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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

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

Plaintiffs,

vs.

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

Defendants.

FILED
ALAMEDA COUNTY

JUN 29 2017

CLERK OF THE SUPERIOR COURT

By *Alfonso J. ...* Deputy

FAX FILE

Case No. RG15760730

ASSIGNED FOR ALL PURPOSES TO:
JUDGE STEPHEN PULIDO
DEPARTMENT 16

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
SEPARATE STATEMENT OF UNDISPUTED
MATERIAL FACTS IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY
ADJUDICATION OF PLAINTIFF JAHl
MCMATH'S FIRST CAUSE OF ACTION FOR
PERSONAL INJURIES**

Reservation #: R-1838158

Date: July 13, 2017

Time: 3:00 p.m.

Dept.: 16

Complaint Filed: March 3, 2015

Trial Date: None Set

1 Plaintiffs submit the following response to Defendants' statement of
 2 undisputed material facts in connection with their Motion for Summary
 3 Adjudication:

DEFENDANTS' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	PLAINTIFFS' RESPONSE AND SUPPORTING EVIDENCE
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 6 **ISSUE 1: In December 2013, McMath Fulfilled the Accepted Medical Standards for Brain Death and Was Appropriately Pronounced Deceased Under California Law – Disputed, see below.**
 7

8 **A. On March 3, 2015, Plaintiffs Filed the Instant Medical Malpractice Suit, That Includes a First Cause of Action for Personal Injuries on Behalf of Jahi McMath**
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10 1. On March 3, 2015, plaintiffs filed the instant medical malpractice action in
 11 Alameda County Superior Court that includes a first cause of action for
 12 personal injuries alleged on behalf of Jahi McMath ("McMath"), a minor, by
 13 and through her Guardian Ad Litem, Latasha Winkfield ("Winkfield").
 14 • Plaintiffs' Complaint filed March 3, 2015
 15 • Plaintiffs' First Amended Complaint filed November 4, 2015
 16

1. Undisputed.

17 **B. On December 12, 2013, McMath Met the Accepted Medical Standards or Brain Death and Was Legally Deceased Under California Law**
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19 2. The "accepted medical standards" for the determination of brain death in
 20 children such as McMath are set forth in the Guidelines for the Determination of
 21 Brain Death in Infants and Children: An Update of the 1987 Task Force
 22 Recommendation ("Guidelines").
 23 • Declaration of Thomas A. Nakagawa, M.D., ¶¶ 7-9 ("Nakagawa Decl.");
 24 • Guidelines, Nakagawa Decl., Ex. B;
 25 • Declaration of Sanford Schneider, M.D., ¶¶ 6-7. ("Schneider Decl.");
 26 • Jahi McMath's Supplemental Response to Dr. Rosen's Request for Admission No. 32, ¶ 2 and Ex. A to
 27 Declaration of Jennifer Still, Esq. ("Still

2. Undisputed.

<p>1 Decl.");</p> <p>2 • Still Decl., ¶ 2; and</p> <p>3 • Testimony of Paul Fisher, M.D.,</p> <p>4 Reporter's Transcript of Proceedings on</p> <p>5 12/24/13, at 8:16 to 9:11 and 10:11 to</p> <p>6 11:15, Ex. L to Nakagawa Decl.</p> <p>• Testimony of Robin Shanahan, M.D.,</p> <p>Reporter's Transcript of Proceedings on</p> <p>12/24/13, at 57:1-10 and 101:4-25.</p>	
<p>7 3. During the evening of December 9,</p> <p>8 2013, while in the Pediatric Intensive</p> <p>9 Care Unit ("PICU") at UCSF Benioff</p> <p>10 Children's Hospital of Oakland ("CHO"),</p> <p>11 McMath began to bleed from the mouth</p> <p>12 and nose. At approximately 12:30 a.m.</p> <p>13 on December 10, 2013, McMath</p> <p>14 appeared to gag and stop breathing. A</p> <p>15 code blue was initiated at</p> <p>16 approximately 12:35 a.m. on December</p> <p>17 10, 2013.</p> <p>18 • First Amended Complaint, ¶¶ 12-18;</p> <p>19 and</p> <p>20 • Nakagawa Decl., ¶ 16(A); and</p> <p>21 • PICU Attending Event Note, CHO</p> <p>22 Chart, Bates Nos. 26607-26608, Ex. C to</p> <p>23 Nakagawa Decl.</p>	<p>3. Undisputed.</p>
<p>16 4. During the approximate 2 hour and</p> <p>17 33 minute code, there was considerable</p> <p>18 difficulty with oxygenation.</p> <p>19 • First Amended Complaint, ¶ 19.</p> <p>20 • Nakagawa Decl., ¶ 16(A); and</p> <p>21 • PICU Attending Event Note, CHO</p> <p>22 Chart, Bates Nos. 26607-26608, Ex. C to</p> <p>23 Nakagawa Decl.</p>	<p>4. Undisputed.</p>
<p>21 5. On December 11, 2013 at 2:08 a.m.,</p> <p>22 Sharon Williams, M.D., ordered a head</p> <p>23 CT scan due to a change in McMath's</p> <p>24 neurological status. The impression of the</p> <p>25 head CT scan, performed early in the</p> <p>26 morning on December 11, 2013, was (1)</p> <p>27 Diffuse cerebral edema and abnormal</p> <p>low attenuation in the basil ganglia and</p> <p>presumed basilar herniation, consistent</p> <p>with sequelae of anoxia; and (2) Global</p> <p>linear high attenuation within the</p> <p>subarachnoid spaces, basal cisterns,</p> <p>and along the tentorium felt to represent</p>	<p>5. Undisputed.</p>

