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**FILED**  
 ALAMEDA COUNTY

JUL 06 2017

CLERK OF THE SUPERIOR COURT  
 By [Signature]  
 JANE THOMAS, Deputy.

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 7 FREDERICK S. ROSEN, M.D.

8 *(Additional Counsel Listed After Caption)*

10 SUPERIOR COURT OF CALIFORNIA  
 11 IN AND FOR THE COUNTY OF ALAMEDA

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

16 Plaintiffs,

17 vs.

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

22 Defendants.

Case No. RG15760730

ASSIGNED FOR ALL PURPOSES TO:  
 JUDGE STEPHEN PULIDO  
 DEPARTMENT 16

**DEFENDANTS' OBJECTIONS AND  
 [PROPOSED] ORDER RE: EVIDENTIARY  
 OBJECTIONS TO PLAINTIFFS'  
 EVIDENCE**

**Reservation #: R-1838158**

**Date: July 13, 2017**  
**Time: 3:00 p.m.**  
**Dept: 16**

Complaint Filed: March 3, 2015  
 Date of Trial: None set

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EVIDENCE OBJECTED TO:	GROUNDS FOR OBJECTION:	RULING ON OBJECTION:
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**A. OBJECTIONS TO DECLARATION OF D. ALAN SHEWMON, M.D.**

<p><b>1. Declaration of D. Alan Shewmon, M.D., ¶¶1-71</b></p>	<p>The declaration of D. Alan Shewmon, M.D., and opinions stated therein are inadmissible. Dr. Shewmon's opinion that McMath does not fulfill the accepted medical standards for pediatric brain death is based on speculation and matters that reputable experts in his field would not normally rely upon in making a determination of brain death. The declaration should be excluded in its entirety for the following reasons:</p> <p><b><u>Improper legal conclusion.</u></b> Dr. Shewmon failed to apply the appropriate legal and medical standards for determining brain death under California's Uniform Determination of Death Act ("CUDDA"). There is no substitute to the accepted medical standards for determining brain death that are set forth in the <u>Guidelines</u>. Video recordings, the onset of puberty, observation and select imaging studies are not a substitute for the accepted medical standards for determining brain death. The matters relied upon by Dr. Shewmon are not the proper basis for forming an opinion on brain death under the CUDDA. A determination of brain death can only be made by physicians who are familiar with the patient's complete medical history, and have performed the requisite neurological examination and apnea testing in accordance with the specific parameters set forth per the <u>Guidelines</u>. Clinical determinations</p>	<p>Sustained: _____</p> <p>Overruled: _____</p>
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of brain death require two examinations by two different physicians and two apnea tests. (Health and Safety Code § 7180 (a); Evid. Code §§ 801-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Opinion conflicts with California law.** Dr. Shewmon's opinion that McMath is not dead is contrary to California law which requires that brain death be determined by the accepted medical standards set forth in the Guidelines. McMath has not undergone a brain death evaluation pursuant to the accepted medical standards in the Guidelines since December 2013. (Health and Safety Code § 7180(a); Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Improper basis of opinion.** The opinion that McMath is not dead is (1) not based on a matter of a type on which an expert may reasonably rely, (2) is based on reasons unsupported by the material on which the expert relies, and (3) is speculative. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772; Evid. Code §§ 720, 800-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental

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Declaration of Sanford Schneider,  
M.D; Supplemental Decl. of Jennier  
Still, Esq.)

**Lack of qualification.** Dr.

Shewmon's theories on brain death,  
i.e., that brain death is a "legal  
fiction" and should not be a legal  
criteria for death, render him  
unreliable, unqualified and unable to  
provide impartial and unbiased  
opinions as to whether McMath is  
dead. Dr. Shewmon's lack of  
qualification and impartiality is  
evidenced by the fact that he opines  
that McMath is no longer brain dead  
even though the accepted medical  
standards for assessing brain death  
have not been applied to McMath  
since December 2013. Dr. Shewmon  
is incapable of providing an opinion  
that conforms with California law.

