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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAHI MCMATH, a minor, NAILAH WINKFIELD, an individual, as parent, as guardian, and as next friend of JAHI MCMATH, a minor, Plaintiffs, v. STATE OF CALIFORNIA; COUNTY OF ALAMEDA, et al., Defendants.	Case No. 3:15-cv-06042-HSG [Hon. Haywood S. Gilliam, Jr.] **NOTICE OF MOTION AND MOTION TO INTERVENE** [FILED CONCURRENTLY WITH PROPOSED JOINDER TO AND MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY] Date Filed: December 23, 2015 Hearing: May 12, 2016 Time: 2:00 p.m.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Thursday, May 12, 2016 at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 10 on the 19th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California. UCSF Benioff Children's Hospital Oakland ("CHO") and Dr. Frederick S. Rosen ("Dr. Rosen") will and hereby do move for leave to intervene as defendants in the above-captioned lawsuit under Rule 24 of the Federal Rules of Civil Procedure.

In their motion, Dr. Rosen and CHO seek an Order by this Court granting leave to intervene as defendants as a matter of right under Federal Rule of Civil Procedure 24(a). In the alternative, CHO and Dr. Rosen seek an Order by this Court granting permissive intervention under Federal Rule of Civil Procedure 24(b).

This Motion is based on this Notice of Motion and Motion for Leave to Intervene, Memorandum of Points and Authorities, Exhibits thereto, Request for Judicial Notice and Exhibits thereto and upon all papers, records and pleadings on file in this action, and upon any

matters which this Court may take judicial notice or take into evidence at the hearing on this Motion.

DATED: March 29, 2016

Respectfully submitted,

COLE PEDROZA LLP

/s/ Dana L. Stenvick
Dana L. Stenvick
Attorney for Defendants FREDERICK S. ROSEN, and UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This legal action arises out of a judgment entered in the Alameda County Superior Court on January 17, 2014 against Children's Hospital Oakland in which a State Court Judge found Jahi McMath satisfied the criteria for brain death under California Health and Safety Code sections 7180 and 7181.

Instead of pursuing an appeal of that State Superior Court judgment in the California Court of Appeal, the plaintiffs have initiated multiple collateral legal actions to challenge the January 17, 2014 judgment, including two currently pending in different trial courts. The first was filed on February 2, 2015 in Alameda Superior Court against UCSF Benioff Children's Hospital Oakland, formerly known as Children's Hospital & Research Center at Oakland ("CHO") and Frederick R. Rosen, M.D. ("Dr. Rosen"). In that case, the plaintiffs allege Jahi is alive despite the Alameda Superior Court's previous finding and judgment that she is legally dead. Based upon this erroneous allegation, Jahi has been permitted to assert a claim for recovery of damages for personal injuries allegedly sustained as a result of medical negligence as though she is alive. Jahi's purported next of kin have also simultaneously asserted an alternative cause of action for wrongful death in the event that Jahi is found to be dead.

The instant federal litigation, filed on December 24, 2015, follows closely on the heels of the wrongful death action filed in Alameda Superior Court. Though plaintiffs have colored the instant federal case as one to redress various alleged constitutional and due process violations, settled firmly at the end of the complaint are two claims for declaratory relief both asking for orders that Jahi is, in fact, alive. Indeed, recent filings in Alameda Superior Court confirm that this federal action was brought to resolve the issue of whether Jahi is legally dead or alive.

CHO and Dr. Rosen have a significantly protectable interest in the outcome of the instant federal litigation. As discussed in further detail below, a finding by this Court that Jahi is alive will have a significant and potentially detrimental impact on CHO and Dr. Rosen's ability to mount a complete defense to the earlier filed wrongful death action in Alameda Superior Court, where the balance of claims asserted against them turns on the finding of whether Jahi is legally

dead or alive. The existing parties to the instant federal case are not named in the earlier filed wrongful death action in state court and therefore, by comparison, do not have an equivalent interest in defending against the plaintiffs' declaratory relief claims in this case to avoid uncapped damage exposure in the state court action. It is therefore clear that CHO and Dr. Rosen's interests in this federal action will not be adequately protected by the existing parties to the suit.

