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FAXED ORIGINAL

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**FILED**  
ALAMEDA COUNTY

APR 4 - 2016

CLERK OF THE SUPERIOR COURT  
By Chiam Wall  
Deputy

10 Attorneys for Defendant  
11 UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND

12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 IN AND FOR THE COUNTY OF ALAMEDA - NORTHERN DIVISION

14 LATASHA NAILAH SPEARS WINKFIELD, Case No. RG15760730  
15 MARVIN WINKFIELD, SANDRA  
16 CHATMAN and JAHl McMATH, a minor, The Honorable Robert B.  
17 by and through her Guardian Ad Litem, Freeman  
18 LATASHA NAILAH SPEARS WINKFIELD,

19 Plaintiffs,

**DEFENDANT'S OPPOSITION TO  
PLAINTIFFS' MOTION TO BIFURCATE  
TRIAL**

20 vs.

21 FREDERICK S. ROSEN, M.D., UCSF  
22 BENIOFF CHILDREN'S HOSPITAL  
23 OAKLAND (formerly Children's Hospital &  
24 Research Center at Oakland); MILTON  
25 McMATH, a nominal defendant, and DOES  
26 1 THROUGH 100.

Date: April 15, 2016  
Time: 11:00 a.m.  
Dept: 20  
Date Complaint Filed:  
Trial:

27 Defendants.

28 UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND hereby opposes plaintiffs'  
Motion to Bifurcate the trial of this matter as follows:

I.

**INTRODUCTION**

Plaintiffs' Motion to Bifurcate the trial in this matter by trying the issue of liability before undergoing discovery and trying the issue of the nature and extent of Jahi McMath's damages should be denied because (1) the motion is premature and

1 prejudicial to the parties served who have not yet appeared; (2) economy and efficiency  
2 will not be served by trying the issue of liability in a bifurcated proceeding as it will be  
3 more time consuming and complex than determining whether Jahi McMath is dead; (3)  
4 trial of liability before determining the harm may result in erroneous determination of  
5 fault; (4) trying the liability before determining Jahi is dead does not afford a more  
6 logical presentation of evidence; (5) trial of liability first will not expedite settlement; and  
7 (6) trial of the liability phase will be more emotionally charged than the issue of whether  
8 Jahi is legally dead.

9 If the court is intent on bifurcating the trial of this matter, the reasons justifying a  
10 bifurcated trial point to an initial determination as to whether Jahi McMath is dead before  
11 proceeding any further. Regardless, the issue of the collateral estoppel effect of an  
12 earlier court determination that Jahi McMath is dead is a special defense that must be  
13 tried prior to any other phase pursuant to the Code of Civil Procedure. (See C.C.P.  
14 §§597 and 598.)

## 15 II.

### 16 ARGUMENT

#### 17 A. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE IT PREMATURE.

18 Defendants James Patrick Howard, M.D., Robert M. Wesman, M.D., and Felicia  
19 Herrera, M.D. have been named and served as Doe defendants in this case, but have  
20 not yet appeared. Despite that, plaintiffs have brought this motion knowing none of  
21 these three defendants have appeared. It would be improper for this Court to rule on  
22 this motion at this juncture because it would deny the three newly named Doe  
23 defendants an opportunity to respond.

24 Should this Court grant this motion at this juncture, it will only mean that the issue  
25 of bifurcation will need to be re-litigated because the three Doe defendants should be  
26 given an opportunity to argue against such a ruling. Hence, ruling on this motion at this  
27 juncture would be a misuse of the Court's time and resources.

1 **B. ECONOMY AND EFFICIENCY WILL NOT BE SERVED BY TRYING THE**  
2 **ISSUE OF LIABILITY FIRST IN A BIFURCATED PROCEEDING.**

3 **1. The Trial of Liability Will Take Much Longer Than the Issue of**  
4 **Whether Jahi McMath is Dead.**

5 Economy and efficiency of handling the litigation is one of the justifications the  
6 court can look to in granting a motion to bifurcate. (C.C.P. §598.) In this case, trying the  
7 issue of liability first in a separate bifurcated trial would not serve the ends of economy  
8 and efficiency given the complexity involved in trying the liability phase.