1	pseudosubarachnoid hemorrhage on the basis of cerebral edema.	
2	• Nakagawa Decl., ¶16(B);	
3	• Dr. Sharon William's December 11, 2013, examination notes, CHO Chart, Bates Nos. 26606-26607, Ex. C to Nakagawa Decl.,	
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5	• Head CT Order, CHO Chart, Bates No. 17332, Ex. C to Nakagawa Decl.; and	
6	• Head CT results, CHO Chart, Bates No. 237, Ex.C to Nakagawa Decl.	
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8	6. An electroencephalogram ("EEG") lasting 41 minutes was performed the morning of December 11, 2013. There was no reaction to stimulation. There was no discernable cerebral activity. No brain wave activity was seen. The EEG fulfilled the criteria for electrocerebral inactivity.	6. Undisputed.
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12	• Nakagawa Decl., ¶16(C)	
13	• EEG results by Dr. Robin Shanahan, CHO Chart, Bates Nos. 26620-26621, Ex. C to Nakagawa Decl.;	
14	• Dr. Robin Shanahan's testimony, Reporter's Transcript of Proceedings on 12/24/13, at 66:5-25, and 67:1-6, Ex. L to Nakagawa Decl., and	
15	• Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 31:1-13, Ex. L to Nakagawa's Decl.	
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19	7. On December 11, 2013, a brain death evaluation was ordered for McMath to determine whether McMath had sustained an irreversible cessation of all functions of her entire brain, including the brain stem.	7. Undisputed.
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22	• Nakagawa Decl., ¶16(D); and	
23	• Declaration of Robin Shanahan, M.D., dated 12/20/13, Ex. E to Nakagawa Decl.	
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25	8. On December 11, 2013, Robin Shanahan, M.D., a board-certified pediatric neurologist at CHO, performed the first of three brain death evaluations performed on McMath at CHO. Dr. Shanahan had performed over 300 brain death examinations prior to her	8. Undisputed.
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<p>1 2 3 4 5 6 7 8 9 10 11</p>	<p>evaluation of McMath. Dr. Shanahan correctly applied the accepted medical standards for evaluating brain death in children as set forth the <u>Guidelines</u>. Dr. Shanahan found there was no evidence of any cerebral or brain stem function.</p> <ul style="list-style-type: none"> • Nakagawa Decl., ¶16(D) and 16(D)(1); • Schneider Decl., ¶¶ 13-14; • Declaration of Robin Shanahan, M.D., filed 12/20/13, Ex. E to Nakagawa Decl.; • Dr. Robin Shanahan's 12/11/13 Brain Death Evaluation, CHO Chart, Bates Nos. 40-41, Ex. C to Nakagawa Decl.; and • Dr. Robin Shanahan's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at pp. 55-57, 58:2-24, 60:13 to 68:2; and pp. 100-104, Ex. L to Nakagawa Decl. 	
<p>12 13 14 15 16 17 18 19 20</p>	<p>9. Pediatric critical care specialist Robert S. Heidersbach, M.D., the PICU attending physician at CHO, also examined McMath the morning of December 11, 2013, to evaluate her clinical and radiographic evidence of early cerebral herniation. On exam, McMath's pupils were dilated and fixed. Dr. Heidersbach reported that McMath had likely progressed to brain death secondary to anoxic injury during the code.</p> <ul style="list-style-type: none"> • Nakagawa Decl., ¶16(E); and • Dr. Robert Heidersbach's 12/11/13 examination notes, CHO Chart, Bates Nos. 256-259, Ex. C to Nakagawa Decl. 	<p>9. Undisputed.</p>
<p>21 22 23 24 25 26 27 28</p>	<p>10. McMath was re-examined by Dr. Shanahan at approximately 9:00 a.m. on December 12, 2013, at the request of the PICU staff. Throughout the night McMath had some spontaneous right arm jerks and some dramatic triple flexion withdrawal movements with extremity stimulation. The ICU staff wanted Dr. Shanahan to confirm that these were not of cortical origin coming from the brain, but rather spinal reflexes. On examination, McMath remained unchanged with unreactive, dilated pupils, fixed at 7mm, no spontaneous breathing and absent cough and gag</p>	<p>10. Undisputed.</p>

<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15</p>	<p>reflexes. Her blood pressure elevated during painful extremity pinching. She remained comatose with no environmental reaction. She had absent corneal reflexes. When fingernails were pressed into her occiput (back of the head/skull), no spontaneous movement was elicited. She had easy to obtain deep tendon reflexes. With plantar stimulation there was a subtle triple flexion of both legs. One spontaneous arm jerk was observed without any stimulation. Dr. Shanahan reported that the movements she observed during her repeat evaluation were consistent with spinal withdrawal and spinal myoclonus.</p> <ul style="list-style-type: none"> • Nakagawa Decl., ¶ 16(F); • Dr. Robin Shanahan's testimony, Reporter's Transcript of Proceedings on 12/23/13, at 68:3-15, 72:8-24, 82:6-21 and 86:12-25, Ex. L to Nakagawa Decl.; • Dr. Shanahan's 12/12/13 examination notes, CHO Chart, Bates Nos. 252-253, Ex. C to Nakagawa Decl.; and • Declaration of Robin Shanahan, M.D., Ex. E to Nakagawa Decl. 	
<p>16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p>11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking. None of the movements had any electrographic correlation. Auditory, photic and painful stimulation did not change the background. There were no changes during blood pressure elevation. The EEG fulfilled the criteria for electrocerebral inactivity. Dr. Shanahan and Dr. Heidersbach confirmed that the spinal movements seen during the time of the EEG were not associated with brain function.</p> <ul style="list-style-type: none"> • Nakagawa Decl., ¶ 16(G); and • CHO Chart, Bates Nos. 252-253, 26604, 	<p>11. Undisputed.</p>

<p>1 Ex. C to Nakagawa Decl.; and</p> <p>2 • CHO Supp. Chart Page Nos. 401-402, Ex. D to Nakagawa Decl.</p>	
<p>3 12. During the second brain death 4 examination conducted on McMath on 5 December 12, 2013, attending PICU 6 physician, Robert S. Heiderbach, M.D., 7 applied the accepted medical standards for determining brain death in children and concluded that McMath met clinical criteria for brain death as set forth in the <u>Guidelines</u>.</p> <p>8 • Nakakawa Decl., ¶16(H);</p> <p>9 • Schneider Decl., ¶¶ 13-14;</p> <p>10 • Declaration of Robert S. Heidersbach, M.D., filed 12/20/13, Ex. G to Nakagawa Decl.</p> <p>11 • Declaration of Sharon Williams, M.D., filed 12/20/13, Ex. F to Nakagawa Decl.;</p> <p>12 • Dr. Heidersbach's Brain Death 13 Evaluation, CHO Chart, Bates No. 26604, Ex. C to Nakagawa Decl.; and</p> <p>14 • Brain Death Summary, CHO Supp. 15 Chart, Page Nos. 407-413, Ex. D to Nakagawa Decl.</p>	<p>12. Undisputed.</p>
<p>16 13. Given that two brain death 17 evaluations performed a day apart by 18 two different attending physicians documented clinical brain death, Dr. 19 Heidersbach appropriately pronounced McMath clinically brain dead and deceased at 3:00 p.m. on December 12, 20 2013.</p> <p>21 • Nakagawa Decl., ¶16(I);</p> <p>22 • Brain Death Summary, CHO Supp. Chart, Bates No. 409, Ex. D to Nakagawa Decl.; and</p> <p>23 • Declaration of Sharon Williams, M.D., filed 12/20/13, Ex. F. to Nakagawa Decl.</p>	<p>13. Disputed. The brain death pronouncement was not appropriate, as Jahi McMath was never truly dead, even though she fulfilled the accepted medical criteria for death in December 2013. She exhibited no brain function at the time, but the cessation of at least two functions— consciousness and hypothalamic regulation of menstruation and sexual development—has proved <i>not</i> to be <i>irreversible</i>. Hence she represents an example of a false positive (erroneous) diagnosis of brain death following the Guidelines. (Shewmon Decl., para. 54.)</p>
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<p>14. As of December 12, 2013, McMath was legally deceased under California's Uniform Determination of Death Act since she was clinically found to have suffered an irreversible cessation of all functions of the entire brain, including the brainstem, by two attending physicians during evaluations performed more than 12 hours apart in accord with the accepted medical standards set forth in the <u>Guidelines</u>.</p> <ul style="list-style-type: none"> • Nakakawa Decl., ¶16(J); • Schneider Decl., ¶¶13-14; • <u>Guidelines</u>, p. e731, Nakagawa Decl., Ex. B, • Declaration of Sharon Williams, M.D., filed 12/20/13, Ex. F to Nakagawa Decl.; and • California Health and Safety Code sections 7180 and 7181 	<p>14. Disputed. The brain death pronouncement was not appropriate, as Jahi McMath was never truly dead, even though she fulfilled the accepted medical criteria for death in December 2013. She exhibited no brain function at the time, but the cessation of at least two functions—consciousness and hypothalamic regulation of menstruation and sexual development—has proved <i>not</i> to be <i>irreversible</i>. Hence she represents an example of a false positive (erroneous) diagnosis of brain death following the Guidelines. (Shewmon Decl., para. 54.)</p>
<p>15. At a family conference on or about December 12, 2013, McMath's extended family was informed of McMath's death by Dr. Heidersbach and Sharon Williams, M.D.</p> <ul style="list-style-type: none"> • Social Worker Note, CHO Chart, Bates Nos. 231-233, Ex. C to Nakagawa Decl. 	<p>15. Undisputed.</p>
<p>16. On December 13, 2013, at second family conference, Dr. Heidersbach reiterated McMath's diagnosis of clinical brain death. McMath's mother, Latasha Winkfield ("Winkfield") requested that McMath be allowed to remain on the ventilator until relatives arrived.</p> <ul style="list-style-type: none"> • Social Worker Note, CHO Chart, Bates Nos. 220-221, Ex.C to Nakagawa Decl. 	<p>16. Undisputed.</p>

