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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JAHI MCMATH, et al., Plaintiffs, **v.** **STATE OF CALIFORNIA, et al.,** Defendants.	Case No. 15-CV-06042-HSG **REPLY IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY PLAINTIFFS' COMPLAINT** Date: May 12, 2016 Time: 2:00 p.m. Courtroom: 10, 19th Floor Judge: The Honorable Haywood S. Gilliam, Jr. Action Filed: December 23, 2015

INTRODUCTION

Despite acknowledging that the Alameda County Superior Court (Superior Court) declared Jahi McMath (JM) brain dead under Health and Safety Code section 7180 on December 26, 2013, plaintiffs request that this determination be revisited in light of subsequent events. Instead of following up on their October 3, 2014 petition for relief with the Superior Court, plaintiffs elected to wait a year and then seek relief in this federal forum. The *Rooker-Feldman* doctrine, however, deprives this court of subject-matter jurisdiction over the complaint. Moreover, plaintiffs' factually-inadequate complaint fails to: (1) overcome Defendants State of California, California

Department of Public Health, Tony Agurto, and Dr. Karen Smith's (collectively State Defendants) Eleventh Amendment immunity; and (2) state a claim upon which relief may be granted. Finally, to the extent State Defendants' motion to dismiss is not granted, this matter should be stayed pending resolution of the related state court proceedings.

ARGUMENT

I. PLAINTIFFS' MOTION TO STRIKE LACKS MERIT

In their opposition brief, plaintiffs contend that under Federal Rule of Civil Procedure 12(d) the court cannot consider the various documents attached to State Defendants' request for judicial notice on a "Rule 12 motion." (Pls.' Opp. 10:1.) Plaintiffs are mistaken. Federal Rule of Civil Procedure 12(d) only applies to "a motion [brought] under Rule 12(b)(6) or 12(c)." (Fed. R. Civ. P. 12(d).) Here, State Defendants' motion to dismiss is partially brought under Federal Rule of Civil Procedure 12(b)(1) and the challenged documents relate to State Defendants' jurisdictional challenge to the complaint (*i.e.*, the application of the *Rooker-Feldman* doctrine). It is well-settled that extrinsic evidence can be considered for a Rule 12(b)(1) motion. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Moreover, even on a Rule 12(b)(6) motion, an exception permits the consideration of judicially noticeable "matters of public record." *Lee v. City of Los Angeles*, 250 F.3d 668, 688-689 (9th Cir. 2001); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006). Therefore, plaintiffs' motion to strike lacks merit and should be denied.

II. THE COMPLAINT IS BARRED BY THE *ROOKER-FELDMAN* DOCTRINE

The *Rooker-Feldman* doctrine prohibits "lower federal courts from hearing de facto appeals from state-court judgments." *Bianchi v. Ryaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003). While *Rooker-Feldman* is a narrow doctrine, it squarely applies to this case. The root of plaintiffs' procedural predicament is that the Superior Court declared JM brain dead under Health and Safety Code section 7180 in *Winkfield v. Children's Hospital Oakland*, Case No RP13707598 (First Superior Court Proceeding) and, in this case, plaintiffs are requesting that this court rule JM is not brain dead under Health and Safety Code section 7180. (State Defendants' Request for Judicial Notice (State Defs.' RJN), Ex. D, 16:20-22; Compl., ¶¶ 235, 250, 264, 278, 291, 299,

303.) In making this contention plaintiffs are necessarily seeking to overturn the result of the First Superior Court Proceeding because, according to plaintiffs:

> Brain death is binary under [Health and Safety Code section] 7180. If there is absolutely no neurological activity, there is brain death. If there is any neurological activity, . . . a person is not brain dead.

(Pls.' Opp., 3:7-9.) Consequently, plaintiffs must claim that the Superior Court erred in December 2013 when it declared JM brain dead because otherwise she is still deceased under Health and Safety Code section 7180. This type of collateral attack on the First Superior Court Proceeding is precisely the type of situation that the *Rooker-Feldman* doctrine prohibits.

Plaintiffs' strategy of challenging everything, but the First Superior Court Proceeding is similarly unavailing. For example, plaintiffs profess various concerns about the "facial invalidity" of JM's death certificate. (Compl., ¶¶ 76-97.) Plaintiffs, however, fail to acknowledge that JM's death certificate is based upon and resulted from the First Superior Court Proceeding. While it is unusual for a Superior Court to make a determination of brain death, it is not unprecedented. *Dority v. Superior Court*, 145 Cal.App.3d 273 (1983). Moreover, the *Rooker-Feldman* doctrine applies in situations where "the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules . . . ." *Bianchi*, 334 F.3d at 898. Therefore, plaintiffs' claims concerning the alleged invalidity of JM's death certificate are "inextricably intertwined" with the judicial findings made in the First Superior Court Proceeding and barred by the *Rooker-Feldman* doctrine. *Doe v. Mann*, 415 F.3d 1038, 1042 (9th Cir. 2005).

