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November 2, 2020

Hon. Brenda K. Sannes,
U.S. District Judge
Federal Building & U.S. Courthouse
P.O. Box 7336
Syracuse NY 13261-7336

Re: Carol Thomas et al v Mohawk Valley Health System et al
6:20-cv-01347 – BKS – ML

Dear Judge Sannes:

Plaintiffs are once again seeking a temporary restraining order, despite the clear evidence in this case refuting their position and despite the fact that their two previous attempts to obtain a stay have been unsuccessful. Respectfully, this application should similarly be denied.

Procedural History

The action follows the hospitalization of Sharon Frederick at St. Elizabeth's Medical Center on September 17, 2020 following a massive stroke and large brain bleed. She was comatose upon her arrival and remained in a coma. Over the course of the next three days, Ms. Frederick's condition worsened to the point where she showed no signs of brain stem function. On September 21, 2020, a private neurologist, Jameel Arastu, M.D., conducted the tests required by New York State Department of Health Guidelines and set forth in 10 NYCRR §400.16 to declare brain death. As a result of that testing, Dr. Arastu certified that Ms. Frederick was brain dead. In New York, a patient who has been certified as brain dead is both clinically and legally dead. Accordingly, a death certificate was filed for Ms. Frederick. However, she was not immediately removed from her ventilator, in keeping with hospital policy, in order to provide "reasonable accommodations" to Plaintiffs, her health care proxies, to allow them to participate in an ethics consult and to consult another physician to obtain a second opinion. Plaintiffs, who refused to accept the determination of brain death, brought a proceeding in state court seeking an order to compel the Hospital to reverse the determination that Ms. Frederick was brain dead and to provide her with "any and all treatment and medical care … in order to preserve and sustain her life, including … any and all reasonable or necessary surgeries …"

Plaintiffs' Complaint is riddled with factual inaccuracies that have already been disproven in prior proceedings in state court. Their state court Petition and Order to Show Cause with supporting papers is attached as **Exhibit A**. In addition, despite the allegation in the Complaint to the contrary, not only was the death certificate provided to Plaintiffs, but they entered it into evidence at the evidentiary hearing in New York State Supreme Court.

During the evidentiary hearing conducted by Oneida County Supreme Court Justice Patrick F. MacRae, Plaintiffs offered no evidence that the brain death certification was done incorrectly, let alone evidence to refute the fact that Ms. Frederick was indeed brain dead as of September 21, 2020. A certified copy of the transcript of the October 9, 2020 hearing is attached as **Exhibit B**. Based on the testimony and exhibits produced during that hearing, Justice MacRae dismissed the Petition (a copy of the signed Order of dismissal is included in Ex. B).

The Plaintiffs then filed a notice of appeal and sought a discretionary stay pending appeal from the Appellate Division, Fourth Department, pursuant to CPLR 5519 (c)[1]. Justice Brian DeJoseph signed a temporary Order to Show Cause in order to allow the parties to fully brief the matter. Subsequently, by Decision and Order dated October 29, 2020, the Fourth Department denied Plaintiffs' motion.

The State trial court properly determined that the evidence established that Ms. Frederick was, under New York State guidelines, brain dead. That determination was made in accordance with statutory and medical standards. Accordingly, the State Court properly dismissed the Petition. Plaintiffs' current attempt to skirt the effect of that dismissal by bringing an application in this Court should not be allowed.

Facts

Plaintiffs, who are members of the church that Sharon Frederick attended, are her health care proxies. Ms. Frederick's certified medical records are attached as **Exhibit C**. The Health Care Proxy is attached as **Exhibit D**.

Ms. Frederick signed the Health Care Proxy form on September 3, 2019. The Proxy states:

> **However, I also know that death need not be resisted by any and every means and that I have the right to refuse medical treatment that is excessively burdensome or would only prolong my death and delay my being taken to God.**

Further, in her specific instructions, Ms. Frederick simply stated: "I believe in Life Support." It should be noted, however, as it was by the state trial court, that she gave no indication in her health care proxy that she personally wanted life support, nor did she indicate, assuming she did want life support measures to be used, the circumstances under which she wanted them to be used. (See Ex. B, at pgs. 199-200).

Ms. Frederick, who was 63, presented to St. Elizabeth's Medical Center (the "Hospital") via ambulance after being found unconscious and in respiratory arrest for an unknown length of time. (Ex. C, SLF/MVHS-00003) Upon her arrival, she was placed on ventilation and began receiving intravenous medication and sodium chloride (saline) immediately. (*Id*.) The medical record shows that she was admitted to the ICU following a CT scan of her head that revealed a

[1] Plaintiffs have not withdrawn their notice of appeal.

large intraventricular bleed with herniation that extended bilaterally into the ventricular system and down into her brain stem. (*Id*. at SLF/MVHS-00005) Ms. Frederick was comatose upon her arrival and remained in a coma. (*Id*. at SLF/MVHS-00043, 000047, 00062, 00137) Almost immediately, she had an ICH (intracerebral hemorrhage) score of 4, which is associated with a 97% mortality rate within 30 days. (*Id*. at SLF/MVHS-00042)

Numerous tests were conducted on her brainstem reflexes, including pupillary reflex, corneal reflex, oculocephalic reflex, oculovestibular reflex, gag reflex and cough reflex. All showed no activity. In addition, she demonstrated no spontaneous breathing and no response to deep central or peripheral pain. (*Id*. at SLF/MVHS-00051-00053, 00079-00082, 00135-00142). An apnea test was performed on September 21, 2020, and no respiratory movements were noted and there was a 20 mm Hg increase in PaCO2 over a baseline normal PaCO2. (*Id*. at SLF/MVHS-00135-00142). As a result, Ms. Frederick was certified brain dead by Dr. Arastu on September 21, 2020. Her attending physician, Dr. Dilip D. Kachare, filed a Certificate of Death, a copy of which is attached as **Exhibit F**.