9 Plaintiffs, in their motion, argue that the issue of liability could be resolved in 7 –  
10 10 days of trial time. This is a completely unrealistic estimate.

11 Plaintiffs are alleging that Children's Hospital Oakland, including its nursing staff,  
12 Dr. Rosen, Dr. Howard, Dr. Wesman, and Dr. Herrera all committed medical  
13 malpractice and should be found liable for Jahi McMath's injury or death. Specifically,  
14 Plaintiffs allege that from the time Jahi arrived in the pediatric ICU at around 7:00 p.m.  
15 on December 9, 2013 until she arrested at 12:30 a.m. on December 10, 2013, all of the  
16 nurses caring for Jahi failed to promptly notify Jahi's physicians of the extent of her  
17 bleeding and otherwise failed to go up the chain of command to obtain an appropriate  
18 response to Jahi's condition. The medical records reveal that there were at least 7  
19 nurses involved in Jahi's care up through her code from the time she arrived in the  
20 pediatric ICU. In the liability phase, Children's Hospital Oakland will be presenting  
21 expert testimony on the standard of care as to each of these nurses in defense of  
22 Children's Hospital Oakland and will have additional witnesses and experts on the issue  
23 of chain of command. In addition, each of the physician defendants will offer expert  
24 testimony regarding the standard of care of each named physician. Hence, it is more  
25 probable that the issue of standard of care alone will consume several weeks of trial  
26 testimony on its own, keeping in mind the Plaintiffs will need to present experts critical  
27 of each named defendant.

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1 On top of this, there is the issue of causation. Plaintiffs will have to prove that the  
2 alleged malpractice of each of the defendants was a substantial factor in the injury to  
3 Jahi McMath whether it be brain damage or death. It is apparent from the medical  
4 records that the precise cause of Jahi McMath's arrest is uncertain and it will no doubt  
5 require substantial expert testimony from various fields of medicine to provide an  
6 explanation as to the cause of her brain injury or death.

7 When the above is considered, it becomes apparent that the liability phase of this  
8 action will require at least 3 - 4 weeks and this phase will exceed the time needed to try  
9 the issue of whether Jahi McMath is, in fact, dead. Importantly, the death determination  
10 phase should only take a few days at most. Jahi McMath was determined dead by  
11 three separate neurologists, two at Children's Hospital Oakland and one appointed by  
12 Judge Grillo in a prior proceeding, Dr. Fisher. Dr. Fisher further was presented with  
13 additional evidence in a subsequent proceeding concerning alleged new facts related to  
14 Jahi McMath's condition and after reviewing that information, Dr. Fisher did not alter his  
15 assessment that Jahi McMath remains deceased. The alleged new facts presented in  
16 this case are not substantially different from those new facts presented to Dr. Fisher  
17 before counsel for Jahi McMath abandoned effort to overturn Judge Grillo's  
18 determination that Jahi McMath had passed away. In light of this background, it is  
19 evident that the trial of whether Jahi McMath is alive or dead could be resolved quite  
20 quickly, particularly if the Court were to rule in an initial bench trial, that the collateral  
21 estoppel impact of Judge Grillo's decision mandates a determination that Jahi McMath  
22 is, in fact, deceased.

23 For this reason, the motion to bifurcate and try the issue of liability first should be  
24 denied because it would not serve the purpose of economy and efficiency.

1 C. THE ENDS OF JUSTICE WILL NOT BE SERVED BY TRYING LIABILITY  
2 SEPARATE AND APART FROM THE ISSUE OF HARM DONE TO JAH  
3 MCMATH.

3 1. Trial of Liability Before Determining Harm May Result in Erroneous  
4 Determination of Fault.

5 One of the key elements that the Plaintiffs will have to establish to prove liability  
6 against any named defendant is that a particular defendant's negligence was a  
7 substantial factor in causing Jahi McMath's harm. (See CACI 400, Negligence  
8 Essential Factual Elements, element No. 3) To assist the jury in determining whether  
9 the conduct of each defendant was a substantial factor in causing the harm, the jury will  
10 be read the substantial factor jury instruction which reads:

11 "A substantial factor in causing harm is a factor that a  
12 reasonable person would consider to have contributed to *the*  
13 *harm*. It must be more than a remote attributable factor. It  
14 does not have to be the only cause of *the harm*. Conduct is  
15 not a substantial factor in causing harm if the same harm  
16 would have occurred without the conduct."

