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ALAMEDA COUNTY
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

LATASHA NAILAH SPEARS WINKFIELD;
MARVIN WINKFIELD; SANDRA
CHATMAN; and JAHl McMATH, a minor, by
and through her Guardian ad Litem,
LATASHA NAILAH SPEARS WINKFIELD,

Plaintiffs,

vs.

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

Defendants.

CASE NO. RG 15760730
ASSIGNED FOR ALL PURPOSES TO:
JUDGE ROBERT B. FREEDMAN -
DEPARTMENT 20

Date: July 30, 2015
Time: 2:00 p.m.
Dept: 20

Date Action Filed: 3/3/15

Reservation Nos. R - 1640356, 1640359

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO DEMURRERS, MOTION TO STRIKE, AND
REQUESTS FOR JUDICIAL NOTICE BY FREDERICK S. ROSEN, M.D. AND
UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND;
PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE**

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1 cessation of all functions in the entire brain” and not entitled to life support at that time does not
2 collaterally estop Jahi and her family from proving that she is alive and is entitled to and in fact
3 has been and is in fact receiving treatment sustaining her life.

4 Jahi’s brain is severely damaged due to Defendants’ negligence, but she alleges and will
5 prove that she has not sustained irreversible cessation of all brain functions.

6 STATEMENT OF THE CASE

7 The complaint alleges the following facts which are accepted as true on demurrer:

8 A. The Negligence of CHO and Dr. Rosen

9 1. The Negligent Surgery. In 2013, Dr. Rosen diagnosed Jahi with sleep apnea and
10 recommended that he perform a surgery that was unreasonably complex and risky which
11 included the removal of her tonsils and adenoids, soft pallet and uvula, and a submucous
12 resection of her bilateral turbinates. On December 9, 2013, at 3:04 p.m., Dr. Rosen took Jahi to
13 the operating room at CHO to perform this extensive surgery. In Dr. Rosen’s Operative Report of
14 his procedure, he noted that he found a "suspicion of medialized carotid on right" – Jahi had an
15 anatomical anomaly in that her right carotid artery was more to the center and close to the
16 surgical site. Although this congenital and asymptomatic anomaly would otherwise have had no
17 impact on Jahi’s life, it raised a serious issue as to this extensive surgical procedure. According
18 to the medical literature, this posed an increased risk factor for serious hemorrhaging during or
19 after surgery. Despite this fact, Dr. Rosen failed to note in any of his orders for the nurses,
20 doctors and other health care practitioners who would be following Jahi postoperatively,
21 including the post-anesthesia care unit (PACU) and pediatric intensive care unit (PICU) nurses,
22 to put these health care workers on notice that Jahi had a congenital abnormality with her right
23 carotid artery that would put her at a higher risk of postoperative bleeding. (Complaint, ¶¶10-11)

24 2. Post-surgery Negligence. After surgery, at approximately 7:00 p.m., Jahi was taken to
25 the PACU then the PICU. Jahi’s mother and stepfather were initially denied permission to visit
26 her. Approximately 30 minutes later, they decided to nevertheless enter the PICU and were
27 alarmed to find their daughter coughing up blood into a plastic emesis container. (Id. at ¶12)

28 The Winkfields expressed their concern to the nursing staff about the amount of blood

1 Jahi was coughing up. The nurses assured the Winkfields that the bleeding was "normal." A
2 nurse then gave a suction wand to Ms. Winkfield and instructed her as to how to suction blood
3 out of her daughter's mouth. The nurses also gave the Winkfields paper towels to help catch all of
4 the blood. At that time, although Jahi was bleeding from the mouth, the packing and bandages in
5 her nose were dry. (Id. at ¶13)

6 Ms. Winkfield complied with the directions and instructions of the CHO nurse as to
7 suctioning the blood from the front of her daughter's mouth for approximately 60 minutes. At
8 that time, another CHO nurse came by and admonished Ms. Winkfield for suctioning Jahi,
9 claiming that it could remove clot clots that are vital for her healing. Ms. Winkfield stopped
10 suctioning, but her daughter continued coughing up blood, and by this point, the bandages and
11 packing in Jahi's nose were also becoming bloody. Ms. Winkfield pleaded with the nurses to call
12 a doctor to Jahi's bedside, to no avail. (Id. at ¶14)

13 Later, the nurse that had instructed Ms. Winkfield to suction the blood from Jahi's mouth
14 returned and admonished her for not suctioning the blood from Jahi's mouth. This nurse then
15 picked up the suctioning wand and began suctioning the blood from Jahi's mouth. Ms. Winkfield
16 again began requesting that a doctor be called to address Jahi's ongoing and significant bleeding.
17 As far as Ms. Winkfield was concerned, the nursing staff at CHO did not appear to be contacting
18 a physician since none was coming to her daughter's assistance. The Winkfields estimated that
19 Jahi had lost 3 pints of blood or more. One nurse said the bleeding was normal; another nurse
20 said she did not know if it was normal or not. (Id. at ¶¶15-16)

21 Concerned about the amount of bleeding that she witnessed her daughter suffering, Ms.
22 Winkfield contacted her mother Ms. Chatman who she knew to be a nurse with many years of
23 experience working in a hospital. Ms. Chatman arrived at Jahi's bedside late in the evening of
24 December 9, 2013, as the nursing staff was changing, at approximately 10:00 p.m. Ms. Chatman
25 immediately became alarmed with the amount of blood she saw in the emesis tray, all over Jahi's
26 clothing and bedding and in the receptacle that collected the blood from the suctioning device.
27 Ms. Chatman immediately confirmed with the nurses that the blood in the suctioning receptacle
28 was all Jahi's, and she advised the nurses that this was an excessive amount of bleeding for the

1 procedure. Ms. Chatman then insisted that the nurses contact the doctors to come to her
2 granddaughter's aid. (Id. at ¶17)

