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1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION
4

5 JAHl MCMATH, a minor, NAILAH
6 WINKFIELD, an individual, as parent,
7 as guardian, and as next friend of JAHl
8 McMath, a minor,

9 Plaintiffs,

10 v.

11 STATE OF CALIFORNIA; COUNTY
12 OF ALAMEDA, et al.,

13 Defendants.
14
15

Case No. 3:15-cv-06042-HSG
[Hon. Haywood S. Gilliam, Jr.]

**NOTICE OF MOTION BY
CHILDREN’S HOSPITAL AND DR.
ROSEN TO DISMISS PLAINTIFFS’
COMPLAINT AND JOINDER IN
MOTIONS BY ALAMEDA COUNTY
AND STATE OF CALIFORNIA TO
DISMISS OR STAY**

Date Filed: December 23, 2015

Hearing: May 12, 2016

Time: 2:00 p.m.

16
17 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

18 PLEASE TAKE NOTICE that on Thursday, May 12, 2016 at 2:00 p.m., or as soon
19 thereafter as the matter may be heard in Courtroom 10 on the 19th Floor of the United States
20 District Court for the Northern District of California, located at 450 Golden Gate Avenue, San
21 Francisco, California. UCSF Benioff Children’s Hospital Oakland (“CHO”) and Dr. Frederick
22 S. Rosen (“Dr. Rosen”) will and hereby do move to dismiss plaintiffs’ Complaint for failure to
23 state a claim under Federal Rule of Civil Procedure 12(b)(6).

24 Additionally, CHO and Dr. Rosen join in The County Defendants’ Motion to Dismiss the
25 plaintiffs’ Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and the
26 arguments and authorities set forth therein. CHO and Dr. Rosen also join in the County
27 Defendants’ Request for Judicial Notice In Support Of Motion To Dismiss Complaint For
28 Declaratory And Injunctive Relief.

1 Finally, CHO and Dr. Rosen join in the State of California’s Motion to Dismiss under
2 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or In The Alternative, To Stay the
3 Action, and the arguments and authorities set forth therein. CHO and Dr. Rosen also join in the
4 County Defendants’ Request for Judicial Notice In Support Of Motion To Dismiss Complaint
5 For Declaratory And Injunctive Relief.

6 This Motion is based upon this Notice of Motion, the Memorandum of Points and
7 Authorities, CHO and Dr. Rosen’s Request for Judicial Notice, the Motions to Dismiss filed by
8 the County Defendants and the State of California and those Defendants’ respective Requests
9 for Judicial Notice

10 DATED: March 29, 2016

Respectfully submitted,

11 COLE PEDROZA LLP

12
13 /s/ Dana L. Stenvick

14 Dana L. Stenvick
15 Attorney for Defendants FREDERICK S.
16 ROSEN, and UCSF BENIOFF
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

By this action, Plaintiffs have set the stage for three potentially conflicting judgments by three different courts on the issue of whether Jahi McMath was correctly pronounced dead by Children's Hospital under California law. Plaintiffs seek a judicial declaration from this federal court that Jahi is alive in direct contravention to the Alameda Superior Court's finding and January 17, 2014 judgment that Jahi met the statutory criteria for brain death under California law and despite currently pending litigation before the Alameda Superior Court in which the same issue is set to be addressed. Not only would the impact of conflicting judgments be detrimental to Frederick R. Rosen, M.D. ("Dr. Rosen") and UCSF Benioff Children's Hospital Oakland ("CHO") in their roles as defendants to the currently pending damages lawsuit, it would upset the generally accepted standards by which our society distinguishes life from death.

On December 12, 2013, Jahi McMath was pronounced dead at CHO after undergoing a surgical procedure to treat sleep apnea. Following plaintiff Nailah Winkfield's first legal action to compel CHO to provide medical treatment to her dead daughter, the Alameda Superior Court conducted a full evidentiary hearing and concluded that Jahi was, in fact, dead under California law. The Alameda Superior Court memorialized the basis for its decision that Jahi met the criteria for establishing death under California law in a comprehensive Order, followed by a Final Judgment entered on January 17, 2014.

Winkfield did not appeal the January 17, 2014 judgment. She has recognized that the statutory window for doing so has since closed. Both CHO and Dr. Rosen are defendants in the lawsuit initiated by plaintiffs to recover damages for personal injuries, or in the alternative, the wrongful death of Jahi. The Alameda Court has been primed to address the procedural intricacies of plaintiffs' unorthodox personal injury/wrongful death alternative claims as well as the factual bases for their allegation that Jahi is not dead under California law.

While plaintiffs have made efforts to loosely disguise this federal action as one to redress alleged constitutional violations and the validity of a death record, when the action is viewed in context with the plaintiffs' earlier litigation efforts, it becomes clear that this action is nothing

1 more than an improper collateral attack on a final judgment that has not otherwise been
2 challenged through established appellate procedures.

3 Plaintiffs have failed to state a claim on which relief can be granted because the issue of
4 whether Jahi meets the criteria for death under California has been fully, and finally, litigated in
5 Alameda Superior Court. The doctrines of *res judicata* and collateral estoppel apply and should
6 be invoked to preclude plaintiffs from engaging in unnecessary duplicative litigation on the
7 issue. A dismissal on this basis is warranted under Federal Rule of Civil Procedure 12(b)(6).

