counsel

ldn/ldn

cc: Mr. K. Scott Dickey, Esq. (via email only)

Exhibit G

AGNEWBRUSAVICH
 Attn: Brusavich, Bruce M.
 20355 Hawthorne Blvd.
 2nd Fl.
 Torrance, CA 90503

Hinshaw, Marsh, Still & Hinshaw LLP
 Attn: Still Esq, Jennifer
 12901 Saratoga Avenue
 Saratoga, CA 95070

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

Spears <p style="text-align: right; margin-right: 20px;">Plaintiff/Petitioner(s)</p> <p style="text-align: center;">VS.</p> Rosen <p style="text-align: right; margin-right: 20px;">Defendant/Respondent(s)</p> <p style="text-align: center;">(Abbreviated Title)</p>	<p style="text-align: center;">No. <u>RG15760730</u></p> <p style="text-align: center;">Order</p> <p style="text-align: center;">Demurrer and Motion to Strike Complaint Denied</p>
--	--

The Demurrer to First Cause of Action and Motion to Strike Portion of First Amended Complaint ("FAC"), filed by Defendant UCSF Benioff Children's Hospital Oakland ("CHO") on November 23, 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:

The demurrer to the First Cause of Action for personal injuries on behalf of Jahi McMath ("Jahi") is **OVERRULED** on the grounds asserted.

CHO's demurrer is based on the argument that Jahi has been declared dead under California law and thus has no standing to sue for personal injury. (Demurrer, p. 2.) The argument is based on: (1) allegations in the FAC itself; (2) the death certificate issued on January 3, 2014; and (3) Judge Grillo's amended order and judgment in Case No. RP13-707598, denying the petition for medical treatment, which included a determination that Jahi "suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." (See Request for Judicial Notice, Exhs. A and B, including Exh. A at 16:20-22.) The court addresses each argument in turn.

(1) The court is not persuaded that the cited allegations in the FAC contain admissions that Jahi is brain-dead. (See FAC, ¶¶ 18, 19, 23 and 24.)

(2) As to the death certificate, while the court can and will take judicial notice of it, the court cannot take judicial notice of the truth of factual conclusions in it. (See, e.g., *Bohrer v. County of San Diego* (1980) 104 Cal.App.3d 155, 164.) By statute, a death certificate is prima facie evidence of the facts stated therein but is subject to rebuttal and explanation. (See Health & Safety Code § 103550; In re Estate of Lensch (2009) 177 Cal.App.4th 667, 677 n. 3.)

The FAC includes new allegations to the effect that the death certificate is invalid and has been the subject of requests or petitions to rescind, cancel, void or amend it, but that such efforts have been unsuccessful. (FAC, ¶¶ 27-29.) Further, it appears that, Jahi and her mother Latasha Nailah Spears Winkfield ("Winkfield") filed a complaint in federal court seeking declaratory and injunctive relief, including a determination that the death certificate is invalid. (Reply Decl. of G. Patrick Galloway, Exh. A.)

The court is not persuaded that the death certificate itself - which is subject to rebuttal and explanation

and is the subject of a pending challenge in federal court - establishes the fact of Jahi's death as a matter of law (at the pleading stage) so as to preclude her from bringing the first cause of action.

(3) As to the amended order and judgment in Case No. RP13-707598, there are essentially two aspects to CHO's argument: (a) the asserted collateral estoppel effect; and (b) the asserted finality of a determination of death under Health and Safety Code sections 7180 and 7181.

As to the asserted collateral estoppel effect, CHO has sound arguments that the court's amended order of January 2, 2014 and judgment in Case No. RP13-707598 - denying Winkfield's petition for medical treatment for Jahi after a hearing at which the court considered declarations of Jahi's examining physicians and a physician (Paul Fisher, MD) appointed by the court to provide a second, independent opinion pursuant to Health and Safety Code section 7181 - may ultimately be entitled to collateral estoppel effect as to the determination "that Jahi had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." (See Decl. of Joseph E. Finkel, Exh. A, p. 16; see also *id.*, Exh. B; Request for Judicial Notice, items 1(a) and 1(b).) As the court noted at the hearing on this demurrer, Judge Grillo's amended order is detailed as to the court's analysis and consideration of the medical evidence, as well as the procedural posture of the hearing and the parties' opportunity to present evidence and argument as to the "brain death" issue.