3 Ms. Chatman advised her daughter Ms. Winkfield that Jahi was bleeding excessively and
4 was at risk of having serious medical complications from the loss of blood and the lack of
5 medical care she was receiving from the nurses and the refusal of doctors to attend to Jahi. After
6 that point, Ms. Winkfield and Ms. Chatman contemporaneously witnessed Jahi continue to bleed
7 as her medical condition deteriorated from the medical neglect and the failure of the CHO
8 medical staff to respond to the declining condition of Jahi. (Id. at ¶18)

9 At approximately 12:30 a.m. on the morning of December 10, 2013, Ms. Chatman was
10 watching the monitors and noted that there was a serious and significant desaturation of Jahi's
11 oxygenation level of her blood. She also witnessed her heart rate drop precipitously. Ms.
12 Chatman then called out for the nursing and medical staff to institute a Code. At 12:35 a.m. on
13 December 10, 2013, the Code was called. At that time Ms. Chatman observed a doctor finally
14 come to the bedside of Jahi and state, "Shit, her heart stopped." The cardiopulmonary arrest and
15 Code was documented to last until 3:08 a.m., or for 2 hours and 33 minutes, an extremely long
16 period of time. During this time, the doctors and nurses failed to timely establish an airway for
17 Jahi and no consideration was apparently given to perform an emergency tracheotomy when it
18 was apparent after endotracheal intubation attempts were not resulting in prompt and adequate
19 oxygenation of Jahi in a timely manner. During the resuscitation efforts, approximately two liters
20 of blood were pumped out of Jahi's lungs. (Id. at ¶¶19-20)

21 During the Code, a nurse who had been caring for another child in the PICU approached
22 Ms. Chatman to console her. This nurse told Ms. Chatman, "I knew this would happen." In
23 nursing notes added to the chart on December 15, 2013, by the night shift registered nurse
24 responsible for Jahi who charted Jahi's postoperative hemorrhaging and that her vital signs and
25 symptoms were critical, noted that she had repeatedly advised the doctors in the PICU of Jahi's
26 deteriorating condition and blood loss. She charted: "This writer was informed there would be no
27 immediate intervention from ENT or Surgery." The registered nurse who took over for the night
28 shift nurse and was also responsible for Jahi, also added an addendum to her nurse charting for

1 December 9 and 10, which chart note was added on December 16, 2013. This nurse also noted
2 that despite her repeated notification and documentation of Jahi's post surgical hemorrhaging and
3 critical vital signs to the doctors in the PICU, no physicians would respond to intervene on behalf
4 of Jahi. (Id. at ¶¶21-22)

5 **3. CHO moves quickly to terminate life support and push for organ donation.** On
6 December 11, 2013, the Winkfields were advised that EEG brain testing indicated that Jahi had
7 sustained significant brain damage. On December 12, 2013, the Winkfields were advised that a
8 repeat EEG also revealed that Jahi had suffered severe brain damage. They were advised that Jahi
9 had been put on the organ donor list and that they would be terminating her life support the next
10 morning. Upset that the hospital administration was pushing them to donate Jahi's organs and
11 terminate life support without explaining what had happened to their daughter, the Winkfields
12 made inquiries as to what happened. Nobody at CHO explained what happened. (Id. at ¶23)

13 Rather than provide the Winkfields and Ms. Chatman with an explanation as to what
14 happened to Jahi, the administration of CHO continued pressuring the family to agree to donate
15 Jahi's organs and disconnect Jahi from life support. At one point, David J. Duran, M.D., the
16 Chief of Pediatrics, began slamming his fist on the table and said, "What is it you don't
17 understand? She is dead, dead, dead, dead!" Unknown to the family at the time, medical facilities
18 were contacting CHO offering to accept the transfer of Jahi. These offers were given to Dr.
19 Duran on his orders and he did not share those with the family. (Id. at ¶24)

20 **4. Defendants breached the standard of care.** Dr. Rosen was negligent in (a) not
21 recommending, prior to deciding to perform the complex and risky surgery, less intrusive and
22 risky procedures be undertaken, including providing Jahi with a CPAP machine, and only
23 removing Jahi's tonsils and adenoids to see if her sleep apnea improved; (b) during the surgery,
24 Dr. Rosen discovered that Jahi might have a medialized right carotid artery but failed to mention
25 this condition in any of his postoperative orders thus failing to provide the medical staff at CHO
26 with important medical information; and (c) in failing to respond post-op to Jahi. (Id. at ¶¶28-31)

27 The CHO nurses and physicians were negligent in (a) allowing Jahi to bleed for hours
28 without the presence and input of any physician, including Dr. Rosen,; (b) failing, in the face of

1 the doctors' evidence refusal to respond, to activate the hospital's nursing hierarchy chain of
2 command reporting system in order to get the medical care and attention which the nurses knew
3 Jahi needed. (Id. at ¶¶32-33)

4 **B. The Brief and Expeditious Proceeding Over Whether CHO Could Terminate Life**
5 **Support**

6 After going into cardiac arrest and lapsing into a coma in the early morning hours of
7 December 10, Jahi was maintained on a ventilator at CHO. On Friday December 20, 2013, the
8 family obtained a temporary restraining order preventing CHO from terminating Jahi's life
9 support. (Id. at ¶26) Judge Grillo endeavored to complete the proceeding in a "reasonably brief
10 period." CHO provided some records to the family, the Court appointed an independent
11 physician, and on December 24, three court days after the petition was filed, the Court found that
12 Jahi had suffered brain death. While the family's emergency petition for mandate a week later
13 was pending in the Court of Appeal (No. A140590), the parties stipulated for Jahi's release to the
14 family (id. at ¶ 26), Judge Grillo's TRO was dissolved, and the Court of Appeal denied the
15 petition as moot. To this date, Jahi continues to receive 24/7 nursing care in New Jersey,
16 pursuant to her eligibility in that state for participation in the New Jersey Medicaid Program.¹

17 Recent evaluations by doctors, including a board certified pediatric neurologist, confirm
18 that Jahi does not meet the definition of brain death. (Id. at ¶26)

19 **C. Plaintiffs' Complaint**

20 The complaint alleges three causes of action: (1) for personal injuries on behalf of Jahi
21 McMath; (2) for negligent infliction of emotional distress on behalf of Jahi's mother and
22 grandmother; and (3) for wrongful death "in the event that it is determined Jahi McMath
23 succumbed to the injuries caused by the negligence of the defendants.