17 (CACI 430, Causation: Substantial Factor, emphasis added.)

18 In order to determine whether a particular defendant's conduct was a substantial  
19 factor in the harm caused to Jahi McMath, the issue of whether she is alive or dead  
20 must first be resolved. The reason for this is that it is quite possible that certain conduct  
21 may have caused or contributed to a brain injury, but not necessarily death. The two  
22 events are distinctly different, one potentially occurring well before the later. Hence, a  
23 jury might conclude that the conduct of one of the defendants may have caused or  
24 contributed to an injury to Jahi's brain, but it was not necessarily a precipitating or  
25 substantial factor in her death. Thus, forcing a jury to determine liability before the  
26 actual harm is specified would potentially result in erroneous liability determination and  
27 would thus not serve the ends of justice.

28 2. Trial of Liability Before Determining the Harm Does not Afford a More  
Logical Presentation of Evidence.

One purpose of a separate trial on the issue of liability is to afford a more logical  
presentation of evidence, thus simplifying the issues for the jury. (*Foreman v. Clark*

1 Corp. (1971) 3Cal.3<sup>rd</sup> 875, 888, fn8.) Here, trying the issue of liability before  
2 determining the actual harm would not afford a more logical presentation of evidence  
3 because a jury would be forced to determine whether a particular defendant's conduct  
4 was a substantial factor in a harm yet to be determined. It is illogical to present  
5 evidence on liability without forcing the Plaintiffs to assert the harm caused by the  
6 alleged negligent conduct.

7 **D. A FINDING OF LIABILITY WITHOUT DETERMINING THE HARM WILL NOT**  
8 **EXPEDITE SETTLEMENT.**

9 Another purpose put forward as a basis for having a separate bifurcated trial on  
10 the issue of liability is that it promotes settlement. (Id.) Plaintiffs, in fact, argue in their  
11 brief that separation of liability and damages issues could be dispositive of the entire  
12 case. (Plaintiffs' Motion to Bifurcate, pg 9:3-7.) In this case, that logic is precisely  
13 backward. Without a determination of whether Jahi McMath is alive or dead, no  
14 settlement can be achieved in this case, given the impact such a determination has on  
15 the value of the case. In fact, a determination of whether Jahi McMath is alive or dead  
16 would have a much greater potential to expedite settlement than would a determination  
17 of liability.

18 **E. A SEPARATE TRIAL OF LIABILITY WOULD BE MORE EMOTIONALLY**  
19 **CHARGED THAN A TRIAL ON THE ISSUE OF THE HARM DONE.**

20 Plaintiffs allege that Latasha Spears Winkfield and Sandra Chapman were  
21 present in the pediatric ICU on December 9, 2013. Latasha Spears Winkfield alleges  
22 that she "pleaded with the nurse to call a doctor to Jahi's bedside, but no doctor came."  
23 Plaintiffs further allege that Ms. Chapman "spoke with the CHO nurses and insisted they  
24 call a physician." Ms. Chapman alleges she was present at the time Jahi arrested and  
25 observed the physicians who came to Jahi's bedside. Their testimony on these events  
26 will be an intricate part of the liability phase of this trial and will no doubt be exceedingly  
27 emotionally charged. In addition, the nurses' testimony regarding their recollection of  
28 events will be emotionally taxing for them. The same, no doubt, holds true for the  
physicians involved.

1 In contrast, the issue of whether the current clinical condition of Jahi McMath  
2 supports a legal determination that she is deceased will be much less emotionally  
3 charged, as it will simply require the application of the objective clinical findings to the  
4 law and the legal definition of death.

5 For this reason, Plaintiffs' argument that the liability phase should be tried first in  
6 order to reduce the emotionally charged nature of the case, and possibly prevent the  
7 resulting prejudice due to that emotion, is entirely backward. It would serve all parties to  
8 try the issue of life or death first, if the case is to be bifurcated at all.