Nevertheless, the court is not persuaded that it would be appropriate to determine the collateral estoppel effect of the amended order and judgment in Case No. RP13-707598 at the pleading stage, based solely on the allegations in the FAC and the matters of which judicial notice is taken. Collateral estoppel is an affirmative defense as to which the defendants bear a "heavy" burden of proof. (*Kemp Bros. Const., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1482.) There are at least some aspects of the collateral estoppel determination that may require a more developed factual record. The court has concerns, for example, about whether the factual determinations in the context of the expedited probate petition - which was filed for the purpose of determining whether CHO should be ordered to continue providing medical care to Jahi - should necessarily be binding on Jahi in a civil lawsuit for damages brought on her own behalf. There are circumstances in which "[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them." (*Rest.2d Judgments* § 28(3).) Here, the prior expedited petition did not involve the same type of discovery and presentation of evidence as is involved in a civil action.

In addition, even where the traditional elements of collateral estoppel (privity, finality and necessary determination of identical issue in prior adjudication) are met, there is also an "equitable nature of collateral estoppel" such that the doctrine is to be applied "only where such application comports with fairness and sound public policy." (*Smith v. Exxon Mobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414.) The court believes it would be premature to determine and apply such considerations based solely on the allegations and matters of judicial notice before it, without a more fully developed factual record.

Further, as both sides recognize (and as Judge Grillo noted in his Order Following Case Management Conference issued on October 1, 2014), California law on issue preclusion permits "reexamination of the same questions between the same parties where in the interim the facts have changed or new facts have occurred which may alter the legal rights of the parties." (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 230.) Jahi has included new allegations in the FAC as to such changed circumstances. (See, e.g., FAC, ¶¶ 30-36.) Such allegations are to be taken as true on demurrer. (See, e.g., *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The court is hesitant to determine that, at the pleading stage, there is no factual issue as to whether the facts have changed or new facts have occurred.

As to the asserted finality of a determination of death under Health and Safety Code sections 7180 and 7181, the court does not find the authority cited by CHO sufficient for the court to determine, at the pleading stage, that the determination made in the context of Winkfield's probate petition is to be accorded finality for any and all other purposes, independent of considerations of collateral estoppel discussed above. CHO contends that a determination of brain death in the context of a probate petition initiated by the guardian of an individual as to whom there is doubt as to her life or death status, based on the procedures set forth in Health and Safety Code sections 7180 and 7181, is a determination that (at least unless set aside) must be accorded finality to serve the purposes of the Uniform Determination of Death Act (UDDA). As CHO observes, such statutes serve the purpose of allowing the family,

physicians and others to take actions based on such a determination, including cessation of life support, removal of organs for transplant, probate of the decedent's estate, and the like. (See, e.g., H&S Code § 7151.40.)

Nevertheless, despite the court's continuance of the hearing so the parties could submit further authority in this regard, the only authority cited by CHO in its supplemental memorandum in this regard (aside from a case to the effect that statutes should be construed in a manner consistent with the ordinary meaning of the words used) is *Dority v. Superior Court* (1983) 145 Cal.App.3d 273. In that case, the court recognized that, while Health and Safety Code sections 7180 and 7181 provide physicians and the guardian of an individual asserted to have suffered brain death with standards for making such a determination, "[w]e find no authority mandating that a court must make a determination brain death has occurred." (*Id.*, p. 278.) Instead, "[n]o judicial action is necessary where the health care provider and the party having standing to represent the person allegedly declared to be brain dead are in accord brain death has occurred." (*Id.*, p. 280.) However, "[t]he jurisdiction of the court can be invoked upon a sufficient showing that it is reasonably probable that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made in accord with accepted medical standards." (*Id.*) In *Dority*, for example, "the parents became unavailable by their actions, requiring the court to appoint a temporary guardian. The guardian, faced with a diagnosis of brain death, correctly sought guidance from the court. The court, after hearing the medical evidence and taking into consideration the rights of all the parties involved, found [the individual] was dead in accordance with the California statutes and ordered withdrawal of the life-support device." (*Id.*, p. 280.) The Court of Appeal held that the "court's order was proper and appropriate." (*Id.*)