24 ///

25 ///

26 ¹In their Request for Judicial Notice filed herewith, Plaintiffs request the court take
27 judicial notice of the eligibility letters from New Jersey's Department of Human Services to Jahi.
28 (Evid.Code, §§ 452, subd. (c), (h), 459(a); *California Advocates for Nursing Home Reform v.*
Bontá (2003) 106 Cal.App.4th 498, 515-516, fn. 8 [letters issued by California Department of
Social Services were proper subjects of judicial notice].)

1 ARGUMENT

2 I. DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IS IMPROPER TO THE
3 EXTENT IT ASKS FOR JUDICIAL NOTICE OF THE CONTENTS AND/OR
4 TRUTH OF THE COURT RECORDS AND DEATH CERTIFICATE.

5 Defendants' demurrer is hinged on this Court taking judicial notice of the contents of the
6 death certificate and the findings that were made in the earlier action for equitable relief.
7 Defendants request for judicial notice extends far beyond what is permissible.

8 While a demurrer can reference matters outside the pleading that are judicially noticeable
9 such as court filings (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins.*
10 *Co.* (2004) 116 Cal.App.4th 968, 994), judicial notice is limited to the orders and judgments in
11 the other court file, as distinguished from the contents of documents filed therein. (*Fremont*
12 *Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 113 ["Taking judicial notice of a
13 document is not the same as accepting the truth of its contents or accepting a particular
14 interpretation of its meaning"]; *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal..App.4th
15 471, 482–484.) The court cannot accept as true the contents of pleadings or exhibits in the other
16 action just because they are part of the court record or file. Such documents are inadmissible
17 hearsay in the present case. (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.) Further, the court
18 may take notice of the existence of findings of fact made in the other action, but may not accept
19 them as true on issues in dispute in the present case. Thus, the other court's findings are not
20 indisputably true. Otherwise, the judge in the other case would be made "infallible" on all
21 matters. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565; see *Fowler v. Howell* (1996) 42
22 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif.* (2004) 119 Cal.App.4th 140, 145–148.)

23 Specifically, the Court in *Bohrer v. County of San Diego* (1980) 104 Cal.App.3d 155,
24 164-65 held that death certificates may be admitted as prima facie evidence of the facts stated
25 therein, but it is improper to take judicial notice of the facts stated in the death certificate as part
26 of ruling on a demurrer where the demurring party sought to indisputably establish cause of
27 death. This is underscored by Health and Safety Code section 103550, which provides that a
28 certified copy of a death certificate is merely "prima facie evidence in all courts and places of the
facts stated therein." Thus, the Court in *In re Estate of Lensch* (2009) 177 Cal.App.4th 667, 676-

1 677, discussing section 103550, held that the date and time of death stated on a death certificate
2 was subject to rebuttal and explanation: “Of course, a death certificate is ‘subject to rebuttal and
3 to explanation.’ (*Morris v. Noguchi* (1983) 141 Cal.App.3d 520, 523, fn. 1, 190 Cal.Rptr. 347;
4 see also *People v. Holder* (1964) 230 Cal.App.2d 50, 56, 40 Cal.Rptr. 655.) And a party may
5 correct a statement in a death certificate by calling as a witness the person who made the death
6 certificate. (See *Estate of Scott* (1942) 55 Cal.App.2d 780, 782–783, 131 P.2d 613.)”

7 Accordingly, it would be improper for this court to take judicial notice of the facts and
8 contents stated in the death certificate as part of ruling on the demurrer by Dr. Rosen and CHO
9 where they seek to indisputably establish that Jahi McMath is dead. (CHO’s request for judicial
10 notice is fatally defective for the additional reason the request violates Cal. Rule of Court
11 3.1113(l) requiring, *inter alia*, a request for judicial notice to be made in a separate document.)

12 **II. RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT APPLY HERE**

13 **A. The Doctrines Never Apply To Bar a Claim Or Issue Where New Facts or**
14 **Changed Circumstances Have Occurred**

15 Defendants argue that Judge Grillo’s finding that CHO could withdraw Jahi’s life support
16 based on a determination by physicians in December 2013 that Jahi met the criteria for brain
17 death, collaterally estops Plaintiffs from alleging and proving that Jahi is, in fact, alive. This
18 argument is meritless. First and foremost, century-old precedent holds that neither *res judicata*
19 nor collateral estoppel were ever intended to prevent a re-examination of the same question
20 between the same parties where, in the interval between the first and second actions, the facts
21 have materially changed or new facts have occurred which have altered the legal rights or
22 relations of the litigants. As the Court in *Union Pacific Railroad Company v. Santa Fe Pacific*
23 *Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 179-182, recently held, relying on our Supreme
24 Court’s decision in *Hurd v. Albert* (1931) 214 Cal. 15, 26:

25 Collateral estoppel does not bar a later claim if new facts or changed
26 circumstances have occurred since the prior decision. (*Melendres v. City of Los*
27 *Angeles* (1974) 40 Cal.App.3d 718, 730, 115 Cal.Rptr. 409.) Neither *res judicata*
28 nor collateral estoppel were ever “ ‘intended to operate so as to prevent a
re-examination of the same question between the same parties where, in the
interval between the first and second actions, the facts have materially changed or
new facts have occurred which have altered the legal rights or relations of the
litigants.’ ” (*Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 748, 238
Cal.Rptr. 259 (Evans).) “Collateral estoppel does not apply where there are

1 changed conditions or new facts which did not exist at the time of the prior
2 judgment....” (*United States Golf Assn. v. Arroyo Software Corp.* (1999) 69
3 Cal.App.4th 607, 616, 81 Cal.Rptr.2d 708.) In the second trial, the court
4 ‘may and should consider all the facts that exist, both prior and subsequent to the
5 first action, so as to determine properly what effect all of the facts, as they exist at
6 the time of the second trial, have on the rights of the parties.’”