8 In the alternative, and as more fully set forth in Motions to Dismiss filed by the County of
9 Alameda Defendants and the State of California, this Court has at its disposal a host of legal
10 doctrines requiring dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on
11 the basis of abstention (the *Younger* doctrine) and subject matter jurisdiction (the *Rooker-*
12 *Feldman* doctrine). In the alternative, and as set forth in the State of California's Motion to
13 Dismiss, a stay of this proceeding may be affected under the *Colorado River* doctrine.

14 II. FACTUAL AND PROCEDURAL BACKGROUND

15 A. Jahi McMath Was Declared Brain Dead At Children's Hospital Oakland

16 On December 9, 2013, Dr. Rosen performed a surgical procedure on Jahi McMath to
17 treat sleep apnea. (Docket No. 1 (Complaint), at ¶ 1; Request for Judicial Notice ("RJN"), Exh.
18 S (First Amended Complaint), at ¶ 11.) Many hours later, Jahi went into cardiac arrest and was
19 placed on a ventilator at CHO. (Docket No. 1 (Complaint), at ¶ 6.) At least two physicians
20 conducted separate examinations of Jahi at CHO after she was placed on a ventilator. (Docket
21 No. 1 (Plaintiff's Complaint) at ¶ 6; RJN, Exh. D (Amended Order by Judge Grillo on 1/2/14),
22 at p. 2, line 21 – p. 3, line 10.) Both physicians concluded that Jahi had tragically suffered
23 irreversible brain death caused by lack of oxygen to her brain. (*Ibid*; RJN, Exh. B (CHO Opp.
24 To Ex Parte Petition for TRO) at p. 1, lines 22-24.) Based upon these physicians' findings, Jahi
25 was pronounced dead at CHO on December 12, 2013. (Docket No. 1, (Complaint), at p. 3, ¶ 8.)
26 Jahi's body was transported to an undisclosed facility in New Jersey where it presumably
27 remains on ventilator support. (Docket No. 1 (Complaint), at ¶ 14.)
28

B. Issue Of Death Fully Adjudicated In Alameda Superior Court

After Jahi was pronounced dead at CHO, but before she was removed from ventilator support, plaintiff Nailah Winkfield filed an *ex parte* application in Alameda Superior Court captioned *Latasha Winkfield, et al. v. Children's Hospital Oakland, et al.*, Alameda Superior Court Case No. RP13-707598 (the "Probate Action") on December 20, 2013. (RJN, Exhibit A, (Ex Parte Petition for TRO) at p. 2, lines 11-14; Exh. B (CHO Opp. To Ex Parte Petition for TRO) at p. 1, lines 22-24.) In the Probate Action, Winkfield asked the Court to issue a temporary restraining precluding CHO from discontinuing ventilator and other life support to Jahi. (*Ibid.*) Winkfield also sought a permanent injunction mandating CHO provide further life sustaining medical treatment to Jahi notwithstanding the fact that Jahi had been declared dead. (*Ibid.*)

CHO opposed the *ex parte* application and submitted declarations by three separate physicians, each attesting to the fact that Jahi had suffered irreversible brain death. (RJN, Exh. B (CHO Opp. To Ex Parte Petition for TRO, with Declarations of Sharon Williams, M.D., Robin Shanahan, M.D., and Robert Scott Heidersbach, M.D.) Because hospitals in California are not obligated to provide medical treatment to dead bodies, (*see, e.g., Dority v. Superior Court* (1983) 145 Cal.App.3d 273, 279), the Alameda Superior Court could only compel CHO to provide medical support to Jahi if she was alive. In short, the Alameda Court had to decide whether Jahi had, in fact, met the statutory criteria for brain death when her death was pronounced at CHO before issuing a ruling on Winkfield's Petition to Compel Medical Treatment.

1. Alameda Superior Court Appointed An Independent Medical Expert To Evaluate Jahi

On December 23, 2013, Alameda Superior Court Judge Evelio Grillo appointed Paul Fisher, M.D., a board certified neurologist and child neurologist who serves as the Service Chief of Pediatric Neurology at Lucile Packard Children's Hospital Stanford and a professor of child neurology at Stanford University Medical School, to serve as the court's expert to independently assess whether Jahi met the criteria for irreversible brain death under the Health and Safety

1 Code. (RJN, Ex. C (Case Management Order by Judge Grillo, Dec. 23, 2013), at p. 5, lines 22-
2 23.) All parties, including Winkfield, agreed to the appointment of Dr. Fisher to serve in the
3 capacity of court expert on this issue. (*Id.*, at p. 5, lines 17-19.) Dr. Fisher conducted an
4 examination of Jahi on December 23, 2013, and concluded that Jahi had suffered irreversible
5 brain death. (RJN, Ex. D (Amended Order 1/2/14) at p. 6, line 18 – p. 7, line 2.)

6 **2. Evidentiary Hearing Held On Issue Of Whether Jahi Was Alive**

7
8 Judge Evelio Grillo presided over a comprehensive hearing on December 24, 2013 to
9 consider medical evidence, including expert testimony, and heard argument from all parties on
10 the issue of whether Jahi met the statutory criteria for brain death. (RJN, Exh. D (Amended
11 Order 1/2/14), at p. 6, lines 4 – 18.) Following the hearing, Judge Grillo issued an order on
12 December 26, 2013, finding that Jahi had suffered irreversible brain death and met the criteria
13 for establishing death under Health & Safety Code sections 7180 and 7181 under the clear and
14 convincing evidence standard, which was later amended, but not substantively on January 2,
15 2014. (RJN, Exh. D (Amended Order 1/2/14), at p. 1, and p. 15, lines 17-22, and p. 16, lines 6-
16 9.)