While *Dority* supports the appropriateness of the judicial proceeding in Case No. RP13-707598, in which Winkfield sought the court's intervention because of uncertainty as to the treating physicians' diagnosis of brain death and Winkfield's assertion that CHO should continue providing life support to Jahi, it does not directly address CHO's assertion that a court's determination in the context of a such a dispute is to be accorded finality in any and all other proceedings or disputes that may arise subsequent to the life-support dispute in which the court's intervention was sought. In the absence of other authority addressing this assertion, the court declines to make a final determination in this regard at the pleading stage.

The court is not persuaded by CHO's argument that Plaintiffs are "improperly asking this court or a jury to reject the accepted medical standards used to determine irreversible brain death." Plaintiffs are not, by way of this action, expressly seeking any redetermination or reversal of the matters in the prior probate proceeding or seeking to apply standards other than those set forth in the UDDA. Instead, they have brought a civil action independent of the prior proceeding, which includes a cause of action asserted on Jahi's behalf. CHO, as the party moving for dismissal of that cause of action, bears the burden of showing that it is insufficient or barred as a matter of law, and the court determines that CHO has not met this burden at the pleading stage, based solely on the allegations and matters of which the court takes judicial notice.

CHO's motion to strike the language in paragraph 54 that "[i]n the event that it is determined Jahi McMath succumbed to the injuries" is DENIED. At the pleading stage, Plaintiffs are entitled to use such language to preserve their right to plead in the alternative, regardless of what determinations may subsequently be made herein.

CHO's Request for Judicial Notice, at pages 2-3 of its moving memorandum and accompanied by the Declaration of Joseph E. Finkel in Support of the request, is GRANTED, but the court does not take judicial notice of the truth of matters asserted, or the binding nature of any determinations made, in the accompanying exhibits.

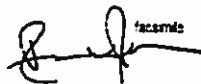
Plaintiffs' Request for Judicial Notice, filed on January 5, 2016, is GRANTED, but the court does not take judicial notice of the truth of the allegations in the attached exhibit and makes no determination that the exhibit is material to the court's determination of this demurrer and motion to strike.

CHO 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.

CHO'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 "R. Freedman", is written over a horizontal line. The signature is cursive and somewhat stylized.

Judge Robert B. Freedman

SHORT TITLE: Spears VS Rosen	CASE NUMBER: RG15760730
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ADDITIONAL ADDRESSEES

ESNER, CHANG & Ellis
Attn: Chang, Andrew N.
35 Quail Ct. #303
Walnut Creek, CA 94596

Order

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

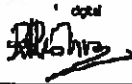
Case Number: RG15760730
Order After Hearing Re: of 03/14/2016

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 03/15/2016.

Chad Finke Executive Officer / Clerk of the Superior Court

By  _____
Deputy Clerk

1 Christopher B. Dolan (SBN 165358)
2 Aimee E. Kirby (SBN 216909)
3 **THE DOLAN LAW FIRM**
4 1438 Market Street
5 San Francisco, California 94102
6 Telephone: (415) 421-2800
7 Facsimile: (415) 421-2830

8 Attorneys for PLAINTIFF
9 JAHl MCMATH, a minor
10 and NAILAH WINKFIELD

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 JAHl MCMATH, a minor; NAILAH
14 WINKFIELD, an individual, as parent, as
15 guardian, and as next friend of JAHl McMath,
16 a minor

17 Plaintiffs,

18 v.