For these reasons and those discussed in further detail below, CHO and Dr. Rosen both satisfy the criteria for intervention under Rule 24, both as a matter of right and as a matter of permission. CHO and Dr. Rosen therefore request that this court grant this motion for leave to intervene for all purposes in this action.

II. FACTUAL AND PROCEDURAL BACKGROUND

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

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

B. Plaintiffs Filed A Series Of Legal Actions Challenging Brain Death Determination

Not including the instant litigation, which includes a specific request that this Court find that Jahi does not meet the statutory criteria for brain death, five other legal actions have been filed to challenge, either directly and indirectly, the December 12, 2013 finding made at CHO that Jahi suffered irreversible brain death in December 2013, including:

(1) A civil action by Latasha Winkfield, the Mother of Jahi McMath, a minor, on December 20, 2013 in Alameda Superior Court to preclude CHO from taking Jahi off a ventilator in which the court entered a final judgment finding Jahi met the criteria for brain death under sections 7180 and 7181 of the Health & Safety Code, captioned *Latasha Winkfield, et al. v. Children's Hospital Oakland, et al.*, Alameda Superior Court Case No. RP13-707598 (the "Probate Action") (RJN, Ex. A);

(2) A Petition for Writ of Mandate by Jahi McMath, by and through her Guardian ad Litem, Latasha Winkfield, to the California Court of Appeal asking for an order to vacate and set aside the lower court's finding that Jahi met the statutory criteria for brain death, captioned *J.M., et al. v. The Superior Court of Alameda County,* (Ct. of Appeal, 1st App. Dist., Case No. A140590) (the "2013 Writ Petition") (RJN, Ex. F);

(3) A civil action by Latasha Winkfield, an individual and as Guardian ad Litem for Jahi McMath, in the United States District Court for the Northern District of California on December 30, 2013 in which plaintiffs sought an order precluding removal of ventilator support and compelling CHO to provide specific medical treatment to Jahi, who they claimed did not meet the criteria for brain death, captioned *Latasha Winkfield v. Children's Hospital Oakland, et al.*, United States District Court, Northern District (Oakland), Case No. 4:13-cv-05993-SBA (the "First Federal Action") (RJN, Ex. H);

(4) A Petition for Writ of Error Corum Nobis And Memorandum Regarding Court's Jurisdiction to Hear Petition for Determination that Jahi McMath is Not Brain Dead by Latasha Winkfield, an individual parent and guardian of Jahi McMath, a minor, on October 3, 2014 in the Alameda Superior Court asking the court to reverse its earlier finding that Jahi had suffered irreversible brain death under the Health & Safety Code that was later withdrawn, captioned

Latasha Winkfield v. Children's Hospital, Alameda Superior Court Case No. RP13-707598, (the "Petition for Writ of Error") (RJN, Ex. K); and

(5) A currently pending civil action for damages in Alameda Superior Court by Latasha Nailah Spears Winkfield; Marvin Winkfield; Sandra Chatman and Jahi McMath, a minor by and through her Guardian Ad Litem, Latasha Nailah Spears Winkfield, on February 2, 2015 in which Jahi alleges that she is alive and asserts a cause of action for personal injuries arising out of medical negligence, or in the alternative, if she is dead, her mother, biological father, stepfather and grandmother have asserted a claim for wrongful death of Jahi against Dr. Rosen, CHO, and others, captioned *Latasha Nailah Spears Winkfield, et al. v. Frederick S. Rosen, M.D., et al.*, Alameda Superior Court Case No. RG15760730 (the "Damages Litigation") (RJN, Ex. S).