17 **3. Final Order and Judgment Entered Finding Jahi Is Deceased Under** 18 **California Law**

19 On January 2, 2014, Judge Grillo issued a detailed Amended Order denying Winkfield's
20 Petition for Medical Treatment. (RJN, Ex. D (Amended Order 1/2/14).) In the Amended Order,
21 Judge Grillo provided a full account of the Petition, CHO's opposition, the appointment of Dr.
22 Fisher, the evidence considered, the court's jurisdiction, the legal standards applied and the
23 hearing itself. (*Id.*) Judge Grillo found that "Jahi had suffered brain death and was deceased as
24 defined under Health and Safety Code sections 7180 and 7181" by "clear and convincing
25 evidence." (*Id.*, at p. 16, lines 20-22.) Based upon this finding, the court allowed the previously
26 granted temporary restraining order to expire on December 30, 2013 at 5:00 p.m., effectively
27 permitting CHO to discontinue ventilation, related treatment and other support to Jahi. (*Id.*, at p.
28 19, lines 3-7.)

1 Judge Grillo entered a Final Judgment Denying Plaintiff's Petition for Medical Treatment
2 in the Probate Action on January 17, 2014 based upon his finding that Jahi "was deceased under
3 Health and Safety Code sections 7180 and 7181." (RJN, Ex. E (Final Judgment Denying
4 Petition for Medical Treatment); Exh. V, (Order Addressing Notice of Related Cases), at p. 2.)
5 The Alameda Superior Court has confirmed that the January 17, 2014 Judgment resulted in a
6 final disposition of the Probate Action. (RJN, Exh. V, (Order Addressing Notice of Related
7 Cases), at p. 2.)

8 **C. Plaintiffs File A Series Of Legal Actions To Challenge Death Declaration**

9 Plaintiffs have filed a series of legal actions to challenge, both directly and indirectly, the
10 Alameda Superior Court's finding and final judgment that Jahi is dead under California law
11 having met the statutory criteria for brain death in December 2013, including:
12

13 **1. The 2013 Writ Petition**

14 On or about December 30, 2013, plaintiffs filed a Petition for Writ of Mandate in the
15 action styled *J.M., et al. v. The Superior Court of Alameda County*, (Ct. of Appeal, 1st App.
16 Dist., Case No. A140590) (the "2013 Writ Petition") requesting an emergency stay of Judge
17 Grillo's December 30, 2013 Order and an order vacating and setting aside Judge Grillo's finding
18 that Jahi was dead having met the statutory criteria for brain death. (RJN, Exh. F, (Petition For
19 Writ of Mandate).) The Court of Appeal granted a temporary stay and effectively ordered CHO
20 to continue ventilator support for 24 hours so that the writ petition could be considered. (RJN,
21 Exh. F, (Petition For Writ of Mandate).) The Court of Appeal never had the opportunity to
22 consider whether Jahi satisfied the criteria for brain death because Jahi's body was removed
23 from CHO and the Petition was deemed moot. (RJN, Exh. G, (Court of Appeal's Detailed
24 Register of Actions).)

25 **2. The First Federal Action**

26 Also on or about December 30, 2013, Winkfield filed a Complaint for Declaratory Relief
27 and Request for Emergency Temporary Restraining Order and Injunctive Relief in the federal
28 court action entitled *Latasha Winkfield v. Childrens Hospital Oakland, et al.*, United States

1 District Court, Northern District (Oakland), Case No. 4:13-cv-05993-SBA (the “First Federal
2 Action”). (RJN, Exh. H (First Federal Action Complaint).) In this First Federal Action,
3 Winkfield alleged an alternative placement for Jahi had been secured at an undisclosed location,
4 and that transport had been arranged on some unspecified date in the future. (*Ibid.*)
5 Accordingly, Winkfield asked the federal court to compel CHO to provide Jahi with nutritional
6 feeding and care to maintain bodily functions. (*Ibid.*) An emergency mandatory settlement
7 conference was held in front of a Magistrate Judge on January 3, 2014 at which point the parties
8 reached an agreement to enable Jahi’s removal to an outside facility.

9 10 **3. The Petition For Writ Of Error Corum Nobis**

11 Plaintiffs undertook efforts to re-open the Probate Case by filing a Memorandum
12 Regarding Court’s Jurisdiction To Hear Petition For Determination That Jahi McMath Is Not
13 Brain Dead on September 30, 2014 against CHO. (RJN, Exh. I (Memorandum Regarding
14 Court’s Jurisdiction).) In the Memorandum, plaintiffs requested a further hearing to “provide
15 new, conclusive evidence that Jahi McMath is not ‘brain dead.’...” (RJN, Exh. (Memo. Re:
16 Court’s Jurisdiction To Determine Brain Death) at p. 1, lines 23-25.) Also in the Memorandum,
17 plaintiffs admit that Judge Grillo has jurisdiction over the issue and should decide that Jahi is
18 alive. (*Id.*, at p. 2, lines 1-4.) Notably, the “evidence” that Jahi is not deceased under Health
19 and Safety Code sections 7180 and 7181 is almost identical to that “evidence” attached to the
20 plaintiffs’ complaint in the instant case, including declarations by Philip De Fina, Ph.D., Calixto
21 Machado, M.D., Charles Pretigiacomo, M.D., Elena B. Labkovsky, Ph.D., and D. Alan
22 Shewmon, M.D., all dated in October 2014. (RJN, Exhs. K, L, M, N, O, and P (Petition for Writ
23 of Error and Declarations Filed In Support Thereof).)