C. A Third EEG Performed on December 17, 2013, Confirmed McMath's Death

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<p>17. McMath demonstrated occasional movements following the declaration of death. On December 13 and 14, 2013, it was noted that McMath was having brain-death associated spinal reflexes and occasional automatisms, including triple flexion of the lower extremities and brief clonic movements of unilateral upper extremities. Slight flexion at the ankle, knee and hip was elicited with touching her foot. McMath's neurological status remained unchanged. The neurologic examinations on December 13 and 14, 2013, remained consistent with brain death.</p> <ul style="list-style-type: none">• Nakagawa Decl., ¶16(K).• PICU Progress Notes on 12/13/13, CHO Chart, Bates Nos. 222-225, Ex. C to Nakagawa Decl.; and• PICU Progress Notes on 12/14/13, CHO Chart, Bates Nos. 208-211, Ex. C to Nakagawa Decl.	<p>17. Disputed to the extent this implies movements by Jahi are not indicative that she is not brain dead. Video evidence taken since spring 2014 indicates, beyond any reasonable doubt, that the slower, more deliberate-looking non-myoclonic movements are in fact not independent of the commands, ruling out some hitherto unknown type of spinal automatism. There is clearly a causal relationship, indicating that <u>at the times the videos were made</u>, Jahi was in a responsive state, capable of understanding a verbal command and barely capable of executing a simple motor response. (See, e.g., Shewmon Decl., paras. 8-25.)</p>
<p>18. On December 16, 2013, McMath's family was informed that mechanical support would be withdrawn on December 17, 2013, and the coroner would remove McMath from the hospital.</p> <ul style="list-style-type: none">• PICU Progress Notes on 12/16/13, CHO Chart, Bates Nos. 181-184, Ex. C to Nakagawa Decl.	<p>18. Undisputed.</p>

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19. McMath continued to exhibit final reflexes. At the request of the family, on December 17, 2013, a third EEG was performed, lasting 31 minutes in duration. McMath was unresponsive to pinch, light touch and loud clapping. The EEG fulfilled the criteria for electrocerebral inactivity. The family was informed that the EEG remained consistent with brain death.

- Nakagawa Decl., ¶16(L);
- EEG Results on 12/17/13, CHO Chart, Bates Nos. 43-44, Ex. C to Nakagawa Decl.; and
- PICU Progress Notes on 12/17/13, CHO Chart, Bates Nos. 161-163, Ex. C to Nakagawa Decl.

19. Disputed to the extent this implies movements and responses by Jahi are not indicative that she is not brain dead. Video evidence taken since spring 2014 indicates, beyond any reasonable doubt, that the slower, more deliberate-looking non-myoclonic movements are in fact not independent of the commands, ruling out some hitherto unknown type of spinal automatism. There is clearly a causal relationship, indicating that at the times the videos were made, Jahi was in a responsive state, capable of understanding a verbal command and barely capable of executing a simple motor response. (See, e.g., Shewmon Decl., paras. 8-25.)

20. On December 17, 2013, CHO arranged for a review of the EEG's and head CT scan with Dr. Jean Hayward, a pediatric neurologist at Kaiser Permanente Oakland. Dr. Hayward spoke with the family and Winkfield's attorney, Christopher Dolan, via a conference call to confirm the findings were consistent with irreversible brain injury and brain death.

Dr. Hayward encouraged the family to meet with the PICU team to decide on a day and time to let McMath pass on.

- Nakagawa Decl., ¶16(M);
- PICU Progress Notes on 12/17/13, CHO Chart, Bates Nos. 161-163, Ex. C to Nakagawa Decl.; and
- Dr. Jean Hayward's progress note dated 12/17/13, Kaiser Permanente Oakland Chart, p. 5, Ex. H to Nakagawa Decl.

20. Undisputed.

21. On or about December 17, 2013, McMath's family and their attorney met with the local news media and provided interviews.

- Social Worker Note, CHO Chart, Bates Nos. 175-176, Ex. C to Nakagawa Decl.;

21. Undisputed.

1 and
 2 • News articles published on 12/17/13
 and 12/18/13, ¶ 9 and Ex. E to Still Decl.

3 **D. Winkfield Filed Legal Proceedings to Contest McMath's Removal from**
 4 **Artificial Support; Winkfield Alleged McMath Was Not Dead Because**
Her Heart Was Still Beating And She Reacted to Touch

5 22. On December 20, 2013, Winkfield
 6 filed a Petition for Temporary Restraining
 7 Order/Order Authorizing Medical
 8 Treatment and Authorizing Petition to
 9 Give Consent to Medical Treatment and
 10 Order to Show Cause Why Permanent
 11 Injunction Should Not be Granted as to
 12 the Same, pursuant to Probate Code
 sections 3200 et seq., and 4600 et seq.,
Winkfield v. Childrens Hospital Oakland,
et al, Alameda County Superior Court,
 Case No. RP13-707598.
 • Petition filed 12/20/13, Ex.1 to Request
 for Judicial Notice.

22. Undisputed.

13 23. On December 20, 2013, Winkfield
 14 filed a Declaration in support of her
 15 probate petition challenging McMath's
 16 withdrawal from mechanical support,
 17 wherein she expressed her belief that
 McMath was not dead because her
 heart was beating and she reacted to
 touch.
 • Declaration of Latasha Winkfield, ¶ 9,
 Ex. 2 to Request for Judicial Notice.

23. Undisputed.

18 **E. The Brain Death Evaluation Performed on December 23, 2013, by the**
 19 **Court- Appointed Independent Pediatric Neurologist,**
Paul Fisher, M.D., Confirmed McMath's Death

20 24. On December 23, 2013, Judge
 21 Evelio Grillo appointed Paul Fisher, M.D.,
 22 as the court's independent physician to
 23 conduct a brain death evaluation to
 24 determine whether McMath was brain-
 dead within the meaning of California
 law.
 • Grillo Order filed 12/23/13, Ex. 3 to
 Request for Judicial Notice.

24. Undisputed.

25 25. Dr. Fisher was qualified to make a
 26 determination of whether there was
 27 cessation of all functions of the entire
 brain, including the brain stem of
 McMath on December 23, 2013. Dr.