Plaintiffs were informed of the brain death determination as well as the Hospital's intent to then place Ms. Frederick on DNR status and schedule removal of her ventilator, in accordance with both New York State guidelines and Hospital policy. As recorded in a 9/22/2020 note of Kevin J. Gehr, PA (neurosurgery), Plaintiff Antonelli was called at 1:47 p.m. and informed of the brain death determination. (Ex. C, SLF/MVHS-00143-00146) According to the note, Ms. Antonelli stated that she understood that "Sharon is brain dead", but indicated she is not "body dead", and that the "patient is deeply rooted in faith and will have Jesus take care of her and will pray for Jesus's miracle." (*Id*.) At that time, the Hospital began implementing "reasonable accommodations", per New York State guidelines and its own policy, including allowing the health care proxies to participate in an ethics consult and to consult an independent physician to obtain a second opinion. (*Id*. at SLF/MVHS-00053) In addition, the Hospital has continually indicated a willingness to transfer Ms. Frederick to a facility of Plaintiffs' choosing. However, despite Plaintiff's continued unfounded assertion that they have a facility to send her to, not a single facility has reached out to the Hospital and indicated a willingness to accept her. To the contrary, the Hospital has been informed thus far that no facility is willing to take the body of Ms. Frederick, as she is both clinically and legally dead.

As was explained to Plaintiffs at their ethics consult with Dr. Stephen Hudyncia, requiring the Hospital staff to continue to provide care and treatment to someone who has been determined more than five weeks ago to be dead has resulted in severe and undue psychological trauma. Further, as noted in the Affirmation of Dr. Eric Yoss, Ms. Frederick's body has been deteriorating and continues to deteriorate. The ventilator serves no purpose than to artificially maintain her organs. Dr. Yoss's Affirmation with exhibits is attached as **Exhibit H**. The condition of Ms. Frederick's body has only worsened since Dr. Yoss's affirmation, which is reflected in the updated medical records sent to Plaintiffs on October 16.

Law of the Case

Plaintiffs commenced their state court proceeding on October 3, 2020, stating that they were seeking to "protect and preserve Sharon Lucy Frederick's life." (Ex. A) They commenced

the proceeding by an Order to Show Cause requiring, among other things, a hearing as to why the Court should not continue or order the Hospital to abide by the health care decisions they made on behalf of Ms. Frederick **and, further, to declare the certification of brain death null and void** and to force the Hospital to continue to provide "any and all treatment and medical care … in order to preserve and sustain her life, including … any and all reasonable or necessary surgeries …" A hearing took place on October 9, 2020 in front of Honorable Patrick MacRae, with both sides presenting expert testimony and evidence. *See* Exhibit B.

Both Plaintiffs testified as to their understanding of the wishes of Ms. Frederick. However, both also admitted that they had never discussed brain death with her. (*See* Ex B at pgs. 38 and 75). Rather, they testified that it was **their** personal belief that there was no such thing as brain death and that they believe it to be nothing more than a "legal fiction". (*See* Ex B at pgs. 38-39 and 74, 76).

Plaintiffs attempted to call a Dr. Paul Byrne as an expert witness. This is the same Dr. Byrne they appear to rely on in furtherance of this motion. The trial Court however, found him to be not qualified as an expert and did not allow him to testify. *Id*. at pgs. 134-137) It is significant to note that during questioning to determine whether he was qualified to testify as an expert, Dr. Byrne admitted that he, too, believes brain death is a "made-up concept" that is intended as a means to facilitate the collection of organ donations. (*Id.* at pg. 107). Dr. Byrne acknowledged his belief in the following quote regarding brain death that was attributed to him: "Brain death is the utilitarian construct adopted by the legal and medical community to label a person with a severely injured brain as 'dead' in order to legally facilitate organ procurement and/or for the hospital to then be the decisionmaker on discontinuation of treatment." (*Id.* at pgs. 131-132)

Plaintiffs also tried to offer into evidence an affidavit signed by a Dr. Cicero Coimbra, an alleged doctor in Brazil. The trial Court declined to receive the affidavit, since it was not subject to cross-examination. (*Id*. at pgs. 137-138).

Plaintiffs provided no medical testimony whatsoever in state court to refute the brain death certification of September 21, 2020. And, once again, Plaintiffs provide absolutely no medical evidence in this Court to refute the brain death determination.

In state court, Plaintiffs relied on what was demonstrated to be an erroneous notation in Ms. Frederick's medical record indicating that there was some ocular movement after the brain death certification. Dr. Dilip Kachare, the first witness called by the Hospital, explained what had happened. Dr. Kachare testified that the Hospital's computerized records contained a box that he needed to uncheck regarding ocular movement. He failed to uncheck that box when he made an entry in the chart subsequent to the brain death certification. Dr. Kachare was clear, however, that at no time did he observe ocular movement by Ms. Frederick following the brain death certification. (*See* Ex. B Transcript of October 9, 2020 hearing at pgs. 158-160) Any notation in her chart to the contrary was attributable entirely to his failure to uncheck the box while making a subsequent entry, and that notation was automatically carried forward into subsequent entries.