(See also 7 Witkin, Cal. Proc. 5th (2008) Judgm, § 434, p. 1087.) In *Wimsatt v. Beverly Hills
Weight Etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1516-1517, the Court held:

7 It is clear that if facts and circumstances change after the first case is final, they
8 are no longer ‘identical’ by the time the second case rolls along. ‘[T]he estoppel
9 effect of a judgment extends only to the facts in issue as they existed at the time
10 the prior judgment was rendered.’ (*People v. Carmony* (2002) 99 Cal.App.4th
11 317, 322, 120 Cal.Rptr.2d 896.) ‘Some issues are not static, that is, they are not
12 fixed and permanent in their nature. When a fact, condition, status, right, or title is
13 not fixed and permanent in nature, then an adjudication is conclusive as to the
14 issue at the time of its rendition, but is not conclusive as to that issue at some later
15 time.’” (*Ibid.*, citing *Lunt v. Boris* (1948) 87 Cal.App.2d 694, 695.)

16 Here, as Plaintiffs’ complaint alleges, “The Winkfields then obtained a restraining order
17 preventing CHO from terminating Jahi's life support. Eventually, an agreement was reached
18 whereby Jahi was released to the Winkfields. Recent evaluations by doctors, including a board
19 certified pediatric neurologist, confirm that Jahi does not meet the definition of brain death.”
20 (Complaint, ¶26.) Further, as Defendants’ motion for judicial notice acknowledges, there are
21 indeed new facts and changed circumstances which prevent the use of res judicata and collateral
22 estoppel to preclude Plaintiffs from arguing that Jahi is indeed alive. As the family has stated:

23 Petitioner is in possession of current evidence, including MRI evidence of the
24 integrity of the brain structure, electrical activity in her brain as demonstrated by
25 EEG, the onset of menarche (her entering into puberty as evidenced by the
26 beginning of menstruation) and her response to audible commands, given by both
27 her mother and an examining physician, demonstrating that Jahi McMath's brain
28 death was not "irreversible." Petitioner's experts will testify that Jahi may have, at
the time of Dr. Fisher's examination, demonstrated evidence of brain death due to
the swelling of her brain following the traumatic events that led to her suffering a
loss of oxygen to her brain but, now that the swelling has receded, and she has had
time to receive proper post incident medical care, she has demonstrable brain
function.

(CHO Demurrer and Request for Judicial Notice, p. 3, Exhibit C, p. 4:2-10.) CHO acknowledges
this fundamental principle that res judicata and collateral estoppel will not be applied where there
are new facts and changed circumstances (CHO Demurrer, 8:6-10) but its only argument is that
there is no authority that would apply this principle to a determination of brain death allowing for
the removal of life support. However, more to the point, there is no authority that would prevent

1 changed circumstances from applying. Plaintiffs have located no case in which brain death was
2 determined and the patient managed to remove themselves, before cardiovascular death, from the
3 facility which had received permission from the court to discontinue life support. Health and
4 Safety Code section 7181 specifically limits the legal determination of brain death to
5 circumstances where there is **"irreversible cessation of all functions of the entire brain,**
6 **including the brain stem."** Plaintiffs allege, and will present proof of changes and developments
7 which show that Jahi's condition is one in which Jahi has brain function and is indeed a living
8 person. Defendants' disagreement with this cannot and should not be resolved on demurrer.

9 Importantly, analogous cases prohibit issue preclusion. In *Blanca P. v. Superior Court*
10 (1996) 45 Cal.App.4th 1738, 1754, the Court held that:

11 a parent was not collaterally estopped from contesting molestation charge at
12 review hearing, where he had denied the charge throughout the proceedings, and
13 new evidence (a psychologist's report) supported his denial. The Court held:
14 collateral estoppel effect should not be given, at a 12 or 18-month review, to a
15 prior finding of child molestation made at a jurisdictional hearing when the
16 accused parents continue to deny that any molestation ever occurred and *there is*
17 *new evidence* supporting their denial. . . . In cases where child molestation is
18 alleged and denied, and there is new evidence supporting the denial, to say that a
19 parent is collaterally estopped from contesting the molestation itself at a 12 or
20 18-month review hearing is to make the "antecedent" jurisdictional finding
21 virtually dispositive in terminating parental rights—and dispositive based on a
22 prior finding made under a preponderance standard. To limit the evidence at the
23 hearing to just the issue of a parent's propensity to commit molestation in the
24 future is, under circumstances when there is new evidence that no molestation
ever happened in the first place, not only grossly unfair, but also contrary to the
logic of *Cynthia D.* The remedy for a factually erroneous molestation finding
made at a jurisdictional hearing is, in the words of *Carmaleta B.*, to allow it to be
reviewed in light of subsequent events. Our conclusion is also buttressed by the
realities of our overcrowded juvenile dependency courts. We have emphasized the
need for accurate and reliable findings of fact where child molestation is at issue.
But we also know that jurisdictional findings are made under extreme time
pressures, and with a certain degree of urgency necessary to protect children. The
hard truth is that all too often (the facts in the case before us demonstrate the point
as much as any other) juvenile courts and counsel do not have enough time to
fully explore molestation issues in jurisdictional hearings, and psychological
evidence about a parent's propensity to commit molestation is likely to be
unavailable, inadmissible or nonexistent.