C. The Issue Of Jahi's Brain Death Is Being Litigated In The Currently Pending Damages Litigation

Dr. Rosen and CHO are actively litigating the issue of brain death as defendants in the currently pending Damages Litigation. (RJN, Ex. S (First Amended Complaint).) In that Litigation, the plaintiffs have asserted a cause of action for personal injuries on behalf of Jahi as though Jahi is still alive, claiming that she has incurred, and will continue to incur, medical, nursing and related expenses into the future as a result of Dr. Rosen and CHO's alleged negligence. (RJN, Exh. S (First Amended Complaint), at p. 12, lines 10 – 13.) "In the event that it is determined that Jahi McMath succumbed to [her] injuries," and is therefore unable to maintain a cause of action for personal injury and future damages, plaintiffs have asserted an alternative cause of action for wrongful death against CHO and Dr. Rosen. (RJN, Exh. S (First Amended Complaint), at p. 13, lines 27-28.)

In the Damages Litigation, Dr. Rosen and CHO have argued in demurrers that the issue of whether Jahi meets the criteria for brain death was decided in the Probate Action proceedings, and confirmed by the court's January 17, 2014 judgment. (RJN, Exhs. T & U (Demurrers).) CHO and Dr. Rosen have argued that collateral estoppel applies to that final judgment to bar any

further litigation on the issue of whether Jahi has suffered irreversible brain death. (RJN, Exhs. T & U (Demurrers).) In short, CHO and Dr. Rosen have argued the issue of brain death cannot be relitigated as a matter of law, and because a claim for personal injuries cannot be maintained by a deceased person, it must be dismissed.

On March 14, 2016, the court overruled demurrers by Dr. Rosen and CHO to the First Amended Complaint. (RJN, Exhs. W & X (March 14, 2016 Orders on Demurrers).) The Court also issued a simultaneous order certifying questions to the Court of Appeal under Code of Civil Procedure section 166.1 on the issue of whether a judgment entered by a probate court finding that an individual satisfied the criteria for brain death under California Health & Safety Code sections 7180 and 7181 is subject to preclusive effect in subsequent proceedings under the doctrines of *res judicata* and collateral estoppel. (RJN, Exh. Y (Request Re: Other Ex Parte Granted).)

D. The Instant Litigation Is Plaintiff's Sixth Legal Action To Challenge Brain Death Determination

The instant litigation captioned *Jahi McMath, et al. v. State of California, et al.,* Northern District Case No. 3:15-cv-06042 (the "Second Federal Action") represents the sixth legal action initiated by Winkfield to request a judicial "declaration that Jahi McMath is not dead," among other things. (Docket No. 1 (Complaint) at p. 55, lines 23-26.) Despite having included CHO all six prior legal proceedings, and despite the ongoing Damages Litigation against CHO and Dr. Rosen in which the identical issue of brain death is being primed for resolution, Winkfield has not named either CHO or Dr. Rosen as a defendant in this Second Federal Action. Importantly, Winkfield has admitted that this Second Federal Action was filed "to resolve the issue of whether Jahi is legally dead or alive." (RJN, Ex. Z (Motion to Bifurcate), at p. 2, lines 27-28.)

Indeed, Winkfield has moved very quickly in this Action to establish her position that Jahi does not meet the statutory criteria for brain death, and in apparent defiance of the Federal Rules of Civil Procedure. For example, CHO and Dr. Rosen are informed and believe that plaintiffs have noticed the deposition of their own brain death expert, Cuban physician Calixto Machado, to commence on March 10, 2016, before any appearance has been made by a

defendant to the litigation, before any disclosures under Rule 26 and before the Rule 16 pretrial conference. In the event that depositions like that of Dr. Machado are allowed to proceed without CHO and Dr. Rosen's participation, the potential for serious injustice will be compounded.

As discussed in further detail below, because the issue of whether Jahi has suffered irreversible brain death under California law is fundamental to CHO and Dr. Rosen's defense of the Damages Litigation, any ruling by this Honorable Court on the same issue will substantially impede and impair CHO and Dr. Rosen's defense in that case. To permit a serious injustice to Dr. Rosen and CHO, this Court should grant CHO and Dr. Rosen leave to intervene in this Second Federal Action.