The Hospital then called Dr. Jameel Arastu, who was accepted by the Court as an expert in neurology. (*Id*. at pg. 177). Dr. Arastu testified extensively as to the requirements of determining a patient to be brain dead. Further, he described the testing that was completed on Ms. Frederick that supported his certification of brain death on September 21, 2020. He testified that when he performed his testing on Ms. Frederick, she remained in an irreversible coma. He tested her brainstem reflexes, including her pupillary reflex, corneal reflex, oculocephalic reflex, oculovestibular reflex, gag reflex and cough reflex, none of which had any activity. In addition, she had no spontaneous breathing, and no response to deep central or peripheral pain. (*Id*. at pg. 179-190, and Ex. C at SLF/MVHS-00135-00142)

Dr. Arsuta testified that he performed the last part of the brain death certification, an apnea test, on September 21, 2020. No respiratory movements were noted and there was a 20 mm Hg increase in PaCO2 over a baseline normal PaCO2. (*Id*.) Dr. Arastu testified that it was his opinion, within a reasonable degree of medical certainty, that Ms. Frederick was brain dead. (*Id*. at pg. 184, 214) This was consistent with New York State law and guidelines and consistent with the testing procedures accepted within the medical community. (*Id*. at pg. 184-185, 214)

After hearing all the testimony and evidence, the state trial Court concluded, among other things, that it wasn't "able to reach a specific conclusion as to what [Ms. Frederick's] intentions were taking into consideration Ms. Thomas's and Ms. Antonelli's testimony…" (*Id*. at pg. 221) Additionally, the Court indicated that it had "evidence that she was in a coma, that she had no brain stem functions, and she was unable to respirate on her own, and the combination of those, according to the New York State Guidelines, **warrant the determination of brain death, which is what the hospital was required to conclude**." (*Id*. at pg. 223) On that basis, the Court held that it was "compelled to dismiss the petition…" (*Id*. at pg. 223-224). The Court's entire Oral Decision can be found at pgs. 218-225 of the transcript. An Order with notice of entry was filed on October 13, 2020 dismissing the Petition in its entirety. (Exhibit B)

Plaintiffs filed a Notice of Appeal and also, by Order to Show Cause and supporting Affirmation, moved for an emergency discretionary stay pursuant to CPLR §5519 (c). An Order to Show Cause was signed by the Honorable Brian D. DeJoseph on October 13, 2020. On or about October 14, 2020 the Hospital requested that Judge DeJoseph modify and/or clarify the temporary order, and the request was denied. However, after fully briefing the issues, the Appellate Division, Fourth Department, denied Plaintiffs' motion by Decision and Order dated October 29, 2020. A copy of the Decision and Order is attached as **Exhibit I**. It should also be noted that Plaintiffs' motion papers in the Appellate Division abandoned the religious ground for their original Petition.

Ms. Frederick's Current Status

As detailed by the Affirmation of Dr. Eric Yoss, Ms. Frederick's body is in a state of ongoing and continuing deterioration. The medical records post-brain death certification indicate that she continued to show progressive signs of organ failure, including cardiac failure, while the hearing was pending.

It is important to understand that the current condition of Ms. Frederick's body and the physiological changes that body is undergoing have nothing to do with the fact that the ventilator continues to pump oxygen. Despite the fact that her body remains connected to a ventilator, it will continue to deteriorate as part of the inevitable process of postmortem bodily decay.

In support of their current motion, Plaintiffs again blatantly ignore facts contained in the medical records that they themselves offered into evidence at the hearing in front of the state trial court. Specifically, they argue that Ms. Frederick's brain stem was functioning, since she was able to regulate her own body temperature. This is not true. As detailed in the Affirmation of Dr. Eric Yoss, the Chief Quality Officer for the Mohawk Valley Health System, of which the Hospital is a member, the medical records clearly indicate that Ms. Frederick was not able to regulate her body temperature. (*See* Yoss Affirmation at Ex. H) Attached as Exhibit B to Dr. Yoss's Affirmation are portions of the medical chart that was entered into evidence at the hearing before Judge MacRae. (*Id*.) The chart not only reflects Ms. Frederick's declining body temperature, but shows that the Hospital used a device called a Bair Hugger and heated blankets in order to increase her body temperature to the point that was necessary in order to conduct the necessary testing to determine whether she was brain dead. (*Id*.) The Bair Hugger system is a convective temperature management system used in a hospital or surgery center to maintain a patient's core body temperature. (*Id*.)

New York Law

The issue of when human life terminates is an issue that has become increasingly difficult for the legal community, considering the medical community's ability to artificially maintain certain bodily functions of an otherwise lifeless body through the use of sophisticated machines. In New York, the first time the Court of Appeals appears to have addressed this issue was in the dual cases of *People v. Eulo/People v. Bonilla*, 63 N.Y.2d 341, 482 N.Y.S.2d 436 (1984). These cases were appeals of criminal prosecutions of defendants who had shot their victims in the head, causing their deaths. The major issue before the Court was a determination of the cause of death, which was related to when the victims had died. At that time, the New York legislature had not yet provided a definition of "death".

In the absence of such legislation, the Court made own determination of the termination of life, holding (at page 357–358):

> When a determination has been made according to accepted medical standards that a person has suffered an irreversible cessation of heartbeat and respiration, **or**, when these functions are maintained solely by extraordinary mechanical means, **an irreversible cessation of all functions of the entire brain, including the brain stem**, no life traditionally recognized by the law is present in that body.

(Emphasis added)

Subsequent to *Eulo*, the Governor established the New York State Task Force on Life and the Law. The Task Force, composed of experts in a number of fields, deliberated for some

eighteen months before releasing a report in 1987. The report concluded, essentially, that it was unnecessary for the Legislature to enact a statutory definition of termination of life as the *Eulo* standard was sufficient. The Task Force did conclude, however, that a standard for the termination of life should be promulgated by the Department of Health.