Finally, plaintiffs reliance on *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) and *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003) are inapposite. These cases stand for the propositions that the *Rooker-Feldman* doctrine is: (1) different from claim or issue preclusion (*i.e.*, res judicata and collateral estoppel); and (2) inapplicable to situations where there is parallel litigation in state and federal court. *Exxon Mobil Corp.*, 544 U.S. at 292-293; *Noel*, 341 F.3d at 1163-1164. Here, State Defendants' motion to dismiss does not address the preclusive effect of the First Superior Court Proceeding. Moreover, State Defendants' *Rooker-Feldman* argument is not premised on *Winkfield v. Rosen*, Case No. RG15760730 (Second Superior Court Proceeding),

which is still pending, but on the First Superior Court Proceeding, which became final as of January 17, 2014. (State Defs.' RJN, Ex. F.) Therefore, as the *Rooker-Feldman* doctrine applies to plaintiffs' complaint, State Defendants' motion to dismiss must be granted.

III. PLAINTIFFS' ALLEGATIONS FAIL TO DEMONSTRATE A SUFFICIENT NEXUS BETWEEN STATE DEFENDANTS AND THE CHALLENGED ACTS UNDER THE ELEVENTH AMENDMENT TO THE U.S. CONSTITUTION

Plaintiffs' opposition brief, like the complaint, fails to make a single factual allegation about any action by Dr. Karen Smith that is relevant to this case. Plaintiffs' opposition brief merely states that Dr. Smith is the Director of the California Department of Public Health. (Pls.' Opp., 19:2.) Such a minimal pleading fails to overcome Dr. Smith's Eleventh Amendment immunity from suit in federal court because she must have "some connection with the enforcement of the [challenged] act." *Ex parte Young*, 209 U.S. 123, 157 (1908).

While plaintiffs' opposition brief is more specific as to Tony Agurto, his connection to plaintiffs' various claims remains unclear. Plaintiffs do not allege that Mr. Agurto was involved in: (1) declaring JM brain dead; or (2) the subsequent issuance of her death certificate. To overcome Mr. Agurto's Eleventh Amendment immunity, plaintiffs' allegations "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). As plaintiffs cannot demonstrate a sufficient nexus between State Defendants and the challenged acts, the Eleventh Amendment bars the complaint.

IV. THE COMPLAINT'S FIRST, SECOND, THIRD, FOURTH, FIFTH, AND SIXTH CAUSES OF ACTION FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Despite plaintiffs' protestations, their various causes of action brought under 42 U.S.C. § 1983, the Rehabilitation Act, the Americans with Disabilities Act (ADA), and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUPA) fail to state a claim upon which relief may be granted. Consequently, State Defendants' motion to dismiss must be granted.

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A. The First, Second, and Third Causes of Action Fail to State a Claim Under 42 U.S.C. § 1983

Plaintiffs agree that state entities, such as the State of California and the California Department of Public Health, are not "persons" under 42 U.S.C. § 1983. *Bennett v. California*, 406 F.2d 36, 39 (9th Cir. 1969). Therefore, plaintiffs' First, Second, and Third Causes of Action fail to state a claim against the State of California and California Department of Public Health.

With respect to Dr. Smith and Mr. Agurto, plaintiffs do not dispute that their claims must be plead with particularity. *Ivey v. Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Here, plaintiffs make no factual allegations as to Dr. Smith and only allege that Mr. Agurto, as the State Registrar and Assistant Deputy Director at the Center for Health Statistics and Informatics, is the record-keeper for various vital statistics in the State of California. While plaintiffs may dispute one of the documents on file with the California Department of Public Health, this does not mean that Mr. Agurto is subject to suit. Therefore, plaintiffs' First, Second, and Third Causes of Action fail to state a claim against Dr. Smith and Mr. Agurto.