25 See also *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1038, [collateral estoppel did not prevent a
26 second dependency proceeding on sexual abuse allegations, even though court in earlier
27 proceeding had rejected different allegations of sexual abuse, where new disclosures of child
28 abuse, substantively different from previous disclosures, constituted new evidence.] These cases

1 apply here – Jahi and her family should not be collaterally estopped from contesting the
2 pronouncement that Jahi is dead where they denied this throughout the proceeding to sustain her
3 life support and where new evidence supports their denial. Where the fact of death is alleged and
4 denied, and there is new evidence supporting the denial, to say that an aggrieved patient is
5 collaterally estopped from contesting her “brain death” in her action for medical negligence is to
6 make the antecedent finding of “brain death” dispositive based on a prior finding made under
7 extreme time pressures and with great urgency necessary to decide the heartbreaking question
8 whether to withdraw life support.²

9 Further, the procedure in Health and Safety Code section 7180 for determining whether a
10 provider can withdraw life support based on a determination of brain death contemplates judicial
11 review of the prior diagnosis of brain death when it is reasonably probable there was a mistake
12 made in that diagnosis. (*Dority v. Superior Court* (1983) 145 Cal.App.3d 273, 276 [“The
13 jurisdiction of the court can be invoked upon a sufficient showing that it is reasonably probable
14 that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made
15 in accord with accepted medical standards”].) Although *Dority* is silent on what showing is
16 necessary to establish “reasonable probability of a mistake,” *Dority* recognizes that an expedited
17 diagnosis of brain death for the purpose of determining whether to withdraw life support is
18 subject to rebuttal when it becomes reasonably probable that the diagnosis was mistaken.

19 **B. Defendants Have Not Met Their Burden of Fulfilling the Threshold**
20 **Requirements for the Application of Res Judicata or Collateral Estoppel**

21 “Collateral estoppel precludes relitigation of issues argued and decided in prior
22 proceedings.’ [Citation.] The doctrine applies ‘only if several threshold requirements are
23 fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided
24 in a former proceeding. Second, this issue must have been actually litigated in the former
25 proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the

26 ²See also *Vandenberg, supra*, 21 Cal.4th at 834-835 [arbitration’s benefits of an informal
27 and expeditious forum for disputes barred the assertion of collateral estoppel].)

1 decision in the former proceeding must be final and on the merits. Finally, the party against
2 whom preclusion is sought must be the same as, or in privity with, the party to the former
3 proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing
4 these requirements.’ ” (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37
5 Cal.4th 921, 943, quoting *Lucido v. Superior Court, supra*, 51 Cal.3d at p. 341.) Further, because
6 the law does not favor estoppels, the party invoking collateral estoppel must establish these
7 requirements with certainty. (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146
8 Cal.App.4th 1474, 1482.) The requirements are missing here. The issue Defendants seek to
9 preclude is whether Jahi is entitled to claim personal injury damages from Defendants, whereas
10 the issue in the expedited proceeding was whether CHO could withdraw life support from Jahi in
11 December 2013; thus the issues are not identical, and the issue whether Jahi can claim personal
12 injury damages was not litigated whatsoever, much less necessarily and finally decided on the
13 merits, in the expedited proceeding. Defendants have not met their burden. (*Ibid*; see also *Santa*
14 *Clara Valley Transportation Authority v. Rea* (2006) 140 Cal.App.4th 1303, 1311–1312 [if the
15 record is incomplete, and the court cannot determine whether one or more of the elements of
16 collateral estoppel is present, the court cannot apply it].)

17 **C. The Preclusion Doctrines Do Not Apply Where Application Would Not Serve**
18 **Their Underlying Fundamental Principles**

19 In any event, even assuming threshold requirements were satisfied, application of
20 collateral estoppel is not appropriate where such an application would defeat public policy and
21 the fundamental principles underlying the doctrine. (*Lucido v. Superior Court* (1990) 51 Cal.3d
22 335, 342–343 [holding that even assuming all threshold requirements are met, courts must “look
23 to the public policies underlying the doctrine before concluding that collateral estoppel should be
24 applied in a particular setting”].) “It must be remembered that ‘[c]ollateral estoppel’ is an
25 equitable concept based on fundamental principles of fairness. [Citation.]” (*White Motor Corp. v.*
26 *Teresinski* (1989) 214 Cal.App.3d 754, 763.) “[T]he public policies underlying collateral
27 estoppel – preservation of the integrity of the judicial system, promotion of judicial economy,
28 and protection of litigants from harassment by vexatious litigation – strongly influence whether
its application in a particular circumstance would be fair to the parties and constitutes sound

1 judicial policy. [Citation.]” (*Lucido, supra*, 51 Cal.3d at p. 343.; see also *Sims, supra*, 32 Cal.3d
2 at pp. 488–489.) Here, application of collateral estoppel would result in injustice when the earlier
3 proceeding was an informal, expedited hearing with limited opportunity to fully explore the issue
4 of brain death. The application of collateral estoppel would also be inappropriate where the relief
5 sought in the earlier proceeding (requiring the continuation of life support) is so disparate from
6 the relief sought in the present proceeding (compensation for harm caused by negligence).

7 **III. THE DEMURRER BY DR. ROSEN TO THE SECOND CAUSE OF ACTION FOR**
8 **NIED SHOULD BE OVERRULED**

9 The complaint alleges that Jahi’s mother and grandmother, a trained and experienced
10 nurse, witnessed Jahi suffering from continuous postoperative bleeding that continued to get
11 worse as CHO medical staff and physicians including Dr. Rosen failed to respond; that they were
12 aware that Jahi’s prolonged bleeding was not normal and that Jahi was suffering from
13 complications of surgery which were not being properly addressed; that medically continued
14 blood loss could result in serious personal injury or death; and that they were aware that Jahi was
15 being harmed by the inadequate and substandard care by CHO staff and by her surgeon who had
16 failed utterly to respond to Jahi’s post-operative condition. (Complaint, ¶¶39-40.) As a result of
17 their contemporaneous observation, Jahi’s mother and grandmother suffered serious emotional
18 distress, and Jahi’s grandmother became so emotionally distraught and overcome that she was
19 admitted into CHO for observation. (Complaint, ¶¶41-42.)

