October 6, 2014

The Honorable Evilio M. Grillo
Superior Court of Alameda County California

Dear Judge Grillo:

I have reviewed the five (5) declarations provided to me your court offices on October 3, 2014, specifically declarations of D. Alan Shewmon, M.D.; Philip De Fina, Ph.D.; Charles J. Prestigiacomo, M.D.; Calixto Machado, M.D.; and Elena B. Labkovsky, Ph.D.

In order for you to review and interpret those declarations, I provide below a number of facts and thoughts, raised by those documents.

1. Criteria for brain death in a child are those posited in *Pediatrics* 2011;128:e720-740 (attached), as endorsed by the American Academy of Pediatrics, Child Neurology Society, American Academy of Neurology, and numerous other professional societies. "The American Academy of Neurology's Practice Parameters for Determining Brain Death in Adults," as referenced by Dr. Shewmon, and "AMA (American Medical Association) guidelines," as referenced by Dr. Prestigiacomo are not the relevant guidelines in the instance of Jahai McMath.

2. The diagnosis and determination of brain death requires serial neurological examinations performed in person by different attending physicians. No records of any on-site or in-person serial neurological examination of Jahai McMath, performed by a physician, have been presented to me via these declarations.

3. Videos of hand and foot movements, coincident with verbal commands heard on audio, cannot affirm or refute brain death, and are not substitutes for in-person serial neurological examinations by a physician.

4. No apnea test has been performed or reported in the declarations, as required for a determination of brain death.

5. A repeat apnea test would not cause harm to Jahai McMath.

6. Dr. Prestigiacomo has referred to a "sleep apnea test," and that is not the correct examination in the determination of brain death.

7. A "flat" electroencephalogram (EEG), or electro-cerebral silence, is not required for the determination of brain death (see *Pediatrics* 2011;128:e720-740). The EEG performed on 9/1/14 was not performed in standard conditions, but rather at an apartment and Dr. Machado does note artifacts, which he attributes to movement. Electrical artifacts cannot be excluded as the cause of reported electrical activity, but again, electro-cerebral silence is not requisite to the determination of brain death.

8. No cerebral blood flow radionuclide brain scan has been performed or reported in the declarations, and that is the test used to determine cerebral blood flow in order to assist in the determination of brain death, not magnetic resonance angiography (MRA) (see *Pediatrics* 2011;128:e720-740).

9. MRA is not a technique used to determine cerebral blood flow.

10. Magnetic resonance imaging (MRI), as performed on 9/26/14, provides a structural picture of the brain and is not part of the determination of brain death. A picture of persistent brain tissue inside the skull does not negate the determination of brain death. Liquefaction of the brain is not requisite to the determination of brain death. There are no specific anatomic or pathologic changes noted in brain death.

11. Heart rate analysis, as presented from 9/1/14, is not part of and not relevant to the determination of brain death.

12. Menarche and menstrual cycles are not relevant to the determination of brain death.

13. A bispectal index (BIS) monitor has no role in and is not relevant to the determination of brain death.

14. I cannot determine from the declarations whether Ms. Labkovsky has completed EEG technician certification in the United States, such as that required by the American Association of Electrodiagnostic Technologists (AAET) or American Board of Registration of Electroencephalographic and Evoked Potential Technologists (ABRET). EEG Neurofeedback Certification is not considered the appropriate certification to conduct diagnostic EEGs, such as EEGs in the determination of brain death.

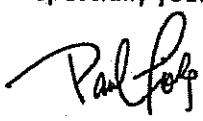
Overall, none of the current materials presented in the declarations refute my 12/23/14 examination and consultation finding (attached), or those of several prior attending physicians who completed the same exams, that Jahai McMath met all criteria for brain death. None of the declarations provide evidence that Jahai McMath is not brain dead.

I want to note on the record that I have not and will not accept any compensation for my services providing expertise in the matter of Jahai McMath, and I have no affiliations with the McMath family, UCSF Benioff Children's Hospital Oakland, or their legal counsels. I continue to extend my sympathies to the family and friends of Jahai McMath.

I hereby grant permission for the court to share this document privately or public, at your discretion. My *curriculum vitae* is attached.

I reserve the right to amend these opinions should additional materials become available for my review.

Respectfully yours,



Paul Graham Fisher, M.D.

Palo Alto, California

October 6, 2014

Christopher B. Dolan (SBN 165358)
THE DOLAN LAW FIRM
The Dolan Building
1438 Market Street
San Francisco, CA 94102
Telephone: (415) 421-2800
Facsimile: (415) 421-2830

Attorneys for Plaintiff
LATASHA WINKFIELD

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

UNLIMITED CIVIL JURISDICTION

LATASHA WINKFIELD,

Plaintiff,

v.