24 A case management conference was held on September 30, 2014 in connection with the
25 plaintiffs’ new petition regarding brain death, following which Judge Grillo issued a scheduling
26 order for briefing by CHO and plaintiffs in addition to inviting amicus briefing from others who
27 may be interested, including the County of Alameda and the Coroner’s office. (RJN, Ex. J
28 (Memo. Order Re: Court’s Jurisdiction To Determine Brain Death) at p. 4, lines 12-20.) A
hearing on the new motion was scheduled for October 9, 2014. (*Id.*, at p. 5.) In response to

1 Judge Grillo’s Order of September 30, 2014, plaintiffs filed a Petition for Writ of Error Corum
2 Nobis to reverse the brain death determination. (RJN, Exhs. K, L, M, N, O, and P (Petition for
3 Writ of Error and Declarations Filed In Support Thereof).) Plaintiffs withdrew the petition
4 almost immediately after Judge Grillo issued an Order that included a preliminary report by Dr.
5 Fisher, in which Dr. Fisher found that none of the “new evidence” submitted by plaintiffs
6 “provide[s] evidence that Jahi McMath is not brain dead.” (RJN, Exh. Q (Order Appointing Dr.
7 Paul Fisher as Court Expert Witness); and RJN, Exh. R (Order Confirming Withdrawal of
8 Petition for Writ of Error).)

9 10 **4. The Damages Litigation**

11 On or about February 2, 2015, plaintiffs filed a separate legal action seeking damages for
12 Jahi’s personal injuries and alternatively for wrongful death in the event Jahi is found to be
13 dead, captioned *Latasha Nailah Spears Winkfield, et al. v. Frederick S. Rosen, M.D., et al.*,
14 Alameda Superior Court Case No. RG15760730 (the “Damages Litigation”). In the Damages
15 Litigation, the plaintiffs allege Jahi is still alive and will continue to incur medical, nursing and
16 related expenses as a result of Dr. Rosen and CHO’s alleged negligence. (RJN, Exh. S (First
17 Amended Complaint), at p. 12, lines 10 – 13.) “In the event that it is determined that Jahi
18 McMath succumbed to [her] injuries,” and is therefore unable to maintain a cause of action for
19 personal injury and future damages, plaintiffs allege an alternative cause of action for wrongful
20 death against CHO and Dr. Rosen. (RJN, Exh. S (First Amended Complaint), at p. 13, lines 27-
21 28.) Plaintiffs have therefore effectively asked the Alameda Superior Court to decide whether
22 Jahi is dead or alive under California law notwithstanding Judge Grillo’s finding and judgment
23 that Jahi suffered irreversible brain death in 2013.

24 In the pending Damages Litigation, Dr. Rosen and CHO have argued in demurrers that
25 the issue of whether Jahi meets the criteria for brain death was decided in the Probate Action
26 proceedings, and confirmed by the court’s January 17, 2014 judgment. (RJN, Exhs. T & U
27 (Demurrers to First Amended Complaint).) CHO and Dr. Rosen have argued that collateral
28 estoppel applies to that final judgment to bar any further litigation on the issue of whether Jahi
has suffered irreversible brain death. (*Ibid.*) In short, CHO and Dr. Rosen have argued the

1 issue of brain death cannot be relitigated as a matter of law, and because a claim for personal
2 injuries cannot be maintained by a deceased person, it must be dismissed. On March 14, 2016,
3 the Alameda Superior Court overruled Dr. Rosen and CHO's demurrers to the First Amended
4 Complaint. (RJN, Exhs. W and X (March 14, 2016 Orders).) In doing so, the Court certified
5 questions to the California Court of Appeal under Code of Civil Procedure section 166.1 on the
6 issue of whether a judgment finding that an individual satisfied the criteria for brain death under
7 California Health & Safety Code sections 7180 and 7181 is subject to preclusive effect in
8 subsequent proceedings under the doctrines of *res judicata* and collateral estoppel. (RJN, Exh. Y
9 (Request Re: Other Ex Parte Granted).)

10 **5. The Second Federal Action**

11 The instant litigation captioned *Jahi McMath, et al. v. State of California, et al.*, Northern
12 District Case No. 3:15-cv-06042 (the "Second Federal Action") represents the sixth legal action
13 initiated by Winkfield to request a judicial "declaration that Jahi McMath is not dead" under
14 California law, and based upon such a finding, to "expunge" state records documenting her
15 death with the goal of paving the way for her body's return to California. (Docket No. 1
16 (Complaint) at p. 55, lines 23-26.) Though the plaintiffs allege that a number of their
17 Constitutional rights have been violated, the primary factual and legal question asked by the
18 plaintiffs is whether Jahi is dead under California law.