25. Undisputed.

1 2 3 4 5 6 7	<p>Fisher had performed approximately 100 brain death evaluations prior to seeing McMath.</p> <ul style="list-style-type: none"> • McMath's Supplemental Response to Dr. Rosen's Request for Admission No. 28, Exhibits A and B to Still Decl.; • Dr. Paul Fisher's Curriculum Vitae, Ex. 4 to Request for Judicial Notice; and • Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 11:4-9 and 29:23-25, Ex. L to Nakagawa Decl. 	
8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>26. In the afternoon on December 23, 2013, Dr. Fisher performed a brain death evaluation pursuant to the accepted medical standards set forth in the <u>Guidelines</u>. Dr. Fisher's found that McMath fulfilled each of the neurologic examination criteria for brain death. All of McMath's cerebral and brainstem reflexes were absent. She had no brainstem and no cerebral function. During the apnea testing, there was no respiratory effort when taken off the ventilator for nine minutes.</p> <ul style="list-style-type: none"> • Nakakawa Decl., ¶16(N); • Schneider Decl., ¶¶13-14, 17; • Dr. Fisher's 12/23/13 Brain Death Evaluation notes and Check List filed 12/26/13, Ex. 5 to Request for Judicial Notice, and Ex. I to Nakagawa Decl.; • Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at pp. 8-31; and 49:10-14, Ex. L to Nakagawa Decl.; • Amended Order, filed 1/2/14, 6:22-7:1, Ex. 6 to Request for Judicial Notice; and • Stipulation by Winkfield's attorney Chris Dolan, Reporter's Transcript of Proceedings on 12/24/13, at 36:22 to 37:1, and 38:3-12, Ex. L to Nakagawa Decl. 	<p>26. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does <i>not</i>, for the single reason that the first of the "three cardinal findings in brain death" –coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.)</p>
26 27	<p>27. Present during Dr. Fisher's evaluation, were Winkfield's attorney, Chris Dolan, and McMath's grandmother, plaintiff Sandra Chatman.</p>	<p>27. Undisputed.</p>

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• Reporter's Transcript of Proceedings on 12/14/13, at 16:1-8, Ex. L to Nakagawa Decl.

28. Dr. Fisher's found that McMath met the neurologic examination criteria for brain death. He determined that McMath's cerebral and brainstem reflexes were absent. She had no brainstem or cerebral function. During apnea testing, there was no respiratory effort when taken off the ventilator for nine minutes.

- Nakagawa Decl., ¶ 16(N);
- Schneider Decl., ¶¶ 13-14, 17;
- Dr. Fisher's 12/23/13 Brain Death Evaluation notes and Check List, Ex. 5 to Request for Judicial Notice, and Ex. I to Nakagawa Decl.; and
- Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at pp.16-27; 39:8 to 40:1; 49:1-9, Ex. L to Nakagawa Decl.

28. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does not, for the single reason that the first of the "three cardinal findings in brain death" –coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.)

1 29. Dr. Fisher's brain death evaluation
2 exceeded the minimum requirements to
3 determine whether a child has suffered
4 brain death. In addition to the required
5 clinical examination and apnea testing,
6 Dr. Fisher ordered a repeat EEG and a
7 radionuclide cerebral blood flow study,
8 both of which are recognized by the
9 Guidelines as appropriate ancillary
10 studies.

- 11 • Nakagawa Decl., ¶ 16(O);
- 12 • Schneider Decl., ¶¶ 13-14, 17(d);
- 13 • Dr. Fisher's letter and Brain Death
14 Evaluation notes and Check List, Ex. 5 to
15 Request for Judicial Notice, and Ex. I to
16 Nakagawa Decl.;
- 17 • Dr. Paul Fisher's Testimony, Reporter's
18 Transcript of Proceedings on 12/24/13, at
19 27:3-22, 40:9-12, 41:3-21, 42:3-25 and
20 43:1-4, Ex. L to Nakagawa Decl.; and
- 21 • Guidelines, p. e728, Ex. B to Nakagawa
22 Decl.

29. Disputed to the extent it implies
Jahi McMath presently fulfills the
Guidelines), as there is no question
that Jahi presently does *not*, for the
single reason that the first of the
"three cardinal findings in brain
death" –coma, absence of brainstem
reflexes, and apnea—is not fulfilled.
Rather, she is intermittently responsive,
placing her in the category of
"minimally conscious state." (See
Shewmon Decl., paras. 6, 8-56.) Also,
tests on Jahi performed over the past
several years also show that Jahi's
brain had (and presumably still has) a
surprising amount of preserved
structure for a brain that was
supposedly totally destroyed many
months previously. Dr. Shewmon
emphatically disagrees with the
defense physicians' claim that the
tests performed since December 2013
are not accepted under the
Guidelines. The tests were not done in
order to "determin[e] brain death" or
to "substitute for the accepted
medical standards," but to evaluate
the structure and electrophysiological
functioning of Jahi's brain many
months after the uncontroverted
diagnosis of brain death according to
the Guidelines. The MRI scan on
September 26, 2014 revealed a
surprising extent of relatively
preserved brain tissue (albeit with
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	all pathways. (Shewmon Decl., at paras. 29-35.)
<p>30. Winkfield's attorney, Christopher Dolan, requested McMath undergo the radionuclide cerebral blood flow study. Dr. Fisher agreed it would be wise to perform the cerebral blood flow study on McMath because it is "beyond definitive" as a diagnostic tool of brain death and the test can help a family understand a brain death diagnosis.</p> <ul style="list-style-type: none">• Nakagawa Decl., ¶16(O);• Schneider Decl., ¶14;• Dr. Fisher's letter and Brain Death Evaluation notes and Check List, Ex. 5 to Request for Judicial Notice, and Ex. I to Nakagawa Decl.; and• Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 27:3-22, 41:3-12, and 42:12 to 43:4, Ex. L to Nakagawa Decl.	30. Undisputed.

1 31. The radionuclide cerebral blood
2 flow study performed on December 23,
3 2013, confirmed the clinical diagnosis of
4 brain death. Dr. Fisher was present
5 during the study. There was 40 minutes
6 of imaging time which exceeds the
7 standard of care. The images
8 demonstrate a complete absence of
9 any blood flow to the brain. There is no
10 intracerebral activity, only some activity
11 in the scalp and face. There cerebral
12 blood flow study is diagnostic of
13 McMath's brain death in that it
14 conclusively demonstrates there is no
15 blood flow going in McMath's brain. Dr.
16 Fisher noted that McMath's CBF had a
17 "white-out in the part of the head where
18 the brain is. Normally it would be dark
19 black. In [McMath's] case it's
20 completely white."

- 21 • Nakagawa Decl., ¶ 16(O)(1) ;
- 22 • Schneider Decl., ¶ 14;
- 23 • Brain Vascular Flow A and Brain Scan
24 SPECT Imaging Reports, CHO Chart,
25 Bates No. 17369, Ex. C to Nakagawa
26 Decl.; and
- 27 • Dr. Paul Fisher's Testimony, Reporter's
28 Transcript of Proceedings on 12/24/13 at
29 24:5-9, and 27:15 to 28:14, Ex. L to
30 Nakagawa Decl.

31. Disputed to the extent it implies
Jahi McMath presently fulfills the
Guidelines), as there is no question
that Jahi presently does *not*, for the
single reason that the first of the
"three cardinal findings in brain
death" –coma, absence of brainstem
reflexes, and apnea–is not fulfilled.
Rather, she is intermittently responsive,
placing her in the category of
"minimally conscious state." (See
Shewmon Decl., paras. 6, 8-56.) Also,
tests on Jahi performed over the past
several years also show that Jahi's
brain had (and presumably still has) a
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structure for a brain that was
supposedly totally destroyed many
months previously. Dr. Shewmon
emphatically disagrees with the
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tests performed since December 2013
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the structure and electrophysiological
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all pathways. (Shewmon Declo., at paras. 29-35.)