CHILDREN'S HOSPITAL, et al.

Defendants.

Case No.: PR13-707598

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

On October 6, 2014, the Court appointed Dr. Paul Fischer, pursuant to Evidence Section 720, as a court expert in this matter that involves brain death. A review of Dr. Fischer's CV indicates that he is not an expert in brain death, he is a very learned scholar and, as shown by his CV, his research and practice focuses not on Brain Death but, instead, on the treatment of brain tumors and pediatric oncology.

Petitioner hereby objects to this appointment as Dr. Fischer has a conflict of interest in this matter. Appointment of Dr. Fischer would create an impression of bias in the eyes of a hypothetical reasonable person. Dr Fischer was the original court expert who opined that Jahi McMath was brain dead. In doing so, he testified that she had "irreversible cessation of all functions of the entire brain,

THE DOLAN LAW FIRM
THE DOLAN BUILDING
1438 Market Street
SAN FRANCISCO, CA 94102
TEL: (415) 421-2800
FAX: (415) 421-2830

including the brain stem." (California Health & Saf. Code, § 7181.) Therefore Dr. Fischer is in a position where he has already sworn that Jahi McMath has suffered an *irreversible* cassation of the entire brain. The appointment of Dr. Fischer puts him in a position where he would have to declare that, perhaps, he was wrong or admit that the evidence presented by Petitioner calls into question the foundation of his assumption. In so far as his previous opinion led to the Court to determining that Jahi need not be kept on a ventilator and, in effect, therefore, that she could have her breathing, and life, irreversibly ended, Dr. Fischer would be seen, in the eyes of a hypothetical reasonable person, to have such an actual bias, in favor of maintaining and defending his earlier decision, so as to undermine confidence in the legal proceedings now before the court.

The Court is putting Dr. Fischer in the position where Dr. Fischer is being called upon to testify as to what the standard is for determining brain death (akin to determining the law within the medical community) as well as being the finder of fact as to whether that standard has been met. Therefore he sits in position akin to being that of both judge and jury. Under California law he would be precluded from acting in either capacity given his prior involvement with the decision which is directly at issue in this case.

The Code of Civil Procedure, as it relates to grounds for disqualification of jurors, provides guidance in determining whether Dr. Fischer should be placed in the position of court appointed expert. California Code of Civil Procedure allows for challenge for cause of a potential juror based on implied bias. C.C.P. § 225 indicates that challenges may be made to a juror for implied or actual bias. (C.C.P. §225 (B) & (C). C.C.P § Section 229 states in relevant part, "A challenge for implied bias may be taken for one or more of the following causes, and for no other: (f) [h]aving an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them. Here Dr. Fischer has demonstrated that he has an both an actual and implied bias by expressing an unqualified opinion that Jahi McMath is irreversibly brain dead. No confidence will be given to the petitioner, or to the public, to have him act as an "independent" expert in this case to evaluate his own determination.

We can likewise look to the Code of Civil Procedure § 170.1, disqualification of judges, for support that Dr. Fischer should be disqualified as a person aware of the facts might reasonably

THE DOLAN LAW FIRM
TRIAL LAWYERS
THE DOLAN BUILDING
1438 Market Street
SAN FRANCISCO, CA 94102
TEL: (415) 421-2800
FAX: (415) 421-2830

entertain a doubt that the Dr. Fischer would be able to be impartial. (See C.C.P. §170.1(6)(iii).) This standard involves an objective test as to whether a reasonable member of the public at large, aware of all facts, would fairly entertain doubts concerning judge's impartiality. (See Briggs v. Superior Court (2001) 87 Cal.App.4th 312.)

Evidence Code § 780 states that the court, in considering the credibility of a witness, can consider any matter that has any tendency in reason to prove or disprove the truthfulness at the hearing including but not limited to the existence of a bias, interest or other motive. (Evidence Code § 780 (I).) Here Dr. Fischer has a bias in favor of his previous conclusions in such a manner as to disregard new incontrovertible evidence.

Conclusion

Petitioner's objection to the appointment of Dr. Fischer should be granted given the fact that a reasonable people from the public at large, aware of all the facts, would entertain doubt as to Dr. Fischer's impartiality. His conflict of interest and actual bias should lead to him being disqualified as an expert in the interests of justice and to promote confidence within the legal system.

Electronically signed this 7th day of October, 2014

Christopher B Dolan Esq.

THE DOLAN LAW FIRM
THE DOLAN BUILDING
1438 Market Street
SAN FRANCISCO, CA 94102
TEL: (415) 421-2800
FAX: (415) 421-2830