19 As discussed in further detail below, because the issue of whether Jahi has suffered
20 irreversible brain death under California law is fundamental to CHO and Dr. Rosen's defense of
21 the Damages Litigation, any ruling by this Honorable Court on the same issue will substantially
22 impede and impair CHO and Dr. Rosen's defense in that case. To prevent a serious injustice to
23 Dr. Rosen and CHO, this Court should grant a dismissal in abstention to the State Court's ruling
24 and on the ground that plaintiffs are barred from relitigating the issues under the doctrines of *res*
25 *judicata* and collateral estoppel.
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III. RELEVANT LEGAL STANDARDS

A. Motion To Dismiss Under Rule 12(b)(6)

A party that wishes to move for dismissal of an action based upon the plaintiff's failure to state a claim must do so before filing a responsive pleading. (Fed. R. Civ. P., Rule 12(b).) The court should grant a motion to dismiss brought under Rule 12(b)(6) if the complaint does not contain "enough facts to state a claim for relief that is plausible on its face." (Fed. R. Civ. P., Rule 12(b)(6); *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 570.) When considering a motion to dismiss under this provision, the Court "must accept as true all of the factual allegations contained in the complaint," but need not accept as true allegations that are legal conclusions, unwarranted deductions of fact, or unreasonable inferences. (*Erickson v. Pardus* (2007) 551 U.S. 89, 94; *Sprewell v. Golden State Warriors* (9th Cir.2001) 266 F.3d 979, 988, *amended*, 275 F.3d 1187.) A dismissal is warranted if there are insufficient facts alleged to state a valid claim, even if a cognizable legal theory is asserted. (*Balistreri v. Pacifica Police Dep't* (9th Cir.1990) 901 F.2d 696, 699.)

Here, CHO and Dr. Rosen move for a dismissal of this Second Federal Action on two independent grounds. First, a dismissal is warranted under the doctrine of abstention as set forth in the court's decision of *Younger v. Harris* (1971) 401 U.S. 37. Second, a dismissal is warranted under the doctrines of *res judicata* and collateral estoppel because the issue of whether Jahi is dead under California law has been fully litigated in a California State Court civil action that resulted in a final judgment.

B. The Uniform Determination of Death Act

An individual is considered dead under California law if he or she 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..." (Cal. Health & Saf. Code, § 7180(a).) Health and Safety Code section 7180, which codifies the Uniform Determination of Death Act (the "UDDA"), goes on to provide that "[a] determination of death must be made in accordance with accepted medical standards." (*Ibid.*) Section 7181 of the Health and Safety

1 Code imposes additional safeguards for individuals before they may be pronounced dead by
2 neurological criteria, mandating that “independent confirmation by another physician” is
3 required “[w]hen an individual is pronounced dead by determining that the individual has
4 sustained an irreversible cessation of all functions of the entire brain, including the brain stem.”
5 (Cal. Health & Saf. Code, § 7181.)

6 As discussed in detail below, a judgment has been entered based upon a finding that Jahi
7 satisfied the criteria for brain death under these provisions. This court must refrain from
8 allowing plaintiffs to re-litigate the issue in this case and enter a dismissal based upon the law of
9 abstention or doctrines of res judicata and collateral estoppel.

10
11 **IV. THIS CASE SHOULD BE DISMISSED TO PRECLUDE PLAINTIFFS
12 FROM MAKING A COLLATERAL ATTACK ON A FINAL
13 JUDGMENT FINDING JAHİ IS DEAD**

14 A complaint should be dismissed when the plaintiff’s claims have been previously
15 litigated to final judgment in a state court proceeding. (*See, Evans v. Pearson Enter., Inc.* (6th
16 Cir.2006) 434 F.3d 839, 849–50; and *Hawkins v. Starosciak* (N.D. Cal. Aug. 24, 2011) C 10-
17 0248 JW PR, 2011 WL 3739038, at p. 2.) Under the Federal Full Faith and Credit Statute, 28
18 U.S.C. § 1738, “a federal court must give to a state-court judgment the same preclusive effect as
19 would be given that judgment under the law of the State in which the judgment was rendered.”
20 (*Migra v. Warren City School Dist. Bd. of Educ.*, (1984) 465 U.S. 75, 80–81; *Abbott v. Michigan*
21 (6th Cir.2007) 474 F.3d 324, 330.) In other words, a federal court must give preclusive effect to
22 a judgment issued by a California state court if California state courts would give the judgment
23 preclusive effect. (*Allen v. McCurry* (1980) 449 U.S. 90, 96.) For that reason, this federal court
24 must look to the law of California to determine whether and to what extent the prior judgment
25 entered in the Probate Action should receive preclusive effect in this Second Federal Action.
(*Migra*, 465 U.S. at p. 81.)

26 For the reasons discussed in further detail below, the final judgment entered in the
27 Probate Action should be given full preclusive effect. That judgment encompassed a finding
28 that Jahi satisfied the criteria for brain death and was therefore legally dead under California
law. Plaintiffs never followed through with an appeal, writ or other order to overturn that final

1 judgment and the finding of brain death. Instead, the plaintiffs abandoned a Petition for Writ of
2 Mandate in the Court of Appeal brought to challenge the brain death finding, and later withdrew
3 a Petition for Error Corum Nobis in which they purportedly sought the same relief: a
4 determination that Jahi is not dead under California law. The question is thus not whether
5 Plaintiffs have had an opportunity to challenge the finding of brain death – they have – it is
6 whether they should be allowed to test their theories before multiple courts before selecting one
7 which will provide a favorable result. The plaintiffs must be precluded from relitigating the
8 issue here.