III. RELEVANT LEGAL STANDARDS

Nonparties to a lawsuit may be permitted to intervene under Rule 24 of the Federal Rules of Civil Procedure[1]. A nonparty with an interest "relating to" the "subject of the action" must be granted leave to intervene under Rule 24 if disposition of the lawsuit will "impair or impede the movant's ability to protect its interest." (Fed. R. Civ. P. 24(a)(2).) Rule 24 is meant to allow intervention by those who might be "practically disadvantaged" by a case's disposition. (*Kleissler v. U.S. Forest Serv*. (3rd Cir. 1998) 157 F.3d 964, 970.) The Ninth Circuit has instructed that intervention should be granted so long as the moving papers state the legal and factual grounds for intervention. (*Beckman Indus., Inc. v. Int'l Ins. Co*. (9th Cir. 1992) 966 F.2d 470, 474.) To that end, Rule 24 traditionally receives "liberal construction in favor of applicants for intervention." (*Arakaki v. Cayetano* (9th Cir. 2003) 324 F.3d 1078, 1083, see also *Donnelly v. Glickman* (9th Cir. 1998)159 F.3d 405, 409 and *Citizens for Balanced Use v. Montana Wilderness Ass'n* (9th Cir. 2011) 647 F3d 893, 897 [Rule 24(a)(2)'s requirements "are broadly interpreted in favor of intervention" so long as the motion to intervene is timely].)

As demonstrated below, CHO and Dr. Rosen satisfy the requirements to intervene as a matter of right under subdivision (a) of Rule 24. In the alternative, both CHO and Dr. Rosen satisfy the requirements for permissive intervention under subdivision (b) of Rule 24.

IV. CHO AND DR. ROSEN ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24

The court must apply a "four-part test" under Rule 24(a) to determine whether a third party should be permitted to intervene in pending litigation "as a matter of right." (*S.W. Ctr. for Biological Diversity v. Berg* (9th Cir. 2001) 268 F.3d 810, 817.) Under this test, a third party should be permitted to intervene as a "matter of right" so long as (1) the motion to intervene is timely; (2) the moving party shows that it has a "significantly protectable" interest in the subject of the action; (3) the moving party's ability to protect its interests must be at risk of being impaired or impeded by the action's disposition; and (4) the moving party's interests are not "adequately represented by the existing parties to the lawsuit." (*Id.*) Each of these criteria is met by CHO and Dr. Rosen.

A. The Motion To Intervene Is Timely

In this Circuit, "[t]imeliness is a flexible concept; its determination is left to the district court's discretion." (*United States v. Alisal Water Corp*. (9th Cir. 2004) 370 F.3d 915, 921.) Notably, timeliness does not depend solely on the amount of time which has elapsed since the litigation began, but also on the purposes for which intervention is sought and the improbability of prejudice to existing parties. (*See, e.g., National Wildlife Fed'n v. Burford* (D.C. Cir. 1989) 878 F.2d 422, 433.) In determining timeliness, "the focus is on the date the person attempting to intervene should have been aware his interest[s] would no longer be protected adequately by the parties, rather than the date the person learned of the litigation." (*Officers for Justice et al. v. Civil Service Commission of the City and County of San Francisco* (9th Cir. 1991) 934 F.2d 1092, 1095.)

This Second Federal Action commenced on or about December 23, 2015. (Docket No. 1.) By agreement, no responsive pleading is due until March 14, 2016, and the Initial Case Management Conference is not set to take place until March 22, 2016. Yet, the plaintiffs have noticed the deposition of one of their own brain death expert witnesses for March 10, 2016. Immediately after learning about this deposition, CHO and Dr. Rosen have concluded that the

[1] All citations to Rules hereinafter relate or refer to the Federal Rules of Civil Procedure unless

plaintiffs intend to swiftly and aggressively litigate the issue of whether Jahi meets the statutory criteria for brain death – an issue, if decided in this case, will have an enormous impact on CHO and Dr. Rosen's ability to defend themselves in the Damages Litigation. Based upon this conclusion, CHO and Dr. Rosen undertook immediate efforts to intervene.