That standard was in fact promulgated later that year, as Title 10 of the New York Codes, Rules and Regulations, section 400.16. The section remains in effect today. In *Matter of Alvarado v. New York City Health and Hospitals Corp.*, 547 N.Y.S.2d 190 (Sup.Ct. New York Co., 1989), the Court upheld the constitutionality of 10 NYCRR §400.16. In *Alvarado*, the parents of a baby moved to enjoin the defendant hospital from terminating life support of the body of their child, whom the hospital alleged was dead. Applying §400.16 to the case before it, the Court ruled that the baby was in fact brain dead, that the hospital had followed proper procedures set forth in that section, and that the Court had "no authority to intervene in what is a wrenching and heartrending decision to be made by the hospital". *Id* at 198. [2]

Subdivision (a) of §400.16 provides for a determination of death of an individual who has sustained either: (1) irreversible cessation of circulatory and respiratory functions; or (2) irreversible cessation of all functions of the entire brain, including the brain stem. Subdivision (b) provides that the determination of death must be made in accordance with accepted medical standards.

The New York State Department of Health has published guidelines for determining brain death in furtherance of §400.16. The New York State regulation defines brain death as the irreversible loss of all function of the brain, including the brain stem. *See* 10 N.Y.C.R.R. §400.16. A copy of the New York State Department of Health Guidelines is attached as **Exhibit E**. The three essential findings for brain death are coma, absence of brain stem reflexes and apnea. An evaluation for brain death needs to be considered in patients who have suffered a massive, irreversible brain injury of identifiable cause, such as that suffered by Ms. Frederick as a result of her stroke. A patient properly determined to be brain dead is legally and clinically dead. "The diagnosis of brain death is primarily clinical and consists of three essential findings: irreversible and unresponsive coma, absence of brain stem reflexes, and apnea. No other tests are required if the full clinical examination, including an assessment of brain stem reflexes and an apnea test, is conclusively performed." *Id.*

Dr. Arastu testified in detail to the requirements of declaring a patient to be brain dead. (*See* Ex. B Transcript of October 9, 2020 hearing at pgs. 169-172) As indicated by Dr. Arastu, there is no dispute that Ms. Frederick remained in an irreversible and unresponsive coma since the time of her arrival at the Hospital. (*Id.* at 179) Further, as the medical records show, she has been tested and has shown absolutely no brainstem reflexes. In fact, on at least two occasions, her brainstem reflexes, including pupillary reflex, corneal reflex, oculocephalic reflex, oculovestibular reflex, gag reflex, cough reflex, no spontaneous breathing, and no response to deep central or peripheral pain were tested by two independent physicians. (*See* Ex. C).

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[2] The *Alvarado* decision was appealed to the Appellate Division, First Department. However, before the Appellate Division considered the appeal, the parties entered into a consent order that vacated the Supreme Court decision and dismissed the appeal as academic. *Matter of Alvarado v. New York City, Department of Health*, 157 A.D.2d 604 (1st Dep't, 1990).

Plaintiffs, although previously unsuccessful, again argue only that her brain stem *must* have been functioning because she was regulating her own body temperature. They contend that she has maintained her own body temperature throughout her admission. This, however, is patently false, as shown by her medical record. For instance, on September 19, 2020, Dr. Mohammed Seedat noted in his ICU daily progress note that Ms. Frederick was "hypothermic" and had a body temperature of 95.2 degrees Fahrenheit. (Ex C at SLF/MVHS-00086-00087) Again on September 20, 2020, Dr. Victor Udekwu noted that the patient's temperature was again 95.2 degrees Fahrenheit. (*Id*. at SLF/MVHS-00097) These are only two of the numerous entries confirming Ms. Frederick's inability to regulate her body temperature, contrary to Plaintiffs' assertions.

Plaintiffs' alternative argument, that Ms. Frederick must be regulating her own temperature since it was not artificially maintained, is also contradicted by the evidence. For instance, on September 20, 2020 at 10:24 a.m., an entry in the chart by Maureen Aurrichio notes the patient had a Bair hugger on. (*Id*. at SLF/MVHS-00100-00103) As noted by Dr. Yoss, the Bair Hugger system is a convective temperature management system used in a hospital or surgery center *to maintain a patient's core body temperature*. (Yoss Affirmation attached as Ex. H) This was repeated later in the day by Dr. Seedat, who noted that Ms. Frederick was "receiving Bair hugger for hypothermia." (Ex C at SLF/MVHS-00104-00105)

On September 19, Dr. Udekqu noted that warming blankets were being used to keep the patient normal thermic. (*Id.* at SLF/MVHS-00431-00432) There is also a note for the 19th that the Bair hugger was applied due to low temperature. (*Id.* at SLF/MVHS-00460) Blankets and Bair huggers were used even following the brain death determination, due to Ms. Frederick's inability to regulate her body temperature and hypothermia. (*Id.* at SLF/MVHS 00777-00778, 00866-00875, 00892-00893, 00898, 00917-00919, 00924, 01178)

Plaintiffs have continually relied on the fact that Ms. Frederick's temperature was normal during the apnea test performed by Dr. Arastu. Their reliance, however, completely ignores the facts. Both the medical record and Dr. Arastu's testimony disprove their reliance. Dr. Arastu testified, "All I do is when I come in to do the test, I inquire whether her body temperature is a certain degree because I can't do a test for brain function without knowing that her temperature is normal, correct." (Ex. B at 196). He did not testify as to how Ms. Frederick's body achieved that temperature.

Plaintiffs also try to assert that she requires no medication to maintain her blood pressure, which is also untrue. A review of the certified medical records indicates that it is riddled with notations that her blood pressure was fluctuating and required medication to regulate.