9
10 **A. Collateral Estoppel Prevents Re-Litigation Of Issues Related To Brain Death**

11 “Collateral estoppel is one aspect of the broader doctrine of res judicata.” (*Gottlieb v.*
12 *Kest* (2006) 141 Cal.App.4th 110, 147-48, citing *Syufy Enterprises v. City of Oakland* (2002)
13 104 Cal.App.4th 869, 878.) The purpose of the doctrine is “to promote judicial economy by
14 minimizing repetitive litigation” in addition to relieving “parties of the cost and vexation of
15 multiple law suits,” and “encourage[ing] reliance on adjudication by preventing inconsistent
16 decisions.” (*Id.*; *Marin v. HEW, Health Care Fin. Agency* (9th Cir.1985) 769 F.2d 590, 594,
17 quoting *Allen v. McCurry* (1980) 449 U.S. 90, 94.) However, “where res judicata operates to
18 prevent relitigation of a cause of action once adjudicated, collateral estoppel operates ... to
19 obviate the need to relitigate issues already adjudicated in the first action.” (*Syufy Enterprises,*
20 104 Cal.App.4th at p. 878.)

21 Under California law, collateral estoppel, commonly known as issue preclusion, prohibits
22 the re-litigation of issues if: (1) the issue is identical to the one decided in a prior proceeding; (2)
23 the issue was actually litigated in the prior proceeding; (3) the issue was necessarily decided in
24 the prior proceeding; (4) the decision in the prior proceeding was final and on the merits; and (5)
25 the party against whom preclusion is sought is the same or is in privity with a party from the
26 prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 272.) Each of the
27 conditions for collateral estoppel have been met in this case.
28

1 **1. Issue Of Brain Death In This Case Is Identical To The Issue Litigated**
2 **In Prior Probate Action**

3 In the Probate Action, the Court considered the issue of whether Jahi met the statutory
4 criteria for brain death as established under sections 7180 and 7181 of the Health and Safety
5 Code. (RJN, Ex. D (Amended Order 1/2/14).) In her original Petition, Winkfield asked the
6 Alameda Superior Court to issue an order requiring CHO to prescribe health care to Jahi under
7 Probate Code sections 3201, 4766 and 4770. (RJN, Ex. A (Petition for Medical Treatment), at
8 p. 4, lines 1-2.) These Probate Code sections set forth the mechanism and procedure for
9 obtaining a court order permitting one person to make health care decisions on behalf of another
10 in the event that the patient loses capacity to make his or her own health care decisions. (*See*
11 *Cal. Prob. Code §§ 3201, 4766 and 4770.*)

12 In her Petition, Winkfield argued that her daughter lacked capacity to make health care
13 decisions and that the court must issue an order forcing CHO to provide the medical care and
14 treatment requested by Winkfield in the form of life support (nutrition, intravenous fluids, and
15 ventilator support). In response, CHO argued that because Jahi had suffered irreversible brain
16 death, and was therefore dead under California law by accepted medical and legal standards, it
17 was not obligated to provide medical treatment to Jahi. (RJN, Ex. B (Memorandum of Ps & As
18 In Opp. To Ex Parte App. For TRO), at pages 1-2.) Indeed, Judge Grillo agreed that Probate
19 Code sections 3200 and 4600, *et seq.*, could not be invoked to compel medical treatment of a
20 deceased person and recognized that the relief actually sought by Winkfield was an order
21 compelling medical treatment based on her position “that her daughter was not legally dead.”
22 (RJN, Ex. D (Amended Order), at p. 3, fn 2.) Thus, to determine whether the Petition should be
23 granted, Judge Grillo was required to adjudicate the question of whether Jahi was dead or not
24 dead.

25 In this Second Federal Action, plaintiffs have alleged that Jahi does not meet the criteria
26 for brain death established under California law. They argue that because Jahi is alive, this
27 Court should issue a variety of declarations, including specific declarations that Jahi “does not
28 have irreversible cessation [of] all functions of the entire brain, including the brain stem” and
that “Jahi McMath is not dead.” (Docket No. 1 (Complaint) at ¶¶ 295, 303.) The issue of brain

1 death adjudicated in the Probate Action is identical to that before the court in this Second
2 Federal Action.

3 **2. Issue Of Brain Death Was Actually Litigated In Prior Action**

4 The issue of whether Jahi satisfied the statutory criteria for brain death was fully litigated
5 in the Probate Action. In his Amended Order issued on January 2, 2014, Judge Grillo sets forth
6 a comprehensive report of the proceedings. (RJN, Ex. D (Jan. 2, 2014 Amended Order).)
7 Specifically, the Court considered briefs and evidence submitted by both plaintiffs and CHO in
8 advance of a December 20, 2013 hearing at which it also heard oral argument from both parties.
9 (*Ibid.*) At a continued hearing on December 23, 2013 hearing, Judge Grillo appointed Paul
10 Fisher, M.D., the Chief of Child Neurology at Stanford University School of Medicine, to serve
11 as the independent medical expert to conduct a full neurological and in-person medical
12 evaluation of Jahi pursuant to Health and Safety Code section 7181. Plaintiffs and CHO agreed
13 to the selection and appointment of Dr. Fisher to fill this role. (*Id.*) At a third hearing on
14 December 24, 2013, the court heard testimony from Dr. Fisher and Dr. Shanahan, the first CHO
15 doctor to have examined Jahi and determined that she had suffered irreversible brain death. The
16 court accepted and considered evidence at the December 24, 2013 hearing, including
17 examination notes, documents setting forth the standards for determining brain death in infants
18 and children, and a declaration by Dr. Shanahan. Counsel for Winkfield was afforded the
19 opportunity to, and did in fact, conduct a cross-examination of both Dr. Fisher and Dr.
20 Shanahan. (*Id.* at pp. 6-7.)