9 **F. IF THE COURT IS INTENT ON BIFURCATING THE TRIAL OF THIS MATTER,  
10 THE QUESTION WHETHER JAHİ MCMATH IS DEAD SHOULD BE TRIED  
11 FIRST.**

12 Code of Civil Procedure §598, cited by the plaintiffs in support of their motion to  
13 bifurcate, provides that special defenses must be given priority in issues to be tried in a  
14 bifurcated proceeding. (See C.C.P. §598, " . . . the trial of any issue or any part thereof  
15 shall proceed the trial of any other issue or any part thereof in the case, *except for*  
16 *special defenses which may be tried first pursuant to §597 and 597.5.*")

17 Here, defendants have argued in their demurrers, that the issue of Jahi's status  
18 has been finally determined by Judge Grillo in a previous proceeding and that  
19 determination collaterally estops Plaintiffs from re-litigating that issue. This Court, in its  
20 ruling on defendants' demurrers, indicated that the collateral estoppel argument may be  
21 valid, but the Court did not want to make that determination *at the demurrer stage*.  
22 Assuming there are factual issues that need to be resolved before the Court can make  
23 this determination, a trial on those factual issues should be held so that this Court can  
24 make a final determination as to the merits of the collateral estoppel special defense –  
25 before any trial on the issue of liability.

26 Even if the collateral estoppel defense to the issue is rejected, a subsequent trial  
27 as to whether Jahi McMath is, in fact, dead, prior to a liability phase will expedite and  
28 simplify the presentation of evidence because the issue is factually simpler and can be  
more expeditiously resolved than the issue of each named defendant's potential liability.

1 A determination of whether Jahi McMath is dead will require testimony from fewer  
2 witnesses, will allow for the subsequent determination of liability to be more logical,  
3 having established the harm caused, and a determination of Jahi's status would be  
4 more likely to promote settlement than would a determination of liability alone.

5 For all of these reasons, the motion to have the issue of liability tried first in a  
6 bifurcated proceeding should be denied.

7 Dated: April 4, 2016

GALLOWAY, LUCCHESI, EVERSON  
& PICCHI

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9  
10 By:   
11

12 JOSEPH E. FINKEL, ESQ.  
13 Attorneys for Defendant  
14 UCSF BENIOFF CHILDREN'S  
15 HOSPITAL OAKLAND  
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1 PROOF OF SERVICE

2 I declare under penalty of perjury that:

3 I am a citizen of the United States and am employed in the County of Contra  
4 Costa. I am over the age of eighteen years and not a party to the within action. My  
5 business address is 2300 Contra Costa Boulevard, Suite 350, Pleasant Hill, CA 94523-  
2398.

6 On the date set forth below, I caused the attached **DEFENDANT'S OPPOSITION  
7 TO PLAINTIFFS' MOTION TO BIFURCATE TRIAL** to be served on the parties to this  
8 action as follows:

8  **BY MAIL.**

9 I placed a true copy thereof, enclosed in a sealed envelope with postage thereon  
10 fully prepaid, in the United States mail at Pleasant Hill, California, addressed to  
11 the parties as set forth on the attached service list. C.C.P. §§1013(a), 2015.5.

11  **BY COURIER SERVICE.**

12 I retained CCX Couriers, Inc. of Pleasant Hill, California, to personally serve a  
13 true copy thereof on the parties as set forth on the attached service list. C.C.P.  
14 §§1011, 2015.5.

14  **BY UNITED PARCEL SERVICE.**

15 I retained **UNITED PARCEL SERVICE** to serve by overnight delivery a true copy  
16 thereof on the parties as set forth on the attached service list. C.C.P. §§1013(c),  
17 2015.5.

18  **BY ELECTRONIC SERVICE.**

19 I electronically served a true copy thereof on the parties at said electronic  
20 notification addresses as set forth on the attached service list at \_\_\_\_ a.m./p.m.  
21 from my electronic notification address: \_\_\_\_\_@glattys.com. The  
22 transmission was reported as complete and without error. C.C.P. §1010(a)(6)  
23 and C.R.C. 2.260.

24 Executed on April 4, 2016 at Pleasant Hill, California.

25   
26 Janet Keough  
27  
28

1 MCMATH (WINKFIELD) V. CHILDREN'S HOSPITAL

2 ALAMEDA - NORTHERN DIVISION COUNTY SUPERIOR COURT CASE NO

3 RG15760730

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