*(Sargon Enterprises, Inc. v.  
University of Southern California  
(2012) 55 Cal.4th 747; Health and  
Safety Code § 7180 (a); Evid. Code  
§§ 801-803; Declarations of Thomas  
A. Nakagawa, M.D., and Sanford  
Schneider, M.D., filed in support of  
Defendants' Motion for Summary  
Adjudication; Supplemental  
Declaration of Sanford Schneider,  
M.D; Still Decl., ¶¶ 13-15, and Ex. I,  
J, and K.)*

**Unreliable and unaccepted  
methodology.** Dr. Shewmon's

proposition in this case, i.e., that brain  
death can be assessed without  
application of the accepted medical  
standards set forth in the Guidelines,  
is not accepted by reputable  
specialists in pediatric brain death.  
Dr. Shewmon's methodology for  
assessing McMath's brain function,  
i.e., review of unauthenticated video

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recordings, the alleged onset of puberty, and select medical imaging studies, fails the test for proper expert evidence. Such matters are not a substitute for the accepted medical standards for assessing brain death per the CUDDA and the Guidelines. A determination of brain death can only be made by physicians who are familiar with the patient's complete medical history, have performed the requisite brain death examination and performed an apnea test. Clinical determinations of brain death require two examinations by two different physicians and two apnea tests. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747; Health and Safety Code § 7180 (a); Evid. Code §§ 801-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Failure to comport with the generally accepted professional standards.** No reputable and qualified physician in pediatric or adult brain death would reasonably rely on the matters that Dr. Shewmon relied upon in opining that McMath is not dead. (*Id*)

**Speculative matters** Video recordings, the alleged onset of puberty, observation, and select imaging studies, are not a proper basis for an expert's opinion in determining brain death in accordance with the CUDDA. Accordingly, any opinion based on such irrelevant and speculative matters is invalid. (*Sargon*

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*Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772; Evid. Code §§801 802; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Lack of authentication.** Dr. Shewmon's opinion that McMath is not dead is based materials that are not properly authenticated. (Evid. Code §§ 250, 1400, 1401.) Plaintiffs failed to authenticate the video recordings or any other matters relied on them in support of the contention that McMath is not dead. Plaintiffs failed to identify the individuals who took the video recordings, the dates of the recordings, the location of the recordings, and who else was present in the room. No one with personal knowledge of the recordings has attested that the recordings are not altered, fraudulent, etc. (Supplemental Decl. of Jennifer Still, Esq.)

**Hearsay.** Dr. Shewmon's opinion that McMath is not dead is based on hearsay rather than the accepted medical standards for determining brain death. The video recordings and statements therein are hearsay because they were made by someone other than Dr. Shewmon. (Evid. Code §§ 1200, et seq.; Supplemental Declaration of Jennifer Still, Esq.)

**Opinion lacks reasoned explanation.** Dr. Shewmon failed to explain how his opinion that McMath is not brain dead comports with the CUDDA's requirement that brain

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	<p>death be determined solely by the accepted medical standards in the <u>Guidelines</u>. (See <i>Jennings v. Palomar Pomerado Health Systems, Inc.</i> (2003) 114 Cal.App.4<sup>th</sup> 1108, 1117; Supplemental Declaration of Sanford Schneider, M.D.)</p> <p><b><u>Irrelevant.</u></b> Given the complete absence of any showing that McMath has undergone a brain death evaluation pursuant to the accepted medical standards in the <u>Guidelines</u> as required by the CUDDA, Dr. Shewmon's opinion that McMath is not dead is lacks relevance. (Evid. Code § 350.)</p> <p><b><u>The purported 49 different video recordings that Dr. Shewmon relied upon are not in evidence.</u></b> (See Shewmon Decl., ¶ 13.) Plaintiffs did not produce 49 different video recordings to defendants. There is no where near 49 different video recordings on file with the court. (See Still Decl., ¶ 17 and Ex. M; Supplemental Declaration of Jennifer Still.)</p> <p><b><u>Lack of personal knowledge.</u></b> Dr. Shewmon was not present when the video recordings were made. Dr. Shewmon admits that McMath demonstrated no intermittent responsive movements during his 8 hour observation of her on December 2, 2014 (Evid. §§ 403 and 702(a).)</p>	
2. Dr. Shewmon's opinion that McMath no longer fulfills the accepted medical standards for determining	Each of the objections set forth in No. 1, above, are fully incorporated herein.	Sustained: _____ Overruled: _____