Based on the foregoing proof, the crux of Plaintiffs' argument is demonstrably false. Finally, in raising this argument, Plaintiffs completely ignore Dr. Arastu's own records from September 20, 2020. On September 20, Dr. Arastu conducted a follow-up visit of Ms. Frederick where he reviewed and noted her last recorded vitals. Those readings included, in bold red, a low temperature of ***95.2 degrees Fahrenheit***. (*See* Ex. C at SLF/MVHS-00104)

The apnea test is the final step in the determination of brain death. Ms. Frederick was given an apnea test on September 21, 2020. That test demonstrated that no respiratory movements were noted and there was a 20 mm Hg increase in PaCO2 over a baseline normal PaCO2. (Ex B at pg. 179-190, and Ex. C at SLF/MVHS-00135-00142) This result, based on New York guidelines and standards, completely supports the diagnosis of brain death.

It is clear that based on the tests performed on the patient and New York law, Ms. Frederick was properly certified as brain dead on September 21. Additional ancillary testing is not at all required following this finding and, additionally, has limitations as noted by the guidelines.

Subdivision (e) of §400.16 provides:

> (e) Each hospital shall establish and implement a written policy regarding determinations of death in accordance with paragraph (a)(2) of this section. Such policy shall include:
>
> > (1) a description of the tests to be employed in making the determination;
> > (2) a procedure for the notification of the individual's next of kin or other person closest to the individual in accordance with subdivision (d) of this section; and
> > (3) a procedure for the reasonable accommodation of the individual's religious or moral objection to the determination as expressed by the individual, or by the next of kin or other person closest to the individual.

Pursuant to subdivision (e), MVHS has a Determination of Brain Death Policy, which provides for the testing detailed above in accordance with Department of Health guidance and for "reasonable accommodation." The MVHS policy is attached as **Exhibit F**.

In *Matter of Long Island Jewish Med. Ctr. (Baby Doe)*, 641 N.Y.S.2d 989, 992 (Sup. Ct. Queens Cnty. 1996) the hospital did not have a written policy and the court had to determine if the hospital had in fact provided "reasonable accommodation." The court looked at whether the parents were kept informed of the condition, were afforded consultation, were allowed to seek a second opinion for an expert of their own choosing and were given cooperation. *Id*. Further, when the hospital came to the conclusion that the baby was irretrievably brain dead, they did not simply "pull the plug", but sought judicial intervention. Additionally, the hospital expressed a willingness, and even a preference, to transfer the baby to a different facility of the parents' choosing. As is shown in the medical history of the patient and by Plaintiffs' own admission, all of these accommodations were provided by the Hospital. The Court in *Matter of Long Island Jewish Med. Ctr. (Baby Doe)* concluded that the parents were in fact afforded reasonable accommodation in light of their religious and moral beliefs.

Here, the Hospital has continued nutrition, hydration, respiratory support and medications to Ms. Frederick despite a brain death certification being performed and a death certificate issued. It should be made clear that these have been done at the request of Plaintiffs. Their reliance on continued care as a basis to assert that the Hospital or treatment providers are treating her as if she is "alive", is completely inappropriate and untrue.

Ms. Frederick's health care proxies have been kept informed as to her condition and test results, and even allowed to participate in an ethics consult. (See Ex. B pgs. 76-77) They have been provided the opportunity to consult an independent physician and obtain a second opinion, which they refused, instead hiring Dr. Paul Byrne, who has never practiced neurology. Additionally, the Hospital has continually indicated its willingness to transfer the patient. (*Id.* at pg. 78). However, at this time, the Hospital has not been made aware of any facility willing to accept Ms. Frederick.

Following a certification of brain death, which was done on September 21, 2020, the next step is that the ventilator is be discontinued after reasonable accommodations have been provided. As detailed above, the Hospital has gone above and beyond its own policy and what is required under state guidelines to provide accommodations to the Plaintiffs.

POINT I

PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF SHOWING THAT EXTRAORDINARY PRELIMINARY RELIEF THEY SEEK IS WARRANTED

Rule 65 of the Federal Rules of Civil Procedure governs both temporary restraining orders ("TRO") and preliminary injunctions. In the Second Circuit, the standard for granting a TRO is the same as the one for granting a preliminary injunction. *See Fairfield Cty. Med. Ass'n v. United Healthcare of New Eng.*, 985 F. Supp. 2d 262, 270 (D. Conn. 2013), *aff'd*, 557 F. App'x 53 (2d Cir. 2014); *AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010).

A party seeking a TRO or a preliminary injunction must demonstrate that:

(1) it is likely to suffer irreparable harm in the absence of preliminary relief;
(2) either (a) it is likely to succeed on the merits or (b) there are sufficiently serious questions going to the merits of its claims to make them fair ground for litigation;
(3) the balance of hardships tips decidedly in its favor; and
(4) a preliminary injunction is in the public interest.

See Oneida Nation of N.Y. v. Cuomo, 645 F.3d 154, 164 (2d Cir. 2011); *Hafez v. City of Schenectady*, No. 17-CV-0219, 2017 WL 6387692, at *3 (N.D.N.Y. Sept. 11, 2017). The purpose of a preliminary injunction is to generally preserve the status quo pending resolution of any underlying dispute. *See Chobani LLC v. Dannon Co., Inc.*, 157 F. Supp. 3d 190, 201 (N.D.N.Y. 2016) (Hurd, J.) Preliminary relief is "an extraordinary remedy" and the party seeking such relief must demonstrate "by a clear showing" that the necessary elements have been satisfied. *See In re Keurig Green Mountain Single-serve Coffee Antitrust Litigation*, No. 14-MD-2542, 2014 WL 12778832, at *4 (S.D.N.Y. Sept. 19, 2014); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

A. Irreparable Harm

A showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). "Irreparable harm is 'injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.'" *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015). "The relevant harm is the harm that (a) occurs to the parties' legal interests and (b) cannot be remedied after a final adjudication, whether by damages or a permanent injunction*." Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (internal footnote omitted).