Simply put, the timing of CHO and Dr. Rosen's motion does not prejudice plaintiffs or defendants to this action, much less result in the type of "serious prejudice" necessary to bar intervention. (*U.S. ex rel. McGough* (9th Cir. 1992) 967 F.2d 1391, 1395.) In fact, an order granting CHO and Dr. Rosen leave to intervene will protect against the risk of serious prejudice if this lawsuit and discovery on issues to be litigated in the related Superior Court action is allowed to proceed without them. Accordingly, the Court should find that CHO and Dr. Rosen's motion to intervene is timely.

B. CHO and Dr. Rosen Have A Legally Cognizable Interest Directly Relating to The Subject Matter Of This Action

Intervention should be permitted as a matter of right when the intervening parties have a significantly protectable interest in the action. (*Arakaki*, 324 F.3d at 1084.) "An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." (*California ex rel. Lockyer v. U.S.* (9th Cir. 2006) 450 F.3d 436, 441, *citing Donnelly, supra,* 159 F.3d at p. 409.) In *California ex. rel.*, a group of healthcare providers sought to intervene in an action to challenge a law that had been enacted to specifically benefit them. The Ninth Circuit found that the healthcare providers' interest in the action was thus "neither 'undifferentiated' nor 'generalized.'" (*California ex rel.*, at p. 441.)

CHO and Dr. Rosen have a significant, legally cognizable interest in this Second Federal Action. Plaintiffs have asked this Court to find, among other things, that Jahi is not brain dead and that she has never satisfied the criteria for brain death established under the Health & Safety Code. (Docket No. 1.) CHO and Dr. Rosen's defense in the earlier filed, and currently pending,

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otherwise noted.

Damages Litigation is based upon their argument that Jahi has suffered irreversible brain death under California law and is precluded from relitigating the issue.

Importantly, one of plaintiffs' primary goals in this Second Federal Action is to obtain a declaration that Jahi is alive. Such a ruling would have numerous significant detrimental effects on the Damages Litigation, not the least of which would be to exponentially increase CHO and Dr. Rosen's potential damages exposure in that Action without affording them the opportunity participate in or conduct their own discovery on the issue of whether Jahi meets the criteria for brain death. Under the Medical Injury Compensation Reform Act of 1975 (MICRA), codified at California Civil Code section 3333.2, if the plaintiffs prevail against CHO and/or Dr. Rosen for wrongful death, their noneconomic damages will be capped. (*See, e.g., Chan v. Curran* (2015) 237 Cal.App.4th 601, 605.) However, MICRA's noneconomic damage cap does not limit a living person's "recovery of actual damages (i.e., medical costs and lost wages)." (*Id*., at p. 616.) Thus, if Jahi is alive, she may be able to recover her actual damages against CHO and Dr. Rosen, if she successfully shows they were negligent in providing medical care to her. If, however, Jahi is not alive, there is no recovery of actual damages in the form of future medical costs or lost wages; her family's damages would be subject to the limits imposed under California law. (*Ibid*.) Dr. Rosen and CHO therefore have a significant, non-generalized interest in the issues subject to resolution in this Second Federal Action and should be permitted to intervene.

C. CHO and Dr. Rosen's Interests Will Be Impaired Absent Intervention

An applicant for intervention is impaired "if the resolution of the plaintiff's claims actually will affect the applicant." (*Arakaki*, 324 F.3d at p. 1084.) CHO and Dr. Rosen's interests will be significantly impaired absent intervention for similar reasons. Plaintiffs have brought this Second Federal Action, in part, to bypass the appropriate appellate procedures for overturning a prior state court judgment. In this case, that judgment affirmed three separate physicians' findings that Jahi had suffered irreversible brain death in December 2013. Plaintiffs have not appealed that final judgment. Instead, they are looking to this court for a new judgment on the same issue without involving CHO or Dr. Rosen, the two real parties in interest on this

question. Because CHO and Dr. Rosen stand to be significantly and detrimentally impacted if this Court finds in favor of the plaintiffs on the issue of brain death, as discussed above, there is certainty that Dr. Rosen and CHO's interests will be impaired absent intervention.