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brain death, at ¶¶ 6, 25, 29, 38, 55, 56, and 57.		
3. Dr. Shewmon's opinion that McMath is intermittently responsive at ¶¶ 6, 18, 19, 20, 21, 22, 23, 24, 25, 38, 40, and 56	Each of the objections set forth in No. 1, above, are fully incorporated herein.	Sustained: _____ Overruled: _____
4. Dr. Shewmon's reliance on McMath's family members' impressions of McMath's responsiveness, at ¶¶ 7, 8, and 9.	Each of the objections set forth in No. 1, above, are fully incorporated herein.	Sustained: _____ Overruled: _____
5. Dr. Shewmon's reliance on 49 video recordings of McMath, at ¶¶ 10-27.	Each of the objections set forth in No. 1, above, are fully incorporated herein.	Sustained: _____ Overruled: _____
6. Dr. Shewmon's reliance on the imaging studies and other testing performed on McMath at University Hospital on September 26, 2014, at ¶¶ 30-37.	Each of the objections set forth in No. 1, above, are fully incorporated herein.	Sustained: _____ Overruled: _____
7. Dr. Shewmon's reliance on McMath's alleged onset of puberty, at ¶ 50.	Each of the objections set forth in No. 1, above, are fully incorporated herein.	Sustained: _____ Overruled: _____
8. Dr. Shewmon's reliance on McMath's continued biological functions, at ¶¶ 51-54.	Each of the objections set forth in No. 1, above, are fully incorporated herein.	Sustained: _____ Overruled: _____
9. Dr. Shewmon's opinion that the video evidence of responsiveness and puberty warrents "giving	Each of the objections set forth in No. 1, above, are fully incorporated herein.	Sustained: _____ Overruled: _____

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<p>1 life the benefit of the 2 doubt”, at ¶ 57.</p>		
<p>3 10. Dr. Shewmon’s 4 disagreement with the 5 accepted medical 6 standards for determining 7 brain death and his 8 opinion that the 9 <u>Guidelines</u> are fallible, at 10 ¶¶42, 46, and 47.</p>	<p><b><u>Improper basis of opinion.</u></b> The opinion that McMath is not dead is (1) not based on a matter of a type on which an expert may reasonably rely, (2) is based on reasons unsupported by the material on which the expert relies, and (3) is speculative. (<i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 771-772; Evid. Code §§ 720, 800-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants’ Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)</p> <p><b><u>Opinion conflicts with California law.</u></b> Dr. Shewmon’s opinion that McMath is not dead is contrary to California law which requires that brain death be determined by the accepted medical standards set forth in the <u>Guidelines</u>. McMath has not undergone a brain death evaluation pursuant to the accepted medical standards in the <u>Guidelines</u> since December 2013. (Health and Safety Code § 7180(a); Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants’ Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)</p> <p><b><u>Unreliable and unaccepted methodology.</u></b> Dr. Shewmon’s proposition in this case, i.e., that brain death can be assessed without application of the accepted medical standards set forth in the <u>Guidelines</u>,</p>	<p>Sustained: _____ Overruled: _____</p>

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is not accepted by reputable specialists in pediatric brain death. Dr. Shewmon's methodology for assessing McMath's brain function, i.e., review of unauthenticated video recordings, the alleged onset of puberty, and select medical imaging studies, fails the test for proper expert evidence. Such matters are not a substitute for the accepted medical standards for assessing brain death per the CUDDA and the Guidelines. A determination of brain death can only be made by physicians who are familiar with the patient's complete medical history, have performed the requisite brain death examination and performed an apnea test. Clinical determinations of brain death require two examinations by two different physicians and two apnea tests. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747; Health and Safety Code § 7180 (a); Evid. Code §§ 801-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Failure to comport with the generally accepted professional standards.** No reputable and qualified physician in pediatric or adult brain death would reasonably rely on the matters that Dr. Shewmon relied upon in opining that McMath is not dead. (*Id*)

**Speculative matters.** Video recordings, the alleged onset of puberty, observation, and select imaging studies, are not a proper basis

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for an expert's opinion in determining brain death in accordance with the CUDDA. Accordingly, any opinion based on such irrelevant and speculative matters is invalid. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772; Evid. Code §§801 802; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Lack of authentication.** Dr. Shewmon's opinion that McMath is not dead is based materials that are not properly authenticated. (Evid. Code §§ 250, 1400, 1401.) Plaintiffs failed to authenticate the video recordings or any other matters relied on them in support of the contention that McMath is not dead. Plaintiffs failed to identify the individuals who took the video recordings, the dates of the recordings, the location of the recordings, and who else was present in the room. No one with personal knowledge of the recordings has attested that the recordings are not altered, fraudulent, etc. (Supp. Decl. of Jennifer Still, Esq.)