B. Plaintiffs' Fourth and Fifth Causes of Action for Claims Under the Rehabilitation Act and ADA Are Inadequately Pled

In their opposition brief, plaintiffs concede that their claims under the Rehabilitation Act and ADA are inadequately plead because they urge the court to make various "inferences." (Pls.' Opp., 21:8-20.) A motion to dismiss may be granted where there is "an absence of sufficient facts alleged to support a cognizable legal theory." *Zamani v. Carnes*, 491 F.3d 990, 996 (9th Cir. 2007). Moreover, even if these suggested inferences are made, it is still unclear what program JM was "otherwise qualified" to participate in and was excluded from participating in based solely on her disability. This is a fundamental allegation in any claim brought under the Rehabilitation Act and ADA. *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999). Therefore, plaintiffs have failed to state claim upon which relief can be granted.

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C. RLUPA Does Not Apply to Private Facilities

RLUPA typically only applies to individuals who are or have been institutionalized at a state hospital/facility or incarcerated in a prison/jail.[1] Here, neither situation would appear to be applicable. Moreover, plaintiffs do not allege that Children's Hospital Oakland (CHO) is owned and operated by the State of California or any of its subdivisions. Instead, plaintiffs merely contend that CHO, on occasion, receives money from the California Medical Assistance Program ("Medi-Cal"). (Pls.' Opp., 22:3-11.) RLUPA is clear that the receipt of such payments does not transform a privately-owned and operated facility into an "institution." 42 U.S.C. § 1997(2). Additionally, plaintiffs concede that their complaint fails to specify whether the type of care provided by CHO to JM qualified it to be an "institution" under RLUPA. (Pls.' Opp., 22:11-12.) For these reasons, State Defendants' motion to dismiss must be granted.

V. SUBSEQUENT DEVELOPMENTS IN THE SECOND SUPERIOR COURT PROCEEDING WARRANT A STAY IF STATE DEFENDANTS' MOTION TO DISMISS IS NOT GRANTED

In their opposition brief, plaintiffs posit that the *Colorado River* abstention doctrine requires State Defendants to satisfy a three-part test. (Pls.' Opp., 23:9-20.) Plaintiffs, however, fundamentally misread *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The portion of the *Colorado River* opinion cited by plaintiffs generally discusses the contours and requirements for asserting the *Pullman*, *Burford*, and *Younger* abstention doctrines. *Colorado River*, 424 U.S. 814-817. State Defendants' motion to dismiss neither discussed nor addressed these other abstention doctrines. Therefore, plaintiffs' criticism of State Defendants' assertion of the *Colorado River* abstention doctrine lacks merit.

As noted in State Defendants' motion to dismiss, the *Colorado River* abstention doctrine applies when there is a "contemporaneous exercise of concurrent jurisdictions" and it is consistent with "wise judicial administration" for the federal court to stay its hand pending the outcome of ongoing state court proceedings. *Colorado River*, 424 U.S. at 817. Here, recent developments in the Second Superior Court Proceeding support State Defendants' request, in the alternative, for a

[1] RLUPA incorporates and builds upon to a large extent the Civil Rights of Institutionalized Persons Act of 1980.

stay. Specifically, since the filing of State Defendants' motion to dismiss, the Superior Court overruled the demurrers seeking to preclude further litigation in the Second Superior Court Proceeding regarding whether JM is brain dead under California law. (Intervenor's RJN in Supp. of Mot. to Intervene, Exs. W & X.) Moreover, the California Courts of Appeal in *UCSF Benioff Children's Hospital Oakland v. Superior Court (Winkfield)*, Case No. A147989 is currently reviewing this ruling via a petition for the writ of mandate. (Decl. of Dana L. Stenvick in Supp. of Reply to Mot. to Intervene, Ex. A.) If the California Court of Appeals upholds the Superior Court's ruling, plaintiffs will be allowed to re-litigate whether JM is deceased under Health and Safety Code section 7180 in the Second Superior Court Proceeding, which will result in this proceeding becoming duplicative and unnecessary. Therefore, if State Defendants' motion to dismiss is not granted, this case should be stayed pending resolution of the ongoing Second Superior Court Proceedings.

CONCLUSION

Contrary to the assertions in the complaint, plaintiffs are not without a remedy; they have just selected the incorrect forum. The Superior Court is the appropriate forum to adjudicate plaintiffs' claims and, depending on the outcome of ongoing state appellate proceedings, is in fact prepared to address whether JM is deceased under Health and Safety Code section 7180. Therefore, State Defendants respectfully request that their motion to dismiss be granted or, in the alternative, that this matter be stayed pending the outcome of the Second Superior Court Proceeding.

Dated: April 27, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: **McMath v. California** No. **15-CV-06042-HSG**

I hereby certify that on April 27, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

REPLY IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY PLAINTIFFS' COMPLAINT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 27, 2016, at San Francisco, California.

R. Manalastas
Declarant


Signature

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