Here, the status of Ms. Frederick, although tragic, is final. She is and has remained brain dead since September 21, 2020. The medical records and evidence previously provided at the October 9, 2020 hearing clearly show absolutely no improvement or brain function as recognized under New York's Brain Death criteria.

It should also be noted that Plaintiff Antonelli has never visited Ms. Frederick in the Hospital since her admission. The irreparable harm being done is to the current treatment team at the Hospital, which has had to deal with the adverse psychological effects of continuing to treat what they recognize to be a deceased individual. The continued treatment of a deceased body has raised numerous ethical issues for providers who believe the continued care is disrespectful to a person who has died.

B. Likelihood of Success

1. Because Plaintiffs cannot show state action, they will not succeed on any constitutional claims.

In their Complaint, Plaintiffs purport to bring three separate federal constitutional claims: (1) violation of the Free Exercise Clause of First Amendment; (2) violation of the Right to Privacy Guaranteed Under the Fourth Amendment; and (3) violation of the Right to Privacy Guaranteed under the Fourteenth Amendment. *See generally* Dkt. No. 2. "Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes 'state action.'" *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 941 F.2d 1292, 1295–96 (2d Cir. 1991). Therefore, to state a claim arising under 42 U.S.C. § 1983, a plaintiff must allege that he or she was injured by either a state actor or a private party acting under color of state law. *See Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) (citing *Spear v. Town of West Hartford*, 954 F.2d 63, 68 (2d Cir. 1992)).

Plaintiffs do not allege at any point that the Hospital is a state actor for purposes of 42 U.S.C. 1983. *See generally* Dkt. No. 2. Although Plaintiffs note that the Hospital may receive state and federal funding, the mere receipt of public funds does not transform a purely private party into a state actor. *See, e.g.*, *Chance v. Reed*, 538 F. Supp. 2d 500, 507 (D. Conn. 2008; *Kraft v. Yeshiva University*, No. 00-CV- 4899, 2001 WL 1191003, at *3 (S.D.N.Y. Oct. 5, 2001) ("The mere fact that a university receives federal funding does not make the school or its

employees state actors."). Because Plaintiffs will be unable to prove state action—which is a necessary prerequisite to a federal constitutional claim—their three causes of action are fatally flawed.[3] *See* Dkt. No. 2.

2. Plaintiffs will be unable to prevail on any claim arising under the Rehabilitation Act and the Americans With Disabilities Act.

Plaintiffs also purport to bring claims arising under Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), as well as the Americans With Disabilities Act 42 U.S.C. § 12101 *et seq* ("ADA"). *See generally* Dkt. No. 2. Given the similar language in the two statutes, the analysis of such claims is virtually identical. *See, e.g.*, *Giraldi v. Bd. of Parole, State of New York*, 04-CV-877, 2009 WL 3191530, at *5 (N.D.N.Y. Sept. 30, 2009); *see also Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1265 n.9 (4th Cir. 1995) ("Because the language of the two statutes is substantially the same, we apply the same analysis to both.").

In relevant part, the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Similarly, the ADA requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Here, both of Plaintiffs' claims suffer from a crucial flaw: Ms. Frederick is brain dead, not disabled. *See, e.g.*, Dkt. No. 1 ¶ 26. "Brain death" does not constitute a "physical or mental impairment" recognized under the law. *See* 29 C.F.R. § 1630.2(h)(l)-(2) (providing the definition of physical or mental impairment). In fact, a certificate of death has been issued and a New York State court has denied their original action to have it revoked.[4] Consequently, plaintiffs will be unable to set forth the required elements of a claim arising under the Rehabilitation Act or the ADA.

Even assuming that "brain death" did qualify as a disability, plaintiffs are still unlikely to succeed on the merits. First, the Rehabilitation Act is intended to ensure that handicapped individuals are not denied access to programs provided to non-handicapped persons. *See Schiavo ex rel Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1166 (M.D. Fla. 2005), *aff'd sub nom. Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005). Because of this intended statutory purpose, courts hold that "the otherwise qualified criteria . . . cannot be meaningfully applied to a medical treatment decision." *United States v. Univ. Hosp. of State Univ. of New York*

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[3] Given the frivolous, unreasonable, and groundless nature of Plaintiffs' claims, this is one of the rare cases in which defendants intend to seek attorney's fees under 42 U.S.C. § 1988. *See Opoku v. County of Suffolk*, 123 F. Supp. 3d 404, 410 (E.D.N.Y. 2015); *see also Sista v. CDC Ixis North Am., Inc.*, 445 F.3d 161, 178 (2d Cir. 2006).

[4] It should also be noted that both the doctor who certified Ms. Frederick brain dead, and the doctor who issued the death certificate are not employees of St. Elizabeth's Medical Center or Mohawk Valley Health System.

at Stony Brook, 729 F.2d 144, 156 (2d Cir. 1984)). In addition, the Rehabilitation Act does not mandate the provision of services. *Schiavo*, 358 F. Supp. 2d at 1166 (citing *Olmstead*, 527 U.S. 581, 603 n. 14 (1999)).

3. One or more abstention doctrines bars Plaintiffs' claims.

"*Rooker-Feldman* bars the federal courts from exercising jurisdiction over claims 'brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 94 (2d Cir. 2015). The doctrine holds that lower federal courts lack "subject matter jurisdiction 'over cases that effectively seek review of judgments of state courts.'" *Phifer v. City of New York*, 289 F.3d 49, 55 (2d Cir. 2002) (quoting *Moccio v. N.Y. State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996)). District courts "do not have jurisdiction . . . over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional," and "[r]eview of those decisions may be had only" in the Supreme Court of the United States. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983). "A plaintiff may not overcome the doctrine and seek a reversal of a state court judgment 'simply by casting his complaint in the form of a civil rights action.'" *Rabinowitz v. New York*, 329 F. Supp. 2d 373, 376 (E.D.N.Y. 2004) (quoting *Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993)).