**Lack of personal knowledge.** Dr. Shewmon was not present when the video recordings were made. Dr. Shewmon admits that McMath demonstrated no intermittent responsive movements during his 8. hour observation of her on December 2, 2014 (Evid. §§ 403 and 702(a).)

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	<p><b>Hearsay.</b> Dr. Shewmon's opinion that McMath is not dead is based on hearsay rather than the accepted medical standards for determining brain death. The video recordings and statements therein are hearsay because they were made by someone other than Dr. Shewmon. (Evid. Code §§ 1200, et seq.)</p> <p><b>Opinion lacks reasoned explanation.</b> Dr. Shewmon failed to explain how his opinion that McMath is not brain dead comports with the CUDDA's requirement that brain death be determined solely by the accepted medical standards in the <u>Guidelines</u>. (See <i>Jennings v. Palomar Pomerado Health Systems, Inc.</i> (2003) 114 Cal.App.4th 1108, 1117; Supplemental Declaration of Sanford Schneider, M.D.)</p> <p><b>Irrelevant.</b> Given the complete absence of any showing that McMath has undergone a brain death evaluation pursuant to the accepted medical standards in the <u>Guidelines</u> as required by the CUDDA, Dr. Shewmon's opinion that McMath is not dead is lacks relevance. (Evid. Code § 350.)</p>	
<p>11. Dr. Shewmon's reliance on peer review articles and other materials that have not been authenticated or submitted to the court, at ¶¶ 43-49, and 60-71.</p>	<p><b>Lack of authentication and proper foundation.</b> The dozens of articles that Dr. Shewmon cites have not been authentication or properly submitted to this court as part of the records in support of plaintiffs' opposition.</p> <p><b>Irrelevant</b></p> <p><b>Reliance on speculative matters</b></p> <p><b>Hearsay</b></p>	<p>Sustained: _____</p> <p>Overruled: _____</p>

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	<u>Materials not in evidence</u>	
12. Dr. Shewmon's defense of his minority perspective on brain death and why his views on brain death should supplant the medical consensus that a determination of brain death under the accepted medical standards is the death of that individual, at ¶¶58-71	<p><b><u>Opinion lacks reasoned explanation.</u></b> Dr. Shewmon failed to explain how his opinion that McMath is not brain dead comports with the CUDDA's requirement that brain death be determined solely by the accepted medical standards in the <u>Guidelines</u>. (See <i>Jennings v. Palomar Pomerado Health Systems, Inc.</i> (2003) 114 Cal.App.4<sup>th</sup> 1108, 1117; Supplemental Declaration of Sanford Schneider, M.D.)</p> <p><b><u>Unreliable and unaccepted methodology.</u></b> Dr. Shewmon's proposition in this case, i.e., that brain death can be assessed without application of the accepted medical standards set forth in the <u>Guidelines</u>, is not accepted by reputable specialists in pediatric brain death. Dr. Shewmon's methodology for assessing McMath's brain function, i.e., review of unauthenticated video recordings, the alleged onset of puberty, and select medical imaging studies, fails the test for proper expert evidence. Such matters are not a substitute for the accepted medical standards for assessing brain death per the CUDDA and the <u>Guidelines</u>. A determination of brain death can only be made by physicians who are familiar with the patient's complete medical history, have performed the requisite brain death examination and performed an apnea test. Clinical determinations of brain death require two examinations by two different physicians and two apnea tests. (<i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4<sup>th</sup> 747; Health and</p>	Sustained: _____  Overruled: _____

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	<p>Safety Code § 7180 (a); Evid. Code §§ 801-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)</p> <p><b><u>Failure to comport with the generally accepted professional standards.</u></b> No reputable and qualified physician in pediatric or adult brain death would reasonably rely on the matters that Dr. Shewmon relied upon in opining that McMath is not dead. (<i>Id</i>)</p> <p><b><u>Speculative matters.</u></b> Dr. Shewmon's opinions on brain death are inconsistent with the mainstream consensus. Opinion based on such irrelevant and speculative matters is invalid. (<i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 771-772; Evid. Code §§801 802; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)</p> <p><b><u>Lack of authentication and foundation.</u></b> Dr. Shewmon has not established that his opinions on brain death should supplant California law and the accepted medical standards.</p>	
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**B. OBJECTIONS TO DECLARATION OF ALIETA ECK, M.D.**