1 32. In addition, the EEG performed on
2 December 23, 2013, fulfills the criteria for
3 electrocerebral inactivity. Dr. Fisher was
4 present during the test. He confirmed
5 there was no brain activity. There was no
6 change in the recording with clapping,
7 pinching the left foot, pinching the left
8 arm or shining a light in each eye. Dr.
9 Fisher also compared the EEG with a
10 prior EEG, and found there was no
11 change.

- 12 • Nakagawa Decl., ¶ 16(O)(2);
- 13 • Schneider Decl., ¶ 14;
- 14 • EEG results on 12/23/13, CHO Chart,
15 Bates Nos. 41-42, Ex. C to Nakagawa
16 Decl.; and
- 17 • Dr. Paul Fisher's Testimony, Reporter's
18 Transcript of Proceedings on 12/24/13, at
19 28:17 to 29:12, and 30:10 to 31:13, Ex. L to
20 Nakagawa Decl.

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all pathways. (Shewmon Declo., at paras. 29-35.)

1 33. Dr. Fisher prepared a two-page
2 report of his examination and completed
3 the "Check List for Documentation of
4 Brain Death," found at Appendix 1 of the
5 Guidelines. Dr. Fisher concluded that
6 McMath has a known, irreversible brain
7 injury and complete absence of
8 cerebral function and brainstem
9 function. He determined that McMath
10 fulfills the accepted medical standards
11 for determining brain death by
12 professional societies and State of
13 California.

- 14 • Nakagawa Decl., ¶ 16(P);
- 15 • Dr. Fisher's 12/23/13 Brain Death
16 Evaluation notes and Check List, Ex. 5 to
17 Request for Judicial Notice, and Ex. I to
18 Nakagawa Decl.; and
- 19 • Dr. Paul Fisher's Testimony, Reporter's
20 Transcript of Proceedings on 12/24/13, at
21 33:14 to 34:9 and 49:3-19, Ex. L to
22 Nakagawa Decl.

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all pathways. (Shewmon Declo., at paras. 29-35.)

1 34. To a reasonable degree of medical
2 certainty, McMath satisfied the medical
3 diagnostic criteria to be determined
4 brain dead.

5 • Nakagawa Decl., ¶¶ 16(D), 16(H),
6 16(O), 16(P), 18, and 20;

7 • Schneider Decl., ¶¶ 7, 8, 14 and 19;
8 and

9 • Dr. Paul Fisher's Testimony, Reporter's
10 Transcript of Proceedings on 12/24/13, at
11 33:24-25, 34:1-9, and 49:3-19, Ex. L to
12 Nakagawa Decl.

13 34. Disputed to the extent it implies
14 Jahi McMath presently fulfills the
15 Guidelines), as there is no question
16 that Jahi presently does *not*, for the
17 single reason that the first of the
18 "three cardinal findings in brain
19 death" –coma, absence of brainstem
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22 placing her in the category of
23 "minimally conscious state." (See
24 Shewmon Decl., paras. 6, 8-56.) Also,
25 tests on Jahi performed over the past
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1 all pathways. (Shewmon Declo., at
2 paras. 29-35.)

3 **F. Plaintiffs Concede that McMath Fulfilled the Accepted Medical**
4 **Criteria for Brain Death and the Diagnostic Criteria Were "Correctly**
5 **and Rigorously Applied"**

6 35. At the hearing on December 24,
7 2013, Winkfield stipulated that Dr. Fisher
8 conducted his brain death examination
9 pursuant to the accepted medical
10 standards, i.e, the Guidelines. Winkfield's
11 attorney, Christopher Dolan, stated:
12 "Based on my review of the guidelines,
13 my observation of the doctor, his
14 examination, his record findings and
15 the worksheet, we will stipulated that
16 [Dr. Fisher] performed his examination
17 within the generally accepted
18 medical guidelines as that is so stated
19 within [Health and Safety Code
20 sections 7180 and 7181.]"
21 • Amended Order, filed 1/2/14, 6:22-7:1,
22 Ex. 6 to Request for Judicial Notice; and
23 • Stipulation by Winkfield's attorney Chris
24 Dolan, Reporter's Transcript of
25 Proceedings on 12/24/13, at 36:22-25,
26 37:1 and 38:3-12, Ex. L to Nakagawa
27 Decl.

35. Undisputed.

17 36. Plaintiffs' expert, D. Alan Shewmon,
18 M.D., admits that McMath fulfills the
19 accepted medical criteria for brain
20 death and that the accepted criteria
21 were "correctly and rigorously" applied.
22 Dr. Shewmon stated under penalty of
23 perjury in his declaration dated
24 December 10, 2014:
25 "There is "no doubt that, at the time of
26 [McMath's] original diagnosis of brain
27 death in December, 2013, [McMath]
28 fulfilled the adult and pediatric
diagnostic criteria [], which were
correctly and rigorously applied by the
several doctors who independently
made that diagnosis the, and
reinforced by ancillary tests: four EEGs
that were all isoelectric (flat), a
radionuclide scan and a SPECT scan,
both of which showed no detectable
intracranial blood flow."

36. Undisputed.

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• "Updated Declaration of D. Alan Shewmon, M.D., Concerning Jahi McMath," at p. 3, Ex. F to Still Decl.

G. Judge Grillo Ruled There Was Clear and Convincing Evidence That McMath Was Brain Dead and Was Legally Deceased as Defined by California Uniform Determination of Death Act.

37. An evidentiary hearing was conducted in the Alameda County Superior Court on December 24, 2013. Judge Grillo received testimony from Dr. Robin Shanahan and Dr. Paul Fisher, and entered into evidence Dr. Shanahan's and Dr. Fisher's examination notes as well as the applicable standards for determining brain death, i.e., the Guidelines.

- Amended Order, filed 1/2/14, 6:4-18, Ex. 6 to Request for Judicial Notice; and
- Reporter's Transcript of Proceedings on 12/24/13, Ex. L to Nakagawa Decl.

37. Undisputed.

1 38. Dr. Fisher and Dr. Shanahan testified
2 that McMath had no evidence of any
3 cerebral or brain stem function under the
4 accepted medical standards, i.e., the
5 Guidelines.