20 CHO does not attempt to challenge Plaintiffs’ second cause of action for NIED, perhaps
21 recognizing the settled state of law that a NIED claim arises when hospital staff and physicians
22 fail to respond significantly to symptoms obviously requiring immediate medical attention. (See
23 *Keys v. Alta Bates Summit Medical Center* (March 15, 2015, depub. req. den. July 15, 2015) 235
24 Cal.App.4th 484, 489, citing line of cases including *Bird v. Saenz* (2002) 28 Cal.4th 910, 920.)
25 Dr. Rosen’s demurrer indeed acknowledges the *Keys* decision. Nevertheless, Dr. Rosen’s
26 demurrer challenges the NIED claim, arguing that there is no allegation in the complaint that he
27 failed to respond to Jahi’s symptoms which required immediate medical attention.

28 The argument fails. The complaint alleges in numerous places that Jahi’s mother and
grandmother (“an experienced and trained nurse”) pleaded with hospital staff to contact doctors

1 (which includes the surgeon Dr. Rosen who performed Jahi's surgery) to respond but that they
2 refused to attend to Jahi: (see Complaint, at:

3 •¶ 14 [mother "pleaded with the nurses to call a doctor to JAHl's bedside, to no avail"];

4 •¶ 16 ["the nursing staff at CHO did not appear to be contacting a physician since none
5 was coming to her daughter's assistance"],

6 •¶ 17 [grandmother "insisted that the nurses contact the doctors to come to her
7 granddaughter's aid"],

8 •¶ 18 [mother and grandmother "contemporaneously witnessed JAHl continue to bleed as
9 her medical condition deteriorated from the medical neglect and the failure of the CHO medical
10 staff to respond to the declining condition of JAHl"],

11 •¶ 19 [a doctor finally arrived after a Code was instituted, and remarked "Shit, her heart
12 stopped;" "doctors and nurses" failed to establish an airway or any other attempt to provide
13 adequate oxygen to Jahi],

14 •¶ 22 [doctors from ENT and Surgery (Dr. Rosen's departments) refused to respond
15 despite staff's pleas on behalf of Jahi and her family, as reflected in hospital records - "no
16 physicians would respond to intervene on behalf of "JAHl"],

17 •¶ 31 [Dr. Rosen failed "to follow up on his patient who he suspected of having a possible
18 medialized right carotid artery"],

19 •¶ 32 [nurses and doctors at CHO allowed Jahi's symptoms to go untreated "without
20 insisting that the surgeon, ROSEN, return to bedside and address the source of the bleed"],

21 •¶ 39 [grandmother "began insisting that doctors be called to the bedside to address the
22 complication of bleeding"],

23 •¶ 40 [grandmother advised mother "that the prolonged bleeding was not normal and that
24 JAHl MCMATH was suffering from complications of surgery which were not being properly
25 addressed medically," and "were aware that JAHl was being harmed by . . . her surgeon who had
26 not checked on the status of his patient or by the other medical staff at CHO"].)

27 The above allegations fully and fairly include Dr. Rosen as one, if not the primary,
28 physician who failed to respond to Jahi's symptoms. These allegations are presumed true for

1 purposes of demurrer, and the complaint is given a reasonable interpretation by reading it as a
2 whole and all of its parts in their context. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679,
3 fn. 31; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Therefore, the
4 demurrer to Plaintiffs' second cause of action for NIED is properly overruled. In the event the
5 Court is inclined to want more specificity, Plaintiffs request leave to amend. "If a complaint
6 does not state a cause of action, but there is a reasonable possibility that the defect can be cured
7 by amendment, leave to amend must be granted." (*Quelimane Co. v. Stewart Title Guaranty Co.*
8 (1998) 19 Cal.4th 26, 38-39.)

9 **IV. THE MOTION TO STRIKE SHOULD BE DENIED**

10 CHO moves to strike the claim for future damages and the alternative claim for wrongful
11 death on the ground that the claims are inconsistent with Defendants' claim that Jahi is dead. For
12 the reasons set forth herein, Jahi is not dead, and thus the motion is meritless.

13 Plaintiffs acknowledge that it appears Mr. Winkfield, Jahi's stepfather, does not have
14 standing to assert the alternative claim for wrongful death.

15 **CONCLUSION**

16 For the foregoing reasons, the demurrers should be overruled, as specified herein.

17
18 DATED: July 16, 2015

AGNEWBRUSAVICH
A Professional Corporation

19
20
21 By: 

BRUCE M. BRUSAVICH
Attorneys for Plaintiffs

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **AGNEWBRUSAVICH**, 20355 Hawthorne Blvd., 2nd Floor, Torrance, California. On July 17, 2015, I served the within document **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRERS, MOTION TO STRIKE, AND REQUESTS FOR JUDICIAL NOTICE BY FREDERICK S. ROSEN, M.D., AND UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND; PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Torrance, California, addressed as set forth below:
- by placing a true copy thereof enclosed in a sealed envelope(s), and caused such envelope(s) to be delivered by hand delivery addressed pursuant to the document(s) listed above to the person(s) at the address(es) set forth below.
- by electronic service. Based on a court order or an agreement of the parties to accept service by electronic transmission. I caused the documents to be sent to the persons at the electronic notification addresses as set forth below:

Thomas E. Still HINSHAW, MARSH, STILL & HINSHAW 12901 Saratoga Avenue Saratoga, CA 95070-9998	ATTORNEYS FOR FREDERICK S. ROSEN, M.D. (408) 861-6500
G. Patrick Galloway GALLOWAY, LUCCHESI, EVERSON & PICCHI 1676 No. California Boulevard 5 th Floor Walnut Creek, CA 94596	ATTORNEYS FOR DEFENDANT UCSF BENIOFF CHILDREN'S HOSPITAL (925) 930-9090

I am readily familiar with the firm's practices of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if post cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at which direction the service was made.