<p>13. Declaration of Alieta Eck, M.D., ¶¶ 1-8.</p>	<p>The declaration of Alieta Eck, M.D., and opinions stated therein are inadmissible. The declaration should</p>	<p>Sustained: _____ Overruled: _____</p>
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be excluded in its entirety for the following reasons:

**Lack of Expert Qualification.** Dr. Eck's declaration does not set forth the requisite showing that she has the specialized knowledge, skill, experience, training, or education sufficient to qualify her as an expert on the subject to which her testimony relates. (Evid. Code §§ 720, 801-803.) Defendants have established, through the expert declarations of Dr. Nakagawa and Dr. Schneider that, under the CUDDA, a determination of brain death can only be made by physicians with special education, training, knowledge and expertise in the legal and medical requirements for determining brain death in the state of California. Brain death is a clinical assessment made by a qualified physician in a standardized approach that relies on a clinical examination and apnea testing with a known cause of coma. Dr. Eck has no education, training or expertise in assessing brain death. She failed to demonstrate that she has any knowledge as to how brain death is declared in California, e.g., the CUDDA, the accepted medical standards, the Guidelines, etc. Dr. Eck failed to provide a curriculum vitae that demonstrates her education, training, and experience in any matters pertaining to brain death/brain function. (Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Lack of foundation.** Dr. Eck failed to demonstrate that she has reviewed and



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is familiar with McMath's medical history, the CUDDA, and the accepted medical standards for determining brain death, i.e, the Guidelines. In addition, Dr. Eck failed to provide any medical records that support her opinion that McMath demonstrates brain function. Dr. Eck failed to demonstrate that she is licensed to practice medicine in the State of California. Dr. Eck failed to demonstrate that she has the knowledge, training, or experience needed to form the impression that McMath's movements are volitional or in response to commands. (Evid. Code §§ 720, 801-803.) Defendants have established that McMath has exhibited purposeless spinal reflexive movements, with and without tactile stimulation, since she was pronounced deceased in December 2013. Defendants have further established that spinal reflexes are a known and recognized phenomenon in brain dead patients maintained on mechanical support. (Declaration of Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication, ¶18.) The Guidelines state that the clinical differentiation of spinal responses from retained motor responses associated with brain activity requires expertise. (Declarations of Thomas A. Nakagawa, M.D., ¶ 11(D).) Ms. Eck has no expertise in distinguishing spinal reflexive movement from activity associated with brain function. (Supplemental Declaration of Sanford Schneider, M.D.)

**Improper legal conclusion.** Dr. Eck did not apply the appropriate legal and medical standards for determining

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brain death under California's Uniform Determination of Death Act ("CUDDA"). There is no substitute to the accepted medical standards for determining brain death that are set forth in the Guidelines. Puberty and observation are not a substitute for the accepted medical standards determining brain death and are not a proper basis for forming an opinion on of brain death under the CUDDA. A determination of brain death can only be made by physicians who are familiar with the patient's complete medical history, have performed the requisite neurological examination and performed an apnea test. Clinical determinations of brain death require two examinations by two different physicians and two apnea tests. (Health and Safety Code § 7180 (a); Evid. Code §§ 801-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Opinion conflicts with California law.** Dr. Eck's opinion that McMath is not dead is contrary to California law which requires that brain death be determined by the accepted medical standards set forth in the Guidelines. (Health and Safety Code § 7180(a).) McMath has not undergone a brain death evaluation pursuant to the accepted medical standards since December 2013. (Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental

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Declaration of Sanford Schneider,  
M.D.)