6 • Dr. Robin Shanahan's Testimony,
7 Reporter's Transcript of Proceedings on
8 12/24/13, at 67:7 to 68:2, Ex. L to
9 Nakagawa Decl.; and

10 • Dr. Paul Fisher's Testimony, Reporter's
11 Transcript of Proceedings on 12/24/13, at
12 49:1-14, Ex. L to Nakagawa Decl.
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1		all pathways. (Shewmon Decl., at paras. 29-35.)
2 3 4 5 6 7 8 9 10 11 12 13	<p>39. Addressing Winkfield's concern that McMath's body movements were evidence that McMath was alive, Dr. Shanahan testified that on December 12, 2013, she was asked to evaluate whether McMath's body movements had a cortical origin coming from the brain. During the exam, Dr. Shanahan observed some small muscle jerks, and when she pinched the toe, there was triple flexion withdrawal movements (the leg flexed at the knee and moved upward). Dr. Shanahan testified that the movements were all compatible with spinal reflex movements.</p> <ul style="list-style-type: none"> • Dr. Robin Shanahan's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 68:3-15, 72:8-24, 82:6-21 and 86:12-25, Ex. L to Nakagawa Decl. 	<p>39. Disputed to the extent this implies movements and responses by Jahi are not indicative that she is not brain dead. Video evidence taken since spring 2014 indicates, beyond any reasonable doubt, that the slower, more deliberate-looking non-myoclonic movements are in fact not independent of the commands, ruling out some hitherto unknown type of spinal automatism. There is clearly a causal relationship, indicating that <u>at the times the videos were made</u>, Jahi was in a responsive state, capable of understanding a verbal command and barely capable of executing a simple motor response. (See, e.g., Shewmon Decl., paras. 8-25.)</p>
14 15 16 17 18 19 20 21 22 23	<p>40. Winkfield submitted no accepted medical evidence that McMath was not brain dead.</p> <ul style="list-style-type: none"> • Reporter's Transcript of Proceedings on 12/24/13, Ex. L to Nakagawa Decl.; and • Amended Order, filed 1/2/14, Ex. 6 to Request for Judicial Notice. 	<p>40. Disputed. The brain death pronouncement was not appropriate, as Jahi McMath was never truly dead, even though she fulfilled the accepted medical criteria for death in December 2013. She exhibited no brain function at the time, but the cessation of at least two functions—consciousness and hypothalamic regulation of menstruation and sexual development—has proved <i>not</i> to be <i>irreversible</i>. Hence she represents an example of a false positive (erroneous) diagnosis of brain death following the Guidelines. (Shewmon Decl., para. 54.)</p>
24 25 26 27 28	<p>41. On December 24, 2013, Judge Grillo issued his decision denying Winkfield's petition for medical treatment on the grounds that there was clear and convincing evidence that McMath had suffered clinical brain death and was legally deceased as defined by California's Uniform Determination of</p>	<p>41. Undisputed.</p>

1	Death Act. On January 2, 2014, Judge	
2	Grillo issued a detailed Amended Order	
3	denying Winkfield's Petition for Medical	
4	Treatment and finding "[McMath] had	
5	suffered brain death and was deceased	
6	as defined under Health and Safety	
	Code sections 7180 and 7181" by "clear	
	and convincing evidence."	
	• Amended Order, filed 1/2/14, at 16:20-	
	22, Ex. 6 to Request for Judicial Notice.	
7	42. Judge Grillo's "Final Judgment	42. Undisputed.
8	Denying Petition for Medical Treatment"	
9	based on the January 2, 2014 Final	
	Order, was filed on January 17, 2014.	
	• Final Judgment, filed 1/17/14, Ex. 7 to	
	Request for Judicial Notice.	
10	H. A Death Certificate Was Issued on January 3, 2014	
11	43. The Alameda County Coroner's	43. Undisputed.
12	office issued a death certificate for	
13	McMath on January 3, 2014.	
	• Death Certificate, Ex. 18 to Request for	
	Judicial Notice	
14	44. Winkfield has not exhausted her	44. Undisputed.
15	administrative remedies or otherwise	
16	invalidated McMath's death certificate.	
	• First Amended Complaint, 8:9-19.	
17	I. McMath's Physicians at Saint Peter's University Hospital Corroborate Her Death	
18	45. On January 6, 2014, McMath was	45. Undisputed.
19	admitted to Saint Peter's University	
20	Hospital ("Saint Peter's") in New	
21	Brunswick, New Jersey, for placement of	
22	a tracheostomy for mechanical	
23	ventilation and percutaneous	
24	endoscopic gastrostomy tube	
25	placement for nutrition following brain	
26	death. These procedures were	
27	performed on January 8, 2014. Since	
	there was no rehabilitative facility that	
	was willing to accept McMath, due in	
	part to the diagnosis of brain death,	
	McMath was hospitalized in the PICU at	
	Saint Peter's until August 25, 2014, when	
	she was discharged to Winkfield's	
	custody and control.	
	• Nakagawa Decl., ¶ 16(Q);	

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- Schneider Decl., ¶15(a);
- Saint Peter's Chart, pp. 5, 483-484, Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl.; and
- Winkfield's Response to Dr. Rosen's Request for Admission Nos. 1-4, at Still Decl., ¶ 3 and Ex. B.

46. The Saint Peter's medical chart reflects that on admission on January 6, 2014, McMath was examined at length by the Chief of Pediatric Critical Care, Siva P. Jonna, M.D. Dr. Jonna reported his clinical examination was consistent with brain death. McMath was non-responsive, had no cough or gag reflex, no pupillary responses, and no spontaneous breathing.

- Nakagawa Decl., ¶16(Q)(1);
- Schneider Decl., ¶ 15(a); and
- Saint Peter's Chart, pp. 483-484, Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl.; and
- Winkfield's Response to Dr. Rosen's Requests for Admission No. 6, at Still Decl., ¶ 3 and Ex. B.

46. Undisputed.

47. On January 9, 2014, Dr. Jonna noted in the progress notes that he spoke with the mother, grandmother and father about McMath's brain death and loss of brain function. On January 10, 2014, Dr. Jonna reported that he explained to J. McMath's family that there was "no hope of brain recovery."

- Schneider Decl., ¶15(a); and
- Saint Peter's Chart, p. 497-498; and 500-501, Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl.

47. Undisputed.

1 48. No formal brain death evaluation
2 per the Guidelines was ever performed
3 on McMath during her hospitalization at
4 Saint Peter's. However, the daily
5 neurological assessments performed by
6 the PICU team were at all times
7 consistent with lack of brain and
8 brainstem function. The PICU team's
9 diagnosis was that McMath was brain
10 dead. The records document that
11 McMath was at all times in a coma, had
12 no brain stem reflexes, had no
13 meaningful movement, lacked
14 spontaneous respiration, and was fully
15 dependent on artificial support.

- 16 • Nakagawa Decl., ¶ 16(Q)(1);
- 17 • Schneider Decl., ¶ 15(a);
- 18 • Winkfield's Response to Dr. Rosen's
19 Requests for Admission Nos. 5 and 9, at
20 Still Decl., ¶ 3 and Ex. B; and
- 21 • Saint Peter's Chart, p. 5, 483-484, 493-
22 498, 500-501, 527, 532, 555-558, 560, 585,
23 608, 616-617, 712, 735, 754, 766, 778-781,
24 800, 821, 823, at Ex. C to Schneider Decl.,
25 and Ex. J to Nakagawa Decl.