The Second Circuit outlined the four requirements for the application of *Rooker-Feldman*:

> (1) the federal-court plaintiff must have lost in state court;
> (2) the plaintiff must complain of injuries caused by a state-court judgment;
> (3) the plaintiff must invite district court review and rejection of judgment;
> (4) the state-court judgment must have been rendered before the district court proceeding commenced.

See Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005). In determining whether to apply the bar of *Rooker-Feldman*, courts in the Second Circuit typically analyze the "substantive" requirements (second and third) before proceeding through the "procedural" requirements (first and fourth). *See McKithen v. Brown*, 481 F.3d 89, 97 (2d Cir. 2007).

In this case, all four of the requirements apply. Just as they do here, Plaintiffs previously sought to have a state court "compel [defendants] to provide all treatments and care, including all needed surgeries, proper nutrition and hydration, however ministered, that will protect and preserve [Ms. Frederick's] life[.]" Following a full evidentiary hearing, their request was denied in its entirety. Although this action does not necessarily *directly* challenge the state court's determination, it appears to do so *indirectly* because Plaintiffs seek to restrain the Hospital from "removing of ventilator support and mandating introduction of nutritional support, insertion of a tracheostomy tube, gastric tube, and to provide other medical treatments and protocols designed

to promote her maximum level of medical improvement[.]" Dkt. No. 1 at 19. To the extent that the Court agrees with Plaintiffs' position regarding the provision of medical care to someone who was declared brain dead, such a finding would seriously undermine the state court's ruling. At a minimum, Plaintiffs' claims are "inextricably intertwined" with the state court action, thereby triggering application of the *Rooker-Feldman* doctrine. *See Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002) ("In addition to claims that were actually litigated in state court, the *Rooker-Feldman* doctrine bars lower federal courts from exercising jurisdiction over claims that are "inextricably intertwined" with state court determinations").

Additionally, this Court should abstain from considering this matter under the *Younger* abstention doctrine. *Younger v. Harris*, 401 U.S. 37 (1971) "and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings, absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). When a case is subject to *Younger* abstention, a district court should dismiss the federal action. *See Juidice v. Vail*, 430 U.S. 327, 337 (1977). Under the three-pronged test established by the Supreme Court in *Younger*, "abstention is appropriate in favor of a state court proceeding if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions." *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1357-58 (9th Cir.1986) (*citing Middlesex*, 457 U.S. at 432).

The State proceedings are ongoing. The Plaintiff's have filed a notice of appeal of the State trial court's dismissal of their Petition. The Appellate Division has denied their motion for a stay pending appeal, but their Notice of Appeal still stands. "Abstention is required only when the state proceedings have been initiated 'before any proceedings of substance on the merits have taken place in federal court.'" *Fresh International*, 805 F.2d at 1358 (quoting *Hicks v. Miranda*, 422 U.S. 332,349 (1975)).

Younger abstention is appropriate only where important state interests would be affected by the federal action. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 4 77 23 U.S. 619,627 (1986) ("We have applied the *Younger* principle to civil proceedings in which important state interests are involved."). In the present action, plaintiffs challenge, among other things, a death certificate issued by the by one of Ms. Frederick's physicians and certified by the State of New York. Additionally, brain death is a matter of state law. 10 NYCRR §400.16. Different states have different statutes regarding brain death. The application of a determination of death statute is a matter of important state interests and a federal court should abstain from the issue.

The third prong of the *Younger* abstention doctrine is whether the plaintiff has or had adequate opportunity to raise federal questions in the state proceeding. *Middlesex*, 457 U.S. at 435. There is simply no bar to Plaintiffs here raising valid constitutional issues in state court. State court proceedings are presumed adequate to raise the federal claim "in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 481 US 1, 15 (1987).

BALANCE OF HARMS

"[T]he balance of hardships inquiry asks which of the two parties would suffer most grievously if the preliminary injunction motion were wrongly decided." *Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 922 F. Supp. 2d 435, 444 (S.D.N.Y. 2013) (alteration in original) (quoting *Tradescape.com v. Shivaram*, 77 F. Supp. 2d 408, 411 (S.D.N.Y. 1999)).

Plaintiffs suggest that "[t]here is absolutely no damage that the Defendants can claim that would override improperly removing SHARON LUCY FREDERICK'S ventilator." Dkt. No. 2 at 8. That is manifestly incorrect. As indicated above, Ms. Frederick's body continues to be cared for in the ICU unit by medical staff. The care of Ms. Frederick's body is currently consuming a very important and critical portion of the Hospital that is needed by the greater community. Further, the medical staff has been left with an incredible ethical dilemma in having to continue to care for a deteriorating postmortem body. This has and will continue to create physiological issues for staff and providers. In addition, there are significant financial costs that are accumulating due to the level of care being provided to Ms. Frederick's body. Upon information and belief, once the patient was declared brain dead, there is no longer payment for services being provided as all such services are deemed "not medically necessary" by insurance providers.