**Improper basis of opinion.** The opinion that McMath is not dead is (1) not based on a matter of a type on which an expert may reasonably rely, (2) is based on reasons unsupported by the material on which the expert relies, and (3) is speculative. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772; Evid. Code §§ 720, 800-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Failure to comport with the generally accepted professional standards.** No reputable and qualified physician would reasonably rely on the matters that Dr. Eck relied upon in opining that McMath is not dead. (*Id*)

**Opinion lacks reasoned explanation.** Dr. Eck failed to explain how her opinion that McMath is not brain dead comports with the CUDDA's requirement that brain death be determined solely by the accepted medical standards in the Guidelines. (See *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

**Irrelevant.** Given the complete absence of any showing that McMath has undergone a brain death evaluation pursuant to the accepted medical standards in the Guidelines as required by the CUDDA, Dr. Eck's

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	<p>opinion that McMath is not dead is lacks relevance. (Evid. Code § 350.)</p> <p><b><u>Unreliable and unaccepted methodology.</u></b> Dr. Eck’s proposition that brain death can be assessed without application of the accepted medical standards set forth in the <u>Guidelines</u> is not accepted by reputable specialists in pediatric brain death. Dr. Ecks’s methodology for assessing McMath’s brain function, i.e., observation and the alleged onset of puberty, fails the test for proper expert evidence. Such matters are not part of the accepted medical criteria for assessing brain death. A determination of brain death can only be made by physicians who are familiar with the patient’s complete medical history, have performed the requisite brain death examination and performed an apnea test. Clinical determinations of brain death require two examinations by two different physicians and two apnea tests. (<i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747; Health and Safety Code § 7180 (a); Evid. Code §§ 801-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants’ Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)</p>	
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**C. OBJECTIONS TO DECLARATION OF SHARLEEN BANGURA, R.N.**

<p>14. Declaration of Sharleen Bangura, R.N., ¶¶1-4.</p>	<p>The declaration of Sharleen Bangura, R.N., and matters stated therein are inadmissible. The declaration should be excluded in its entirety for the following reasons:</p>	<p>Sustained: _____</p> <p>Overruled: _____</p>
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**Lack of Expert Qualification.** Ms.

Bangura is a registered nurse. She lacks the specialized knowledge, skill, experience, training, or education sufficient to qualify her as an expert on the subject to which his testimony relates. (Evid. Code §§ 720, 800-803.) Defendants have established, through the expert declarations of Dr. Nakagawa and Dr. Schneider that, under the CUDDA, a determination of brain death can only be made by physicians with special education, training, knowledge and expertise in the accepted medical standards for assessing brain death. Brain death is a clinical assessment made by a qualified physician in a standardized approach that relies on a clinical examination and apnea testing with a known cause of coma. Ms. Bangura is a nurse, not a physician. Furthermore, she has no education, training or expertise in assessing brain death. She failed to demonstrate that she has any knowledge how brain death is declared in California, e.g., the CUDDA, the accepted medical standards, the Guidelines, etc.

**Lack of foundation.** Ms. Bangura failed to demonstrate that she has reviewed and is familiar with McMath's medical history, the CUDDA, and the accepted medical standards for determining brain death. Ms. Bangura failed to demonstrate that she has the knowledge, training, or experience needed to form the impression that McMath's movements are volitional or in response to commands. (Evid. Code §§ 720, 801-803.) Defendants have established that McMath has exhibited purposeless spinal reflexive

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movements, with and without tactile stimulation, since she was pronounced deceased in December 2013. Defendants have further established that spinal reflexes are a known and recognized phenomenon in brain dead patients maintained on mechanical support. (Declaration of Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication, ¶18.) The Guidelines state that the clinical differentiation of spinal responses from retained motor responses associated with brain activity requires expertise. (Declarations of Thomas A. Nakagawa, M.D., ¶ 11(D).) Ms. Bangura has no expertise in distinguishing spinal reflexive movements from activity associated with brain function.

**Improper basis of opinion.** Ms. Bangura's statement that McMath is "alert" and responsive to command (and by implication not brain dead) is (1) not based on a matter of a type on which an expert may reasonably rely, (2) is based on reasons unsupported by the material on which the expert relies, and (3) is speculative. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772; Evid. Code §§ 720, 800-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

**Irrelevant.** Given the complete absence of any showing that McMath has undergone a brain death evaluation pursuant to the accepted

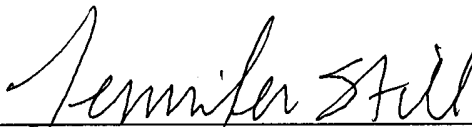
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medical standards in the Guidelines as required by the CUDDA, Ms. Bangura's impression that McMath is "alert" and responsive lacks relevance. (Evid. Code § 350.)