48. Disputed to the extent it implies
Jahi McMath presently fulfills the
Guidelines), as there is no question
that Jahi presently does *not*, for the
single reason that the first of the
"three cardinal findings in brain
death" –coma, absence of brainstem
reflexes, and apnea—is not fulfilled.
Rather, she is intermittently responsive,
placing her in the category of
"minimally conscious state." (See
Shewmon Decl., paras. 6, 8-56.) Also,
tests on Jahi performed over the past
several years also show that Jahi's
brain had (and presumably still has) a
surprising amount of preserved
structure for a brain that was
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months previously. Dr. Shewmon
emphatically disagrees with the
defense physicians' claim that the
tests performed since December 2013
are not accepted under the
Guidelines. The tests were not done in
order to "determin[e] brain death" or
to "substitute for the accepted
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the structure and electrophysiological
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months after the uncontroverted
diagnosis of brain death according to
the Guidelines. The MRI scan on
September 26, 2014 revealed a
surprising extent of relatively
preserved brain tissue (albeit with
abnormal signal properties). This
explains that in December 2013 when
Jahi was diagnosed brain dead, the
lack of brain function was due more
to low rather than absent blood flow -
low enough to abolish neuronal
function but not low enough to cause
necrosis (tissue destruction) in much

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	all pathways. (Shewmon Decl., at paras. 29-35.)
49. Plaintiffs' expert, D. Alan Shewmon, M.D., admits that McMath's medical records from Saint Peter's document the absence of brainstem reflexes. <ul style="list-style-type: none">• "Updated Declaration of D. Alan Shewmon, M.D., Concerning Jahi McMath," signed under penalty of perjury on 12/10/14, at Page 7, Ex. F to Still Decl.	49. Undisputed.
50. On August 25, 2014, McMath was discharged 'home' to Ms. Winkfield's apartment in New Jersey where McMath receives continuous 24-hour a day home nursing care. The discharge diagnosis from Saint Peter's was brain death due to cardiopulmonary arrest and hypoxic ischemic encephalopathy. McMath's condition on discharge was that she was brain dead. <ul style="list-style-type: none">• Nakagawa Decl., ¶ 16(Q)(2));• Schneider Decl., ¶ 15(a);• Winkfield's Response to Dr. Rosen's Requests for Admission Nos. 3 and 14, at Still Decl., ¶ 3 and Ex. B; and• Saint Peter's Chart, p. 5, at Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl.	50. Undisputed.

1 51. Although McMath has been in
2 Winkfield's custody since August 25,
3 2014, McMath has not been clinically
4 evaluated by a physician in accord with
5 the accepted medical standards in the
6 Guidelines since December 23, 2013,
7 when McMath was examined by Paul
8 Fisher, M.D., at CHO.

- 9 • Nakagawa Decl., ¶¶ 16(S), 19, 20;
- 10 • Schneider Decl. ¶¶ 12, 16, 17 and 19;
- 11 • Winkfield's Response to Dr. Rosen's
12 Request for Admission Nos. 15 and 18, at
13 Still Decl., ¶ 3 and Ex. B;
- 14 • Winkfield's Response to Dr. Rosen's
15 Requests for Admission No. 4, at Still
16 Decl., ¶ 3 and Ex. B; and
- 17 • McMath's Supplemental Response to
18 Dr. Rosen's Request for Admission No. 32,
19 at Still Decl., ¶ 2 and Ex. A.

51. Disputed to the extent it implies
Jahi McMath presently fulfills the
Guidelines), as there is no question
that Jahi presently does *not*, for the
single reason that the first of the
"three cardinal findings in brain
death" –coma, absence of brainstem
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Rather, she is intermittently responsive,
placing her in the category of
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all pathways. (Shewmon Decl., at paras. 29-35.)

J. Judge Grillo's Finding of Brain Death Has Not Been Reversed in a Court of Law

1. Winkfield did not appeal Judge Grillo's Final Order and Judgment

52. Winkfield did not appeal Judge Grillo's Final Order and Judgment filed January 17, 2014.
• Still Decl., ¶ 9.

52. Undisputed.

2. Petition for Writ of Error Coram Nobis

53. On September 30, 2014, Winkfield initiated proceedings in the Alameda Superior Court, individually and as Guardian ad Litem for McMath, by filing a "Memorandum Regarding Court's Jurisdiction To Hear Petition For Determination That McMath Is Not Brain Dead"
• Memorandum Regarding Court's Jurisdiction to Hear Petition for Determination that Jahi McMath is Not Brain Dead, filed 9/30/14, Ex. 8 to Request for Judicial Notice.

53. Undisputed.

54. On October 3, 2014, Winkfield filed a Petition for Writ of Error Coram Nobis and Memorandum Regarding Court's Jurisdiction To Hear Petition for Determination that Jahi McMath is Not Brain Dead.
• Order Following Case Management Conference, Ex. 9 to Request for Judicial Notice; and
• Writ of Error Corum Nobis and Memorandum Regarding Court's Jurisdiction To Hear Petition for Determination that Jahi McMath is Not Brain Dead, Ex.10 to Request for Judicial Notice.

54. Undisputed.

55. In support of her Petition, Winkfield argued that she was in possession of video recordings of McMath moving in response Winkfield's commands, a brain MRI study, an EEG study, and declarations from individuals who would

55. Undisputed.

1	testify McMath has brain function.	
2	<ul style="list-style-type: none"> • Writ of Error Corum Nobis and Memorandum Regarding Court's Jurisdiction To Hear Petition for Determination that Jahi McMath is Not Brain Dead, 7:5-7; 9:13-21, Ex.10 to Request for Judicial Notice. 	
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5	56. Judge Grillo appointed Dr. Paul Fisher to again serve as the independent medical expert. On October 6, 2014, Dr. Fisher issued a report to Judge Grillo reporting his conclusion that:	56. Undisputed.
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8	“[N]one of the current materials presented in the declarations refute my [12/23/13] examination and consultation finding [], or those of several prior attending physicians who completed the same exams, that Jahi McMath met all criteria for brain death. None of the declarations provide evidence that McMath is not brain dead.	
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13	<ul style="list-style-type: none"> • Order, filed 10/6/14, Ex. 11 to Request for Judicial Notice; and • Fisher Report, 10/6/14, Exhibit 11 and 12 to Request for Judicial Notice 	
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16	57. After acknowledging receipt of Dr. Fisher's report, Winkfield withdrew her Petition for Writ of Error Coram Nobis.	57. Undisputed.
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18	<ul style="list-style-type: none"> • Order, filed 10/8/14, Ex. 13 to Request for Judicial Notice. 	
19	58. On October 8, 2014, Christopher Dolan issued a press release advising that he has asked Judge Grillo to postpone the hearing regarding McMath's status as brain dead so that the “team of international brain death experts ... can have time to read and react to a new statement issued by Dr. Paul Fisher.” Mr. Dolan advised the media that he objected to Dr. Fisher's appointment on the grounds that Dr. Fisher had a conflict of interest and a legal bias. Mr. Dolan advised that the hearing would be rescheduled in the near future.	58. Undisputed.
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26	<ul style="list-style-type: none"> • Press Release, Ex. G to Still Decl. 	
27	59. Winkfield did not reschedule the	59. Undisputed.
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1 hearing before Judge Grillo. Nor did she
2 seek appellate relief or otherwise
3 challenge Judge Grillo's orders. Instead,
4 six months later, on March 3, 2015, she
5 filed the instant medical malpractice
6 action, alleging a personal injury cause
7 of action on behalf of McMath on the
8 grounds that McMath is not brain dead.

- Declaration of Jennifer Still, Esq., ¶ 11;
and
- Plaintiffs' Complaint.

3. 2015 Federal Action

9 60. On December 23, 2015, Winkfield
10 filed a complaint for declaratory and
11 injunctive relief in federal court alleging
12 that McMath is alive, *McMath v. State of
13 California et al.*, U.S. District Court,
14 Northern District of California, Case No.
15 3:15-cv-06042.

- Complaint for Declaratory and
Injunctive Relief, Ex. 14 to Request for
Judicial Notice.

60. Undisputed.

16 61. On December 12, 2016, the federal
17 district court issued an order staying the
18 action pending the outcome of
19 plaintiffs' efforts to seek a determinative
20 ruling in the instant state court action.