PUBLIC INTEREST

Finally, "the court must ensure that the public interest would not be disserved by the issuance of a preliminary injunction." *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010); *see U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 163 n.1 (2d Cir. 2012) ("[W]hen a court orders injunctive relief, it should ensure that injunction does not cause harm to the public interest."). Notably, "it is in the public interest to deny injunctive relief when the relief is not likely deserved under law." *Hubbard v. United States*, 496 F. Supp. 2d 194, 203 (D.D.C. 2007) (quoting *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 287 (D.D.C. 2005)); *see also Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C.Cir.1998) ("The final preliminary injunction factor, the public interest, . . . is inextricably linked with the merits of the case.")

Here, because there is absolutely no merit to the underlying suit, the public interest would not be served by granting Plaintiffs' request. *See Hubbard*, 496 F. Supp. 2d at 203. In addition, granting Plaintiffs' request would effectively have a federal court making an *ad hoc* decision concerning medical treatment of a single individual. This would harm both defendants and the public's interest. *See, e.g.*, *Hoskins v. Wexford Health Sources, Inc.*, CV DKC-17-3823, 2018 WL 2431887, at *3 (D. Md. May 30, 2018) ("[The plaintiff's] request to compel his receipt of medications deemed by medical provider to be no longer medically necessary for his treatment and potentially contraindicated, does not serve the public interest or tip the balance of equities.") Granting preliminary relief is simply not appropriate.

Additionally, a trial court has already made the determination that the patient was properly determined to be brain dead under New York law.

POINT II

IN THE EVENT THE COURT CONCLUDES THAT PRELIMINARY RELIEF IS WARRANTED, DEFENDANTS REQUEST THAT PLAINTIFFS BE REQUIRED TO POST A SECURITY BOND

Rule 65(c) of the Federal Rules of Civil Procedure provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper." Fed. R. Civ. P. 65(c). The purpose of this requirement is "to 'assure . . . the [restrained] party that it may collect damages from the funds posted in the event that it was wrongfully [restrained] and that it may do so without further litigation and without regard to the possible insolvency of the plaintiff.'" *U.S. D.I.D. Corp. v. Windstream Communs., Inc.*, 775 F.3d 128,135 (2d Cir. 2014) (quoting *Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 557 (2d Cir. 2011)).

Here, Plaintiffs suggest that the "only harm that would come to Defendants should the temporary restraining order be granted would be the minimal cost continuing life-support measures." Dkt. No. 2 at 9. This is not correct. Further, the costs to continue ventilator and other support is in absolutely no way a "minimal cost." Upon information and belief, the current estimated costs for Ms. Frederick's care to date is approximately $95,000. Based on the last 10 days, the current daily cost is about $2,050 per day (those costs were increased earlier on). It is also important to note, these are only the Hospital costs (respiratory therapists, nursing, room, etc.), and **not** include Physician costs (professional billing by employed or non-employed MDs). As articulated more completely *supra*, defendants continue to be harmed by Plaintiffs' inability to accept the fact that Ms. Frederick was declared brain dead more than a month and a half ago. Treatment providers have been forced to essentially continue treating a corpse that is in a state of progressive and ongoing deterioration. This has caused not only ethical but psychological concerns for the treatment providers.

Conclusion

Sharon Frederick underwent a series of evaluations that established a complete cessation of all spontaneous brain activity. Thus, the determination that she had died, based on the standard set forth by 10 NYCRR §400.16, was properly certified. In the state courts, Plaintiffs failed to present any controverting evidence – much less competent expert evidence establishing a reasonable medical probability – that Ms. Frederick is not dead as determined under the statutory standard above and its accompanying New York State Department of Health guidelines. As shown above, the Hospital has complied with all applicable legal standards in providing services to Ms. Frederick and, in fact, has gone beyond what is required of a health care institution in this position.

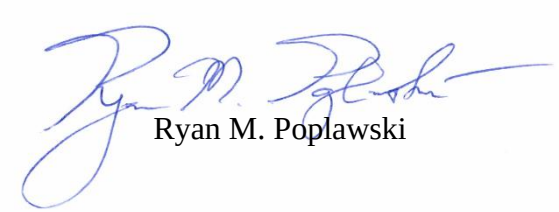
Plaintiff's contention that the Hospital must do more, that it must be prevented from terminating further services for Ms. Frederick, *six weeks after she was declared legally dead by NYS standards*, is based not on any medical evidence but, rather, simply their own lack of belief in the concept of brain death. (See Ex B at pgs. 38-39 and 74, 76) The inability of Plaintiffs to

accept this admittedly tough reality has forced treatment providers to essentially continue to treat a corpse that is in a state of progressive and ongoing deterioration. This has caused not only ethical but psychological concerns for the treatment providers. Further, it should be brought to the Court's attention that Plaintiffs and/or their associates have been picketing outside of the Hospital indicating that they do not believe in the widely accepted concept of brain death. Unfortunately, Sharon Frederick is being used as the means to push this belief.[5]

Based on the express and unambiguous language of that statute and New York State Department of Health Guidelines and the undisputed facts of this case, Sharon Frederick is in fact, brain dead. While her death is undeniably tragic, there is simply no legal or factual support for Petitioners' attempt continue to "protect and preserve Sharon Lucy Frederick's life." The unfortunate reality is that there is no life to preserve. Consequently, the Hospital respectfully requests that this Court deny Plaintiffs' application for a stay pending appeal.

Respectfully submitted,

HANCOCK ESTABROOK, LLP



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RMP/sed

[5] There is absolutely no evidence Sharon Frederick ever indicated that she shared the belief of the Plaintiffs. In fact, both Plaintiffs testified they had never discussed brain death with Ms. Frederick. (*See* Ex B at pgs. 38 and 75) It should also be noted that the Health Care Proxy executed by Ms. Frederick indicates: "However, I also know that death need not be resisted by any and every means and that I have the right to refuse medical treatment that is excessively burdensome or would only prolong my death and delay my being taken to God." (*See* Ex. D).