Executed this 17th day of July, 2015 at Torrance, California.


ANNE SANSALONE



13920401

1 Bruce M. Brusavich, State Bar No. 93578
2 Puneet K. Toor, State Bar No. 289893
3 **AGNEWBRUSAVICH**
4 A Professional Corporation
5 20355 Hawthorne Boulevard
6 Second Floor
7 Torrance, California 90503
8 (310) 793-1400

FILED
ALAMEDA COUNTY

JUL 17 2015

CLERK OF THE SUPERIOR COURT
By *William Wullen* Deputy

Attorneys for Plaintiffs

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ALAMEDA

11 LATASHA NAILAH SPEARS WINKFIELD;)
12 MARVIN WINKFIELD; SANDRA)
13 CHATMAN; and JAHI McMATH, a minor, by)
14 and through her Guardian ad Litem,)
LATASHA NAILAH SPEARS WINKFIELD,)

Plaintiffs,

vs.

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

Defendants.

CASE NO. RG 15760730
ASSIGNED FOR ALL PURPOSES TO:
JUDGE ROBERT B. FREEDMAN -
DEPARTMENT 20

Date: July 30, 2015
Time: 2:00 p.m.
Dept: 20

Date Action Filed: 3/3/15

Reservation Nos. R - 1640356, 1640359

22 **PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE;**
23 **DECLARATION; EXHIBIT**

1



State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF AGING SERVICES
PO BOX 607
TRENTON, N.J. 08625-0807
www.nj.gov/humanservices

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

JENNIFER VELEZ, ESQ.
Commissioner

Date: 01/02/16

Reply to:
Central Regional Office of the
Office of Community Choice Options
45 Kilmer Road, Edison, NJ 08817

Medicaid # 123039116320

Dear Jahi McMath:

This notice advises you of the following decision regarding your clinical eligibility for participation in the New Jersey Medicaid Program identified below.

Importante: Si usted no entiende este aviso, pongase en contacto con un representante de esta oficina.

1. You are clinically eligible for:

- a. Nursing facility level of care in a nursing facility or home and community based services waiver in accordance with N.J.A.C. 8:35-2.1.
- b. Special Care Nursing Facility placement _____ in the State of NJ which is a Special Care Nursing facility (SCNF), in accordance with N.J.A.C. 8:35-2.21.
- c. You are approved for Jersey Assistance for Community Caregiving (JACC). If you are enrolled in the program a Care Manager will contact you to arrange services.
 - JACC is unable to accept new clients at this time. You will be contacted once an opening is available for you.
- e. PACE (Program for all inclusive Care for the Elderly) you will be contacted by the PACE provider.

Client Name: Jahi McMath

Date: 01/02/15

2. You are clinically eligible and approved for:

Adult Day Health Services in accordance with N.J.A.C. 8:86-1.5.

Pediatric Medical Day Care in accordance with N.J.A.C. 8:87-3.1.

The child is exempt from Prior Authorization in Pediatric Medical Day Care for 90 days as per N.J.A.C. 8:87-3.3, which addresses a child being discharged from a Neonatal Intensive Care Unit. Exemption from Prior Authorization is dependent upon the provider following all provisions in the cited regulation.

Additional Information:

- This notice confirms clinical eligibility only. Program enrollment will not occur until both financial and clinical eligibility is established.
- Approval for the service(s) or program(s) identified by this notice, which is under the New Jersey Medicaid program is contingent upon financial eligibility. Financial eligibility is determined by the County Welfare Agency/Board of Social Services in your county or through SSI, if applicable.
- Approval for the Jersey Assistance for Community Caregiving (JACC) is contingent upon financial eligibility, which is determined by Pharmaceutical Assistance to the Aged and Disabled (PAAD).
- Enrollment in NJ Family Care MLTSS, PACE, and Jersey Assistance for Community Caregiving (JACC) is contingent upon compliance with the specific program enrollment requirements.

Your clinical and financial eligibility will be re-evaluated at least annually; you must continue to meet the clinical and financial eligibility criteria in order to remain in the program.

Sincerely,

Tasneem Mohammedshah RN
Name of Community Choice Counselor

Signature of Community Choice Counselor

- c:
- County Welfare Agency/Board of Social Services
 - PACE Provider Organization
 - Nursing Facility
 - MCO Provider



Horizon Blue Cross Blue Shield of New Jersey

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**Horizon
NJ Health**

THIS IS NOT A BILL

January 14, 2015

JAHM MCMATH
4 BRIDLE CT
SOMERSET, NJ 08873-5354

Dear JAHM MCMATH,

Please be advised that the treatment scheduled for Horizon NJ Health member, JAHM MCMATH 71283251 is approved according to the specifications below:

Reference Number: 0000924660

Name of Requesting Provider: BAYADA HOME HEALTH CARE INC

Name of Servicing Provider: BAYADA HOME HEALTH CARE INC

Diagnosis Code:

348.1 - DAMAGE, ANOXIC BRAIN

Type of Authorization: Home, Private Duty Nursing, S9123, Nursing care in home RN

Treatment Date Range: 01/14/2015 - 03/14/2015

Number of Visits/Units Authorized: 1440

Type of Authorization: Home, Private Duty Nursing, S9124, Nursing care, in the home; b

Treatment Date Range: 01/14/2015 - 03/14/2015

Number of Visits/Units Authorized: 1440

Treatment authorization is dependent upon eligibility of the member. All claims must be submitted to Horizon NJ Health within 180 days of the date of service to be eligible for payment. Claims should be mailed to the following address:

**Horizon NJ Health
Claims Processing Department
P.O. Box 7117
London, Kentucky 40742**

Pursuant to N.J.A.C. 10:49-7.3(d), Medicaid and Family Care members are not responsible for any non-reimbursed care.