Furthermore, through the course of litigating issues related to whether Jahi is alive, it is anticipated that there will be a significant overlap of factual and legal discovery between this and the Damages Litigation. Because CHO and Dr. Rosen have a substantial interest in the outcome of both actions, as well as an interest in ensuring there is no inconsistent finding in either action, allowing CHO and Dr. Rosen to intervene in this Second Federal Action will help to ensure that there is no miscarriage of justice or unnecessary waste of attorney or judicial resources.

D. CHO and Dr. Rosen's Interests Will Not Be Adequately Represented By Existing Parties

An applicant's burden to prove inadequate representation by existing parties is minimal. It is sufficient to show that representation may be inadequate. (*Arakaki*, 324 F.3d at p. 1086.) Indeed, the United States Supreme Court has held this "requirement of the rule is satisfied if the applicants show the representation of its interest 'may be' inadequate." (*Trbovich v. United Mine Workers* (1972) 404 U.S. 528, 538.) Courts consider three factors: (1) whether the existing parties will "undoubtedly" make all the intervenor's proposed arguments; (2) whether the parties are capable and willing to make such arguments; and (3) whether the intervenor would offer any necessary elements to the proceeding that other parties would neglect. (*Arakaki*, 324 F.3d at p. 1086.) The Ninth Circuit has emphasized that there is "no presumption that one governmental entity represents another." (*U.S. v. Carpenter* (9th Cir. 2002) 298 F.3d 1122, 1125 (*per curiam*).) "The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties." (*Arakaki*, 324 F.3d at p. 1086.)

Presumably, the existing defendants in this action have an interest in preserving the State Court's judgment that Jahi satisfied the criteria for brain death under California law. That judgment ultimately formed the basis of the death certificate issued by the Coroner. Indeed, there is a public interest in ensuring that a public record, like a death certificate, contains a

reliable record of a matter of public interest as demonstrated by the rule that a death certificate typically serves as prima facie evidence of a person's death and there will thus be an incentive for the government defendants to protect that interest. (*See, e.g.*, Cal. Health & Safety Code § 103550.) Yet, the government defendants in this Second Federal Action are not parties to the Damages Litigation. (RJN, Exh. S (First Amended Complaint).) The government defendants therefore do not share in the exposure risk looming in the Damages Litigation; that risk will be shouldered by CHO and Dr. Rosen. Thus, by comparison, the interests of CHO and Dr. Rosen in defending the plaintiffs' claims for declaratory relief in this Second Federal Action are significantly greater than that borne by the government defendants.

V. IN THE ALTERNATIVE, CHO AND DR. ROSEN SHOULD BE GRANTED PERMISSIVE INTERVENTION

Under Rule 24(b), upon timely application, this Court may permit anyone to intervene in the action if the nonparty "has a claim or defense that shares with the main action a common question of law or fact." (Fed. R. Civ. P., Rule 24(b)(1)(B).) The Rule goes on to provide that permissive intervention should be granted if it will not "unduly delay or prejudice the adjudication of the original parties' rights." (Fed. R. Civ. P, Rule 24(b)(3).) Much like the rule mandating intervention "as a matter of right," courts have been willing to apply a "flexible reading of Rule 24(b)" which generally favors permissive intervention where no prejudice will result. (*E.E.O.C. v. Nat'l Children's Ctr., Inc*. (D.C. Cir. 1998) 146 F.3d 1042, 1046.)