21 The court concluded that examinations had been conducted by physicians in accord with
22 accepted medical standards as required in sections 7180 and 7181 of the Health and Safety
23 Code. The court further reasoned that although additional expert testimony and more complete
24 medical records were relevant to the cause of death, they were not relevant to the fact of death,
25 which had been established as required by the Health and Safety Code. The court also examined
26 issues pertaining to its jurisdiction, the relevant legal standard of review and related due process
27 concerns. Satisfied that it had jurisdiction to rule, the court applied the clear and convincing
28 evidence standard to conclude that Jahi had suffered irreversible brain death and was therefore

1 dead under California law. Accordingly, CHO had no further obligation to provide medical care
2 or treatment and Winkfield's Petition was denied.

3 **3. Issue Of Brain Death Was Necessarily Litigated In Prior Action**

4 As recognized by Judge Grillo, hospitals in California are not obligated to provide
5 medical treatment to a deceased person as such treatment would be "futile." (RJN, Ex. D (Jan.
6 2, 2014 Amended Order), at p. 5.) Thus, the only way to reach the issue of whether CHO should
7 be compelled to provide medical treatment to Jahi was to evaluate whether CHO's defense to
8 providing such treatment - that Jahi was legally dead - was valid. Put differently, Winkfield's
9 only option for succeeding on her Petition to Provide Medical Treatment was to establish that
10 Jahi was alive. Thus, not only was the issue fully litigated, full litigation of the issue was
11 necessary to adjudicate Winkfield's Petition.
12

13 **4. Issue Of Brain Death Was Decided On The Merits In Prior Action**

14 The Court held a full evidentiary hearing over the course of three days in December 2013
15 before deciding Jahi was not alive under California law. (RJN, Ex. D (Jan. 2, 2014 Amended
16 Order), at p. 5, lines 10-21.) During the course of those proceedings, and as more fully set forth
17 above, the Court considered medical evidence, legal standards, oral argument and expert
18 testimony. The Court also permitted cross-examination of the child neurology expert whose
19 appointment to satisfy the section 7181 independent examination requirement was agreed to by
20 Winkfield's attorney. After hearing conclusive testimony from both Dr. Shanahan and Dr.
21 Fisher, the court issued a ruling in open court confirming that Jahi had suffered irreversible brain
22 death and was therefore dead under sections 7180 and 7181 of the Health and Safety Code.
23 Following the hearing, the Court issued an Order and Final Judgment finding that Jahi satisfied
24 the criteria for brain death under sections 7180 and 7181 and was therefore deceased under
25 California law. (RJN, Exh. D (Jan. 2, 2014 Amended Order); RJN, Exh. E (Jan. 17, 2014
26 Judgment).)
27
28

5. Winkfield Was A Party To Prior Action

Both CHO and Winkfield were parties to the Probate Action where the court concluded that Jahi was dead under California law. Although Dr. Rosen was not a party to the Probate Action, he was the surgeon who performed the surgical procedure on Jahi at CHO the day before Jahi went into cardiac arrest and was found to be brain dead. A District Court has discretion to “apply collateral estoppel to non-parties to prevent ‘relitigation of issues actually litigated and necessarily decided, after a full and fair opportunity for litigation, in a prior proceeding.’” (*Monolithic Power Sys., Inc. v. O2 Micro Intern. Ltd.* (N.D. Cal. 2007) 476 F. Supp. 2d 1143, 1150, citing *Kourtis v. Cameron* (9th Cir.2005) 419 F.3d 989, 995–96; see also *United States v. Geophysical Corp. of Alaska* (9th Cir.1984) 732 F.2d 693, 697 [whether to apply the doctrine of collateral estoppel “is left to the district court’s discretion”].) Dr. Rosen’s interests are fully aligned with those of CHO on the issue of whether Jahi meets the statutory criteria for brain death. On the other hand, Winkfield was a party to the prior proceeding, and it is against her here that CHO and Dr. Rosen seek to have the Probate Court’s ruling applied. There is no reason to not apply collateral estoppel to prevent plaintiffs from relitigating the issue of whether Jahi is dead in this Second Federal Action.

B. There Is No Legal Or Equitable Basis To Permit Relitigation Of Death

It is anticipated plaintiffs will argue there are “changed circumstances” obligating this Court to reconsider whether Jahi is dead under California law as a matter of equity. California courts are not obligated to apply collateral estoppel to “bar a later claim if new facts or changed circumstances have occurred since the prior decision.” (*Melendres v. City of Los Angeles* (1974) 40 Cal.App.3d 718, 730.) The court in *Union P. R.R. Co. v. Santa Fe P. Pipelines, Inc.* (2014) 231 Cal.App.4th 134 recognized, both logically and accurately, that “[s]ome issues are not static, that is, they are not fixed and permanent in their nature.” (*Union P. R.R. Co.*, 231 Cal.App.4th at p. 181, citing *Lunt v. Boris* (1948) 87 Cal.App.2d 694, 695.) It went on to explain that “[w]hen a fact, condition, status, right, or title is not fixed and permanent in nature, then an adjudication is conclusive as to the issue at the time of its rendition, but is not conclusive as to that issue at some later time.” (*Ibid.*, citing *Lunt v. Boris* (1948) 87 Cal.App.2d 694, 695.)