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NJ Health

THIS IS NOT A BILL

February 23, 2015

JAHl MCMATH
4 BRIDLE CT
SOMERSET, NJ 08873-5354

Dear JAHl MCMATH,

Please be advised that the treatment scheduled for Horizon NJ Health member, JAHl MCMATH 71283251 is approved according to the specifications below:

Reference Number: 0001039624

Name of Requesting Provider: ECK, ALIETA

Name of Servicing Provider: ADVANCED RESPIRATORY INC

Diagnosis Code:

348.1 - DAMAGE, ANOXIC BRAIN

Type of Authorization: Home, Durable Medical Equipment Rental, E0483, Chest compression gen system

Treatment Date Range: 01/27/2015 - 11/27/2015

Number of Visits/Units Authorized: 10

Modifier:

Treatment authorization is dependent upon eligibility of the member. All claims must be submitted to Horizon NJ Health within 180 days of the date of service to be eligible for payment. Claims should be mailed to the following address:

Horizon NJ Health
Claims Processing Department
P.O. Box 7117
London, Kentucky 40742

Pursuant to N.J.A.C. 10:49-7.3(d), Medicaid and Family Care members are not responsible for any non-reimbursed care.

If you have any questions, please contact us at 1-877-765-4325.

Thank you,
Utilization Management Department

Page 1 of 2



Horizon Blue Cross Blue Shield of New Jersey
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**Horizon
NJ Health**

THIS IS NOT A BILL

March 24, 2015

JAHl MCMATH
4 BRIDLE CT
SOMERSET, NJ 08873-5354

Dear JAHl MCMATH,

Please be advised that the treatment scheduled for Horizon NJ Health member, JAHl MCMATH 71283251 is approved according to the specifications below:

Reference Number: 0001136809

Name of Requesting Provider: MAXIM HEALTHCARE SERVICES INC

Name of Servicing Provider: MAXIM HEALTHCARE SERVICES INC

Diagnosis Code:

348.1 - DAMAGE, ANOXIC BRAIN

Type of Authorization: Home, Private Duty Nursing, S9123, Nursing care in home RN

Treatment Date Range: 03/15/2015 - 05/11/2015

Number of Visits/Units Authorized: 1392

Modifier:

Type of Authorization: Home, Private Duty Nursing, S9124, Nursing care, in the home; b

Treatment Date Range: 03/15/2015 - 05/11/2015

Number of Visits/Units Authorized: 1392

Modifier:

Comments: 24 hours a day 7 days a week as per HNJH Private Duty Nursing Policy # 31C.096.08
Case shared between Preferred, Bayada and Maxim

Treatment authorization is dependent upon eligibility of the member. All claims must be submitted to Horizon NJ Health within 180 days of the date of service to be eligible for payment. Claims should be mailed to the following address:

**Horizon NJ Health
Claims Processing Department
P.O. Box 7117
London, Kentucky 40742**

Page 1 of 2

(See next page)

Horizon

Horizon Blue Cross Blue Shield of New Jersey

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**Horizon
NJ Health**

THIS IS NOT A BILL

June 10, 2015

JAHM MCMATH
4 BRIDLE CT
SOMERSET, NJ 08873-5354

Dear JAHM MCMATH,

Please be advised that the treatment scheduled for Horizon NJ Health member, JAHM MCMATH 71283251 is approved according to the specifications below:

Reference Number: 0001395482

Name of Requesting Provider: EPIC HEALTH SERVICES INC

Name of Servicing Provider: EPIC HEALTH SERVICES INC

Diagnosis Code:

348.1 - DAMAGE, ANOXIC BRAIN

Type of Authorization: Home, Private Duty Nursing, S9123, Nursing care in home RN

Treatment Date Range: 06/10/2015 - 07/10/2015

Number of Visits/Units Authorized: 720

Modifier:

Type of Authorization: Home, Private Duty Nursing, S9124, Nursing care, in the home; b

Treatment Date Range: 06/10/2015 - 07/10/2015

Number of Visits/Units Authorized: 720

Modifier:

Comments: 24 hours a day 7 days a week as per HNJH Private Duty Nursing policy # 31C.096.08
Case shared between Bayada, Epic, and Maxim

Treatment authorization is dependent upon eligibility of the member. All claims must be submitted to Horizon NJ Health within 180 days of the date of service to be eligible for payment. Claims should be mailed to the following address:

**Horizon NJ Health
Claims Processing Department
P.O. Box 7117
London, Kentucky 40742**

Page 1 of 2

(See next page)

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **AGNEWBRUSAVICH**, 20355 Hawthorne Blvd., 2nd Floor, Torrance, California. On July 15, 2015, I served the within document **PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE; DECLARATION; EXHIBIT**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Torrance, California, addressed as set forth below:
- by placing a true copy thereof enclosed in a sealed envelope(s), and caused such envelope(s) to be delivered by hand delivery addressed pursuant to the document(s) listed above to the person(s) at the address(es) set forth below.
- by electronic service. Based on a court order or an agreement of the parties to accept service by electronic transmission. I caused the documents to be sent to the persons at the electronic notification addresses as set forth below:

Thomas E. Still HINSHAW, MARSH, STILL & HINSHAW 12901 Saratoga Avenue Saratoga, CA 95070-9998	ATTORNEYS FOR FREDERICK S. ROSEN, M.D. (408) 861-6500
G. Patrick Galloway GALLOWAY, LUCCHESI, EVERSON & PICCHI 1676 No. California Boulevard 5 th Floor Walnut Creek, CA 94596	ATTORNEYS FOR DEFENDANT UCSF BENOIFF CHILDREN'S HOSPITAL (925) 930-9090

I am readily familiar with the firm's practices of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if post cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at which direction the service was made.

Executed this 17th day of July, 2015 at Torrance, California.


 ANNE SANSALONE