Here, CHO and Dr. Rosen fall squarely within the Rule's requirements sufficient to warrant permissive intervention. The motion is timely. And, as described in detail above, both CHO and Dr. Rosen are currently defending an identical claim that Jahi is alive in the earlier filed Damages Litigation. (RJN, Ex. S (First Amended Complaint).) The same issue of brain death is presently at risk of being decided in this Second Federal Action without participation of CHO and Dr. Rosen, both real parties in interest to the claim. Indeed, plaintiffs have expressed their intention to obtain a determination of death in this Second Federal Action by admission contained in a motion filed in Alameda Superior Court. (RJN, Ex. Z (Motion to Bifurcate), at p. 2, lines 27-28 [the federal action will "resolve the issue of whether Jahi is legally dead or

alive"].) To avoid undue prejudice to CHO and Dr. Rosen, this Court must permit CHO and Dr. Rosen to intervene.

VI. CHO AND DR. ROSEN INTEND TO FILE A MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY THIS ACTION

Rule 24(c) provides that "a motion to intervene must be… accompanied by a pleading that sets out the claim or defense for which intervention is sought." (Fed. R. Civ. P., Rule 24(c).) CHO and Dr. Rosen intend to file a Motion to Dismiss under Rule 12(b)(6), or in the alternative, to stay the action pending the resolution of the Damages Litigation. As alluded to elsewhere in this motion, and as set forth more fully in the accompanying pleading, the State Court has already found that Jahi suffered irreversible brain death and issued a final judgment to that effect in January 2014. Plaintiffs cannot collaterally attack that judgment here. This Court should not revisit an issue that has been decided as a part of a final judgment. Plaintiffs' remedy to challenge the judgment is to pursue the ordinary appellate procedure under State law. If this Court is not inclined to dismiss the plaintiffs' claims, then CHO and Dr. Rosen will ask the Court to stay this action pending a final determination of the issues in the Damages Litigation to avoid any conflict in findings of law or fact.

VII. CONCLUSION

Based upon the foregoing, CHO and Dr. Rosen respectfully request this Court grant the Motion for Leave to Intervene as a matter of right under Rule 24(a). In the alternative, CHO and Dr. Rosen ask this Court to grant permissive intervention.

DATED: March 29, 2016

Respectfully submitted,

COLE PEDROZA LLP

/s/ *Dana L. Stenvick*
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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 MOTION TO INTERVENE

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

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAHI MCMATH, a minor, NAILAH WINKFIELD, an individual, as parent, as guardian, and as next friend of JAHI MCMATH, a minor, Plaintiffs, v. STATE OF CALIFORNIA; COUNTY OF ALAMEDA, et al., Defendants.	Case No. 3:15-cv-06042-HSG [Hon. Haywood S. Gilliam, Jr.] **DECLARATION OF DANA L. STENVICK IN SUPPORT OF MOTION TO INTERVENE** [FILED CONCURRENTLY WITH PROPOSED JOINDER TO AND MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY] Date Filed: December 23, 2015 Hearing: May 12, 2016 Time: 2:00 p.m.

I, Dana L. Stenvick declare as follows:

1. I am an attorney at law duly licensed to practice before all the Courts of the State of California and a member of Cole Pedroza LLP, attorneys of record for Intervening Third Party Defendants Frederick S. Rosen, M.D., and UCSF Benioff Children's Hospital Oakland.

2. Attached hereto as Exhibit A is the Notice of Motion and Motion by UCSF Benioff Children's Hospital Oakland and Frederick R. Rosen, M.D. to Dismiss Plaintiff's Complaint and Joinder to Motions to Dismiss by the Alameda County Defendants and Defendant State of California. The attached Motion and Joinder is submitted to satisfy the Notice and Pleading requirement set forth in Federal Rule of Civil Procedure 24(c).

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.

/s/ Dana L. Stenvick
Dana L. Stenvick

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:

DECLRATION OF DANA L. STENVICK IN SUPORT OF MOTION TO INTERVENE

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