1 Death, by logic, law and necessity, is permanent. A judgment finding death has occurred under
2 California law – particularly where the judgment was never challenged through the ordinary
3 appellate procedure – must be accorded finality.

4 In the Probate Action, the parties litigated whether Jahi is dead. Death is a fixed point,
5 permanent and unchanging; it is a point from which a person cannot return. As a result of
6 modern medicine, however, a person’s body can be “artificially supported for respiration and
7 circulation after all brain functions cease irreversibly” even though irreversible loss of all brain
8 function has been confirmed. (RJN, Ex. AA (Preface to UDDA), at p. 1.) Under the common
9 law, a person could be declared dead only when there had been a cessation of all circulatory and
10 respiratory function. (*Ibid.*) Thus, the drafters of the UDDA recognized that a second standard
11 for establishing death must be enacted legislatively to permit the pronouncement of death when
12 a person’s brain has irreversibly ceased to function, even if the body’s respiratory and
13 circulatory functions are otherwise being maintained artificially. (*Ibid.*) In short, the UDDA
14 recognizes that a person may be legally dead, having suffered irreversible loss of brain function,
15 even though respiratory and circulatory functions are being artificially maintained. Once a
16 person is declared dead, there is no basis for revisiting the determination and plaintiffs have not
17 presented any factual or legal basis for doing so. Revisiting the issue of whether someone is
18 dead or alive after death has been confirmed under Code of Civil Procedure § 7181 has very
19 serious public policy implications.

20 The “evidence” of alleged “changed facts or circumstance” cited by plaintiffs in
21 connection with this Second Federal Action is identical to that submitted by plaintiffs in October
22 2014 in support of their Petition for Writ of Error Corum Nobis, which was withdrawn before
23 being decided on the merits. Judge Grillo issued an Order on October 3, 2014 appointing Dr.
24 Fisher to again serve as the expert to determine whether Jahi was now alive and indicated that
25 all documents submitted by plaintiffs in connection with the Writ had been reviewed
26 preliminarily by Dr. Fisher. (RJN, Ex. Q (Oct. 3, 2014 Order).) Judge Grillo attached a copy of
27 Dr. Fisher’s preliminary letter analysis of the “new” facts contained in plaintiffs’ declarations.
28 Dr. Fisher stated that nothing in those letters “provide[s] evidence that Jahi McMath is not brain
dead.” (RJN, Ex. Q (Oct. 3, 2014 Order and attached Dr. Fisher Letter).)

C. Public Policy Mandates Judgments Be Reliably Final

When the Court issued its Order and Final Judgment in the Probate Action, it agreed with the independent medical experts that Jahi had suffered “irreversible” brain death and necessarily found there was no medical possibility that Jahi’s condition would change. California courts recognize a “strong policy favoring finality of judgments” and an “end to litigation.” (*Kulchar v. Kulchar* (1969) 1 Cal. 3d 467, 470.) All interested parties, including both CHO and Dr. Rosen, as well as the other defendants to this and the Damages Litigation, have a right to rely upon the final judgment issued in the Probate Action. A final determination of death under the circumstances of this case must not be upset. Because Jahi’s family has been allowed to maintain Jahi on a ventilator indefinitely, it is inevitable that the state of her body will change with time. These parties must not be forced to re-open litigation every time that Jahi’s body exhibits some change when the core finding remains static and irreversible: she is dead under California law.

V. JOINDER TO COUNTY DEFENDANTS’ MOTION TO DISMISS

As set forth in detail in the County Defendants’ Motion to Dismiss, this Court should abstain from interfering in State issues concerning Jahi McMath. (*Younger v. Harris* (1971) 401 U.S. 37.) Whether Jahi meets the statutory criteria for brain death is an issue that has been adjudicated to final judgment before the Alameda Superior Court, as set forth above. Further, plaintiffs have continued to challenge the determination of death in connection with their medical malpractice suit against Dr. Rosen and CHO, among others. Indeed, plaintiffs have indicated in court filings in Alameda Superior Court in the Damages Action that they intend to engage in discovery almost identical to that which they have attempted to initiate in this case. (*See, e.g.*, Docket No. 28 (Joint Letter Brief Re: Deposition of Dr. Machado, a Cuban National) and Docket No. 29 (Order Denying Early Discovery and Deposition of Dr. Machado).) Specifically, plaintiffs have stated in Alameda Superior Court:

Plaintiffs anticipate that issues related to *whether or not Jahi is brain dead* or alive, *the status of her death certificate* and, if found to be alive, her injuries and damages will consume months of discovery, including depositions of the New Jersey physicians who have treated

1 **VII. CONCLUSION**

2 For the reasons set forth in detail above, this court should dismiss the complaint under
3 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

4
5 DATED: March 29, 2016

Respectfully submitted,

6 COLE PEDROZA LLP

7
8 /s/ Dana L. Stenvick

9 Dana L. Stenvick

10 Attorney for Defendants FREDERICK S.

11 ROSEN, and UCSF BENIOFF

12 CHILDREN'S HOSPITAL OAKLAND
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CERTIFICATE OF SERVICE

Case Name: McMath Jahi (Minor) v. State of CA No. 15-cv-06042

I hereby certify that on March 29, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF MOTION AND JOINDER IN MOTIONS BY ALAMEDA COUNTY AND STATE OF CALIFORNIA TO DISMISS PLAINTIFFS' COMPLAINT

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 29, 2016, at San Marino, California.

Cynthia Michelena

/s/ Cynthia Michelena

Declarant

Signature