19 STATE OF CALIFORNIA;
20 COUNTY OF ALAMEDA, et al

21 Defendants.

Case No. 3:15-cv-06042 HSG

**PLAINTIFF’S REQUEST FOR JUDICIAL
NOTICE OF REGISTER OF ACTIONS IN
ALAMEDA SUPERIOR COURT CASE
NUMBER RG15760730**

Date: August 4, 2016

Time: 2:00 PM

Judge: The Honorable Haywood S. Gilliam, Jr.

Action filed: December 23, 2015

22 **I. INTRODUCTION**

23 Plaintiffs respectfully request that the court take judicial notice of the item listed below.
24 Judicial notice is appropriate where the fact is not subject to reasonable dispute because it is
25 "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably
26 be questioned." Fed. R. Evid. 201(b)(2). Federal courts routinely take judicial notice of state court
27 records. *Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012); *Cachil Dehe Band of*
28

1 *Wintun Indians v. California*, 547 F.3d 962, 968 n. 4 (9th Cir. 2008) (taking judicial notice of state
2 records); *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (noting that a court "may take
3 notice of proceedings in other courts, both within and without the federal judicial system, if those
4 proceedings have a direct relation to matters at issue"); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*,
5 442 F.3d 741, 746 n. 6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other
6 court filings); *Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n. 1 (9th Cir. 1996)
7 (court may take judicial notice of pleadings and court orders in related proceedings). Judicial notice
8 by a court is mandatory "if requested by a party and supplied with the necessary information." Fed.
9 R. Evid. 201(c)(2). This court may properly take judicial notice of matters of public record,
10 including the decision and file of another court. Therefore, Plaintiff request the court take judicial
11 notice of the following items, which are attached to the **DECLARATION OF ALTON INGRAM**

12
13
14 **IN SUPPORT OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE:**

- 15
16
17 1. Exhibit A: This is a minute order issued by The US District Court for the Northern
18 Division, Judge Sandra Brown Armstrong on January 22, 2014, which dismissed the case number
19 C 13-59993 SBA as "moot."
- 20 2. Exhibit B is an order issued by The Court of Appeal of the State of California First
21 Appellate District, on January 6, 2014, which dismissed the Petition for Writ of Mandate and/or
22 Prohibition as "moot." (Highlighted portion of Exhibit B, p. 2.)
- 23 3. Exhibit C: "Death Certificate" issued to Jahi McMath. This Exhibit is a true and correct
24 copy of the original document.
- 25 4. Exhibit D: Exhibit D is a document titled "Petitioner's Notice of Motion and Motion to
26 Continue Hearing to Present Additional Evidence to Address Letter of Dr. Paul Fischer; Request
27 for Evidentiary Hearing and Opportunity to Examine Dr. Fischer." This is a motion filed by
28

1 Plaintiff Latasha Winkfield on October 8, 2014, in Alameda Superior Court case number RP 13-
2 707598 which requested that the Court permit an opportunity for a frank and unscripted dialogue
3 with the experts, and Dr. Fischer, who are opining that the new obtained evidence supports a
4 finding that Jahi is not brain dead. (Highlighted portion of Exhibit D, p.2.)

5 5. Exhibit E: two videos of Jahi McMath during May, 2016. These files could not be served
6 via the electronic filing system. They are being provided to the Court and to opposing counsel via
7 U.S. Mail on this date.

8 6. Exhibit F: compiled exhibits (H-L) from the original Complaint, case number 3:15-cv-
9 06042. where County Counsel ultimately, without any hearing or process, summarily refused to
10 acknowledge the deficiencies with the Death Certificate and/or the evidence presented
11

12 7. Exhibit G: is a document titled "Order Demurrer and Motion to Strike Complaint Denied."
13 This is a true and correct copy of an order issued by Judge Robert B. Freedman on March 14,
14 2016, which denied Intervening Defendant CHO's second demurrer in Alameda County Superior
15 Court Case Number RG15760730 (the Damages Trial).
16
17

18
19
20 DATED: June 3, 2016

Respectfully submitted,

THE DOLAN LAW FIRM

21
22 By: /s/ Christopher B. Dolan

23 Christopher B. Dolan, Esq.
24 Aimee E. Kirby, Esq
25 Attorneys for Plaintiff
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