**Unreliable and unaccepted methodology.** Ms. Bangura's methodology for assessing McMath's brain function, i.e., observation, is not part of the accepted medical criteria for assessing brain death. A determination of brain death can only be made by physicians who are familiar with the patient's complete medical history, have performed the requisite brain death examination and performed an apnea test. Clinical determinations of brain death require two examinations by two different physicians and two apnea tests. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747; Health and Safety Code § 7180 (a); Evid. Code §§ 801-803; Declarations of Thomas A. Nakagawa, M.D., and Sanford Schneider, M.D., filed in support of Defendants' Motion for Summary Adjudication; Supplemental Declaration of Sanford Schneider, M.D.)

DATED: July 6, 2017

HINSHAW, MARSH, STILL AND HINSHAW, LLP

By   
THOMAS E. STILL  
JENNIFER STILL  
Attorneys for Defendant  
FREDERICK S. ROSEN, M.D.

**PROOF OF SERVICE**  
(C.C.P. §§ 1013a, 2015.5)

I, the undersigned, say:

I am now and at all times herein mentioned have been over the age of 18 years, a resident of the State of California and employed in Santa Clara County, California, and not a party to the within action or cause; my business address is 12901 Saratoga Avenue, Saratoga, California 95070.

I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, mailing via Federal Express, hand delivery via messenger service, and transmission by facsimile machine. I served a copy of each of the documents listed below by placing said copies for processing as indicated herein.

**DEFENDANTS' OBJECTIONS AND [PROPOSED] ORDER RE EVIDENTIARY  
OBJECTIONS TO PLAINTIFFS' EVIDENCE**

\_\_\_\_\_ If MAILED VIA U.S. MAIL, said copies were placed in envelopes which were then sealed and, with postage fully prepaid thereon, on this date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the U.S. Postal Service at Saratoga, California on this date in the ordinary course of business; and there is delivery service by U.S. Postal Service at the place so addressed.

XX \_\_\_\_\_ If MAILED VIA FEDERAL EXPRESS, said copies were placed in Federal Express envelopes which were then sealed and, with Federal Express charges to be paid by this firm, on this same date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the Federal Express Corp. on this date following ordinary business practices; and there is delivery service by Federal Express at the place so addressed.

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\_\_\_\_\_ If VIA FACSIMILE TRANSMISSION, said copies were placed for transmission by this firm's facsimile machine, transmitting from (408) 257-6645 at Saratoga, California, and were transmitted following ordinary business practices; and there is a facsimile machine receiving via the number designated herein, and the transmission was reported as complete and without error. The record of the transmission was properly issued by the transmitting fax machine.

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1 Andrew N. Chang, Esq.  
2 ESNER, CHANG & BOYER  
3 234 East Colorado Blvd., Suite 975  
4 Pasadena, CA 91101

5 I certify (or declare) under penalty of perjury under the laws of the State of California that the  
6 foregoing is true and correct and that this Declaration was executed on July 6, 2017.

7 Jessica Picone  
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27 Court: Alameda County Superior Court  
28 Action No: RG15760730  
Case Name: *Spears/Winkfield, et al. v. Rosen, M.D., et al.*

**PROOF OF SERVICE**  
(C.C.P. §§ 1013a, 2015.5)

I, the undersigned, say:

I am now and at all times herein mentioned have been over the age of 18 years, a resident of the State of California and employed in Santa Clara County, California, and not a party to the within action or cause; my business address is 12901 Saratoga Avenue, Saratoga, California 95070. My electronic service address is: jpicone@hinshaw-law.com.

I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, mailing via Federal Express, hand delivery via messenger service, electronic service and transmission by facsimile machine. I served a copy of each of the documents listed below by placing said copies for processing as indicated herein.

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XX If ELECTRONIC SERVICE, I electronically served the documents listed above as follows:

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13 Email: [smurray@dndmlawyers.com](mailto:smurray@dndmlawyers.com)

14  
15 I certify (or declare) under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct and that this Declaration was executed on July 6, 2017.

16  
17 Jessica Picone  
Jessica Picone

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27 Court: Alameda County Superior Court  
Action No: RG15760730

28 Case Name: *Spears/Winkfield, et al. v. Rosen, M.D., et al.*