- Order, Ex. 15 to Request for Judicial
Notice.

61. Undisputed.

21 **ISSUE 2: No Mistakes Were Made in the Diagnosis of McMath's Brain Death in
22 December 2013, and the Diagnosis of McMath's Brain Death Was
23 Made in Accord with the Accepted Medical Standards**

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62. The medical evidence of McMath's brain death exceeds the minimum criteria to determine brain death based on the Guidelines and what is required by law and the medical profession.

- Nakagawa Decl., ¶¶ 16(O), 18 and 19(A); and
- Schneider Decl. ¶ 13.

62. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does *not*, for the single reason that the first of the "three cardinal findings in brain death" – coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.) Also, tests on Jahi performed over the past several years also show that Jahi's brain had (and presumably still has) a surprising amount of preserved structure for a brain that was supposedly totally destroyed many months previously. Dr. Shewmon emphatically disagrees with the defense physicians' claim that the tests performed since December 2013 are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many months after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow - low enough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain. This range of cerebral blood flow is called the "ischemic penumbra." As

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63. There were no diagnostic errors or mistakes made in the determination of McMath's brain death in December 2013. McMath's brain death diagnosis was made in accord with the accepted medical standards.

- Nakagawa Decl., ¶¶ 16(D), 16(H), 16(O), 16(P), and 17; and
- Schneider Decl. ¶¶ 13, 14 and 17.

63. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does *not*, for the single reason that the first of the "three cardinal findings in brain death" – coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.) Also, tests on Jahi performed over the past several years also show that Jahi's brain had (and presumably still has) a surprising amount of preserved structure for a brain that was supposedly totally destroyed many months previously. Dr. Shewmon emphatically disagrees with the defense physicians' claim that the tests performed since December 2013 are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many months after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow - low enough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain. This range of cerebral blood flow is called the "ischemic penumbra." As

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1 64. In December 2013, McMath
2 fulfilled the accepted pediatric
3 diagnostic criteria for brain death. Dr.
4 Shanahan, Dr. Heidersbach and Dr.
5 Fisher appropriately applied the
6 accepted medical standards during
7 their brain death evaluations
8 performed at CHO in December 2013.

- 9 • Nakagawa Decl., ¶¶ 16(D), 16(H),
10 16(O), 16(P), and 17; and
- 11 • Schneider Decl. ¶¶ 13, 14 and 17.

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1 65. McMath was appropriately
2 pronounced deceased under
California law in December 2013.

- 3 • Nakagawa Decl., ¶¶ 16(D), 16(H),
16(O), 16(P), and 17; and
4 • Schneider Decl. ¶¶ 13, 14 and 17.
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intracranial blood flow decreases from normal to zero during the pathophysiological vicious cycle leading to brain death, it necessarily passes through a stage of global ischemic penumbra. (CITE TO SHEWMON 32) If the brain's nonfunction is due to ischemic penumbra, all elements of the standard diagnostic Guidelines will be fulfilled, but there is still the potential for recovery of function because the brain tissue is still viable; therefore, the critical element of irreversibility in the statutory definition of death is not fulfilled. Jahi's MRI scan shows severe damage especially to the brainstem, with substantial parts of it missing (after the body's removal of necrotic tissue over the prior 9 months), most likely due to brainstem herniation around the time of diagnosis. Thus, it is not at all surprising that Jahi should still demonstrate absence of brainstem reflexes and apnea, and that her motor abilities are so severely limited. By contrast, consciousness, language processing, and initiation of voluntary movements are mediated by higher brain structures, which the MRI shows to be partially preserved. The brainstem is not completely destroyed, and it is totally conceivable that some descending motor pathways have survived. The somatosensory evoked response test, in and of itself, certainly does not establish a complete "loss of neurological brain pathway function above this [cervical] level," [Schneider declaration, p. 14, line 1] if the phrase "brain pathway" is intended to mean all pathways. (Shewmon Declo., at paras. 29-35.)

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66. Plaintiffs' expert, D. Alan Shewmon, M.D., admits that in December 2013, McMath fulfilled the accepted medical criteria for brain death and that the accepted criteria were correctly applied.

- "Updated Declaration of D. Alan Shewmon, M.D., Concerning Jahi McMath," at p. 3, Ex. F to Still Decl.

66. Undisputed.

ISSUE 3: The Accepted Medical Standards for Pediatric Brain Death Have Not Been Applied to McMath Since She Was Declared Deceased in December 2013

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67. The only accepted neurologic criteria for assessing McMath's brain function is a brain death examination performed in accord with the accepted medical standards in the Guidelines.

- Nakagawa Decl., ¶¶6-12, and 19;
- Schneider Decl., ¶¶5-8, 16, and 17; and
- Plaintiffs' Supplemental Response to Dr. Rosen's Request for Admission No. 32, at Still Decl., ¶2 and Ex. A.

67. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does *not*, for the single reason that the first of the "three cardinal findings in brain death" – coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.) Also, tests on Jahi performed over the past several years also show that Jahi's brain had (and presumably still has) a surprising amount of preserved structure for a brain that was supposedly totally destroyed many months previously. Dr. Shewmon emphatically disagrees with the defense physicians' claim that the tests performed since December 2013 are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many months after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow - low enough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain. This range of cerebral blood flow is called the "ischemic penumbra." As

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68. McMath has not been clinically evaluated by a physician in accord with the accepted medical standards for determining pediatric brain death set forth in the Guidelines since she was declared deceased in December 2013.

- Nakagawa Decl., ¶¶ 16(S) and 19;
- Schneider Decl., ¶¶ 15-19.; and
- Winkfield's Response to Dr. Rosen's Request for Admission, Nos. 15, 18, and 22, at Still Decl., ¶ 3 and Ex. B.

68. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does not, for the single reason that the first of the "three cardinal findings in brain death" – coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.) Also, tests on Jahi performed over the past several years also show that Jahi's brain had (and presumably still has) a surprising amount of preserved structure for a brain that was supposedly totally destroyed many months previously. Dr. Shewmon emphatically disagrees with the defense physicians' claim that the tests performed since December 2013 are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many months after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow - low enough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain. This range of cerebral blood flow is called the "ischemic penumbra." As

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1 69. No physician specializing in
2 pediatric neurology or pediatric
3 critical care medicine with expertise
4 in the accepted medical standards
5 for determining pediatric brain death
6 set forth in the Guidelines, who has
7 performed a neurologic examination
8 on McMath in accord with the
9 accepted medical standards, has
10 found that McMath does not fulfill the
11 accepted neurologic criteria for
12 brain death.

- 13 • Winkfield's Response to Dr. Rosen's
14 Request for Admission No. 18, at Still
15 Decl., ¶ 3 and Ex. B.

69. Disputed to the extent it implies
Jahi McMath presently fulfills the
Guidelines), as there is no question that
Jahi presently does *not*, for the single
reason that the first of the "three
cardinal findings in brain death" –
coma, absence of brainstem reflexes,
and apnea—is not fulfilled. Rather, she is
intermittently responsive, placing her in
the category of "minimally conscious
state." (See Shewmon Decl., paras. 6,
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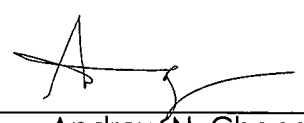
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DATED: June 29, 2017

AGNEW BRUSAVICH
ESNER, CHANG & BOYER

By 

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